

10 h. the failure of the trial judge or the Court of Appeal to identify how the "position" of the potential bidders was relevant or gave rise to a relevant prejudice;

i. the absence of any evidence of knowledge by the applicant of prejudice to the respondent or third parties prior to the commencement of proceedings; and

j. there was no finding that the "merger" was irreversible.

20 9. The Court of Appeal erred in law and in fact in upholding the trial judge's finding that the applicant must have been "well aware of the enormous expenses being incurred by [the respondent]" and the potential buyers, when there was no evidence of such knowledge, nor was such knowledge part of the respondent's case at trial or put to the applicant when giving evidence.

10. The Court of Appeal erred in law in holding that s 1322(2) of the *Corporations Act* would cure the alleged failures of the board to act in accordance with the company constitution.

20 11. ~~The Court of Appeal erred in law in holding that the enactment of Pt 2F.1A of the *Corporations Act* disentitled a member of a company, who had not sought leave to commence a proceeding under Pt 2F.1A but who had brought a proceeding bona fide for the benefit of the company, to an indemnity for his costs in the absence of an exceptional case or unusual circumstances.~~

30 12. The Court of Appeal erred in law in failing to grant leave to join AS Residential Property No.1 ACN 601 592 661 atf Residential Property No. 1 (ASRP), in circumstances where the relief sought by the applicant in the Court of Appeal directly affected ASRP's rights and liabilities.

Orders sought

1. Special leave to appeal be granted.

2. The appeal be allowed.

30 3. The orders made by the Court of Appeal on 13 February 2015 and 27 February 2015 be set aside and it is ordered that the appeal to the Court of Appeal be allowed and, further, the following orders be made:

40 3.1. Pursuant to s 247A of the *Corporations Act*, an order for the inspection of the books of the respondent.

3.2. Pursuant to s 233(j) of the *Corporations Act*, 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.

3.3. Pursuant to s 233(b) of the *Corporations Act*, orders that the respondent repeal the constitution purportedly adopted on 29 October 2013.

3.4. A declaration that the 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 the Australian Securities and Investments Commission on 16 December 2013, 31 October 2013 and 8 October 2013 bearing Doc ID numbers 028819142, 1E9933109, 1E993110, 1F0499933 respectively), are invalid and void.

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

3.6. That leave be granted to join ASRP as a respondent to the proceeding.

3.7. That the proceeding be remitted to the trial division for the hearing and determination of applications:

3.7.1. to set aside the contract of sale dated 5 September 2014 between the respondent and ASRP, and/or to restrain the respondent and/or ASRP from completing and/or giving effect to the contract of sale;

3.7.2. incidental or necessary to give effect to the judgment of the Court of Appeal as varied by the order of the High Court.

4. Alternatively, the matter be remitted to the trial division and/or the Court of Appeal for determination according to law.

5. ~~In any event, the applicant be indemnified for the costs of the proceeding by the respondent.~~

6. Costs.

7. Such further or other order as to the Court seems appropriate.

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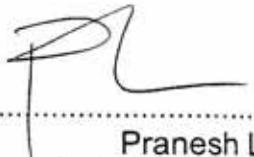
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Dated 26 March 2015



.....
Pranesh Lal
Lyttletons Lawyers
Lawyer for the Applicant

To: The Respondent
Maddocks Lawyers
140 William Street
Melbourne VIC 3000
DX 259 Melbourne
Telephone: (03) 9258 3555
Fax: (03) 9258 3666

10 TAKE NOTICE: Before taking any step in the proceedings you must, within 14 DAYS after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

The Applicant's Solicitor is:
Lyttletons Lawyers
53 Marcus Road
Dingley VIC 3172
Telephone: (03) 9551 3155
Fax: (03) 9551 8250

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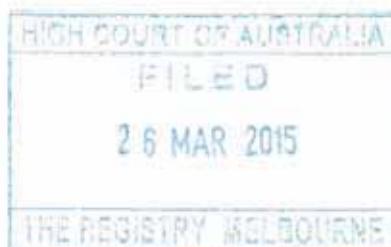
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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M44
No. of 2015

BETWEEN:



WILLIAM FALKINGHAM
Applicant

and

10

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

APPLICATION FOR SPECIAL LEAVE TO APPEAL

20

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 27 February 2015.

Grounds

30

1. The Court of Appeal erred in law in holding that the enactment of Pt 2F.1A of the *Corporations Act* disentitled a member of a company who had not sought leave to commence a proceeding under Pt 2F.1A but who had brought a proceeding bona fide for the benefit of the company, to an indemnity for his costs in the absence of an exceptional case or unusual circumstances.
2. The Court of Appeal should have found that the enactment of Pt 2F.1A of the *Corporations Act* did not prevent a member of a company from obtaining an indemnity for his costs where the member complained of a wrong done to the company and had brought the proceeding bona fide for the benefit of the company.

40

Orders sought

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1. Special leave to appeal be granted.
2. The appeal be allowed.
3. The orders made by the Court of Appeal on 27 February 2015 be set aside and, in lieu thereof, it is ordered that the applicant be indemnified for the costs of the proceeding by the respondent.
4. Alternatively, the matter be remitted to the trial division and/or the Court of Appeal for determination according to law.

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

5. Costs.
6. Such further or other order as to the Court seems appropriate.

Dated 25 March 2015

10


.....
Pranesh Lal
Lyttletons Lawyers
Lawyer for the Applicant

20

To: The Respondent
Maddocks Lawyers
140 William Street
Melbourne VIC 3000
DX 259 Melbourne
Telephone: (03) 9258 3555
Fax: (03) 9258 3666

TAKE NOTICE: Before taking any step in the proceedings you must, within 14 DAYS after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

30

The Applicant's Solicitor is:
Lyttletons Lawyers
53 Marcus Road
Dingley VIC 3172
Telephone: (03) 9551 3155

40

50

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF
VICTORIA

BETWEEN:

WILLIAM FALKINGHAM
Applicant

10

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

DRAFT NOTICE OF APPEAL

20 1. The appellant appeals pursuant to special leave to appeal granted on
from whole of the judgment of the Court of Appeal of the Supreme Court of
Victoria given on 13 February 2015.

Grounds

20 2. 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).

3. 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:

30 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:

40 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;

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

HIGH COURT OF AUSTRALIA	
FILED	
10 APR 2015	
THE REGISTRY MELBOURNE	

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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

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

- 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;
- 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";
- where neither the trial judge nor the Court of Appeal identified any relevant prejudice to third parties;
- 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
- where neither the trial judge nor the Court of Appeal made a finding that the "merger" was irreversible.

30 5. 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.

40 6. 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.

7. 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*.

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

- 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.

10 9. 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;
- 20 g. the finding by the Court of Appeal that the evidence of prejudice to the respondent if relief was granted was "speculative";
- h. the failure of the trial judge or the Court of Appeal to identify how the "position" of the potential bidders was relevant or gave rise to a relevant prejudice;
- i. the absence of any evidence of knowledge by the applicant of prejudice to the respondent or third parties prior to the commencement of proceedings; and

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j. there was no finding that the "merger" was irreversible.

10. The Court of Appeal erred in law and in fact in upholding the trial judge's finding that the applicant must have been "well aware of the enormous expenses being incurred by [the respondent]" and the potential buyers, when there was no evidence of such knowledge, nor was such knowledge part of the respondent's case at trial or put to the applicant when giving evidence.

10 11. The Court of Appeal erred in law in holding that s 1322(2) of the *Corporations Act* would cure the alleged failures of the board to act in accordance with the company constitution.

12. The Court of Appeal erred in law in failing to grant leave to join AS Residential Property No.1 ACN 601 592 661 atf Residential Property No. 1 (**ASRP**), in circumstances where the relief sought by the applicant in the Court of Appeal directly affected ASRP's rights and liabilities.

Order[s] sought

20 13. The appeal be allowed.

14. The orders made by the Court of Appeal on 13 February 2015 and 27 February 2015 be set aside and it is ordered that the appeal to the Court of Appeal be allowed and, further, the following orders be made:

14.1. Pursuant to s 247A of the *Corporations Act*, an order for the inspection of the books of the respondent.

30 14.2. Pursuant to s 233(j) of the *Corporations Act*, 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.

14.3. Pursuant to s 233(b) of the *Corporations Act*, orders that the respondent repeal the constitution purportedly adopted on 29 October 2013.

40 14.4. A declaration that the 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 the Australian Securities and Investments Commission on 16 December 2013, 31 October 2013 and 8 October 2013 bearing Doc ID numbers 028819142, 1E9933109, 1E993110, 1F0499933 respectively), are invalid and void.

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

50 14.6. That leave be granted to join ASRP as a respondent to the proceeding.

10 14.7. That the proceeding be remitted to the trial division for the hearing and determination of applications:

14.7.1. to set aside the contract of sale dated 5 September 2014 between the respondent and ASRP, and/or to restrain the respondent and/or ASRP from completing and/or giving effect to the contract of sale;

14.7.2. incidental or necessary to give effect to the judgment of the Court of Appeal as varied by the order of the High Court.

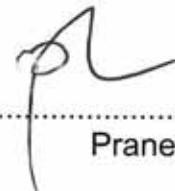
15. Alternatively, the matter be remitted to the trial division and/or the Court of Appeal for determination according to law.

16. In any event, the applicant be indemnified for the costs of the proceeding by the respondent.

17. Costs.

20 18. Such further or other order as to the Court seems appropriate.

Dated



.....
Pranesh Lal

30 TO: The Registrar
Court of Appeal
Supreme Court of Victoria
210 William Street
Melbourne VIC 3000

AND TO: The Respondent
Maddocks Lawyers
140 William Street
Melbourne VIC 3000
DX 259 Melbourne
Telephone: (03) 9258 3555
Fax: (03) 9258 3666

40 THE APPELLANT'S SOLICITOR IS:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172
Telephone: (03) 8555 3895
Fax: (03) 8555 3865

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M44 of 2015

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF
VICTORIA

BETWEEN:



WILLIAM FALKINGHAM

Applicant

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED

(ACN 004 208 076)

Respondent

DRAFT NOTICE OF APPEAL

20 1. The appellant appeals pursuant to special leave to appeal granted on from whole of the judgment of the Court of Appeal of the Supreme Court of Victoria given on 27 February 2015.

Grounds

30 2. The Court of Appeal erred in law in holding that the enactment of Pt 2F.1A of the *Corporations Act* disentitled a member of a company who had not sought leave to commence a proceeding under Pt 2F.1A but who had brought a proceeding bona fide for the benefit of the company, to an indemnity for his costs in the absence of an exceptional case or unusual circumstances.

3. The Court of Appeal should have found that the enactment of Pt 2F.1A of the *Corporations Act* did not prevent a member of a company from obtaining an indemnity for his costs where the member complained of a wrong done to the company and had brought the proceeding bona fide for the benefit of the company.

Order[s] sought

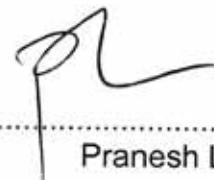
40 4. The appeal be allowed.

5. The orders made by the Court of Appeal on 27 February 2015 be set aside and, in lieu thereof, it is ordered that the applicant be indemnified for the costs of the proceeding by the respondent.

6. Alternatively, the matter be remitted to the trial division and/or the Court of Appeal for determination according to law.

7. Costs.
8. Such further or other order as to the Court seems appropriate.

Dated



.....
Pranesh Lal

10 TO: The Registrar
Court of Appeal
Supreme Court of Victoria
210 William Street
Melbourne VIC 3000

AND TO: The Respondent
Maddocks Lawyers
140 William Street
Melbourne VIC 3000
DX 259 Melbourne
Telephone: (03) 9258 3555
Fax: (03) 9258 3666

20)
20 THE APPELLANT'S SOLICITOR IS:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172
30 Telephone: (03) 8555 3895
Fax: (03) 8555 3865

40

50

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M31 of 2015

BETWEEN:



WILLIAM FALKINGHAM
Applicant

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

10

APPLICANT'S SUMMARY OF ARGUMENT

Part I: Special Leave Questions

1. Is the equitable defence of laches available as a defence to a statutory oppression claim under s 232 of the *Corporations Act 2001* (Cth) (the *Act*)?
2. Does *House v The King* apply to appellate review of equitable remedies and equitable defences?
3. Which of three conflicting tests, or what other test, should be applied in assessing whether an irregularity will be cured by s 1322(2) of the *Act*?
4. The trial judge found that the delay in the applicant's proceeding had not been great. The prejudice found to exist to the respondent and third parties was either wholly irrelevant, or wholly unsupported, or wholly speculative. In those circumstances, did the Court of Appeal err in failing to overturn the trial judge's holding of laches?
5. In exercising his discretion not to grant a remedy, in the alternative, under s 233 of the *Act*, the trial judge identified harm, prejudice and inconvenience to third parties which was either wholly irrelevant, wholly unsubstantiated, or wholly speculative. In those circumstances, did the Court of Appeal err in failing to overturn the trial judge's refusal to grant relief under s 233 of the *Act*?

