

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

<u>JUDGES:</u>	WARREN CJ, WHELAN and BEACH JJA
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	On the papers
<u>DATE OF JUDGMENT:</u>	27 February 2015
<u>MEDIUM NEUTRAL CITATION:</u>	[2015] VSCA 30
<u>JUDGMENT APPEALED FROM:</u>	[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.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
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 summons² 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

¹ [2015] VSCA 16.

² Filed 14 October 2014.

³ Made by summons filed 12 November 2014.

that power 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.

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].

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

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].

the appellant did have a personal interest in the proceeding (he wished to preserve 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.
