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 2014
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

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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

Board of Directors …

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 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

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

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

4 Reasons [75].

5 Reasons [94].

6 Reasons [58].

conduct of the board in admitting the Peninsula members.'[7]

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

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7 Reasons [95].

8 Reasons [70].

9 Reasons [98].

10 Reasons [99].

11 Reasons [100].

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

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, 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]

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

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

15 Reasons [113].

16 Reasons [113].

17 Reasons [115].

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 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

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18 Reasons [33].

19 Reasons [35].

20 Reasons [45].

21 Reasons [46].

22 Reasons [27].

23 Reasons [24].

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 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

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[24] (1936) 55 CLR 499.

judge to the effect that the late raising of delay would result in a lack of procedural fairness.

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

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

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 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

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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*').

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 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

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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*').

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 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.

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32 (1938) 60 CLR 150.

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.

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

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

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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].

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.

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]

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

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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.

> 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 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

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

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].

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 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.

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50 [1970] 1 WLR 1194, 1210.

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

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 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.

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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

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[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.

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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.

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