IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31/M44 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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

Respondent

JOINT APPLICATION BOOK

APPLICANT		RESPONDENT	
Solicitors	**Counsel**	**Solicitors**	**Counsel**
Lyttletons Lawyers Address**: 2/128 Centre Dandenong Road** Telephone: **(03) 8555 3895** Fax: (03)8555 3865 DX 33401 Dingley Email: plal@lyttletons.com.au	C.M. Kenny C.E.M Exell A.F. Solomon-Bridge	Maddocks Lawyers 140 William Street Melbourne VIC 3000 **Telephone:** (03) 9258 3555 **Fax:** (03) 9258 3666 DX 259 Melbourne **Email:** gina.wilson@maddocks.com.au	A.C.Archibald S.B.Rosewarne

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31/M44 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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

Respondent

JOINT APPLICATION BOOK
INDEX OF REFERENCE

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

---

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

TABLE OF CONTENTS

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,

---

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

---

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

---

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.

---

[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

---

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.

---

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:

---

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

---

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

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

---

JUDGE:	ROBSON J
WHERE HELD:	Melbourne
DATES 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

DRAFT

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

---

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.

---

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.

JUDG.....

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.

---

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*.
>
> 2. The discretion must be exercised judicially: *Donald Campbell & Co v Pollak* [1927] AC 732; *Cretazzo v Lombardi* (1975) 13 SASR 4.
>
> 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.
>
> 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.
>
> 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.
>
> 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
>
> 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

---

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.

JUDG...

THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

IN THE COURT OF APPEAL **FILE No.** S APCI 2014 0109

IN THE MATTER of the **PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (FORMERLY KNOWN AS KINGSWOOD GOLF CLUB LIMITED)**

BETWEEN

WILLIAM FALKINGHAM Appellant

and

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

NOTICE OF APPEAL

Date of document: 4 September 2014
Filed on behalf of: The Appellant
Prepared by:
Lyttletons
53 Marcus Rd,
Dingley Village VIC 3172

Solicitor's firm code: 106703
DX: 33401 DINGLEY
Tel: 03 9551 3155
Ref: 214083
Attention: Pranesh Lal
Email: plal@lyttletons.com.au

TAKE NOTICE that the appellant intends to appeal to the Court of Appeal against the judgment of the Honourable Justice Robson delivered on 3 September 2014 on file number S CI 2014 04329.

ORDER /JUDGMENT APPEALED FROM

The Honourable Justice Robson No. S CI 2014 04329

GROUNDS OF APPEAL

1. Having found that the directors of the respondent had engaged in oppressive conduct under s232 of the *Corporations Act 2001* (Cth, the learned judge erred in law in refusing to grant a remedy for the oppressive conduct.

2. Having found that a resolution on 17 September 2013 to approve the merger of the Peninsula Golf Club and the Kingswood Golf Club required a 75% vote (not a 50% vote) and, therefore, was not in accordance with the Constitution of the respondent, the learned judge erred in law in failing to declare the resolution void.

3. Having found that the directors of the respondent breached their fiduciary duty and/or misused their power in admitting over 1000 member of the Peninsula Golf Club to the Kingswood Golf Club the learned judge erred in law in failing to set aside the resolution of 29 October 2013.

4. The learned judge erred in law in finding that the defence of laches was applicable to s232 of the *Corporations Act 2001* (Cth) or to the claim that the resolution should be declared void for non compliance with the Constitution of the Respondent.

5. Further or alternatively to paragraph 4, the learned judge erred in law and in fact in finding that there had been any delay by the plaintiff in commencing the proceeding sufficient to make good the defence of laches.

6. The learned judge should have found that the defence of laches was in all circumstance not satisfied on the facts.

7. The learned judge erred in law in failing to provide t he remedies sought in the Originating Process, or any remedy at all, to the appellant under s233 of the *Corporations Act 2001* (Cth) for the oppressive conduct and breach of fiduciary duty which he found to be established on the facts on the ground that to do so would be unfair to the majority who voted in favour of the resolution to merge the clubs on 17 September 2013.

8. The learned judge erred in law in elevating unfairness to the majority who voted for the resolution on 17 September 2013 over the minority, including the plaintiff, who he found to have been oppressed by the respondent's conduct in connection with the resolution.

ORDERS SOUGHT

In lieu of the order made by the learned judge the appellant seeks the following orders:-

1. Pursuant to section 247A of *Corporations Act 2001* (Cth) , an order for the inspection of the books of the Respondent.

2. A declaration that the Respondent contravened and continues to contravene one or more of the grounds in section 232 of the *Corporations Act 2001* (Cth)

3. A declaration that any purported admission of persons as new members of the after Respondent after 17 September 2013 from the Peninsula Country Golf Club ACN 167 296 746, was invalid and void.

4. Pursuant to section 233 (j) of the *Corporations Act 2001* (Cth) , orders that the Respondent remove from the register of members the names of any persons added as members since 17 September 2013 from the Peninsula Country Golf Club ACN 167 296 746.

5. A declaration that resolutions passed by the Respondent 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.

6. Pursuant to section 233 (b), orders that the Respondent repeal the constitution of the Company purportedly adopted on 29 October 2013.

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

8. A decalaration that the Contract of Sale between the purchaser and the Respondent be set aside.

9. An order that the proceeding be remitted to the trial division for orders under s 232 (or otherwise) of the *Corporations Act 2001* (Cth) against the directors of the Respondent .

10. Until the hearing and determination of the appeal, the Respondent be restrained from dissipating any proceeds from the sale of the land.

11. The appeal be expedited.

12. The Respondent pays the Appellant's costs of the proceeding and the appeal.

13. Such further or other orders as may be appropriate.

DATED: 5 September 2014

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

IN THE COURT OF APPEAL **FILE No.**

IN THE MATTER of the **PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (FORMERLY KNOWN AS KINGSWOOD GOLF CLUB LIMITED)**

BETWEEN

WILLIAM FALKINGHAM Appellant

and

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

and

AS Residential Property No.1 (ACN 601 592 661)

As trustee for Residential Property No. 1 Second Respondent

FURTHER AMENDED NOTICE OF APPEAL

Date of document: 30 September 2014
Filed on behalf of: The Appellant
Prepared by:
Lyttletons
53 Marcus Rd,
Dingley Village VIC 3172

Solicitor's firm code: 106703
DX: 33401 DINGLEY
Tel: 03 9551 3155
Ref: 214083
Attention: Pranesh Lal
Email: plal@lyttletons.com.au

TAKE NOTICE that the appellant intends to appeal to the Court of Appeal against the judgment of the Honourable Justice Robson delivered on 3 September 2014 and the further orders made on 25 September 2014 on file number S CI 2014 04329.

ORDER /JUDGMENT APPEALED FROM

The Honourable Justice Robson No. S CI 2014 04329

GROUNDS OF APPEAL

1. The trial judge erred in law in holding (at [101]-[112]) that the defence of laches was applicable to a proceeding under s 232 of the *Corporations Act 2001* (Cth).

2. Further or alternatively, in finding (at [111]) that the defence of laches was made out, the trial judge erred in law and fact by concluding that it would be inequitable and unreasonable to set aside the merger.

3. In finding (at [111]) that the defence of laches was made out, the trial judge erred in law:

(a) in elevating (at [112]) unfairness to the majority who voted for the resolution on 17 September 2013 over the minority, including the appellant, whom he had found (at [98]) to have been oppressed by the first respondent's conduct in connection with the resolution of 17 September 2013; and/or

(b) by taking into account (at [112]) the position of the majority of Kingswood members who had voted on 17 September 2013 to approve the merger.

3. Further or alternatively, the trial judge erred in law and in fact in finding (at [111]) that there had been any delay by the plaintiff in commencing the proceeding sufficient to make good the defence of laches.

4. The trial judge should have found that the defence of laches was, in all the circumstances, not satisfied on the facts.

5. In exercising, in the alternative, his discretion under s 233 of the *Corporations Act*, the trial judge erred in law:

(a) in considering (at [113]) that s 233 required him to balance the harm done to the members of the company as it now stands with the appellant's entitlement to relief;

(b) in taking into account (at [115]) his impression that the appellant's proceeding was not supported by many members and his expectation that the board would probably be able to effect the merger again.

6. The learned trial judge's finding (at [27]) that the appellant was being supported in the proceeding by a group called the Save Kingswood Group was against the evidence or the weight of evidence.

7. Further or alternatively, the learned trial judge's finding (at [27]) that the appellant was being supported in the proceeding by a group called the Save Kingswood Group was made in breach of the rules of procedural fairness in circumstances where, in attempting to contest that fact, the appellant was advised by the trial judge that he did not think that the case was going to turn on that issue and that the parties did not need to go into it.

8. The trial judge erred in law by wrongly admitting (at [45]-[46]) and/or relying upon (at [107]) the evidence of Mr Willison of Ernst & Young in circumstances where:

(a) the appellant was not on notice that that evidence was to be admitted or relied upon for the purposes of the final hearing of the proceeding;

(b) the evidence of Mr Willison's opinion disclosed no, or no sufficient, basis for his reaching that opinion;

(c) the evidence of Mr Willison was otherwise inadmissible; and/or

(d) the evidence of Mr Willison was otherwise insufficient to be relied upon.

9. The trial judge erred in fact by finding (at [46]) that the evidence of Mr WIllison had not been challenged by the appellant.

10. The trial judged erred in law and in fact in finding (at [106]) that the appellant must have been well aware of the enormous expenses being incurred by the first respondent and potential third party purchasers in circumstances where:

(a) that fact was not put to the appellant when giving his evidence; and/or

(b) that finding was against the evidence or against the weight of evidence.

11. The trial judge erred in law in finding (at [70]) that the appellant's procedural complaints in respect of the merger procedure could be cured by s 1322(2) of the *Corporations Act*.

12. Having found (at [98]) that the directors of the first respondent had engaged in oppressive conduct under s 232 of the *Corporations Act*, the learned judge erred in law in refusing to grant a remedy for the oppressive conduct.13. Having found (at [68]) that a resolution on 17 September 2013 to approve the merger of the Peninsula Golf Club and the Kingswood Golf Club required a 75% vote (not a 50% vote) and, therefore, was not in accordance with the Constitution of the first respondent, the learned judge erred in law in failing to declare the resolution void.