Part II: Factual Background

6. The respondent, formerly Kingswood Golf Club Limited (**Kingswood**), is a company limited by guarantee (TJ: [6]). Since the 1930s it has owned and operated a golf course at Dingley (TJ: [3]). The applicant has been a member of Kingswood for more than 30 years (TJ: [2]). Until October 2013, Kingswood's constitution prevented the sale of any part of the real property of the club, including the Dingley course, without the sanction of a general meeting (TJ: [65]). AB 4-5
7. In March 2013, the Kingswood board proposed investigating a merger with Peninsula Country Golf Club (**Peninsula**) at Frankston, which would require the approval of 75% of members.¹ However, the board had already entered into AB 4
AB 4
AB 19

¹ Exhibit PJS-28 to the affidavit of Peter Sweeney, dated 25 August 2014 at p 17; par 13 of the affidavit of Jeffrey Dinger sworn 20 August 2014.

Filed on behalf of the Applicant

Prepared by:

Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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heads of agreement with Peninsula in relation to a "possible merg[er]" of the two clubs (TJ: [72]-[74]).

AB 20-21

10 8. The proposed "merger" involved the sale of Kingswood's golf course during a transition period of 3 to 5 years (CoA: [26]), the use of the proceeds to pay debts at Peninsula and to establish a 'future fund' (whose earnings would then be applied to meet operating expenses at the Peninsula course) (TJ: [8]), and a move to Peninsula's Frankston course. Many members opposed the merger and in May 2013, 97 members requisitioned a special general meeting to terminate the heads of agreement,² which the Kingswood board refused to convene.³ Several members who openly opposed the merger were suspended from the club for up to four and a half months.⁴

AB 59

20 9. In August 2013, the Kingswood board recommended the merger to members. The Kingswood board recognised that there had to be constitutional change to the company to effect the merger which change would require a 75% majority vote.⁵ Nonetheless, at a general meeting on 17 September 2013 it put the following as an ordinary 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*" (CoA: [20]). At that meeting, 578 of around 900 Kingswood members (TJ: [3]) voted. Of those that did, 63% voted in favour of the proposed resolution (the **Majority**) and 37% voted against (the **Minority**) (CoA: [31]). This resolution would be the only Kingswood vote relating to the merger which was taken by its originally constituted membership.

AB 57

AB 4

AB 60

30 10. Then, in early October 2013, shortly before the vote on constitutional change was due to be held, the Kingswood board purported to admit approximately 1000 Peninsula members to membership of Kingswood for \$2 each (the **New Peninsula Members**) (CoA: [33]). At a meeting held on 29 October 2013, the Kingswood board put special resolutions to the enlarged membership of the company, now including the New Peninsula Members, to change the club's name and adopt a new constitution which removed the requirement for the sale of land to be sanctioned by a general meeting. Those special resolutions were carried (CoA: [34]).

AB 61

40 11. In March 2014, the applicant engaged solicitors (TJ: [19]) and then sought to raise funds to commence a proceeding (TJ: [108]). On 5 May 2014, the applicant received an update on the merger implementation from Kingswood which indicated that the board was seeking advice on "*divestment of the Dingley land planned to occur by the end of the transition period*" (TJ: [32], [106]), being 3 to 5 years.

AB 7

AB 28

AB 10 + 28

12. On 20 August 2014, the applicant commenced proceedings in the Supreme Court of Victoria alleging oppression under s 232 of the Act and seeking relief both under ss 233 and 247A to remedy the oppressive conduct and declaratory

² Par 35 of the affidavit of William Falkingham dated 20 August 2014.

³ On the advice that, because the names of the requisitionists were not attached to the requisition itself, it was not legally effective: exhibit HWW9 to and par 18 of the affidavit of Heath Wilson dated 28 August 2014; par 48 of the affidavit of Peter Sweeney dated 25 August 2014.

⁴ Affidavit of Robert Wallace Fraser dated 28 August 2014; Affidavit of William Falkingham dated 28 August 2014, par 4

⁵ PJS-28 to the affidavit of Peter Sweeney dated 25 August 2014, p 17.

relief in relation to the resolutions. The applicant also sought interlocutory injunctive relief to restrain the sale of the golf course land. The trial judge declined to determine the injunction application and ordered instead that the matter be set down for an urgent trial a few days later. The plaintiff was ordered to file points of claim but otherwise there were no pleadings. The respondent did nothing to put the plaintiff on notice that it would pursue the defence of laches in relation to the oppression claim until an objection was made to evidence on the first day of a two-day trial. The applicant had filed no evidence going to delay.

10 13. The trial judge found that the Kingswood board breached its fiduciary duties in admitting the New Peninsula Members (TJ: [54]), that the Kingswood board had exercised its powers to admit members for a purpose other than that for which they were conferred (TJ: [69], [87], [94]), that the merger, including the step of admitting the New Peninsula Members, required a change to the Kingswood constitution (TJ: [68]), that the board's actions were unconstitutional and unfair, that they were also oppressive to the applicant, and that the oppression was continuing (TJ: [98]).⁶ AB 17 AB 20,23,24 AB 20 AB 25

20 14. However, the trial judge upheld the respondent's defence of laches (TJ: [111]-[112]). He held further that, if he was wrong as to the application of laches to the statutory oppression claim, then he would not, in his discretion under s 233 of the Act, make orders undoing the merger (TJ: [113]-[115]). The applicant's application was dismissed on 3 September 2014 with no order as to costs. AB 31, 32 AB 31

30 15. An injunction application to restrain the sale of the land pending an appeal was refused by the trial judge. On 5 September 2014, Kingswood entered into a contract of sale in relation to the Dingley golf course land to AS Residential Property No 1 Pty Ltd for \$115M. Subsequently, two further injunction applications to restrain the use of the deposit proceeds were refused by the Court of Appeal.

16. On 5 September 2014, the applicant appealed to the Court of Appeal. The Court of Appeal upheld the trial judge's findings on oppression (which were contested by way of a notice of contention) and the purpose for which New Peninsula Members were admitted (CoA: [104]).⁷ Nevertheless, the Court of Appeal dismissed the appeal on the grounds that the applicant had failed to establish error of the kind necessary to overturn the trial judge's discretionary judgment to refuse relief (CoA: [100]). AB 80-81 AB 79

Part III: Applicant's summary of argument

Ground 1 – Laches is not an available defence to a statutory claim

40 17. This is the first case in Australia or England in which laches has been upheld as a defence to a statutory oppression claim.⁸ Yet the leading judgment⁹ of this

⁶ The reasons, delivered *ex tempore*, followed a trial conducted substantially on the basis of materials prepared for an interlocutory injunction application.

⁷ In so holding, it stated: "the idea that the directors could use the specific power [under the company constitution] to admit members ... for the purpose of admitting *en masse* the entire membership of a 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".

⁸ In *Crawley v Short (No 30) [2007] NSWSC 1322*, the trial judge would have upheld laches and acquiescence in relation to the plaintiffs' claims for an account of profits, but not in respect of the statutory relief sought for oppression: [945], [972].

Court on laches could not have been clearer: "Laches is an equitable defence and is not available in answer to a legal claim."¹⁰ That means, relevantly, that "[laches] operates only to bar the grant of equitable relief".¹¹

10 18. In suing the respondent for oppression, the applicant sought both relief pursuant to ss 233 and 247A of the Act, and declaratory relief. Insofar as he sought statutory relief under the Act, it was not open to the trial judge to uphold the defence of laches, as it was, plainly, not equitable relief. It is not to the point that ss 233 and 247A are discretionary powers or might, in some circumstances, operate in a similar fashion to equitable relief: equitable defences cannot, on authority and principle, apply.¹²

19. The declaratory relief sought was also not equitable relief. Where declaratory relief is sought by itself or in aid of legal rights, it is characterised as a statutory, and not equitable, remedy.¹³ So much is made clear in *Chapman v Michaelson*¹⁴ where the plaintiff had sought declarations that a mortgage was void, without seeking any consequential equitable remedy.¹⁵ In response to a submission that the declaration sought was a purely equitable remedy and so the plaintiff must do equity to be entitled to the remedy, Cozens-Hardy MR stated:¹⁶ "The simple answer is that it is not equitable relief".

20 20. It follows that laches was not available as a defence to any part of the applicant's claim, and most certainly not to the relief sought under the Act. This Court observed in *Campbell v Backoffice Investments Pty Ltd* that, "ss 232 and 233 are to be read broadly. The imposition of judge-made limitations on their scope is to be approached with caution";¹⁷ and that s 233 "should not be hedged about by implied limitations".¹⁸ Thus, quite apart from principle, the above observations militate against the application of laches to s 233 of the Act.

21. That is not to say that delay and prejudice may not have been relevant to the grant of relief under s 233 or the grant of declaratory relief. However, as discussed below, the trial judge considered wholly different matters when considering, if laches did not apply, whether relief should go under s 233; in any event, that alternative exercise of discretion was vitiated by a number of errors.

Ground 4 - House v The King principles do not apply to equity appeals

30 22. On the alternative assumption that laches was an available defence, the Court of Appeal was wrong to apply the principles propounded in *House v The King*¹⁹ in

⁹ *Crawley v Short* (2009) 262 ALR 654 at 679 [172] per Young JA.

¹⁰ *Orr v Ford* (1989) 167 CLR 316 at 340 per Deane J. Laches may apply in a qualified way to equitable relief prayed in aid of legal rights: J D Heydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at 1090 [38-045].

¹¹ *Lester v Woodgate* [2010] EWCA Civ 199 at [22] per Patten LJ (emphasis added).

¹² Thus, statutory declarations cannot attract equitable defences: J D Heydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at 644 [19-315].

¹³ Under s 36 of the Supreme Court Act 1986. See J D Heydon et al, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) at 644 [19-315]; *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 450-456 per Dixon CJ; *Ansford v Plymouth Finance Co Ltd* [1933] NZLR 209; *Rodgers v Resi-Statewide Corp Ltd (No 2)* (1991) 32 FCR 344 at 351. See also H Woolf, *Zamir and Woolf: The Declaratory Judgment* (4th ed, 2011) at 135-138.

¹⁴ *Chapman v Michaelson* [1908] 2 Ch 612; affirmed in *Chapman v Michaelson* [1909] 1 Ch 238.

¹⁵ See *Chapman v Michaelson* [1908] 2 Ch 612 at 620-621 per Eve J.

¹⁶ *Chapman v Michaelson* [1909] 1 Ch 238 at 242.

¹⁷ (2009) 238 CLR 304 at 334 [72] per French CJ.

¹⁸ (2009) 238 CLR 304 at 361 [178] per Gummow, Hayne, Heydon and Kiefel JJ.

¹⁹ (1936) 55 CLR 499 at 504-505.

reviewing the trial judge's upholding of the defence of laches.²⁰ As far as the applicant is aware, no Australian court has ever before determined that *House v The King* principles apply to appellate review of the administration of final equitable remedies,²¹ let alone appellate review of equitable defences. Quite apart from the absence of authority, it would be against both practice and principle to apply *House v The King* principles to equity appeals.

Contrary to practice

10 23. This Court has never applied *House v The King* to its review of the defence of laches. There is no suggestion in *Lambshed v Lambshed*²² (where the trial judge's holding on laches was overturned by majority), or in the minority judgments in *Orr v Ford*²³ (where Mason CJ and Deane J would have overturned the trial judge's holding on laches) that *House v The King* principles applied. Similarly, in agreeing with the trial judges' holdings on laches, there is no suggestion that the majorities in *Elder's Trustee and Executor Co Ltd v Higgins*²⁴ and *Orr v Ford*²⁵ reached their conclusions in some way restrained by *House v The King*.

20 24. In *Byrnes v Kindle*,²⁶ this Court unanimously overturned the holding of the court below²⁷ that the plaintiff was guilty of acquiescence. Again, there was nothing to indicate that in reviewing (and overturning) that equitable defence the Court was restrained by *House v The King* principles.