14. Having found (at [54], [87], [94]) that the directors of the first respondent breached their fiduciary duty and/or misused their power in admitting over 1000 member of the Peninsula Golf Club to the Kingswood Golf Club, the learned judge erred in law in failing to set aside the resolution of 29 October 2013.

15. The learned judge erred in law in finding (at [101]-[112]) that the defence of laches was applicable to the appellant's claim that the resolution of 17 September 2013 and the admission of new members should be declared void for non-compliance with the Constitution of the first respondent.

16. Further or alternatively, the trial judge erred in law in not disposing of the appellant's claim that the resolution of 17 September 2013 and the admission of new members should be declared void for non-compliance with the Constitution of the first respondent.

17.. The learned judge failed to ensure procedural fairness to the appellant by permitting the defence of laches to be raised as a defence to s 232 of the *Corporations Act* when he had no notice of that defence until the first day of the trial.

. .

ORDERS SOUGHT

In lieu of the order made by the learned judge the appellant seeks the following orders:-

1. Pursuant to section 247A of *Corporations Act*, an order for the inspection of the books of the first respondent.

2. A declaration that the first ~~R~~respondent contravened and continues to contravene one or more of the grounds in section 232 of the *Corporations Act*.

3. A declaration that any purported admission of persons as new members of the after first ~~R~~respondent after 17 September 2013 from the Peninsula Country Golf Club ACN 167 296 746, was invalid and void.

4. Pursuant to section 233 (j) of the *Corporations Act*, orders that the first respondent remove from the register of members the names of any persons added as members since 17 September 2013 from the Peninsula Country Golf Club ACN 167 296 746.

5. A declaration that resolutions passed by the first respondent 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.

6. Pursuant to section 233 (b), orders that the first respondent repeal the constitution of the Company purportedly adopted on 29 October 2013.

7. A declaration that the resolution passed by the first respondent on 17 September 2013 was invalid and void.

8. An order that the contract of sale dated 5 September 2014 between the respondents be set aside and/or orders restraining the respondents from completing and/or giving effect to the contract of sale dated 5 September 2014.

9. Alternatively to paragraph 8, should the appeal succeed, orders remitting the proceeding to the trial division for the hearing and determination of applications:

   (a) to set aside the contract of sale dated 5 September 2014 and/or orders restraining the respondents from completing and/or giving effect to the contract of sale;

(b) incidental or necessary to give effect to the judgment of the Court of Appeal.

10. The first respondent pays the appellant's costs of the proceeding in the trial division including on an indemnity basis ~~and the appeal~~.

11. The respondents (or any one of them pay the appellant's costs of the appeal including on an indemnity basis.

12. Such further or other orders as may be appropriate.

DATED: ~~29 September~~ 28 October 2014

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
IN THE COURT OF APPEAL

FILE No. S APCI 2014 0109

IN THE MATTER OF PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (FORMERLY KNOWN AS KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

Appellant

-and -

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

Respondent

NOTICE OF CONTENTION

Date of document: 24 September 2014
Filed on behalf of: The Respondent
Prepared by:
Maddocks
Lawyers
140 William Street
Melbourne VIC 3000

Solicitor's Code: 230
DX 259 Melbourne
Tel: (03) 9258 3555
Fax: (03) 9258 3666
Ref: GLW:SPD:6175682
Attention: Gina Wilson
E-mail: gina.wilson@maddocks.com.au

TAKE NOTICE THAT at the hearing of this appeal, the respondent will contend that the decision of the court below should be affirmed on the ground that the trial judge erroneously decided or failed to decide the following matters of fact or law, but does not seek a discharge or variation of any part of the orders of the court below.

GROUNDS

1. The trial judge erred in law in finding (at [54] and [87]) that the directors of the Kingswood Golf Club Limited (**Kingswood**) breached their fiduciary duties in admitting the new members from the Peninsula Country Golf Club (**Peninsula**) on 2 October 2013.

2. The trial judge erred in law in finding (at [79]) that "it was not permissible to admit the thousand odd members" from Peninsula to membership of Kingswood on the basis of erroneous and contradictory findings (at [79]) that this was done to "enable the merger to be approved", (at [80]) that "the substantial object of the board in admitting new members was to give effect to the merger agreement", and (at [94]) "the substantial purpose of admitting the 1000 odd new members was to give effect to the merger" in circumstances where:

7. The trial judge erred in law in concluding (at [98]):

7.1 that the actions of the Board had deprived Mr Falkingham of any protection of the Kingswood Constitution, as no constitutional amendment was required in order to effect the merger; or alternatively

7.2 that any such deprivation "was unfair" on the basis that "he [Mr Falkingham] has lost the use of the golf club he has been a member of for many years and uses practically on a daily basis".

8. The trial judge erred in law in concluding (at [98]) that "the presence of the Peninsula members as members of the club" satisfied the requirement that "the oppression must also be continuing at the time of the application".

9. The trial judge erred in law by not taking into account the fact that, at the special general meeting of Kingswood members held on 29 October 2013, over 79% of the Kingswood founding members (and over 93% of the entire membership of the respondent) voted in support of the special resolutions to give effect to the final steps of the merger which had been approved by the Kingswood members on 17 September 2014 (being the adoption of a new constitution and a change of name for the merged club).

10. The trial judge failed in his obligation to provide adequate and proper reasons in that it is not possible to ascertain from the judgment the trial judge's reasons for his findings that:

10.1 it was necessary to amend the Kingswood Constitution in order to empower the Board to exercise its powers under the Kingswood Constitution to admit the Peninsula members to membership of Kingswood; or

10.2 the exercise of the power by the Board to admit the Peninsula members to membership of Kingswood was for an improper purpose. In particular, no improper purpose known to the law was identified anywhere in the judgment.

11. By reason of the errors identified in paragraphs 1 to 10 above, the trial judge erred in law in concluding (at [99]) that "the power of the Court to make orders under s 233 of the Act has been enlivened".

12. By reason of the errors identified in paragraphs 1 to 10 above, the trial judge erred in law in concluding (at [100]) that "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".

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0109

WILLIAM FALKINGHAM

v

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

JUDGES:	WARREN CJ, WHELAN and BEACH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 November 2014
DATE OF JUDGMENT:	13 February 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 16
JUDGMENT APPEALED FROM:	[2014] VSC 437 (Robson J)

CORPORATIONS – Oppression proceedings – *Corporations Act 2001* (Cth), ss 232 and 233 – Admission to Kingswood golf club of membership of Peninsula golf club for the purpose of effecting a merger – Admission for improper purpose – Oppressive conduct.

CORPORATIONS – Relief – Statutory and equitable claims – Relevance of delay – Trial judge refused to exercise discretion to grant relief under s 233 of the *Corporations Act 2001* (Cth) due to applicant's delay in bringing proceedings – Delay a relevant matter in the exercise of the broad discretion under s 233 – Analysis of equitable defence of laches – *Re Jermyn Street Turkish Baths Ltd* [1970] 1 WLR 1194 and *Crawley v Short* (2009) 262 ALR 654 applied – No error in exercise of trial judge's discretion – *House v The King* (1936) 55 CLR 499 applied.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Ms C M Kenny QC with Ms C E M Exell and Mr A F Solomon-Bridge	Lyttletons
For the Respondent	Mr A C Archibald QC with Mr N J O'Bryan SC and Mr S Rosewarne	Maddocks

WARREN CJ:

1 I have had the benefit of reading in draft form the reasons for judgment of Whelan JA. I agree with his Honour, for the reasons that he gives, that the appeal should be dismissed.

WHELAN JA:

2 Private golf clubs in Victoria are facing financial pressures. In response to these pressures some clubs are pursuing possibilities which include amalgamations and asset rationalisation. On 17 September 2013 the members of the Kingswood Golf Club passed an ordinary resolution directing and empowering its board of directors to give effect to a merger of their club with the Peninsula Country Golf Club. Thereafter, the board admitted approximately 1,000 members of the Peninsula Club to the Kingswood Club, and other steps were taken to effectuate a merger of the two clubs.

3 By originating process filed 20 August 2014 one member of the Kingswood Club, the appellant Mr Falkingham, sought relief under the oppression provisions of the *Corporations Act 2001* (Cth) ('*Corporations Act*') and sought declarations. Amongst other things, it was contended on Mr Falkingham's behalf that the resolution of 17 September 2013 and the admission of the Peninsula members thereafter had been invalid. Relief was sought directed towards preventing or unwinding the proposed merger.

4 An application was made on behalf of Mr Falkingham for an interlocutory injunction which was dealt with by the provision of an undertaking and the fixing of an urgent trial. The trial was held on 1 and 2 September 2014 and judgment was delivered on 3 September 2014.[1] The trial judge found that the board had exercised its power to admit new members for a purpose other than that for which that power had been conferred and that that conduct had been oppressive. The Court refused

---

1 *Peninsula Kingswood Country Golf Club* [2014] VSC 437 ('Reasons').

relief, however, because of laches, acquiescence and delay and dismissed Mr Falkingham's proceeding.

5 From that judgment Mr Falkingham has appealed submitting, in substance, that the trial judge had been correct in his conclusion concerning improper purpose but had been wrong in refusing relief based upon laches, acquiescence and delay. For its part, the respondent, which is the Kingswood Golf Club under a new name, supports the trial judge's finding on laches, acquiescence and delay, whilst by a notice of contention submitting that the trial judge had been wrong to find that the board had acted for an improper purpose.

6 Within a very short time after delivery of the judgment at first instance, a transitional board of directors established under a new Constitution adopted by the membership of the Kingswood Golf Club, including the newly admitted Peninsula members, entered into a contract of sale of the Kingswood golf course to a company named AS Residential Property No 1 Pty Ltd ('AS Residential'). Applications on behalf of the appellant to add that company as a respondent to the appeal, and for an injunction restraining the dissipation of a deposit which had been paid, were dismissed during the hearing of the appeal. The Court indicated that reasons would be provided later. A third application on behalf of the appellant for an order that the respondent pay or indemnify the appellant for his costs was deferred.