Contrary to principle

30 25. There are sound reasons why *House v The King* principles should not apply in equity appeals. The very nature of the extraordinary jurisdiction of the Court of Chancery originally precluded all notion of appeal but to the King himself.²⁸ When, eventually, it became possible to appeal from Chancery to bodies other than the King, the equity appeal was always a rehearing.²⁹ Unlike in common law cases before the *Judicature Act 1873* (reviewed by writ of error³⁰), the purpose of an equity appeal was not whether the lower court committed error but whether it had rendered a decree which should have been rendered in light of all the evidence.³¹ Those historical considerations deny the imposition of judge-made restrictions in equity appeals.

²⁰ The Court of Appeal held 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" (Court of Appeal judgment at [7]; insofar as that paragraph suggests that the appellant accepted that *House v The King* principles applied to the Court of Appeal's review of the laches holding, that is wrong). More particularly, the Court of Appeal held that, insofar as the applicant sought to impugn the trial judge's decision on the issue of delay, it was an appeal against the exercise of discretion and that *House v The King* principles applied (CoA: [89]). It then applied those principles to the applicant's grounds of appeal, including those challenging the trial judge's upholding of the defence of laches (CoA: [91], [93]).

AB 53

40 ²¹ It was assumed for the purposes of argument, but not decided, in *Cadwallader v Bajco Pty Ltd* [2002] NSWCA 328 at [248].

AB 77-78

²² (1963) 109 CLR 440 at 456 per Kitto J, 457 per Windeyer J.

²³ (1989) 167 CLR 316 at 323 per Mason CJ, 335-346 per Deane J.

²⁴ (1963) 113 CLR 426 at 452.

²⁵ (1989) 167 CLR 316 at 328-331.

²⁶ (2011) 243 CLR 253 at 268 [30] per French CJ, 279-280 [79] per Gummow J, 293 [129], 294-295 [134]-[139] per Heydon and Crennan JJ.

²⁷ *Byrnes v Kindle* (2009) 3 ASTLR 459; 267 LSJS 43 at [50] per Doyle CJ (Nyland and Vanstone JJ, agreeing).

²⁸ G Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) vol 1 at 393-394.

²⁹ W Holdsworth, *A History of the Laws of England* (1926) vol 9 at 373; G Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) vol 1 at 393-396; S Williams and F Guthrie-Smith, *Daniell's Chancery Practice* (1914) vol 2 at 1145.

³⁰ Substituted by a memorandum of error by the *Common Law Procedure Act 1852*.

³¹ L Orfield, "Appellate Procedure in Equity Cases" (March 1942) *University of Pennsylvania Law Review* 563 at 563; see also 564-571.

10 26. Those considerations also deny the relevance of specific error in the *House v The King* sense (for example, an error by which the trial judge "acts upon a wrong principle", or "allows extraneous or irrelevant matters to guide him"³²). As observed in *Troll v Spencer*:³³

[I]t is a matter of no concern whatever to the upper court what advice the lower court gave to itself ... On appeal the advice, as well as the ratio decidendi, are drowned in the decree and lost sight of; the question remains only on the decree itself. Therefore, on appeal, our bounden duty ... is to see whether it did equity. If it did, that is the end of the matter. If it did not, then upon our consciences is laid the burden of seeking equity and doing it ourselves.

20 27. To describe equitable remedies or defences as "discretionary", as the Court of Appeal did here (CoA: [100]), does not assist in determining the Court's role in an equity appeal. Rather, as this Court has unanimously held, "the occasion for appropriate appellate intervention will depend upon the nature and scope of the particular statutory appeal for which the legislature provides".³⁴ The statutory appeal right from the trial division of the Supreme Court of Victoria is conferred in unfettered terms.³⁵ The Court of Appeal's appellate jurisdiction should not now be taken to "depart from the general system of law"³⁶ which, as shown above, always treated equity appeals peculiarly and in a way wholly inconsistent with *House v The King* principles.³⁷ For an alteration of that kind to the general system of law, there must be express words or necessary intendment,³⁸ and both are absent.

28. It follows that *House v The King* principles do not apply to appellate review of equitable remedies and equitable defences. On the basis that it considered laches was an available defence, the Court of Appeal should have considered for itself, but did not, whether the defence of laches was satisfied.

Ground 10 - Section 1322(2) of the Act

30 29. Having found that the admission of New Peninsula Members was for an improper purpose, the trial judge considered he did not need to determine a great part of the applicant's case. However, he held that, if he was wrong about the improper purpose issue, various other complaints by the applicant "would be saved by s 1322(2) of the Act" (TJ: [70]).

30 30. The acts of oppression which are said to have been "saved" by s 1322(2) of the Act were set out in particulars of oppression and included various breaches of the respondent's constitution (e.g. failing to display notice of candidates for admission and a failure to exercise an independent discretion in considering the applications for admission of the New Peninsula Members (TJ: [47])).

AB 20

AB 13

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³² (1936) 55 CLR 499 at 505.

³³ (1911) 141 SW 855 at 858; see also *Lee v Lee* (1914) 167 SW 1030 at 1032: "In chancery the question is, not what the chancellor instructed himself to do, or how he talked the matter over with himself – the question is: Did he seek equity and do it?".

³⁴ *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138-139 [39]-[40] *per curiam*, see also at 128-129 [2].

³⁵ *Supreme Court Act 1986*, ss 10(1)(a), 17(2). Section 17A contains the exceptions to the general right of appeal, which are irrelevant to this case. There is a new requirement for leave for civil appeals: s 14A. That was not applicable in this appeal.

³⁶ *Potter v Minahan* (1908) 7 CLR 277 at 304 *per O'Connor J.*

³⁷ *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 128 [2] citing with approval *Eastman v The Queen* (2000) 203 CLR 1 at 40-41 *per McHugh J.*

³⁸ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 132 [86]-[87] *per Hayne and Bell JJ, 153 [158] per Kiefel J.*

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10 31. Section 1322(2) cures, relevantly, "procedural irregularities". There is a difference of opinion between Australian courts as to how to judge whether an irregularity is "procedural" within the meaning of s 1322. The Federal Court and Western Australian Court of Appeal have placed determinative significance on whether or not the parties have tried to achieve something that the Act authorises,³⁹ the Victorian Supreme Court has rather placed determinative significance on the degree of injustice or inconvenience caused,⁴⁰ while the New South Wales Supreme Court has set out a test informed by conflict of laws principles.⁴¹ There is then a further difference of opinion between Australian courts as to whether a procedural irregularity deliberately achieved can be cured pursuant to s 1322(2).⁴²

32. The relevant acts of oppression complained of were not failures that were authorised by the Act, they caused substantial injustice, and some were, on the applicant's case at trial, deliberate.⁴³ Depending upon the correct construction of s 1322(2), any one of those factors means the Court of Appeal erred in not correcting the trial judge's view that s 1322(2) would apply (CoA: [98]).

AB 79

Ground 2 – grave errors in relation to laches

20 33. The relevant type of laches in this case was delay with unconscionable prejudice to others.⁴⁴ Relevant unconscionable prejudice involves loss or damage to others which is incurred on account of the applicant's delay in commencing proceedings.⁴⁵ Relevant unconscionable prejudice could not extend to circumstances which are merely contrary to particular members' voting preferences in favour of an unconstitutional and oppressive merger.

34. The Court of Appeal held (CoA: [93]) that the trial judge was entitled to take into account prejudice to the Majority. Yet there was no evidence of any relevant prejudice to them.

35. The Court of Appeal also held (CoA: [93]) that the trial judge was entitled to take into account prejudice to the New Peninsula Members. No such prejudice was found. Peninsula had paid merely \$2 each for them to join Kingswood, which was substantially below the normal membership fees of several thousand dollars. But even the payment of \$2, which could hardly amount to unconscionable prejudice, occurred contemporaneously with the merger itself. Thus any prejudice arising from it (which is not conceded) was plainly not caused by the applicant's delay.⁴⁶

36. The Court of Appeal also held (CoA: [93]) that the trial judge was entitled to take into account the position of the bidders for the land (the **Bidders**). There was

AB 78

AB 78

40 ³⁹ Eg. *Sipad Holding ddpo v Popovic* (1995) 61 FCR 205 at 219 per Lehane J; *Smolarek v Liwszyc* (2006) 32 WAR 129 at [59].

⁴⁰ *Re Freehouse Pty Ltd; Jordan v Avram* (1997) 26 ACSR 662 at 678-679; see also *Cordiant Communications (Aust) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [87].

⁴¹ See e.g. *Cordiant Communications (Aust) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 55 ACSR 185 at [102]-[103].

⁴² This conflict in the authorities was alluded to by Sackville AJA in *Beck v LW Furniture Consolidated (Aust) Pty Ltd* (2012) 87 ACSR 672 at [232] but, on appeal in *Weinstock v Beck* (2013) 251 CLR 396, this Court did not resolve the issue. See also *Nenna v ASIC* (2011) 198 FCR 32 at [50]-[54].

⁴³ Eg, there was evidence at trial that the board knew it was not complying with the company constitution in not putting the occupations of prospective members on the nomination forms: HWW-3 to the affidavit of Heath Wilson dated 28 August 2014.

⁴⁴ *Crawley v Short* (2009) 262 ALR 654 at 678 [163] see also *Meagher, Gummow and Lehane, Equity: Doctrine and Remedies* (5th ed, 2015) at 1085 citing *Lindsay Petroleum C v Hurd* (1874) LR 5 PC 221.

⁴⁵ Or prosecuting proceedings; but that is not relevant here.

⁴⁶ *Crawley v Short* (2009) 262 ALR 654 at 678 [163].

simply no evidence of any prejudice to any one or all Bidders. Further, it was entirely illogical to aggregate any prejudice faced by the Bidders as a whole, even if an evidentiary basis for it had been advanced (which was not): only one Bidder could ever have been successful in purchasing the land.

10 37. Therefore, it is quite plain the trial judge was guided by extraneous and irrelevant matters in finding that the above parties were "adversely affected" (TJ: [112]) in the sense of suffering unconscionable prejudice by reason of the applicant's delay. On the Court of Appeal's *House v The King* analysis, those specific errors compelled the Court of Appeal to revisit the defence of laches for itself. Its failure to do so constituted grave error. AB 31

Ground 3 - laches patently not made out on the facts

20 38. In any event, the laches ground was so patently not made out that the Court of Appeal committed grave error in upholding it. AB 28

39. The point of departure for the consideration of the laches holding was the trial judge's undisturbed finding that the "delay ha[d] not been great" (TJ: [111]). The Court of Appeal found it was 11 months at most [CoA: [91]]. The delay was explained as being on account of the need to secure litigation funding (TJ: [108]) and occurred in the context where, as the trial judge found (TJ: [11]), the proposed merger provided that the land would not be sold for 3 to 5 years. AB 36

40. The principal evidence of prejudice relied upon by the respondent was the affidavit of Mr Willison prepared for the interlocutory injunction application but which was later tendered at trial without calling him. His opinion was that the sale price of the Kingswood course might be adversely impacted by between \$10-20M if an injunction were granted. Other than by reference to his "experience in transactions of this nature" (TJ: [45]), there was no substantiation of that opinion, which the applicant had earlier challenged.⁴⁷ Unsurprisingly, the Court of Appeal accepted that such evidence was "speculative" (CoA: [92]). In any event, it was almost entirely irrelevant to the question of final relief: the whole purpose of the final relief was to prevent the sale of the land at all, so even a potential diminution in land value could hardly have amounted to unconscionable prejudice to the respondent by reason of the applicant's delay in commencing the proceeding. AB 12

30 41. The respondent did not adduce evidence of prejudice to any other party. Further, for the reasons given above,⁴⁸ the prejudice to third parties inferred or assumed by the trial judge was wholly misconceived. The particular inference that the applicant must have been aware of the "enormous expenses" being incurred by the respondent and the Bidders was neither put to the applicant when giving his evidence, nor the subject of submission; and the inference was entirely contrary to the evidence about the sale process which had been shrouded in secrecy. AB 77

40 42. Whether the test was an "unreasonable or plainly unjust" test, or whether, as submitted above, the Court of Appeal was required to determine for itself the question of laches, the upholding of laches on the facts was patently erroneous.

⁴⁷ Contrary to the trial judge's finding the evidence was challenged. The Applicant's written submissions dated 26 August 2014, par 41 objected on the basis that the evidence is "...speculative in the extreme and should be disregarded."