7 For the reasons set out below, I have concluded that the appeal should be dismissed. Both parties to the appeal accepted that the trial judge's decision on laches, acquiescence and delay was a discretionary judgment. The appellant has failed to establish error of the kind necessary to overturn that judgment. Whilst that conclusion is sufficient to determine the appeal, I nevertheless have also concluded that the trial judge was correct in finding that the board had exercised its power to admit new members for a purpose other than that for which that power had been conferred by the Constitution. I would hear further submissions on the issue of costs, including the application made by the appellant for indemnity, in the light of these conclusions and the reasons for them.

Constitution of the Kingswood Golf Club Ltd as at 17 September 2013

8 Kingswood Golf Club Ltd (the 'Club') is a company limited by guarantee. As at 17 September 2013 it was governed by a Constitution which had been adopted at a general meeting of the Club on 30 September 2010.

9 The provisions of that Constitution relevant to this appeal are the following.

10 In clause 3 of the Constitution the purpose of the Club was described in the following terms:

> 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.

11 The procedure for admission of members was set out in three provisions. It is necessary to quote them in full. They were as follows:

> **8. Nomination of Members**
>
> (A) (i) Except as hereinafter 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.

9. Display and Election of Members

(A) Save and except 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. For the purpose of this Rule the Board shall be an election committee for the purposes of the Liquor Control Reform Act 1998 and a record shall be kept by the Secretary of the Club of the number of members of the Board voting. Every candidate for election shall be balloted for by the Board. An interval of not less than two weeks shall elapse between nomination and election of any person.

(B) Any member may if the Board thinks fit and upon the application of such member be elected a member of any other category of membership subject to there being a vacancy in that category of membership.

(C) The Board may limit the number of members in any particular category.

10. Payment of Entrance Fee & First Annual Subscription

When the candidate has been elected, the Secretary shall forthwith send to the candidate at the address given upon the application, a request for payment of the entrance fee and first annual subscription. Upon payment of the entrance fee and first annual subscription a candidate shall become a member of the Club on probation for a period of three months during which time the members of the Board shall have the right to terminate such membership by notice in writing and all entrance monies and such portion of the first annual subscription calculated on a pro-rata basis having regard to the unexpired period of the year for which the member has paid shall be refunded. If within one calendar month after notification of election such entrance fees and subscriptions be not paid the election shall be made null and void at the discretion of the Board.

12 The Constitution provided for a board of directors constituted by specified office bearers and six other members (clauses 18 and 19). Amongst other things, the board was empowered to fix entrance fees for various categories of membership (clause 14).

13 Clause 27 provided, amongst other things:

The business and affairs of the Club shall be under the management of the

14 Clause 29 provided, amongst other things:

> The Board shall exercise all such powers and do all such things as may be exercised or done by the Club save such as are by these Articles or by any statute for the time being in force required to be exercised or done by the Club in general meeting.

15 Clause 35 of the Constitution provided as follows:

> 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.

16 Provision was made identifying business which was deemed to be special at an annual general meeting, under a heading which read 'Special Resolutions' (clause 45), and provision was also made for special general meetings (clause 46). The only matter required by the Constitution to be dealt with by way of anything other than an ordinary resolution was amendment of the Constitution. Clause 53 read:

> **53. Alteration of the Constitution**
>
> (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.
>
> (B) While and so long as the Club is licensed under the Liquor Control Reform Act 1998 the Secretary shall on the making of any amendment or alteration to the Constitution of the Club forward to the Secretary of the Department of Justice, Victoria a certified copy of such amendment or alteration with the time prescribed by the Liquor Control reform Act 1998.

Relevant facts

17 The Club owns an 18 hole golf course and club house in Dingley. It is known as the Kingswood golf course. The course has significant value as a potential residential development. It is surrounded by existing residential suburbs.

18 The Peninsula Country Golf Club Inc ('Peninsula') is an incorporated association. It owns two 18 hole golf courses and a club house in Frankston.

19 By a document entitled 'Heads of Agreement' signed on behalf of the Club by its then President on 26 March 2013 and on behalf of Peninsula by its President on 25 March 2013, the two clubs agreed to investigate and, subject to a mutually satisfactory outcome, proceed to a merger of the two clubs.

20 So far as the board of the Club was concerned the outcome of the investigation was that the Club's best interests would be served by a merger with Peninsula. The board determined to call a special general meeting of the Club for the purpose of putting the following resolution:

> The Board is directed and empowered to give effect to the merger of the Club with Peninsula Country Golf Club, as described in the Information Pack distributed to members for the purpose of this meeting.

21 A notice of the special general meeting dated 23 August 2013 was distributed to members of the Club.

22 The information pack referred to in the resolution was a glossy brochure addressed to the membership of both clubs. The covering letter was signed by both Presidents. The letter 'strongly' urged members to vote for the proposed merger.

23 In commercial terms, what was proposed was the creation of a single financially secure club utilising renovated facilities and the two golf courses owned by Peninsula in Frankston. This was to be achieved by the sale of the Kingswood golf course, repayment of debts (Peninsula's debts being significantly greater) and the creation of a 'future fund' which, it was projected, would secure the long-term financial viability of the combined Club.

24 The information pack described the 'transmission mechanisms' as follows:

> The transition mechanisms are:
>
> - To hold a vote of the Members at each Club on Board/Committee resolutions to merge the two Clubs (using the steps outlined in this part of the Members' Information and Voting Pack);
>
> – *By way of an Ordinary Resolution.*
>
> - To change Peninsula Country Golf Club from an incorporated Association to a Company Limited by Guarantee (retaining its assets upon which stamp duty may not be payable subject to ongoing discussions), and having one shareholder (PKCGC);
>
> – *This will require a 75% vote in favour by eligible Peninsula Members who vote and will be voted concurrently with the merger vote.*
>
> - To admit all Peninsula Country Golf Club Members to membership of the Kingswood Golf Club;
>
> – *For stamp duty savings and incorporation reasons (See below).*
>
> – *Peninsula Members need only to sign the authority in the voting pack.*
>
> - To use the current Corporations law entity (Kingswood Golf Club) as the vehicle for creating the merged Club.
>
> – *Reducing potential stamp duty from $5.5m (if both Clubs had been placed into a new entity) to an estimated $2.75m by retaining the Kingswood assets in the existing entity (with some potential for further savings in relation to stamp duty on Peninsula's assets);*
>
> - To approve (under Corporations law, by a 75% vote in favour of those who vote) a new Constitution and name for that entity (i.e., The Peninsula Kingswood Country Golf Club Ltd – PKCGC); and
>
> - Both Clubs will be bound to proceed with the Merger once these steps are completed.

25 In summary, then, the legal structure proposed or envisaged was that, after the passage of ordinary resolutions by each of the separate memberships, the Peninsula members would be admitted to the Club, Peninsula would become a company limited by guarantee with the Club as its sole member, and the Club's expanded membership would adopt a new Constitution and change the Club's name to the Peninsula Kingswood Country Golf Club Ltd. This structure was proposed because of the potential to reduce stamp duty. Presumably it was thought this could be achieved by avoiding any asset transfers.

26 The information pack stated that there would be a 'transition period' which was expected to take between three and five years, and which would begin with the approval of the merger by members and conclude when the Kingswood course was no longer available for play. During this transition period members would have 'home' rights at their founding club and 'visiting' rights at the other club.

27 In a section headed 'Merged Club Strategy' the information pack set out steps proposed to be taken over the following decade. Members were told that the precise actions to achieve the 'vision' articulated in the document would be the responsibility of the board and that it was envisaged that there would be three phases of the strategy. Members were advised that during the first three year 'phase', amongst other things, the new corporate structure would be implemented, transitional funding for course and facility upgrades would be secured, and, under a heading 'Land Sale', that steps would be taken so as to secure a 'satisfactory sale outcome' of the Dingley site.

28 The final section of the information pack was headed 'Resolutions for Members of the Respective Clubs'. What was proposed was that on 17 September 2013 members of the Club and of Peninsula in separate meetings would consider ordinary resolutions directing and empowering its directors or committee to give effect to the merger. Peninsula members would also consider special resolutions, requiring a 75% majority, directed towards converting Peninsula into a company limited by guarantee. Then, in October or November 2013 special resolutions would be put to the membership of the 'merged Club' altering the name to 'Peninsula Kingswood Country Golf Club Ltd' and adopting a new Constitution.

29 The new Constitution which was to be adopted was broadly similar to the Club's existing Constitution, but there were some significant differences. The board was expanded in numbers (clause 16) and provisions concerning transitional governance were introduced (clause 19). Provision was made for the creation, maintenance and administration of the future fund (clause 29). The provision which required the approval of members for any sale or lease of real property was not reproduced in the

proposed new Constitution. No provision was made for alteration of the Constitution (as a result of which s 136(2) of the *Corporations Act 2001* (Cth) would apply). The Club's purposes (clause 2) were altered so as to read:

> The Club is established for the purpose of providing and maintaining suitable golf facilities comprising at least 36 holes (subject to maintenance requirements) and club house facilities for members and their guests.

30 Prior to the meeting on 17 September 2013 advice was sought from counsel as to whether the resolution directing and empowering the board to give effect to the merger was a resolution requiring 75% approval. Counsel advised that it did not as no provision of the Constitution or of the *Corporations Act* provided that such a special majority was required. The advice concluded:

> The proposed resolution does not involve a change required by the *Corporations Act* or the Club's constitution to be in the form of a special resolution. If it is passed by ordinary resolution at the meeting on 17 September 2013, and the merger proposal proceeds as described in the information pack, special resolutions will be required in the future to amend the Club's constitution and to change its name. However that point has not yet arrived.

31 On 17 September 2013 the special general meeting of the members of the Club passed the ordinary resolution proposed, with 63% of members (present or by proxy) voting in favour. Mr Falkingham was one of the 37% who voted against the resolution.