⁴⁸ See pars 34-37 above.

10 *Ground 7 – grave errors in relation to s 233*

43. The matters considered by the trial judge in exercising his discretion not to make alternative orders under s 233 were quite distinct from the matters considered in relation to laches: see [113]-[115] of the trial judgment. The Court of Appeal held (CoA: [93]) that the trial judge was entitled to take into account the position of the Majority at Kingswood (who had favoured the merger). Yet, just as company constitutions act as checks on the unfettered power of the majority (TJ: [96]), the relief a court may grant under s 233 of the Act is directed at remedying the unfair prejudice or oppression suffered by the minority. It is concerned with vindicating the rights of the minority, in spite of the majority. There is plainly no place for consideration of how the relief will affect the majority's position. AB 31-32 AB 78 AB 25

44. The trial judge also wrongly identified harm, inconvenience and prejudice to the Kingswood members today, including the Majority and the New Peninsula Members. Other than the relief being against those groups' preference for a merger, there was simply no evidence (nor an explicit finding) that either of these groups would have suffered harm, inconvenience, or prejudice if relief had been given in relation to the oppression. AB 25

20 45. The Court of Appeal and the trial judge also relied upon the extraordinary hypothesis that, if relief were granted, the board would probably be able to effect the merger again (TJ: [115]) (i.e. that 75% of the original Kingswood members would probably vote in favour of an identical merger proposal if it were put again). The Court of Appeal sought to justify that finding on the entirely speculative possibility that the Minority (37%) opposing the merger might have changed their views because the sale of land process had advanced since the last occasion for voting (CoA: [94]). Neither of those matters was the subject of any cross-examination, evidence or submission before the trial judge and it was a speculative inference entirely at odds with all the evidence as to voting intentions. AB 32 AB 78

30 46. Each of the above constituted the plainest of specific errors. The Court of Appeal was quite wrong to uphold them.

47. In any event, the facts of the case so clearly warranted some form of relief under s 233. The applicant succeeded in arguing that the *en masse* admission of the New Peninsula Members was oppressive, unconstitutional, unfair and was brought about by a breach of the board's fiduciary duties. The oppression was found to be continuing and the trial judge expressly found that his discretion to grant relief had been enlivened (TJ: [99]), notwithstanding that he declined to make findings in relation to the other particulars of oppression argued. The supposed prejudice to others relied upon was, as described above,⁴⁹ illogical and lacking in evidentiary foundation, so too the finding that the merger would be able to be completed again if relief were granted. AB 25

40 48. It was so plainly unreasonable and unjust not to grant remedies in those circumstances that the result itself bespeaks the plainest of errors.

50 ⁴⁹ See pars 34-37 above.

-10-

Part IV: Reasons Why Special Leave Should Be Granted

49. Special leave should be granted because:

- a. the judgment below concerns matters of public importance, being:
 - i. the novel application of an equitable defence to a claim which is frequently brought under nationally applicable legislation; and
 - ii. the standard of review for appellate courts nationwide in equity appeals.
- b. this Court is required to resolve differences of opinion between State courts, and between State courts and Federal courts, as to the scope and operation of a frequently litigated provision of nationally applicable legislation, being s 1322(2) of the Act; and
- c. the decision below is attended with such doubt, and there is such hardship done to the applicant as a result, that the interests of justice in the particular case require its consideration by this Court.

Part V: Costs

50. If this application is refused, the respondent should not be awarded costs because (1) the application is brought bona fide for the benefit of the respondent (its involving abuse of fiduciary duties on the part of directors and there not being in prospect any personal pecuniary gain for the applicant);⁵⁰ and/or (2) the application raises questions of law of public importance and is brought otherwise than substantially for any private benefit.⁵¹

Part VI: Relevant Provisions

51. See annexure.

Part VII: Oral Argument

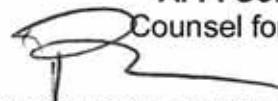
52. The applicant seeks to supplement these written submissions with oral argument.

Dated 10 April 2015

C. M. Kenny
C. E. M. Exell

A. F. Solomon-Bridge

Counsel for the Applicant



.....
Lyttletons Lawyers, Solicitors for the Applicant

Pranesh Lal

⁵⁰ Cf. *Farrow v Registrar of Building Societies* [1992] 2 VR 589 at 595; *Wallersteiner v Moir (No 2)* [1975] QB 373; *Woods v Links Golf Tasmania Pty Ltd* [2010] FCA 570.

⁵¹ *Smith v Airservices Australia* (2005) 146 FCR 37 at 55-57.

Annexure: Relevant Provisions

Corporations Act 2001 (Cth):

Part 2F.1 – Oppressive conduct of affairs

232 Grounds for Court order

The Court may make an order under section 233 if:

- 10 (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.

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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.

Note: For **affairs**, see section 53.

233 Orders the Court can make

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

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- (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;

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-12-

- (i) restraining a person from engaging in specified conduct or from doing a specified act;
- (j) requiring a person to do a specified act.

Order that the company be wound up

(2) 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:

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- (a) as if the order were made under section 461; and
- (b) with such changes as are necessary.

Order altering constitution

(3) 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:

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- (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.

Supreme Court Act 1986 (Vic):

10 Jurisdiction and powers

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- (1) Subject to this Act, the Court of Appeal has jurisdiction to hear and determine—
- (a) all appeals from the Trial Division constituted by a Judge of the Court; ...

17 Business to be disposed of by Trial Division constituted by a Judge of the Court or by an Associate Judge

...

- (2) Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge of the Court. ...

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36 Declaratory judgments

A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

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This is page 17 of Exhibit PJS-28 to the Affidavit of Peter Sweeney sworn 25 August 2014 referred to in **footnote 1** of the Applicant's summary of argument dated 10 April 2015.

This document is part of the Original Information Pack which was tendered in evidence by the respondent at trial in the Supreme Court of Victoria.

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172



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~ SECURING OUR FUTURE ~

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Transitional Arrangements

A number of transitional mechanisms to create the new Club were examined. The key drivers in that examination were to adopt an approach that was the most tax effective and satisfied all Corporations law requirements.

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 - PKCCC); and
- Both Clubs will be bound to proceed with the Merger once these steps are completed.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is para 13 of the Affidavit of Jeffrey Dinger sworn 20 August 2014 referred to in **footnote 1** of the Applicant's summary of argument dated 10 April 2015.

This Affidavit was provided in support of the Applicant and tendered in evidence at trial in the Supreme Court of Victoria.

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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10 12. In the March powerpoint, I have observed that it was stated that Kingswood would set up working groups to benchmark the two options, and that the club would continue to talk with members and that any feedback or questions must be in writing and that there would be regular meetings on updates (as set out on slide 46). I understand an 'Option 4' committee was formed with a mix of Board representatives and general membership representatives (Stay Committee) an Option 1 committee was also formed (Go Committee). I knew this because I know all the members of both the Stay and Go Committee and I was also present in the Kingswood's lounge whilst some of the meetings took place.

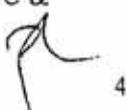
20 13. At this presentation, a member, David Pemberton, asked Peter Sweeney what kind of resolutions would be required to approve the 'merger' contemplated by Option 4. Peter Sweeney replied to this question by stating that 75% of members would need to approve the merger.

30 14. I believed that a decision to merge with Peninsula would require 75% of the Kingswood members to vote in favour of such a fundamental change to the nature, purpose and membership of the club. It has always been my understanding that a 75% majority is required for all special business of the club and 50% for general business. As this was the most important decision or event in Kingswood's history, I was certain it would require a 75% majority decision. This also seemed to be the consensus and understanding of other members that I spoke to about this issue. Now produced and shown to me and marked "JWD-4" is a true copy of the Club's constitution that was in force before the merger with Peninsula.

40 15. I did not receive any further information from either the Stay Committee or the Go Committee and there were no reports or feedback from the committees of their investigations to the members either through the Club's Website or otherwise. I understand that both Committees were sworn to secrecy during this process.

Heads of Agreement and consultation with members

16. In approximately late March or early April 2013, I received a copy of an undated letter from Peter Sweeney entitled "*Investigation of merger between Kingswood GC &*

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. 31 of 2015

B E T W E E N:

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
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EXHIBIT COVERSHEET

This is para 35 of the Affidavit of William Falkingham sworn 20 August 2014 referred to in **footnote 2** of the Applicant's summary of argument dated 10 April 2015.

This is an Affidavit of the Applicant filed in support of Application made to the Supreme Court of Victoria and tendered in evidence at trial.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

50

10 Requests for special general meetings

10 31. Around mid April 2013, I decided to organise a petition to obtain the requisite number of signatures to hold a Special General Meeting of Members. The purpose of meeting that I wanted to call was to consider a resolution for the dismissal of the entire board on the grounds that they had not acted in the best interest of Kingswood in pursuing a merger with Peninsula. I also believed that Kingswood was pursuing the merger without any consideration of alternatives. It seemed to me that despite what was set out in the March powerpoint, that the merger was a 'done deal'.

20 32. I started talking to Kingswood members around mid to late April 2013 with the intention of collecting members' signatures for my proposed Special General Meeting. I first spoke to Norman Seaton, David Picard, Chris Malone, Rex Carum and a few others, probably ten in total. However, at about the same time, I spoke with Robert Fraser who told me that Alan Copsey and Rod McKenzie had also been organising a request for a special meeting and had been collecting signatures from members.

30 33. I am aware from my discussions with Robert Fraser and believe that Alan Copsey and Rod McKenzie also did not wish merger talks with Peninsula to go ahead. Robert Fraser told me that Alan and Rod's request for a meeting would be to propose a resolution along the lines of opposing the decision to investigate the merger and enter into the Heads of Agreement, rather than any resolution that the board be dismissed or removed.

40 34. I did not think that the proposal by Alan Copsey and Rod McKenzie would be strong enough to address the fundamental issue of the merger (as I saw it) needing to be stopped through the removal of the board of directors and I told Robert this. However, Robert asked me not to pursue my request for a meeting because Alan and Rod had already obtained a large number of signatures. I did not pursue my request. Because by this time, I understood from my discussions with Robert that Alan and Rod already had a large number of signatures, I did not sign the petition.

35. I have since reviewed the request to convene a Special General Meeting of Members which I understand was sent to Kingswood on or about 1 May 2013 and made by 97

members. Now produced and shown to me and marked "WPF-5" is a true copy of the request.

36. On 23 May 2013, I received an email message from the president, Peter Sweeney. Now produced and shown to me and marked "WPF-6" is a true copy of the email sent to me on 23 May 2013 at 4.23pm which stated, *inter alia*, as follows:

10

"Members I wish to advise you of the outcome of a request to call a Special General Meeting on the heads of agreement with Peninsula Country Golf Club. On 1 May 2013 the club received a letter signed by Mr Alan Copsey and Mr Rod McKenzie with a request to convene a Special General Meeting. Messrs. Copsey and McKenzie signed the letter 'On behalf of the Save Kingswood Group'. The Board wishes to advise members that there is no separate entity or association named 'the Save Kingswood Group' so far as it is aware.

20

The request as received was "That the meeting opposes the decision of the Board of Directors to enter Heads of Agreement with Peninsula Country Golf Club to jointly investigate a possible merger, and further calls upon the Board to terminate the investigation and the heads of Agreement forthwith".

30

Acting in the interests of all members the Board sought counsel's advice regarding the legality of the request as submitted by Mr Copsey and Mr McKenzie and, in particular, whether it constituted a requisition within the Club's rules.

40

Advice received by the Board determined that the request dated 1 May 2013 was not a requisition within the meaning of Rule 46 of the Club's Constitution and therefore the Board shall not proceed to convene a Special General Meeting. The Board further advise (sic) that the members who were signatories to a document titled 'Request to convene a special general meeting of members' are not in a position to call a meeting pursuant to rule 46C of the Constitution. ..."

37. Although I believe that a group of that name now exists, as this email was sent in May 2013, I do not believe that Heath Wilson was referring to the current group of that name. Since the club's vote on the merger in September 2013, a group called "Save

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

LIST:

No.

10 IN THE MATTER OF

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

BETWEEN:

WILLIAM FALKINGHAM

PLAINTIFF

-AND-

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

DEFENDANT

EXHIBIT NOTE

Date of document: August 2014
 Filed on behalf of: The Plaintiff
 Prepared by:
 30 Lyttletons
 53 Marcus Road
 Dingley 3172

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

This is the Exhibit marked "WPF-5" produced and shown to WILLIAM PATRICK FALKINGHAM
 at the time of swearing his Affidavit on 20 August 2014.