32 Peninsula members passed the resolutions put to them by overwhelming majorities.

33 Immediately after the meeting on 17 September 2013, 1,044 members of Peninsula applied to become members of the Club. The process by which they applied and were admitted as members was set out in an affidavit of Heath William Wilson, the general manager of the Club at the relevant time. Relevantly, he deposed as follows:

> (b) [T]he Board at its 11 September 2013 meeting approved the setting of the entrance fee at $1 and the subscription at $1, and prescribed under Rule 8(B) that Peninsula members who were nominated for admission as Kingswood full (pending) members only needed to be nominated by

Gerry Ryan by name;

(c) on 19 September 2013, I received from Gerry Ryan a list of Peninsula members who had given authority to Gerry Ryan to apply for them to become members of Kingswood. [Lists produced.]

(d) I then displayed those names on the notice board in the members' foyer at Kingswood for 7 days. [Photograph referred to.]

(e) The Kingswood Board then resolved on 2 October 2013 (14 days after I received the names of the Peninsula members from Gerry Ryan) to elect those members by circular resolution. [Circular resolution produced.]

(f) I immediately informed Gerry Ryan of the successful election of the members. Kingswood received payment of $2 in respect of each of those members.

34 On 29 October 2013 the expanded membership of the Club including the Peninsula members who had been admitted as described, passed a special resolution adopting the new Constitution and changing the name of the Club to Peninsula Kingswood Country Golf Club Ltd. The resolutions were passed by majorities in excess of 90%. Approximately 80% of members who had not been Peninsula members who voted, voted in favour. Mr Falkingham did not vote. In his affidavit sworn 20 August 2014 he deposed that he did not vote because he considered any vote to be 'meaningless' given the admission of the Peninsula members.

35 On 22 February 2014 the board of the Club, which I will now refer to as the Peninsula Kingswood Country Golf Club Ltd ('PKCGC'), resolved to appoint Ernst & Young to advise on the sale of the Kingswood course.

36 Other steps were also taken in implementation of the merger arrangements. Subscription fees were discounted. Contractors were engaged to undertake works at the Peninsula site.

Timing of the sale process and the institution of the proceeding

37 The trial judge heard the trial substantially on the basis of materials which had been prepared for an interlocutory injunction application, supplemented by oral evidence, and delivered an *ex tempore* judgment the next day. The speed with which the Court dealt with the matter was necessitated by the fact that by the time the proceeding was instituted the sale process of the Kingswood course was well advanced and about to be finalised.

38 Ernst & Young were engaged to conduct a sale campaign on 26 March 2014. An advertisement seeking expressions of interest was published in the *Australian Financial Review* on 8 May 2014. An information memorandum was then delivered to 19 parties who had executed confidentiality agreements, and 14 expressions of interest were received by 12 June 2014. Proposals from potential buyers closed on 8 August 2014. Nine potential buyers progressed to the due diligence phase. On 14 August 2014, after receiving a report from Ernst & Young, the board resolved to enter into final negotiations with four 'preferred bidders'. On 18 August 2014 Ernst & Young advised the four preferred bidders and requested final offers including marked up contracts by 29 August 2014. This proceeding was issued on 20 August 2014 and Ernst & Young were notified of it by the respondent the following day. Ernst & Young notified the preferred bidders of the proceeding by letter dated 22 August 2014. The board had proposed to consider the final offers on 30 August 2014.

39 Rather than hearing a contested application for an interlocutory injunction, the Court fixed an urgent trial date and counsel for PKCGC gave an undertaking not to sell pending that urgent trial.

Judgment at trial

40 The trial judge held that the power which the board had to admit new members had not been exercised for the purpose for which it was given. The trial judge quoted and relied upon passages from *Howard Smith v Ampol Petroleum Ltd*[2] and

---

2 [1974] AC 821 ('*Howard Smith*').

from *Whitehouse v Carlton Hotels Pty Ltd*.[3] The judge observed that a purpose might be found to be impermissible notwithstanding that the motives of the persons exercising the power were substantially altruistic.

41 It is important to record that the judge made no finding that the board members had been motivated by any consideration other than an honestly held view that the merger was in the best interests of the Club. The trial judge did observe that there 'may be much to suggest' that the board may not have been even-handed in presenting the competing arguments, and that the evidence of the Club's then President, Mr Sweeney, did not fill him with confidence that he would have been fully frank with the members.[4] The judge said however that he did not need to decide that issue.

42 The judge's conclusion on the exercise of the power to admit the Peninsula members was in these terms:

> Applying those principles [a reference to the principles in *Howard-Smith* and *Whitehouse*], 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.[5]

43 As to the resolution of the members concerning the merger, the judge said that that resolution was not invalid but that it did not authorise the board to do something that the board could not otherwise do under the Constitution.[6] Given the judge's finding that the board had no power under the Constitution to admit the 1,000 odd new members so as to give effect to the merger, the judge concluded that the ordinary resolution passed by the members was 'ineffective to authorise the conduct of the board in admitting the Peninsula members.'[7]

---

3 (1987) 162 CLR 285 ('*Whitehouse*').

4 Reasons [75].

5 Reasons [94].

6 Reasons [58].

7 Reasons [95].

44 Amongst the complaints made by Mr Falkingham was a complaint that the formalities required by clause 8 of the Constitution, in terms of the information to be provided about proposed members and so forth, had not been followed. The judge said that it was unnecessary for him to deal with these complaints but that, if he were wrong on the issue of improper purpose, the irregularities relied upon would, in his opinion, be 'saved by' s 1322(2) of the *Corporations Act*.[8]

45 The judge concluded that the conduct of the board had been oppressive and that oppression was continuing.[9] The judge found that the power of the Court to make orders under s 233 of the *Corporations Act* had been enlivened.[10]

46 He also held that the power of the Court in its equitable jurisdiction to give relief by way of a declaration in relation to the admission of the Peninsula members had also been enlivened.[11]

47 The judge then addressed the issue of whether laches, acquiescence and delay could be relied upon by the defendant. The judge described the defendant as having pleaded laches, acquiescence and delay. There were no pleadings. For reasons the judge set out in detail in his subsequent ruling on costs,[12] it is clear the defendant had relied upon laches, acquiescence and delay. In this appeal it was submitted on behalf of the appellant that that reliance was belated and that the appellant had been subjected to procedural unfairness as a consequence. I will return to that issue.

48 In relation to the question of whether a defence of laches, acquiescence and delay could be relied upon in an oppression claim the judge quoted a long passage from the judgment of Young JA in *Crawley v Short*.[13] He relied upon that passage in concluding that the defence of laches could be relied upon. Amongst other things,

---

8 Reasons [70].

9 Reasons [98].

10 Reasons [99].

11 Reasons [100].

12 *Re Peninsula Kingswood Country Golf Club (No 2)* [2014] VSC 483.

13 (2009) 262 ALR 654, 677–9 [155]–[180] ('*Crawley*').

Young JA had observed that the authorities showed that the ultimate question to be asked was whether in all the circumstances the plaintiff had impliedly released the defendant from his or her claim or had so acted as to make it unfair that the claim should then succeed. The trial judge expressed his relevant conclusion in the following terms:

> 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.
>
> 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 [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.[14]

49 The judge went on to observe that if he was wrong as to the application of the defence of laches, acquiescence and delay in a statutory oppression claim, he would in any event exercise his discretion under s 233 of the *Corporations Act* so as not to make orders undoing the merger.[15] His Honour then observed:

> There 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.[16]

50 One final matter referred to by the judge was what he described as an expectation that given the small size of the group supporting Mr Falkingham the board would probably be able to effect the merger again.[17]

51 In the course of the trial judge's factual analysis he referred to the fact that Mr Falkingham had produced as an exhibit to an affidavit that he swore in support

---

14 Reasons [111]–[112] (citation omitted).

15 Reasons [113].

16 Reasons [113].

17 Reasons [115].

of his application the advertisement in the *Australian Financial Review* of 8 May 2014,[18] as well as an article which had appeared in '*Golf Industry Central*' on 25 June 2014 describing the interest which one big property developer had in the acquisition of the golf course.[19]

52 The trial judge also referred to evidence given by a partner at Ernst & Young responsible for the marketing of the golf course, Mr Willison, to the effect that orders aborting the sale process could adversely affect the final sale price by between $10m and $20m.[20] The judge said that this evidence had not been challenged by the plaintiff.[21]

53 In his introductory recitation of the facts, the trial judge referred to opposition to the proposed sale of the Kingswood course by local residents and found that although Mr Falkingham was the sole plaintiff he was being supported by a group called the 'Save Kingswood Group'.[22] His Honour also referred to a group of Club members who were supporting him.[23]

Appellant's grounds of appeal and submissions

54 The appellant submitted that the trial judge's legal analysis of the delay issues had been erroneous. It was submitted that the trial judge had erroneously treated laches, acquiescence and delay as constituting a defence to an oppression claim, when in fact it was merely one matter relevant to the determination of whether relief for oppression should be granted. In that respect, it was submitted that his Honour had misunderstood Young JA's judgment in *Crawley*. Similarly, it was submitted that his Honour had failed to appreciate that insofar as equitable relief had been

---

18 Reasons [33].

19 Reasons [35].

20 Reasons [45].

21 Reasons [46].

22 Reasons [27].

23 Reasons [24].

sought that relief was sought to protect a legal right and that laches is much harder to establish when that is the situation.

55 It was submitted that his Honour's conclusion that laches had been established, or that delay precluded the granting of relief, was erroneous given the following matters:

- The relevant delay was not great. It was submitted that the relevant delay was between May 2014 when Mr Falkingham was aware that the land was being sold and August 2014 when the proceeding was issued.

- His Honour wrongly admitted and relied upon the evidence of Mr Willison as to the possible damage which would be suffered if the sale process were to be aborted. It was submitted that this evidence was without a factual basis and was purely speculative. It was also submitted that his Honour had been wrong to say that the evidence was unchallenged because objection had been taken to the admission of the evidence.

- His Honour wrongly took into account the position of the majority of pre-merger members of the Club who had voted in favour of the merger. It was submitted that oppression proceedings were designed to protect minorities and it could not be a proper exercise of discretion to form a conclusion based upon the views or interests of the majority.