40 Before me:



PRANESH H LAL
 53-55 Marcus Road, Dingley 3172
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004

EXHIBIT "WPF 5"

50 A TRUE COPY OF REQUEST FOR SPECIAL GENERAL
 MEETING BY MEMBERS DATED MAY 2013

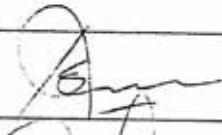
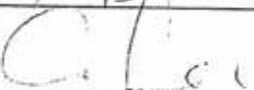
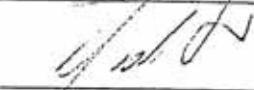
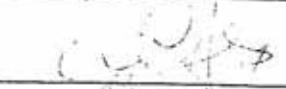
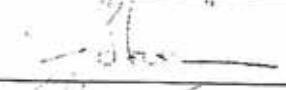
1st ListRequest to convene a Special General Meeting of Members

	Name	Signed	Membership #
10	Alan Copsey	Alan Copsey	1958
	PETER FORD	Peter Ford	1850
20	DAVE BYRNES	Dave Byrnes	0150
	PETER CORKE	Peter Corke	209
30	GEOFF WRIGHT	Geff Wright	2184
	Red McKeon	Red McKeon	2016
	Robert Price	Robert Price	2121
	ISTER RUGERT	Ister Rugert	1701
	ROBERT LASER	Robert Laser	0356
40	JOHN SPEAR	John Spear	2230
	RAY WYLD	Ray Wyld	1917
	JEFF Abbott	Jeff Abbott	2
	LINNE Mathewson	Linne Mathewson	2250
	NEVILLE McONEY	Neville Mconey	1165
	DANVAN BENTON	Danvan Benton	1581
	HS TAINTER	HS Tainter	
	JOHN FITZGERALD	John Fitzgerald	810
	JOHN MITCHELL	John Mitchell	725
	S.H. DODD	S.H. Dodd	2146
	NEIL TURNER	Neil Turner	832
	JOHN DOWNEY	John Downey	1555
	DENIS RENNIE	Denis Rennie	1150
50	ROBERT G. PERT	Robert G. Pert	803

Requisition to convene a Special General Meeting

#	Name	Signed	Membership #
24	Helen Wadewitz	Wadewitz	1044
25	TILL MARSH	J. Marsh	622
26	Dinul Makany	Dinul	639
27	Jane Deanne	J. Deanne	269
28	Nez Hutchens	Nez Hutchens	502
29	Brandi Tate	Brandi Tate	2133
30	Ginny Karistis	G. Karistis	2595
31	NORMA KILBURN	N. Kilburn	548
32	TRISH LESNIE	T. Lesnie	2198
33	Janelle Bergman	J. Bergman	2263
34	Valma Waddell	V. Waddell	1041
35	Anne Lewis	A. Lewis	2605
36	DONNA BECKER	D. Becker	2668
37	RUTH REYNOLDS	R. Reynolds	1627
38	Morris Taylor	M. Taylor	1457
39	Ish Young	I. Young	1137
40	MARIAHNE RAWLINS	M. Rawlins	2085
41	Andrea Seymour	A. Seymour	912

Requisition to convene a Special General Meeting

#	Name	Signed	Membership #
42	KENT FULLER		2314
43	Alma Lee		585
44	GEOFF HIBBERT		2313
45	Peter Brack		2318
46	David Pinworth		2248
47	GENE STRINE JR		2652
48	James Gilmour		2725
49	GEOFF HIBBERT		2387
50	ROY SAWLE		2638
51	MALCOLM SAWLE		2424
52			
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	Name	Membership	
52	MARIA VINES	1033	maria vines
53	LOLA LANGFORD	576	L. Langford
54	Alden Smith	440	Alden Smith
10	55 Pam Haddrell	413	P. Haddrell
	56 KATE BEAT	376	Kate Beat
	57 HARUMI MAGUIRE	2311	Harumi
	58 Judy Kingman	535	J. Kingman
20	59 Roslyn Warner	1514	Roslyn Warner

Requisition to convene a Special General Meeting

#	Name	Signed	Membership #
60	HARVIE DESAI	✓	1620
61	RAMEH NUGAHELA	✓	2100
62	J. Cawthon	✓	1771
63			
64			
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Requisition to convene a Special General Meeting

Requisition to convene a Special General Meeting

Requisition to convene a Special General Meeting

#	Name	Signed	Membership #
75	Geoff Thomas	<i>Geoff Thomas</i>	2338
76	Bruce Williams	<i>B. Williams</i>	2147
77	TOM GREGGON	<i>T. Gregson</i>	408
78	ROBERT SHEARER	<i>R. Shearer</i>	927
79	NOEL LAND	<i>Noel Land</i>	550
80	Ken Denovic	<i>Ken Denovic</i>	265
30			
40			
50			

Requisition to convene a Special General Meeting

#	Name	Signed	Membership #
10	81 Danny Graech	<i>D. Graech</i>	2024
	82 T NEVILLE Young	<i>T. Neville Young</i>	1136
	83 ERIC HANLEY	<i>E. Hanley</i>	424
	84 LYN MANZIK	<i>Lyn Manzik</i>	651
20	85 Brian Naughton	<i>Brian Naughton</i>	736
	86 George Let	<i>George Let</i>	592
	87 Jan Fraser	<i>Jan Fraser</i>	353
	88 Lorraine Nash	<i>Lorraine Nash</i>	768
	89 Shirley Purcell	<i>Shirley Purcell</i>	833
30	90 HELEN GREGSON	<i>Helen Gregson</i>	407
	91 Vicki ROBERTSON	<i>Vicki Robertson</i>	564
	92. Vicki LISBON	<i>Vicki Lisbon</i>	598
40			
50			

Requisition to convene a Special General Meeting

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is para 18 and Exhibit HWW9 of the Affidavit of Heath Wilson sworn 28 August 2014 referred to in **footnote 3** of the Applicant's summary of argument dated 10 April 2015.

This Affidavit and exhibit were filed in support of the Defendant and tendered in evidence at trial in the Supreme Court of Victoria.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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copy of bank statement which I have obtained which shows the direct credit from Peninsula to Kingswood on 2 October 2013 of \$2,066.

10 17. To my knowledge, the Kingswood Board has on numerous occasions in the past, considered applications of persons not known to club members under Rule 8A(ii). Kingswood has been desperate to attract new members for many years' past and so the Board has acted regularly under Rule 8A(ii) to elect new members. I am informed by Steve Poulter (Membership Co-ordinator, PKCGC) and believe that, for the period from January 2009 to August 2014, 549 new members were admitted to the club and 256 of those were not known to club members. Now produced and shown to me and marked "HWW-8" is a true copy of a spreadsheet prepared by Mr Poulter which contains this information.

20 **Counsel advice**

18. Now produced and shown to me and marked "HWW-9" as follows is a true copy of advice provided to Kingswood by Chris Northrop of counsel in relation to whether the request by members on 1 May 2013 to convene a special meeting of the club was valid. The club followed this advice.

19. Now produced and shown to me and marked "HWW-10" is a true copy of advice provided to Kingswood by Chris Northrop of counsel in relation to the voting requirements for the 17 September 2013 members meeting. The club followed this advice.

30 **Other Matters**

20. Now produced and shown to me and marked as follows is a true copy of the following documents:

(a) "HWW-11" - Kingswood 2013 Annual Report; and

(b) "HWW-12" - Computershare report in relation to the outcome of the 17 September 2013 members' meeting.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

No. S CI 2014 04329

IN THE MATTER OF

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly
 known as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

and

Plaintiff

20

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

Defendant

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 28 August 2014

Filed on behalf of: The Defendant

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:6175682

Attention: Gina Wilson

E-mail Address: gina.wilson@maddocks.com.au

30

This is the exhibit marked "HWW-9" now produced and shown to Heath William Wilson at the time of swearing his affidavit on 28 August 2014.

Before me:

Signature of person taking affidavit

40

STEPHEN PAUL D'ARCY
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004.

Exhibit "HWW-9"
 C R Northrop memorandum of advice dated 20 May
 2013

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Vol. 3 - 1173

"HWW - 9"

KINGSWOOD GOLF CLUB LTD - SPECIAL GENERAL MEETING

MEMORANDUM

10 1. Kingswood Golf Club Ltd is a company limited by guarantee. The purpose of the Club, as set out in clause 3 of its constitution, is to provide and maintain a suitable clubhouse and golf course for its members.

20 2. The Club currently operates an 18-hole golf course in Centre Dandenong Road, Dingley Village. Due to a number of factors the Club's directors are considering proposals to combine resources with another golf club, The Peninsula Country Golf Club, which operates a 36-hole course in Skye Road Frankston. The proposal is to the general effect that Kingswood will re-locate to the Skye Road course.

30 3. A number of the members of Kingswood object to the proposed changes and are agitating for the calling of a special general meeting. On 1 May 2013 two of those members sent a letter to the Club's secretary calling for such a meeting. Included with the letter was a document entitled:

Requisition to convene a Special General Meeting

4. This document goes on to state:

Pursuant to Rule 46 of the Constitution of the Kingswood Golf Club, the undersigned members requisition the Board of Directors to convene a Special General Meeting of the Club.

The object of the Meeting is to consider, and if thought fit, pass a resolution to the effect that:

This meeting opposes the decision of the Board of Directors to enter Heads of Agreement with Peninsula Country Golf Club to jointly investigate a possible merger, as announced to the Members by an undated letter from the President circulated on 26 March 2013, and further calls upon the Board of Directors to terminate the investigation and the Heads of Agreement forthwith.

40 There are no signatures on this document, which bears the date 1 May 2013.

5. The letter also included a number of sheets of paper. Each sheet is signed by up to 23 members, with a total of 100 signatures. On each sheet there is the heading:

Request to convene a Special General Meeting of Members

- 2 -

These sheets contain no indication of the object of the meeting.

10 6. I have been asked to advise whether the Club's board is required to convene a special general meeting of members in response to the letter of 1 May 2013, the requisition document and the enclosed sheets of paper. In my view there is no such requirement and the members cannot rely on the documents to call such a meeting.

7. Clause 46 of the Constitution sets out the procedure for calling special general meetings. It states:

20 46. Special General Meetings

(A) The Board may whenever it thinks fit and shall on a requisition made in writing by 50 or more of members entitled to vote convene a Special General Meeting.

(B) Any requisition made must state the object of the meeting proposed to be called and must be signed by the requisitionists and deposited at the registered office of the Club.

(C) On receipt of the requisition the Board shall forthwith proceed to convene a Special General Meeting such meeting to be held as soon as practicable but not later than two months after the receipt by the Club of the requisition. If the Board does not within twenty one days after the date of receipt of the requisition proceed to convene a Special General Meeting the requisitioning members or any of them representing more than fifty per centum of the total voting rights of all of them may themselves in the same manner as nearly as possible as that in which meetings are to be convened by the Board convene a special meeting of members but any meeting so convened shall not be held after the expiration of three months from the date of receipt by the Club of the requisition.

30 8. In my view nothing sent to the secretary on 1 May 2013 constitutes a requisition within the meaning of clause 46. Paragraphs (A) and (B) make it clear a requisition must meet various criteria:

(a) It must be in writing.

(b) It must be signed by 50 or more members.

(c) It must state the object of the meeting.

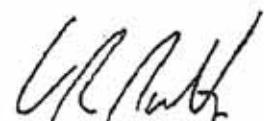
40 9. The document that is headed as a requisition is not signed by any member at all. The several sheets of paper included with it are not entitled as requisitions and do not have any statement of the object of the proposed meeting. There is nothing to

- 3 -

show that any, and if so which, of the signatories to the sheets knew they were signing a formal requisition or shared the same object.

10

10. Clause 46 contemplates a requisition which on its face states the object of the proposed meeting and is itself signed by the required number of members. The requisition document and letter of 1 May 2013, even when read with the enclosed sheets, do not satisfy this requirement. The Board is not compelled to call a special general meeting and members may not themselves convene such a meeting under paragraph (C).



20

C.R. NORTHROP
20 May 2013

Aickin Chambers
200 Queen Street
Melbourne

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Vol. 3 - 1177

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is para 48 of the Affidavit of Peter John Sweeney sworn 25 August 2014 referred to in footnote 3 of the Applicant's summary of argument dated 10 April 2015.