- The delay which had occurred was explicable by the need to obtain litigation funding.

56 It was also submitted that the trial judge had made a number of specific errors, in particular:

- The finding that the board could probably implement the merger again even if relief were granted. It was submitted that this conclusion was inconsistent with the 37% vote against the resolution put on 17 September 2013.

- The finding that Mr Falkingham was supported by the Save Kingswood Group. It was submitted that there was procedural unfairness in relation to this finding as that matter had not been put to Mr Falkingham and, when it had been raised, counsel had been dissuaded from seeking to address the matter by statements made by the judge to the effect that the issue was not significant. It was submitted on the appeal that but for those indications from the judge counsel for Mr Falkingham would have sought to lead further evidence and, in particular, the evidence contained in an affidavit of Kevin Poulter sworn 7 October 2014.

- What was said to be a finding that Mr Falkingham had been well aware that significant expenses in the sale process were being incurred.

- The trial judge's reliance on s 1322(2) was said to be a specific error.

57 It was submitted on behalf of the appellant that in addition to the specific errors identified, the trial judge's conclusion in refusing any remedy was unreasonable or plainly unjust within the meaning of *House v The King*.[24]

58 The appellant submitted that the trial judge had entirely failed to deal with what the appellant characterised as its claim for relief based on 'breach of the company's constitution'.

59 The appellant submitted that there had been procedural unfairness by virtue of the fact that the issue of delay was raised late. In the course of oral submissions senior counsel for the appellant conceded that no adjournment had been sought in order to address the delay issue and that no complaint had been made to the trial judge to the effect that the late raising of delay would result in a lack of procedural fairness.

---

[24] (1936) 55 CLR 499.

60 In the course of oral argument it was also submitted on behalf of the appellant that the proposal voted on by the members on 17 September 2013 was in two significant respects not the merger which was in fact being implemented. The first matter relied upon was that the land had been sold earlier than the members had been advised would be the case in a passage on page 18 of the information pack. The second matter relied upon was that the assets of Peninsula had not become assets of the merged entity and that two separate legal entities continued to exist.

61 The appellant supported the trial judge's conclusion as to improper purpose substantially for the reasons which the trial judge had given.

Submissions on behalf of the respondent

62 In the respondent's written submissions the trial judge's conclusions on laches, acquiescence and delay were adopted. It was submitted that the trial judge had correctly understood *Crawley* and that that was a decision which ought to be followed as a decision of an intermediate appellate court in another State.[25] It was submitted that the discretion under ss 232 and 233 of the *Corporations Act* is a very wide one and that no error of the kind required by *House v The King* had been established.

63 In the written submission it was contended that the only basis for relief which had been sought before the trial judge was relief under ss 232 and 233 of the *Corporations Act*. In oral submissions the contrary was submitted, correctly in my view. The appellant had sought relief both under ss 232 and 233 and in the Court's equitable jurisdiction.

64 The notice of contention was addressed in the written submissions in some detail. It was submitted that the trial judge had been wrong to find that the power to admit new members could not be exercised for the purpose of giving effect to the merger. It was submitted that the trial judge had not explained why he had reached this

---

25 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

conclusion. Otherwise, the written submission proceeded as if the relevant issue was whether the board members had acted bona fide in the interests of the company as a whole. To that extent the written submissions were misconceived. The trial judge did not find that there was any lack of bona fides or that the board had not acted honestly in pursuit of what they considered to be the best interests of the Club. The matter was put differently in oral submissions.

65 In oral submissions the respondent advanced four contentions. They were:

1. The admission of the members so as to give effect to the merger did lie within the powers conferred on the board under the Constitution. No amendment was required.
2. The board did not exercise the powers that it had for any improper or collateral purpose.
3. The doctrine of laches was capable of applying and was rightly held by the trial judge to apply.
4. In any event, all of the remedies sought, including the statutory remedies, were discretionary, and his Honour was correct in refusing relief in the exercise of discretion.

66 It was submitted that the fourth contention was dispositive of the appeal and that if it was upheld none of the other matters would need to be dealt with.

67 The provisions of the Constitution were analysed, in particular clause 8, which, it was submitted, addressed the process of nomination rather than admission, and clauses 27 and 29. It was submitted that clauses 27 and 29 empowered the board to deal with the issue of merger. It was submitted that there was no need for any special provision in the Constitution or special resolution empowering the board to deal with a proposed merger. The board's powers in that respect were conferred generally and without relevant restriction by the Constitution in clauses 27 and 29.

68 It was submitted that the board did not need any resolution of the members in order to implement the proposed merger, save for the fact that the land was to be

sold and clause 35 would require a resolution of the members for that. It was submitted that prudent directors often seek the approval of the membership whether it is required or not.

69 It was submitted in the course of oral submissions that it was clear that equitable relief had been sought in addition to relief under the oppression provisions of the *Corporations Act* and indeed that relief was at 'the very core' and was 'fundamental' to the appellant's claim.

70 In relation to laches, it was submitted that the relevant form of laches applicable here was delay with prejudice to others. It was submitted that there were several cases in which the defence of laches had been entertained in oppression proceedings. In that respect reference was made to *Re Jermyn Street Turkish Baths Ltd*,[26] *Re S G White Pty Ltd*[27] and *Ansett v Butler Air Transport Ltd (No 1)*.[28] In any event, it was submitted that the trial judge plainly had a discretion under ss 232 and 233 and the difference between an analysis based upon the equitable doctrine of laches and an analysis based upon the undoubted statutory discretion was somewhat academic.

71 It was submitted that the trial judge had been correct to take into account the interests of the 63% of Club members who had voted in favour of the merger on 17 September 2013. They are not oppressors. Similarly, it was submitted that the interests of the Peninsula members who had been admitted and bidders for the land could not be ignored and that they had done no wrong to anyone. These were all properly matters to be taken into account on the issue of discretion.

72 It was submitted that it was necessary for the appellant to identify an error of the kind dealt with in *House v The King* and that he had failed to do so.

73 In relation to the mode of implementing the merger, it was submitted that the process foreshadowed in the information pack was being followed but, as was

---

26 [1970] 1 WLR 1194 ('*Re Jermyn Street*').

27 (1982) 1 ACLC 254 ('*Re S G White*').

28 (1958) 75 WN (NSW) 299 ('*Ansett v Butler*').

indicated in the information pack, the precise procedure eventually adopted would depend to some extent on the stamp duty implications.

Delay — applicable legal principles

74 Significant attention was given in both the trial judge's reasons and in the appellant's submissions to Young JA's judgment in *Crawley*.[29] Before turning to that judgment, some relevant legal principles, which were not controversial on the appeal, need to be stated.

75 For over 20 years *Ford's Principles of Corporations Law* has stated the following principle:

> Proceedings for a declaration of invalidity of a board resolution may be met by the defence that the plaintiff has delayed the institution or conduct of proceedings unreasonably.[30]

The authorities cited for the proposition are *Ansett v Butler* and *T C Newman (Qld) Pty Ltd v DHA Rural (Qld) Pty Ltd*.[31]

76 *T C Newman* was a case which concerned the exercise by directors of a power they had under the Articles to allocate shares offered for sale by a member amongst the existing members. Declarations were sought as to the validity of the resolution passed by directors. The plaintiffs sought a declaration that the allocation was invalid. The defendants pleaded delay, contending that the Court should not grant relief in the exercise of discretion. The substantive issue was similar to that raised in this case, being whether the power had been exercised for a purpose other than that for which it had been conferred, and in the judgment of Williams J, *Whitehouse* and *Howard Smith* as well as *Mills v Mills*[32] were cited and considered. The conclusion reached was that the plaintiffs had not established an improper purpose. The judge

---

29 (2009) 262 ALR 654.

30 H A J Ford and R P Austin, *Ford's Principles of Corporations Law* (Butterworths, 6th ed, 1992) [1439] (citation omitted); R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, online) [8.260] (current to December 2013) (citation omitted).

31 (1988) 1 Qd R 308; (1987) 12 ACLR 257 ('*T C Newman*').

32 (1938) 60 CLR 150.

nevertheless dealt with the defence of delay concluding that delay would not have precluded relief if the improper purpose had been established. The judge concluded that there had not been such delay as to call for the exercise of discretion against the plaintiffs had they otherwise established their case. The judgment assumes that delay could properly have been a basis upon which to refuse relief.

77 In *Ansett v Butler* five shareholders sought a declaration that an issue and allotment of shares undertaken by the directors was invalid, as well as other relief. Myers J held that the relevant resolutions were invalid as the directors were motivated to ensure the preservation of a majority within the company which would carry out the policy the directors thought best. The plaintiffs nevertheless failed because it was held that they had not come to the Court with the promptness which was required of them. The plaintiffs had been aware of the share issue for 11 months prior to the commencement of the suit. Myers J expressed the view that ordinarily that would not justify the withholding of relief but, after referring to some English cases concerning removal of a shareholder from the registry,[33] he observed that third parties had acted on the faith of the fact that the shares in question had been validly registered and, as the company in question was a listed company, there may well have been constant dealings in the shares on the faith of the register. Other transactions had also been undertaken during the period of the delay.

78 Insofar as Mr Falkingham sought a declaration that the admission of the Peninsula members was invalid, relief could properly be refused in the exercise of discretion based upon delay, notwithstanding that an improper purpose had been established.

79 Insofar as relief was sought under ss 232 and 233 of the *Corporations Act*, those provisions give the Court a wide discretion.[34]

---

33 *In re Cachor Company* ('Lawrence's Case') (1866-67) LR 2 Ch App 412, 417; *In re Scottish Petroleum* (1883) 23 Ch D 413, 434.

34 Goldberg J described the discretion as 'very wide and unconstrained' in *Szencorp Pty Ltd v Clean Energy Council Ltd* (2009) 69 ACSR 365, 378 [56].

80 The appellant relied upon authority to the effect that laches as an equitable defence is not available in answer to a legal claim, citing in that regard Deane J's judgment in *Orr v Ford*,[35] and also relied upon the statement in *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* to the effect that where a plaintiff seeks equitable relief in protection of a purely legal right it is not easy to make out the defence of laches.[36]

81 In the course of oral submissions the respondent contended that courts in both England and Australia had previously entertained delay as a ground for refusing relief in oppression proceedings. In that respect they relied upon *Re Jermyn Street*, *Re S G White* and *Ansett v Butler*.

82 *Ansett v Butler* was not an oppression proceeding. Both *Re Jermyn Street* and *Re S G White* were and, as the respondent submitted, in each case delay was entertained as a potential ground for denying relief.

83 In *Re Jermyn Street* Pennycuick J analysed the issue of delay in the context of a complaint as to a share issue in an oppression case.[37] After quoting a passage from *Weld v Petre*,[38] which in turn quoted *Archbold v Scully*,[39] *Lindsay Petroleum Co v Hurd*[40] and *Erlanger v The New Sombrero Phosphate Co*,[41] Pennycuick J concluded that the analysis of delay is the same whether relief is sought under statutory oppression provisions or by way of an action to set aside a share issue.[42]

---

35 (1989) 167 CLR 316, 340.

36 R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (Butterworth's LexisNexis, 4th ed, 2002) 1036.

37 [1970] 1 WLR 1194, 1208–10. Pennycuick J's conclusions as to the allegedly oppressive conduct were reversed on appeal. The English Court of Appeal did not deal with Pennycuick J's analysis of delay: *In re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042.

38 [1929] 1 Ch 33, 50–2.

39 (1861) 9 HLC 360, 383; 11 ER 769, 778.

40 (1874) LR 5 PC 221, 239.

41 (1877–78) 3 App Cas 1218, 1279.

42 [1971] 1 WLR 1042. Notwithstanding the successful appeal on other issues, the analysis of an issue such as this by Sir John Pennycuick, who by 1970 had sat in the Chancery Division for 10 years and was, very shortly after the judgment in *Re Jermyn Street*, appointed as the first modern Vice-Chancellor of the Chancery Division, must be regarded as being significant.

84 It was not contended by the appellant that delay was irrelevant to the exercise of discretion under the oppression provisions but it was contended that laches as a 'stand-alone defence' was not available in order to meet the statutory claim. Likewise, it was not contended that, insofar as declarations of invalidity were sought, such claims might not be defeated by reason of delay, but it was submitted that the trial judge ought to have approached that issue on the basis that delay in relation to such claims would be made out only in rare circumstances.

85 The trial judge found that laches, acquiescence and delay was an available defence to an oppression claim, although he also found that he could take into account delay in the exercise of discretion under the oppression provisions in any event. In this respect the trial judge quoted a long passage from the judgment of Young JA in *Crawley*. The appellant submitted that the trial judge had misunderstood Young JA's judgment.

86 *Crawley* was an oppression case. It concerned a large number of transactions over a long period of time. The plaintiffs succeeded in obtaining an order at first instance that their shares be purchased by the oppressing shareholders, but they did not succeed on all of the matters which they had raised. One of their complaints concerned a share purchase and a loan facility in 1997 which, although it was the subject of complaint when the proceeding was first issued in 1998, was not the subject of any claim to have the relevant transactions set aside until 2004. The trial judge found against the otherwise successful plaintiffs on that issue in these terms (quoted by Young JA in the Court of Appeal):

> Even if the plaintiffs' claims to have the right to elect to take a half-share of the capital profit derived by Springsley from its share purchase had otherwise been made good, the plaintiffs would be barred by laches. They would also be barred by acquiescence, that is, that Nabatu saw that its rights had been violated and acquiesced in that violation. The same considerations also preclude the relief sought under s 233 of the *Corporations Act* (or s 260 of the Corporations Law) in relation to that transaction.[43]

87 The New South Wales Court of Appeal found no error in the primary judge's

---

43 *Crawley* (2009) 262 ALR 654, 676 [150].

analysis of this issue which would constitute a ground for interference.[44] Young JA did, however, ask the question why laches was relevant when considering a statutory remedy under the *Corporations Act*.[45] The first answer which he suggested was that acquiescence might lead to a conclusion that there was no subsisting oppressive conduct as at the time of the trial. He observed that that sort of approach was not relevant to the instant case as oppression had been conceded and he suggested that in those circumstances he had 'difficulty' in seeing how laches could be a real issue in the case.[46] He then went on to say that as the matter had been argued he would nevertheless deal with it and he did so addressing the traditional elements of the defence of laches and in particular considering what degree of knowledge of the wrong-doing a plaintiff must have before he or she may be guilty of laches.[47] His conclusion in that respect was that the elements of knowledge, delay and prejudice need to be all considered together and that there is no 'formula' as to just what degree of knowledge must exist in any particular case.[48] Young JA observed that he did not think it right to 'equate the defence of laches with the defence of release' as the former is 'within the discretion of a judge in equity to decline to give relief' whilst the latter has more of a 'proprietary flavour'.[49]

88 The submission made on behalf of the respondent that an attempt to analyse distinctions between the equitable doctrine of laches on the one hand, and the relevance of delay in the exercise of the statutory discretion on the other, is somewhat academic, is, in my view, well-founded. Insofar as declaratory relief was sought, it is clear that it was open to the judge to refuse that relief in the exercise of his discretion on the basis of delay. Insofar as relief was sought under the oppression provisions, delay was a relevant matter for the judge to take into account

---

44 Ibid 680 [184].

45 Ibid 677 [152].

46 Ibid 677 [155]–[160].

47 Ibid 677–9 [162]–[180].

48 Ibid 679 [175], [180].

49 Ibid 680 [183].

in the exercise of the wide discretion given to him under those provisions. I would adopt the approach of Pennycuick J in *Re Jermyn Street* in treating the analysis as being, in practical terms, essentially the same.[50] With respect, it seems to me that the judgment of Young JA is consistent with that approach.

89 The appeal insofar as it seeks to impugn the judge's decision on the issue of delay is an appeal against an exercise of discretion. It is necessary for the appellant to establish that the judge acted upon a wrong principle, took into account some extraneous matter, mistook the facts, ignored some relevant matter, or reached a result which is unreasonable or plainly unjust such that this Court can infer that in some way there had been a failure to properly exercise the discretion.[51]

Delay — analysis

90 The appellant submitted that the trial judge had made a number of errors in his analysis of the delay issue.

91 It was submitted that the relevant delay was between May 2014 and August 2014 and that the judge ought to have held that that delay was not great. I do not accept that any such error has been demonstrated. The relevant period of delay did not begin when Mr Falkingham found out that the sale process had commenced in May 2014. In 2013 he knew that the resolution had been passed on 17 September 2013 and he knew that the Peninsula members had been admitted. It was because of their admission that he did not vote at the meeting in October 2013.

92 I do not accept that the judge made an error by taking into account the evidence of Mr Willison as to the possible damage that would be sustained if the sale process were aborted. The evidence was, in a sense, speculative. It is an inherently speculative exercise to try to assess what the result of a competitive sale process might have been if significant events had not occurred. The precise figures are not

---

50 [1970] 1 WLR 1194, 1210.

51 *House v The King* (1936) 55 CLR 499, 504–5.

really important. The important matter is that orders aborting the sale process could potentially result in a significant loss of value. The trial judge was correct to see that as a relevant matter.

93 In my view the judge was entitled to take into account the expressed views of the majority of the members of the Club prior to the admission of the Peninsula members who favoured the merger. Those members are not wrongdoers in any relevant sense. The judge was entitled to take their position into account. Similarly, he was entitled to take into account the position of bidders for the land and of the Peninsula members who were admitted to the Club.

94 The judge was entitled to take into account what he saw as a probability that the merger might be implemented in any event if relief were granted. The fact that 37% of the membership had opposed the resolution in September 2013 did not mean that members, particularly if confronted by a situation where the sale process was already well advanced and that significant losses might be suffered if it were not pursued, would not have taken a different view to the view they had taken in September 2013.

95 The finding that Mr Falkingham was supported by the Save Kingswood Group was open to the judge on the basis of the material to which he referred. If the material in Mr Poulter's affidavit sworn 7 October 14 had been put before him, it seems to me that it would have fortified his conclusion. Mr Poulter's affidavit, if accepted, reveals that the Save Kingswood Group has not used its own funds to support the litigation. But it also makes it clear that the Group has supported, and does support, Mr Falkingham's legal challenge and that, at one time at least, it encouraged its supporters to donate to the fund established to assist in financing Mr Falkingham's action.

96 The appellant characterised the trial judge as having found that Mr Falkingham was aware of the enormous expenses being incurred in the sale process. What the judge in fact found was that Mr Falkingham was aware that the sale process had

begun in May 2014 and was aware that the sale of the Dingley land was the key to the merger. The judge then said:

> 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.[52]

97 It seems to me that that conclusion was open to the trial judge. I do not accept that he made in any error in drawing it.

98 In relation to the judge's reliance on s 1322(2),[53] the judge was referring merely to formal defects in the nomination process. In my view there was no relevant error in what the judge said. Likewise, I do not consider that any relevant error is revealed by what his Honour said about litigation funding.

99 I do not accept that the appellant was subjected to procedural unfairness by virtue of the fact that the issue of delay was raised late. The judge set out the full chronology of the matter in his ruling on costs. More importantly, no adjournment was sought at the time in order to further address the issue and it was not put to the trial judge that it would be unfair to proceed in the circumstances.

100 The appellant failed to establish any relevant error in relation to the exercise of the judge's discretion not to grant relief by reason of delay. The decision is not so unreasonable or unjust as to require an inference of error to be drawn. The appeal should be dismissed on that ground.

---

52 Reasons [106].

53 Reasons [70].

Improper purpose

101 Given my conclusion in relation to the issue of delay, it is not strictly necessary to address the submissions concerning the trial judge's conclusion that the directors admitted the Peninsula members for an improper purpose. I will nevertheless briefly state my reasons for agreeing with the trial judge.