This Affidavit was filed in support of the respondent and tendered in evidence at trial in the Supreme Court of Victoria.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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10 43. 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 of members of the Board and members, would be formed to assess the Stay Option and the Go Option.

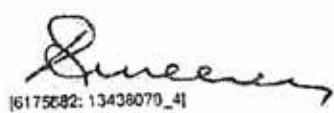
20 44. A copy of my presentation to members is exhibit "JWD-3" to the affidavit of Jeffrey William Dinger filed in this proceeding. The presentation was also placed on Kingswood's website following the meeting.

30 45. I have been shown a copy of the affidavit of William Falkingham filed in this proceeding. At paragraph 12 of the affidavit, Mr Falkington says that he was informed by Ken Brown that I stated at the information night that 75% of members would need to approve the merger. This is not correct. My position has always been that voting would be governed by the Kingswood constitution and the Corporations Act. At no time during that meeting did I expressly state to members that a 75% majority was required. Further, the Board only obtained written advice from counsel on 24 August 2013 that the merger needed to be passed by an ordinary resolution. I would not have expressed a view on the majority of votes required until that written advice had been received.

40 46. I have also been shown a copy of the affidavit of Jeffrey William Dinger filed in the proceeding. At paragraph 13 of his affidavit, he states that in response to a question asked by a member at the 26 March 2013 information night I had responded that 75% of members would need to approve the merger. This is also incorrect.

48. Following the information night, in about April 2013 pro forma feedback forms on the future options were made available to all members via the Kingswood website. Hard copies were also made available at the administration office at the Kingswood site clubhouse. Members were encouraged to submit their comments on the 2 options for the consideration by the Go and Stay working groups and the Board.

48. During this period, some members attempted to call a special meeting of members to instruct the Board to terminate the heads of agreement. The first request was made in



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[6175682: 13438070_4]



May 2013 and was rejected by the Board following legal advice on the basis that it did not comply with the Kingswood constitution and was therefore ineffective.

49. Now produced and shown to me and marked "PJS-13" is a true copy of the request dated 1 May 2013.

10 50. Now produced and shown to me and marked "PJS-14" is a true copy of my letter to Mr Copsey dated 20 May 2013 informing him of the Board's decision.

51. The second request was made on 13 June 2013. Now produced and shown to me and marked "PJS-15" is a true copy of the withdrawal of the request dated 4 July 2013, which states, "In light of the decision of the board to announce the date of the EGM and to conduct the vote that will decide the future of the Kingswood Golf Club and the decision to appoint Computer Share to manage the process and declare the decision of the members, we no longer find it necessary to continue to pursue our requisition to call a SGM to vote on our motion".

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April 2013 – appointment of working groups

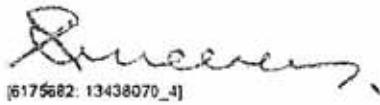
30 52. In about April 2013, a joint merger investigation working party was appointed with representatives of both Kingswood and Peninsula. The Kingswood representatives were me, Mike Mileo, Heath Wilson and Janelle Shcreiber. The Peninsula representatives were Gerry Ryan, Gary Richardson, Edwina LeMaistre and Peter Russell. Martin Hirons of SBP was appointed as a consultant to assist the working group.

53. At the same time:

(a) PricewaterhouseCoopers (PwC) was engaged to analyse the financial implications of any merger for both Kingswood and Peninsula, including the implications if the merger did not proceed;

(b) Work continued in relation to the stamp duty consequences of any merger. We were at that time, working around a fairly simplistic model which would require the formation of a new company, and the contribution of members and assets by both clubs to the new entity. The members would then vote for a new name and constitution. However, as part of the due diligence process, we determined that, in order to address stamp duty concerns, the

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[6175682: 13438070_4]

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is the Affidavit of Robert Wallace Fraser sworn 28 August 2014 referred to in **footnote 4** of the Applicant's summary of argument dated 10 April 2015.

This Affidavit was provided in support of the Applicant and tendered in evidence at trial in the Supreme Court of Victoria.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

SCI 2014 04329

10 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

Plaintiff

and

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

Defendant

20

AFFIDAVIT OF ROBERT WALLACE FRASER

Date of document: 26 August 2014
Filed on behalf of: The Plaintiff
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

30

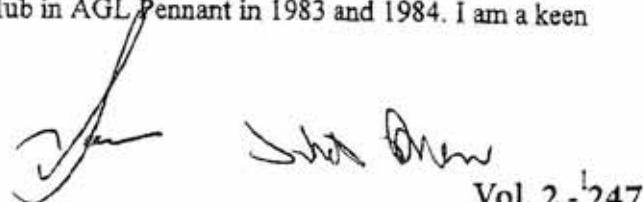
I ROBERT WALLACE FRASER of 220 Spring Road, Dingley Village, Victoria, MAKE
OATH AND SAY as follows:

Introduction

40

1. I have been a member of the Kingswood Golf Club (Kingswood) for approximately 30 years. I was appointed Director of the Club for two years in 1992 and 1993. Since retiring I have been a volunteer in assisting Kingswood half a day a week and have been a member of the Regeneration Committee of Kingswood up until July 2013.
2. Prior to my membership at Kingswood I was the Captain of Sandringham Golf Club in 1984 and 1985 and represented the club in AGL Pennant in 1983 and 1984. I am a keen golfer.

50



John Fraser
Vol. 2 - 247

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3. In addition to golf I have been extensively involved in various sports over the course of my life time, including the following: competition squash, auto racing and go karting. I was awarded the "Australian Sports Medallion" from the Commonwealth Government in 2000 for my contribution to Motor Sport and a Confederation of Australian Motor Sports "Service Award" in 2003. As a result of this involvement I have considerable experience in the conduct of sporting clubs.
4. I have been shown and read a copy of the affidavit of Peter Sweeney filed in this proceeding.

Events of 31 July 2013

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5. On the morning of 31 July 2013 I played a round of golf at Kingswood with Neville Young. After completing our round of golf Neville and I were sitting in the Spike Bar having a drink. Peter Sweeney approached Neville and stared talking to him.

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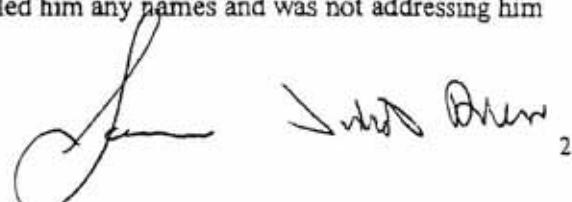
6. When Peter Sweeney finished talking to Neville he turned to me and said words to the effect "Bob, and how are you?" I replied "Ok apart from the disruption to our Club because of the proposed merger which has the morale of Kingswood Members at a very low level".
7. After I mentioned the merger to Peter Sweeney he became very aggressive and said words to the effect "I am only one member of the Club, I only have one vote, the members of this Club will choose what will happen".
8. As a result of Peter Sweeney's aggression I turned to Neville and said quietly "Sorry Neville but I don't have to listen to this wanking". I did not address Peter Sweeney when I said this.

40

9. Peter Sweeney then stood over me, as I was still sitting, and in a loud voice said "Did you call me a "wanker"? I informed Peter Sweeney that I did not speak to him but that I was talking to Neville. Peter Sweeney continued to be aggressive towards me and stand over me. He was "in my face" and came back at me saying "You called me a wanker". I again informed him that I had not called him any names and was not addressing him but talking to Neville.

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2

10 10. Peter Sweeney continued to keep up a loud tirade directed at me and behaved in a threatening manner. I said no more and left the Spike Bar.

11. Neville and I went to the car park. As I was loading my clubs into my car Peter Sweeney approached me again. I could see that he was in a very agitated state. Neville was some distance away and was not within earshot of us. After he approached me Peter Sweeney said "Bob, you will be getting a letter from the office. You cannot call the President of Kingswood a wanker" I again replied that I did not call him a wanker. I was not abusive or aggressive at any time. I found his demeanour aggressive and threatening.

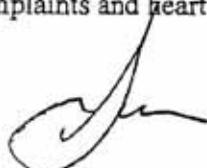
Consequences of the events of 31 July 2013

20 12. On or around 8 August 2013 I received a letter from Kingswood telling me that I was being charged with Rule 13 of the Club's Constitution regarding Compliance with By Laws. I was ordered to attend a Meeting at Kingswood on 13 August 2013 in relation to the matter. I did not keep a copy of this letter as I was extremely upset by the contents and subsequently destroyed the letter.

30 13. On 9 August 2013 I wrote a letter to Heath Wilson the General Manager of Kingswood in which I strongly denied the charge against myself. I attached an explanation to this letter of what took place on 31 July 2013 to this letter. Now produced and shown to me and marked RWF-1 and RWF-2 are true copies of the letter dated 9 August 2013 and my Statement of Facts.

40 14. In my letter dated 9 August 2013 I informed Heath Wilson that I would not be able to attend the Meeting on 13 August 2013 as I had previous commitment. I told him that I was very concerned that my wife had been informed by at least three other members of the Club that "Bob is in trouble" and that I would be called before the Board for calling the President names. I expressed my displeasure at the lack of confidentiality shown by the Board.

15. I did not approach Neville Young to corroborate what had happened as he has had many medical issues including kidney complaints and heart issues.



John Drew

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16. Within a week of 13 August 2013 I received another letter from Kingswood informing me that I had been banned for four and a half months from the Club, until the end of the financial year in March 2014. I do not have a copy of this letter as I was extremely upset by the contents and destroyed this letter also.

10 17. I did not receive a refund of my membership fees for this period of time.

Membership of Southern Golf Club Keysborough

18. As a result of being banned from Kingswood I approached Southern Golf Club in Keysborough to enquire about membership. I was told that I would be welcome there and within a day or so I was admitted as a member to Southern Golf Club. I have found the members at Southern to be very friendly and welcoming.

20

SWORN by the said ROBERT WALLACE FRASER
at Dingley this 26th day of August 2014

Before me:

Robert Fraser

30

LYCONE
53-55 MARCUS ROAD, DINGLEY
3172

An Australian Legal Practitioner
Legal Profession Act 2004 (Vic)

40

Robert Fraser

Robert Fraser

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

SC 1 2014 043-

LIST:

No.

10

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

BETWEEN:

WILLIAM FALKINGHAM

PLAINTIFF

20

-AND-

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

DEFENDANT

EXHIBIT NOTE

Date of document 24 August 2014

Solicitor's firm code: 106703

Filed on behalf of: The Plaintiff

DX: 33401 DINGLEY

Prepared by:

Tel: 03 9551 3155

Lyttletons
 53 Marcus Road
 Dingley 3172

Ref: 214083

Attention: Pranesh Lal

Email: plal@lyttletons.com.au

30

This is the Exhibit marked "RWF-2" produced and shown to ROBERT WALLACE FRASER at the time of swearing his Affidavit on 24 August 2014.

Before me:

40

John Drew

LYTTELTONS
 53-65 MARCUS ROAD, DINGLEY

3172

An Australian Legal Practitioner
 Legal Profession Act 2004 (Vic)
 EXHIBIT "RWF 2"

50

A TRUE COPY OF STATEMENT OF FACTS
 Vol. 2 - 251

Statement of Facts

I, Robert Fraser, plead NOT GUILTY of the Charge by the Board of Directors of Kingswood Golf Club Ltd against Myself.

The following is a true account of what took place in the Spike Bar and the Car Park, at Kingswood Golf Club on the 31 July 2013.

10 My playing partner Neville Young and I were having a drink after completing our round. Whilst sitting having our drink the Club President approached Neville and started talking to him, I believe that they both worked for Spalding Australia at one time.

When the President finished talking to Neville he said "Bob and how are you?" My reply was "OK apart from the disruption to our Club because of the proposed merger which has the morale of Kingswood Members at a very low level".

The President then spoke back, like a lecture. "I am only one member of the Club, I only have one vote, the members of this Club will choose what will happen and on etc"

20 I did not address the President; I turned to Neville and said quietly "sorry Neville but I don't have to listen to this wanking".

The President then stood over me, as I was still sitting, and in a loud voice said "Did you call me a wanker?" I informed the President "I did not speak to him I was talking to Neville". He came back "You called me a wanker" I informed him "I had not called him any names and was not addressing him but talking to Neville." The President kept up a loud tirade at me, I found in a threatening manner. I said no more and left the Spike Bar.

30 As I was loading my clubs into my car the President approached me, I could see he was in a very agitated state and spoke to me. "Bob you will be getting a letter from the office you cannot call the President of Kingswood a wanker." To which my only reply was "I did not call you a wanker".

His approach and his demeanour, I found threatening and the follow up charge against me confirms my original thoughts.

I was not abusive or aggressive at any time. I was originally asked a question; my answer was presumable not what was required?

40 I have enjoyed nearly 30 years at Kingswood GC, have served on the Board and am still a member of Norm's tree planters group.

I have a great pleasure in playing golf with my wife Janice and my many friends at our great golf club.

Yours in golf,

Robert W Fraser
Loyal Member.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

SC1 2014 043-

LIST:

No.

10

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

BETWEEN:

WILLIAM FALKINGHAM

PLAINTIFF

20

-AND-

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

DEFENDANT

EXHIBIT NOTE

Date of document 24 August 2014

Solicitor's firm code: 106703

Filed on behalf of: The Plaintiff

DX: 33401 DINGLEY

Prepared by:

Tel: 03 9551 3155

Lyttletons

Ref: 214083

53 Marcus Road

Attention: Pranesh Lal

Dingley 3172

Email: plal@lyttletons.com.au

30

This is the Exhibit marked "RWF-2" produced and shown to ROBERT WALLACE FRASER at the time of swearing his Affidavit on 25 August 2014.

Before me:

40

John Drew

LYTTELTONS
 53-55 MARCUS ROAD, DINGLEY
 3172

An Australian Legal Practitioner
 Legal Practitioner Act 2004 (Vic)
 EXHIBIT "RWF 2"

A TRUE COPY OF STATEMENT OF FACTS
 Vol. 2 - 253

50

Statement of Facts

I, Robert Fraser, plead NOT GUILTY of the Charge by the Board of Directors of Kingswood Golf Club Ltd against Myself.

The following is a true account of what took place in the Spike Bar and the Car Park, at Kingswood Golf Club on the 31 July 2013.

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I have a great pleasure in playing golf with my wife Janice and my many friends at our great golf club.

Yours in golf,

Robert W Fraser
Loyal Member.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is para 4 of the Affidavit of William Falkingham sworn 28 August 2014 referred to in **footnote 4** of the Applicant's summary of argument dated 10 April 2015.

This Affidavit was filed in support of Application made to the Supreme Court of Victoria and tendered in evidence at trial.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865

Ref: Pranesh Lal

50

10 required. It is my understanding from discussions with MICHEL BENJAMIN that the legal advice stating that a 50% vote was required (and not the 75% majority as advised to members) was received only a day or so prior to the circulation of the information pack which is a glossy and substantial document which would require some time to amend and print. The receipt by me of the information pack was the first I knew that the vote had to be 50% and not 75% as previously suggested.

Now produced and shown to me marked "WPF-19" is a copy of a document entitled "Strategic Options Working Paper – Option One" dated April 2013 given to me by Anthony Rawlings who was a member of the Stay Committee.

20 Paragraph 94 With reference to Exhibit "PJS-31", I have checked my diary and advise that I was in Kingswood and in the foyer on 27, 28, 29 & 30 September 2013 and on 1 & 2 October 2013 and there was no such notice on the notice board on any of those days.

30 3. In relation to other options available to Kingswood, I understand that a part of its landholding in the current golf club includes land, not part of any fairways, that has already been zoned residential and could readily be sold for development. I am not aware if the Stay and Go Committee or Kingswood's board considered selling these surplus land.

Now produced and shown to me marked "WPF-20" is a copy of the Kingswood land that is currently zoned residential.

40 4. Two members of the Kingswood Golf Club were suspended around May 2013 I believe for speaking out against the merger. After a conversation with one of those members, KENT FULLER (Kent), he provided me with copies of the following documents relating to his suspension:-

- Kent's email to me dated 28 August 2014;
- a flyer dated 8 May 2013 (the flyer);
- letter dated 13 May 2013 from Kingswood Golf Club to Kent (the 13 May 2013 letter); and



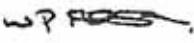
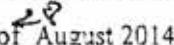


- letter dated 21 May 2013 from Kent to Kingswood Golf Club (the 21 May 2013 letter).

Now produced and shown to me marked "WPF-21" are copies of the flyer, the 13 May 2013 letter and the 21 May 2013 letter and Kent's email to me.

5. For the last five years (since I retired) I have been attending at Kingswood four or five times a week.

10

SWORN by the said WILLIAM PATRICK 
FALKINGHAM at Dingley this
day of  August 2014

Before me:



PRANESH H LAL
53-55 Marcus Road, Dingley
An Australian Legal Practitioner
within the meaning of
Legal Profession Act 2007

20

30

40

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

No. S CI 2014 04329

10 IN THE MATTER OF

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

BETWEEN:

WILLIAM FALKINGHAM

PLAINTIFF

-AND-

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

20

DEFENDANT

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 28 August 2014
 Filed on behalf of: The Plaintiff
 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

30

This is the Exhibit marked "WPF- 21" produced and shown to WILLIAM PATRICK
 FALKINGHAM at the time of swearing his Affidavit on 28 August 2014.

Before me:

PRANESH H LAL
 53-55 Marcus Road, Dingley 3172
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004

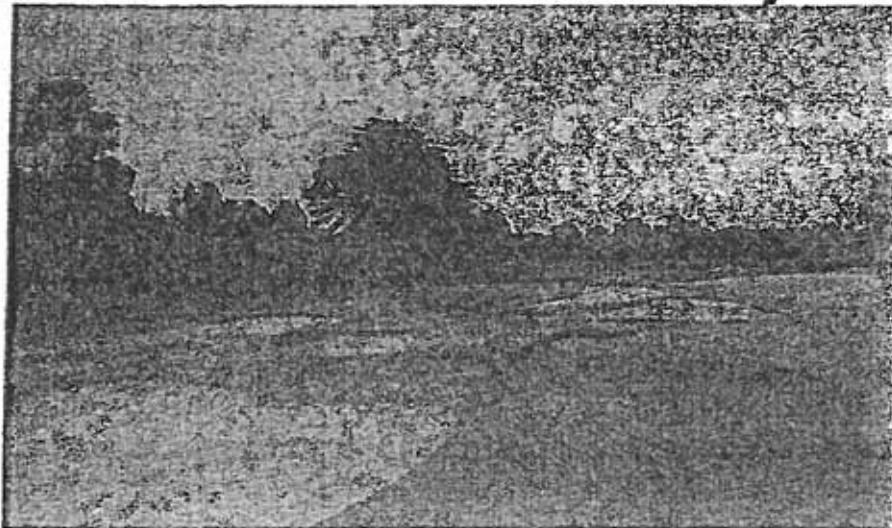
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COPIES OF THE FLYER, THE 13 MAY 2013 LETTER,
 THE 21 MAY 2013 LETTER AND KENT'S EMAIL

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Vol. 2 - 241

Vote to stop the merger with Peninsula Country Club



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- The KGC Board's 'merger' proposal involves closing your Club and *donating* assets – worth probably \$60-\$80 million – to another Club that's not physically close, nor has cultural links with Kingswood.
- The majority of KGC members will receive no benefit from this proposal.
- KGC has no external debt. It can remain viable with a new strategy; better direction; and improved control over expenditure.
- KGC's finances are not critical. We need to make changes – not surrender.
- A **Special General Meeting** has been requisitioned by many concerned members of KGC. The goal is to pass a **Special Resolution** to terminate the merger negotiations.

What we need from you:

- When the meeting date is announced, please attend and vote to save our treasured Club.

OR

- Vote your **Proxy Vote** in favour of the Special Resolution that will terminate negotiations.

Save Kingswood – "Whatever it takes"

May 8, 2013

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KINGSWOOD GOLF CLUB LTD.

(Incorporated in Victoria) A.C.N. 004 208 075 A.B.N. 91 004 208 075

10

13 May, 2013

Mr. Kent Fuller
16 Young Street
BRIGHTON VIC 3186

Dear Kent,

NOTICE OF CHARGE

20

It is alleged that, in breach of rule 13 of the Constitution, you have wilfully refused or neglected to comply with the rules or by-laws of the Club and have engaged in conduct unworthy of a Member.

30

Particulars of Allegations

1. That on 8 May 2013 you, along with others, exhibited a placard and distributed pamphlets or had another person exhibit the placard and distribute pamphlets at the Club in breach of by-law 9.3.

Any wilful refusal or neglect to comply with the by-laws is a breach of rule 13 of the Constitution.

Notice of Meeting

40

The Board of the Kingswood Golf Club will meet on 21 May 2013 at 6.15 p.m. in the Wilson Room at the Club at Centre Dandenong Road, Dingley Village to consider the aforementioned allegations.

You are invited to attend the meeting and make any submissions, proffer any explanation and/or defence that you may think fit. Those submissions or explanations can be provided orally or in writing.

If found guilty you may also address the Board as to any penalty.

If you choose not to attend the meeting at the date, time and place stated in this notice the Board may determine the charge and penalty in your absence and pass any resolution that it determines.

For your information a copy of rule 13 and by-law 9.3 are set out below.

Centre Dandenong Road, Dingley Village, Victoria 3172.

Telephone: (03) 9551 1670 Facsimile: (03) 9558 0283

Email: general@kingswoodgc.com.au Website: www.kingswoodgc.com.au

50

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9.3. Canvassing of Members

No person shall circularize or canvass in writing, other Members, in respect of any election of the Board or of any political or municipal election, or without the express authority of the Board circularize other Members on any matter whatsoever. No subscription list shall be canvassed, and no placard, pamphlet, advertisement or notice of any kind shall be in any manner whatsoever exhibited in the Club without approval of the Board. Members so approached shall report the occurrence in writing to the General Manager

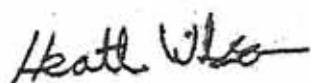
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13. Compliance with By-Laws

30

If any member shall wilfully refuse or neglect to comply with the provisions of the rules or By-Laws of the Club or shall be guilty of any conduct unworthy of a member, such member shall be liable to suspension or expulsion by a resolution of a three fourths majority of the Board provided that at least one week before the meeting at which such resolution is proposed he/she shall have received written notice of the allegation. Before the passing of any resolution the member shall have had an opportunity of giving orally or in writing any explanation or defence he/she may think fit. Following this procedure, the Board shall determine whether the member is guilty of the charge and, if found guilty, the member shall be given the opportunity to address the Board prior to the Board's consideration of any penalty to be imposed. A member expelled under this rule shall forfeit all right in and claim upon the Club and its property (except under any debenture or debentures held by him/her).

For and on behalf of the Board of Directors



Heath Wilson
General Manager

40

16 Young Street
Brighton
Victoria, 3186
May 21, 2013

The Board of Directors
Kingswood Golf Club Ltd
Centre Dandenong Road,
Dingley Village
Victoria, 3172

10

Re: Letter dated May 13, 2013 - Notice of Charge

As I have said in my verbal presentation, I do regret the events that occurred on May 8 and that some people became very upset. However, I do not believe I have acted in breach of By Law 9.3, in relation to the allegations made against me which are:- .

Particulars of Allegations

1. That on 8 May 2013 you, along with others, exhibited a placard and distributed pamphlets or had another person exhibit the placard and distribute pamphlets at the Club in breach of by-law 9.3.

Any wilful refusal or neglect to comply with the by-laws is a breach of rule 13 of the Constitution.

20

By Law 9.3 is a sanction provision. As such it must be construed narrowly and in accordance with its strict literal wording.

The first allegation made against me is that I "distributed" a pamphlet at the Club in contravention of By Law 9.3.

The relevant language of By Law 9.3 actually refers to "exhibited in the Club".

30

There is clearly a considerable difference between the processes of exhibition and distribution. Indeed "distribution" is not mentioned in any part of By Law 9.3.

Accordingly, I believe the first allegation is not within the ambit of By Law 9.3 and is clearly defective.

The second allegation alleges I exhibited a placard "at the Club". However, the actual wording of By Law 9.3 refers to "in the Club".

At all relevant times I was located outside of the gates of the Club's premises on the pavement of Lower Dandenong Road.

As such I consider this allegation is also outside the scope of By Law 9.3.

40

Accordingly, I believe that both allegations fall outside the scope and literal wording of By Law 9.3. As the allegations cannot provide any proper basis for a contravention of Rule 13 of the Constitution, I believe I should be exonerated.

As a salient feature of the rules of natural justice, I would expect that the Board would not seek to recast further allegations against me in relation to the same factual matters.