102 The directors were exercising, or purportedly exercising, their powers under clauses 8, 9 and 10 of the Constitution. I do not accept the submission that what they were doing was taking a step in the management of the affairs of the Club under clauses 27 and 29. The Constitution contains specific provisions dealing with the admission of members. I think it is clear that the directors were acting under those provisions.

103 The relevant issue is that articulated by the Privy Council in *Howard Smith* in the following passage:

> In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. 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 that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion 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.[54]

104 I agree with the trial judge that the Constitution did not envisage or provide for the steps which were intended to be taken in order to effectuate the merger as described in the information pack and which were the subject of the ordinary resolution passed by the members on 17 September 2013. It seems to me that the idea that the directors could use the specific power to admit members nominated under clause 8 for the purpose of admitting *en masse* the entire membership of a

---

[54] [1974] AC 821, 835

different club with a view to then selling the existing golf course, adopting a new Constitution (which did not require member approval for sale of the golf course), and changing the club's name, only has to be stated to be rejected.

105 The proposal may well have been a prudent and sound one, as I am sure the directors considered that it was. The fact that the merger may well have been an excellent idea is not relevant to the question of whether the directors had power to implement it in the way in which they did.

106 The resolution of 17 September 2013 was itself valid but, as the trial judge said, it did not authorise the directors to take any step which they did not have power to take under the Constitution. The absence of any element of self-interest in directors does not make the admission of the Peninsula members valid.

Issues raised concerning implementation

107 The two matters raised on behalf of the appellant concerning the manner in which the merger is being implemented were each without substance in my view.

108 The information pack does not state that the Kingswood golf course will not be sold for three years, either in the passage relied upon on page 18 or anywhere else. It says that the transition period will be three to five years. It says that the objective would be to secure a sale during the first three years. It says that members will be able to play on both courses, at Dingley and Frankston, during the transition period. Nothing that has happened is inconsistent with any of that.

109 It was submitted, in fairly strong terms, that the entire merger was taking place in a way which was inconsistent with what the members had been advised because two separate legal entities continued to exist and because the Peninsula course had not been transferred to the merged club. The information pack described the process which was envisaged. I have set it out earlier. That process did involve the continued existence of two separate legal entities which would continue to hold the same assets. The information pack also advised that the structure proposed was

being driven by stamp duty considerations and that it might be varied depending upon those considerations. The aspects of the process which were the subject of the complaint made orally by senior counsel on behalf of the appellant seem to me to be the very process described in the information pack.

The interlocutory applications

110 As indicated, the application to join AS Residential as a party was dismissed during the hearing of the appeal. The application was dismissed because AS Residential objected to being joined as a party in circumstances where it had had no opportunity to call witnesses or cross-examine the appellant's witnesses in the proceeding. It did not wish to be forced into attempting to meet a claim to have the contract of sale which it had entered into set aside in circumstances where it had had no opportunity to call evidence or test the evidence put against it.

111 These submissions put on behalf of AS Residential were accepted.

112 If the appellant had otherwise succeeded, either the matter would have been remitted to the Trial Division so that any claim to set aside the contract of sale could be determined in circumstances where AS Residential had a proper opportunity to advance any case it wished to advance, or the appellant would have been required to issue a separate proceeding against AS Residential seeking that relief.

113 The appellant's application for an injunction enjoining dealings with the deposit paid by AS Residential pending the hearing of the appeal was also dismissed during the hearing. Earlier applications for injunctions had been refused by the trial judge and by this Court (Kyrou JA and Garde AJA).[55] The respondent and Peninsula have substantial assets. The balance of convenience was against the granting of the interlocutory injunction sought and the prospects of success on appeal were not sufficient to warrant the injunction.

---

55 *Falkingham v Peninsula Kingswood Country Golf Club Ltd* [2014] VSCA 235.

114 As to the application that the respondent indemnify the plaintiff, I would defer that application to be heard at the same time as submissions on the costs of this appeal.

Conclusion

115 In my view the appeal should be dismissed. Orders should also be made dismissing the appellant's applications by summons dated 12 November 2014 (the injunction application) and 28 October 2014 (the joinder application). The application by summons dated 13 October 2014 (the costs indemnity) should be heard at the same time as submissions as to the costs of the appeal.

BEACH JA:

116 I agree that the appeal must be dismissed for the reasons given by Whelan JA.

- - -

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

S APCI 2014 0109

BETWEEN:

WILLIAM FALKINGHAM — Appellant

- and -

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

ORDER OF THE COURT OF APPEAL

JUDGES:	The Honourable the Chief Justice The Honourable Justice Whelan The Honourable Justice Beach
DATE MADE:	13 February 2015
ORIGINATING PROCESS:	Notice of appeal.
HOW OBTAINED:	At the hearing of the appeal..
ATTENDANCE:	Ms C.M. Kenny, one of Her Majesty's Counsel, with Ms C.E.M. Exell of Counsel and Mr. A.F. Solomon-Bridge of Counsel for the Appellant. Mr. A.C. Archibald, one of Her Majesty's Counsel, with Mr. N.J. O'Bryan, of Senior Counsel, and Mr. S. Rosewarne of Counsel for the Respondent.
OTHER MATTERS:	This matter coming on to be heard before the Court on 24 November 2014 and the Court having directed that this matter should stand for judgment and this matter standing for judgment this day accordingly.

THE COURT OF APPEAL ORDERS THAT:

1. The appeal is dismissed.
2. Any submissions or further submissions on the indemnity application, the costs of the appeal, and the costs of the injunction application to be filed and served by 2pm, 20 February 2015.

DATE AUTHENTICATED: **17 February 2015**

PROTHONOTARY

Rjs: 17/2/15

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

S APCI 2014 0109

BETWEEN:

WILLIAM FALKINGHAM — Appellant

- and -

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

ORDER OF THE COURT OF APPEAL

JUDGES:	The Honourable the Chief Justice The Honourable Justice Whelan The Honourable Justice Beach
DATE MADE:	13 February 2015
ORIGINATING PROCESS:	Application for restraining order.
HOW OBTAINED:	Summons filed by the Appellant on 12 November 2014.
ATTENDANCE:	Ms C.M. Kenny, one of Her Majesty's Counsel, with Ms C.E.M. Exell of Counsel and Mr. A.F. Solomon-Bridge of Counsel for the Appellant. Mr. A.C. Archibald, one of Her Majesty's Counsel, with Mr. N.J. O'Bryan, of Senior Counsel, and Mr. S. Rosewarne of Counsel for the Respondent.
OTHER MATTERS:	This matter coming on to be heard before the Court on 24 November 2014 and the Court having directed that this matter should stand for judgment and this matter standing for judgment this day accordingly.

THE COURT OF APPEAL ORDERS THAT:

1. The application is dismissed.

DATE AUTHENTICATED: **17 February 2015**

SUPREME COURT OF VICTORIA PROTHONOTARY

PROTHONOTARY

Rjs: 17/2/15

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0109

WILLIAM FALKINGHAM — Appellant

v

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

---

JUDGES:	WARREN CJ, WHELAN and BEACH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	On the papers
DATE OF JUDGMENT:	27 February 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 30
JUDGMENT APPEALED FROM:	[2014] VSC 437 (Robson J)

COSTS – Application by unsuccessful appellant for costs – Application by unsuccessful appellant for indemnity in relation to costs – Appellant unsuccessful on appeal and respondent unsuccessful on notice of contention – Whether costs should take into account success on separate issues – Whether proceeding akin to a derivative proceeding – Discretion as to costs – Ordered that there be no order as to costs.

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

WARREN CJ
WHELAN JA
BEACH JA:

1 On 13 February 2015, this Court dismissed Mr Falkingham's appeal in this proceeding.[1] Following the delivery of judgment, the only outstanding issues between the parties were:

(a) the appellant's summons[2] seeking an order that the respondent 'pay and/or indemnify the appellant for his costs of the appeal':

(b) the costs of the appellant's injunction application;[3] and

(c) the costs of the appeal (including the costs of the respondent's notice of contention).

2 The parties agreed to these issues being resolved on the papers and they have filed written submissions setting out their respective positions.

3 In summary, the appellant submits that he should be indemnified by the respondent for the costs of the appeal and the proceeding below; alternatively, that there be no order for costs in relation to the appellant's notice of appeal, and the respondent should pay the appellant's costs in relation to the notice of contention. The respondent submits that there is no reason why costs should not follow the event and that it should have its costs of the appeal and of each of the appellant's summonses (including the appellant's summons seeking to join AS Residential Property No 1 Pty Ltd as a party to the appeal).

4 The trial judge found that the board of directors of the respondent had exercised its power to admit new members for a purpose other than that for which that power

---

1 [2015] VSCA 16.

2 Filed 14 October 2014.

3 Made by summons filed 12 November 2014.

had been conferred and that that conduct had been oppressive. However, the judge refused relief because of laches, acquiescence and delay, and therefore dismissed the appellant's proceeding. Following the delivery of judgment, the appellant submitted that the judge should make an order that the appellant be awarded two thirds of the costs of the trial and that he should 'make no other order as to costs'. In support of this submission, the appellant contended that his proceeding 'took on much of the colour of a derivative action' and was thus 'for the benefit of the company'.

5 The appellant's submissions did not find favour with the judge. The judge exercised his discretion 'to allow for costs incurred on discreet issues in the trial.'[4] In the result, the judge ordered that there be no order as to the costs of the proceeding at first instance.

6 On behalf of the appellant, it was submitted to us that 'his [the appellant's] application for relief was analogous to a derivative proceeding and as he was bona fide seeking relief, not for himself, but for the benefit of the Kingswood Golf Club Ltd, he should be entitled to indemnity from Kingswood in relation to his costs'. In support of this submission, the appellant contended that this Court (constituted by Neave JA and Sloss AJA) had already noted that the appellant was:

> 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.[5]

7 However, the passage relied upon by the appellant in the judgment of Neave JA and Sloss AJA, is in a part of their Honours' judgment that recites the appellant's submissions rather than any finding by their Honours. Their Honours made no finding of the kind contended for by the appellant.

8 The appellant did not seek to bring this proceeding under Pt 2F.1A of the

---

4 *Re Peninsula Kingswood Country Gold Club (No 2)* [2014] VSC 483 [23].

5 *Falkingham v Peninsula Kingswood Country Golf Club* (Unreported, Court of Appeal of Victoria, Neave JA and Sloss AJA, 31 October 2014) [53].

Corporations Act 2001. Had he done so, he could have relied upon the express statutory power given to the Court in s 242 to order that he be indemnified for his costs (amongst other things). He would then have been subject to the restrictions in Pt 2F.1A, most notably the requirement to obtain leave. In seeking indemnity now, the appellant relies upon *Farrow v Registrar of Building Societies*,[6] *Wallersteiner v Moir (No 2)*[7] and *Woods v Links Golf Tasmania Pty Ltd*.[8]

9 *Wallersteiner* was decided under what were generally called the exceptions to the rule in *Foss v Harbottle*.[9] Those principles were abolished in Australia under Pt 2F.1A and, in particular, by s 236(3). *Farrow* involved a building society, but it was also decided under those principles. *Wallersteiner* was the principal case Marks J in *Farrow* relied upon. *Wood* was a proceeding under Pt 2F.1A. As Finklestein J explained in *Wood*, Pt 2F.1A abolished the exceptions to the rule in *Foss v Harbottle* and established in its place a new statutory regime.[10]

10 The appellant chose not to proceed under Pt 2F.1A. If any scope remains for an indemnity order of the kind sought here, independent of the power to order indemnity under Pt 2F.1A, it would be only in an exceptional case. It would need to be demonstrated that, notwithstanding that the action was brought *bona fide* to protect the company or to advance its interests, for some good reason leave was not sought under Pt 2F.1A.

11 The Court's power in relation to costs is very wide. It could not be said that an indemnity order of the kind addressed in *Wallersteiner*, *Farrow* and *Wood*, which is not made under s 242 of Pt 2F.1A, could never be made, but it would have to be very unusual circumstances to warrant it. No such order is warranted in this case where the appellant did have a personal interest in the proceeding (he wished to preserve

---

6 [1991] 2 VR 589 ('*Farrow*').

7 [1975] 1 QB 373 ('*Wallersteiner*').

8 [2010] FCA 570 ('*Wood*').

9 (1843) 2 Hare 461; 67 ER 189.

10 [2010] FCA 570 [2].

his capacity to play at the Kingswood course) and where he determined not to seek leave under Pt 2F.1A.

12 We think there is much to be said for the trial judge's approach to the question of costs. The appellant established that the board of directors of the respondent had exercised its powers to admit new members for a purpose other than that for which the power had been conferred and that that conduct had been oppressive. That was a significant finding which the respondent failed to overturn on this appeal. As with the conduct of the trial, much of the time of the appeal was taken with the respondent's attempt (by its notice of contention) to overturn the judge's finding of oppression.

13 That said, the respondent was ultimately successful on the appeal – the appellant being unable to show error in the judge's exercise of his discretion not to grant relief.

14 In all the circumstances, we think the costs of the appeal as between the parties (including the notice of contention, any reserved costs and the costs of the appellant's various summonses) should be dealt with in the same way as the costs of the proceeding at first instance were dealt with by the trial judge. That is, there will be no order as to the appellant's or the respondent's costs of the appeal, the notice of contention and the appellant's summonses filed in this Court, save for the order already made on the joinder application.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

S APCI 2014 0109

BETWEEN:

WILLIAM FALKINGHAM — Appellant

- and -

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

ORDER OF THE COURT OF APPEAL

JUDGES:	The Honourable the Chief Justice The Honourable Justice Whelan The Honourable Justice Beach
DATE MADE:	27 February 2015
ORIGINATING PROCESS:	Application for indemnity for costs.
HOW OBTAINED:	Orders made after receipt of written submissions filed by the parties.
ATTENDANCE:	Orders made in chambers.
OTHER MATTERS:	This matter coming on to be heard before the Court on 24 November 2014 and the Court having directed that this matter should stand for judgment and this matter standing for judgment this day accordingly.

THE COURT OF APPEAL ORDERS THAT:

1. The application is dismissed.
2. There is no order as to the costs of the application.

DATE AUTHENTICATED: **27 February 2015**

PROTHONOTARY

PROTHONOTARY

Rjs: 27/2/15

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

S APCI 2014 0109

BETWEEN:

WILLIAM FALKINGHAM — Appellant

- and -

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

ORDER OF THE COURT OF APPEAL

JUDGES:	The Honourable the Chief Justice The Honourable Justice Whelan The Honourable Justice Beach
DATE MADE:	27 February 2015
ORIGINATING PROCESS:	Notice of Appeal.
HOW OBTAINED:	Orders made after receipt of written submissions filed by the parties.
ATTENDANCE:	Orders made in chambers.
OTHER MATTERS:	1. This order applies to all applications in the appeal not otherwise already the subject of an order as to costs. 2. This matter coming on to be heard before the Court on 24 November 2014 and the Court having directed that this matter should stand for judgment and this matter standing for judgment this day accordingly.

THE COURT OF APPEAL ORDERS THAT:

1. There is no order as to the costs of the appeal.

DATE AUTHENTICATED: **27 February 2015**

PROTHONOTARY

SUPREME COURT OF VICTORIA PROTHONOTARY

Rjs: 27/2/15

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:

WILLIAM FALKINGHAM
Applicant

and

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

AMENDED APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for special leave to appeal from the whole of the judgment and orders of the Court of Appeal of the Supreme Court of Victoria given on 13 February 2015 ~~and 27 February 2015~~.

Grounds

1. The Court of Appeal erred in law in holding that *laches* was a defence to a statutory oppression claim under s 232 of the *Corporations Act 2001* (Cth).

2. Alternatively, the Court of Appeal erred in law in holding that the trial judge, in considering the defence of *laches* was entitled to have regard to the interests of:

   a. those persons admitted to membership of the respondent from Peninsula Country Golf Club (**Peninsula**), in circumstances where the trial judge had not identified any relevant prejudice to them and had found their admission was unconstitutional;

   b. the majority members at Kingswood Golf Club (**Kingswood**) who had voted in favour of the "merger" in circumstances where:

      i. the trial judge failed to identify any relevant prejudice to them;

      ii. the trial judge found that a 75% vote was required to effect the merger but only a 50% vote was sought at the relevant meeting; and

      iii. a statutory oppression claim is necessarily concerned with the protection of minority interests within a company;

   c. the bidders for the Kingswood land in circumstances where the trial judge failed to identify any relevant prejudice which would be

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
53 Marcus Road,
Dingley VIC 3172

Telephone: (03) 9551 3155
Fax: (03) 9551 8250
Ref: Pranesh Lal

suffered by them if the "merger" was unwound and where the Court of Appeal found that the evidence of potential loss to the bidders and the respondent was "speculative".

3. The Court of Appeal erred in holding that *laches* was made out on the facts, in circumstances where:

   a. it did not disturb the trial judge's finding that "the delay ha[d] not been great" and on any view had been less than 12 months;

   b. the evidence of prejudice to the respondent was the potential impact of an interlocutory order injuncting the sale of the Kingswood land on its sale price, which evidence the Court of Appeal found to be "speculative";

   c. where neither the trial judge nor the Court of Appeal identified any relevant prejudice to third parties;

   d. where the trial judge's finding that the applicant "must have been aware of the enormous expenses being incurred by [the respondent] and the potential buyers" was not based on any evidence and no inference to that effect could be drawn from the evidence; and

   e. where neither the trial judge nor the Court of Appeal made a finding that the "merger" was irreversible.

4. The Court of Appeal erred in law in holding that the principles propounded in *House v The King* (1936) 55 CLR 499 at 504-505 applied to appellate review of equitable remedies and equitable defences.

5. The Court of Appeal erred in law in holding there was no distinction between the defence of *laches* on the one hand and the relevance of delay in the exercise of the discretion under s 233 of the *Corporations Act* on the other.

6. The Court of Appeal erred in law and in fact in conflating the issues considered by the trial judge in regard to the defence of *laches* and those considered in relation to the exercise of the discretion under s 233 of the *Corporations Act*.

7. The Court of Appeal erred in law in finding that the the trial judge was entitled, in considering the exercise of his powers under s 233 of the *Corporations Act*, to have regard to:

   a. the interests of those persons admitted to membership of the respondent from Peninsula, in circumstances where the trial judge had not identified any relevant prejudice to them and had found their admission was unconstitutional;

b. the interests of the majority members of Kingswood where a statutory oppression claim is necessarily concerned with minority interests within a company and where the trial judge had not identified any relevant prejudice suffered by them; and

c. the likelihood that the board would be able to effect the "merger" again, when such a finding was entirely speculative and contrary to the trial judge's finding that the merger required a 75% vote and only 63% of the pre-merger Kingswood members had voted in favour of it.

8. The Court of Appeal erred in law in failing to find that the refusal to grant a remedy under s 233 of the *Corporations Act* for the oppression suffered by the applicant was unreasonable or plainly unjust in all the circumstances, especially having regard to:

a. the undisturbed finding by the trial judge that the period of delay in commencing the proceeding "was not great" and on any view had been less than 12 months;

b. the undisturbed finding by the trial judge that the applicant became aware of the potential sale of the Kingswood land by an advertisement in The Australian Financial Review on 8 May 2014;

c. the undisturbed finding by the trial judge that during the period of the delay the applicant was attempting to procure litigation funding which explanation neither the trial judge nor the Court of Appeal found to be unreasonable;

d. the undisturbed finding by the trial judge that the applicant had been oppressed by the *en masse* admission of more than 1000 Peninsula members which was contrary to the respondent's constitution;

e. the evidence that the more than 1000 Peninsula members had paid $2 each to join Kingswood and were then able to determine the outcome of a vote on 29 October 2013 to amend the constitution to remove the decision to sell the Kingswood land, then estimated to be worth in excess of $70 million, from the pre-merger members of Kingswood;

f. the undisturbed finding by the trial judge that the applicant continued to be oppressed at the date of judgment;

g. the finding by the Court of Appeal that the evidence of prejudice to the respondent if relief was granted was "speculative";