Sincerely,

K. D. Fuller

50

From: Kent Fuller <kfuller821@gmail.com>
Date: Wed, Aug 27, 2014 at 6:58 PM
Subject: Your court action
To: banco49@gmail.com
Cc: plal@lyttletons.com.au

Dear Bill Falkingham,

10

Regarding your court action against KGC and our chat today, I was unaware that any of this court activity was in progress and would have appreciated the opportunity to have been approached with reasonable notice.

The fact is that I have 'moved on' from the extremely unpleasant experience I had with the Kingswood board. I did not renew my membership in 2014. My wife is also unhappy for me to volunteer help to a club of which I am no longer a member, where I have been treated badly by its board, and received very little support from other members except for a handful of close friends. She is correct in saying "there is nothing in this for you except angst."

However, I will provide some documents to you that I kept regarding what happened.

20

My overall feeling about the merger was that as a member it never seemed to me to be a transparent process. I had been suspended for seven months and was not present when the final vote was taken. The suspension was an over-the-top punishment that I believe was done to silence me (and my friend Peter Roberts who was suspended for 9 months) and serve as an example to others. As we had just paid our fees it was the equivalent in my case to a fine of a couple of thousand dollars. That is a serious impost upon a retired person.

30

In fact the merger the board wanted could have been the best option for KGC, but it's also fair to say that a number of the people I played with thought the prime function of the committees that had been formed to examine the 'go or stay' options was merely to justify a board decision that had already been taken. During the period when various committees were supposedly canvassing the options, this impression might have been dispelled, for example by posting committee minutes on the club website in the section which requires a member password. Nothing like that ever happened.

I have attached 3 documents.

- The written submission I handed each of those who attended the board meeting where I was censured. The original was signed.
- The letter the club sent to me alleging transgressions of the rules.
- The flyer Peter Roberts and I made available outside the gates of the club. [A third person who handed these out was not a member of the club]. Peter and I stood outside the gates and I held a small sign that said (from memory) 'please take a leaflet'. We did not do this within the club perimeter or harass people.

40

Good luck,
Kent Fuller

50

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

BETWEEN:

WILLIAM FALKINGHAM
Applicant

-and-

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is page 17 of Exhibit PJS-28 to the Affidavit of Peter Sweeney sworn 25 August 2014 referred to in **footnote 5** of the Applicant's summary of argument dated 10 April 2015.

This document is part of the Original Information Pack which was tendered in evidence by the respondent at trial in the Supreme Court of Victoria.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865

Ref: Pranesh Lal

50

~ SECURING OUR FUTURE ~

10

Transitional Arrangements

A number of transitional mechanisms to create the new Club were examined. The key drivers in that examination were to adopt an approach that was the most tax effective and satisfied all Corporations law requirements.

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.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

10

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

20

This is Exhibit HWW-3 of the affidavit of Heath Wilson sworn 28 August 2014 referred to in **footnote 43** of the Applicant's summary of argument dated 10 April 2015.

This Affidavit was filed in support of the respondent and tendered in evidence at trial in the Supreme Court of Victoria.

30

40

Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

50

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

10

No. S CI 2014 04329

IN THE MATTER OF

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly
 known as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

and

Plaintiff

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

Defendant

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 28 August 2014
 Filed on behalf of: The Defendant

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:6175682
 Attention: Gina Wilson
 E-mail Address: gina.wilson@maddocks.com.au

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This is the exhibit marked "HWW-3" now produced and shown to Heath William Wilson at
 the time of swearing his affidavit on 28 August 2014.

Before me:

40 Signature of person taking affidavit

STEPHEN PAUL D'ARCY
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004.

Exhibit "HWW-3"
 Table produced by Gary Richardson

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Process for admitting Peninsula Members to Kingswood

Step:

Step:	Comments:	Action:
1. Confirm members elected to the 5(A)(iv) category In the KGC Constitution have voting rights.	This looks to be the case under Rules 4, 5, 17 and 39. Being "probationary" in 1 st three months (10) doesn't appear to affect voting rights.	NO'B — Norm O'Byr "HWW-3"
2. KGC Board set the Entrance Fee for 5(A)(iv) at \$1		
3. KGC Board set Subscription for 5(A)(iv) members at \$1	Rule 14(A), can be done immediately	KGC Board
4. After the vote on 17th, GR provides HW with list of PCGC members who have given authority to G Ryan to sign them up as members of KGC.	Rule 15(A), can be done immediately Perhaps 3-4 days after vote? Note, list needs to include address (5(B)) but I assume they can all be c/o PCGC? 5(B) & 8(B)(3) also require occupations! Is this challengeable If not provided? Can all be "retired"?	KGC Board GR
5. HW to then follow requirements under Rule 9	"Secretary" must have for 14 days, display for 7 of those days	HW No'B Norm O'Byr
6. KGC Board to then hold ballot to elect those members	Rule 9(A)	HW
7. HW to advise GR of successful ballot, GR to arrange immediate payment to KGC of \$2 for everyone on that list.	Once done, those on the list are financial members of KGC	HW, GR KGC Board
8. KGC Board to then set date at which list of eligible members will be determined for 2 nd vote.	Rule 17 (B)(i)	KGC Board
9. KGC Board to then set date for 2 nd vote and send 21-day Notice of Meeting to all eligible Members	Rule 39	KGC Board

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 31 of 2015

B E T W E E N :

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

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This is para 41 of the Plaintiff's Outline of Submissions dated 26 August 2014 referred to in **footnote 47** of the Applicant's summary of argument dated 10 April 2015.

This was an application for an interlocutory injunction by the Applicant and was tendered in evidence at trial in the Supreme Court of Victoria.

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865

Ref: Pranesh Lal

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cl 46 of the Constitution then in place, a meeting of members following the written request of 97 Kingswood members concerned about the proposed merger (Falkingham's affidavit at pars 35-36 and Ex WPF-5 and Ex WPF-6 thereto).

38. In relation to the third issue, it is alleged in three affidavits that from March 2013 to at least 26 August 2013 the board consistently represented to members (and did nothing to disabuse members' understanding) that the resolution on the proposed merger on 17 September 2014 would require a 75% majority of Kingswood members (Falkingham's affidavit at par 12; Dinger's affidavit at pars 18-19, 26-27 and Ex JWD-5 thereto; Benjamin's affidavit at pars 20-26). Paragraph 45 and 46 of Mr Sweeney's affidavit denies the contentions on this issue raised in Mr Falkingham and Mr Dinger's affidavit.

BALANCE OF CONVENIENCE

39. The plaintiff seeks interlocutory orders to preserve the status quo until the hearing and determination of this proceeding. Significant prejudice would be suffered if the land on which the club of which he is a member were sold to a development company or other third party. Damages will not be an adequate remedy and are not claimed in the proceeding.
40. There is little or no prejudice to the defendant in granting the injunction until the trial. The plaintiff will comply with all orders to bring the proceeding to trial as quickly as possible. The matter can be set down for trial within months as soon as a date can be appointed by the Court. With the filing of extensive affidavit material much of the work for trial has already been done. Apart from the filing of any further affidavit material, the matter is ready for trial.
41. The evidence relied on by the defendant as going to prejudice by the defendant is speculative in the extreme and should be disregarded.
42. Furthermore, in view of the fact that the 17 September 2013 vote to merge with Peninsula was made by the members on the basis that they would continue to enjoy the Dingley golf course for a minimum of 3 years after the merger there is no urgency in entering into a contract of sale for the land. Representations that the transition period would be 3-5 years were made repeatedly by the board up to the 17 September 2013 vote:

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M44 of 2015

BETWEEN:

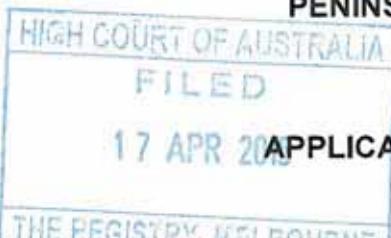
WILLIAM FALKINGHAM

Applicant

and

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)

Respondent



Part I: Special Leave Questions

1. Does the enactment of Part 2F.1A of the *Corporations Act 2001* (Cth) (Act) restrict the Court's discretion to order a company to indemnify the costs of a member who commences a proceeding for the benefit of the company but not as a derivative action by leave granted under that Part?
2. Is a member who commences a proceeding for the benefit of a company but not as a statutory derivative action under Part 2F.1A required to demonstrate "exceptional" or "very unusual circumstances" to obtain an indemnity for the costs of the proceeding?

Part II: Factual Background

3. The factual background is set out in the applicant's summary of argument in Application No M31 dated 10 April 2015 which addresses the substantive issues on the appeal.¹ The defined terms in that summary are adopted for the purposes of this summary.
4. The proceeding came on for trial with great haste. The applicant had no reason to doubt the respondent's pre-merger representation that after the "merger",² members could continue to enjoy the Kingswood golf course for between 3 to 5 years.³ In May 2014 the applicant learnt that the respondent had called for expressions of interest for the purchase of the Kingswood golf course by an advertisement placed in The Australian Financial Review on 8 May 2014 (TJ:[33]). The applicant had been fundraising to challenge the

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¹ Those matters relate to the applicant's application for leave to appeal the whole of the judgment and orders of the Court of Appeal of the Supreme Court of Victoria of 13 February 2015.

² There was no finding that any of the steps taken to "merge" the two golf clubs could not be undone. No evidence was led at trial as to the legal or financial steps taken to merge the two golf clubs. In the second injunction application in the Court of Appeal there was evidence that the respondent and the Peninsula Country Golf Club Ltd operated as separate entities and were not legally related and that they each continued to own their respective golf courses: affidavit of Pranesh Hoteswar Lal sworn 12 November 2014.

³ Affidavit of William Falkingham sworn 20 August 2014, exhibit WPF-12.

Filed on behalf of the Applicant

Prepared by:

Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 9551 3155
Fax: 9551 8250
Ref: Pranesh Lal

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merger (TJ: [19]-[21]) and commenced the proceeding by Originating Process on 20 August 2014 as soon as sufficient funds were available (TJ: [22]). On 26 August 2014, the trial judge declined to hear an application for an interlocutory injunction restraining the sale of the Kingswood land and ordered the trial take place a few days later on an urgent basis (CoA: [4]). There was no time, therefore, after the proceeding commenced to apply under Part 2F.1A of the Act to continue the proceeding as a derivative proceeding. As it turned out, the applicant had commenced the proceeding within days of the due date for final offers for the purchase of the Kingswood land (TJ: [42]). An offer for the purchase of the land by AS Residential Property No 1 Pty Ltd (**ASRP**) was tendered during the trial.⁴

10 5. On 3 September 2014, the trial judge delivered an *ex tempore* judgment in which he upheld the applicant's oppression claim. However, he declined to grant relief on the basis of *laches*. On the same day he refused to grant an injunction restraining the sale of the land pending an appeal. On 5 September 2014, the applicant appealed to the Court of Appeal and sought to have the matter listed for an urgent interlocutory injunction. By the time the injunction was listed by the Court of Appeal on 17 September 2014 the respondent had already entered into a contract of sale with ASRP for \$115M (CoA: [6]) (on 5 September 2014). At the injunction hearing on 17 September 2014 the applicant sought to restrain the respondent from dealing with the deposit proceeds of \$20M which was due for payment within days of the application. That application, as well as the later application for an injunction made during the appeal, was refused.⁵

20 6. The respondent is a company limited by guarantee and its members are the members of the Kingswood Golf Club (TJ: [6]). The applicant has been a member of that club for more than 30 years (TJ: [2]).

30 7. In the proceeding the applicant sought relief against oppression. Although the proceeding took place without pleadings the trial judge ordered the applicant to file particulars of oppression. In the particulars the applicant relied upon the following acts of oppression (TJ:[47]): (i) the *en masse* admission by the directors of more than 1000 Peninsula members which was not in accordance with the constitution of the respondent and which had the effect of diluting the voting power of the (original) Kingswood members; (ii) the proposal of resolutions on 17 September 2013 and 29 October 2013 to effect the merger as ordinary resolutions when they required constitutional change and were properly the subject of special resolutions requiring a 75 per cent vote; (iii) permitting the New Peninsula Members to vote on a resolution which changed the Kingswood constitution and removed the need for any sale of the land to be sanctioned by a general meeting; (iv) the failure to investigate alternatives to a merger; and (v) representing that members would continue to play golf at the Kingswood golf course for 3 to 5 years.

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⁴ Affidavit of Marcus Geoffrey Willison sworn 2 September 2014.

⁵ *Falkingham v Peninsula Kingswood Country Golf Club Limited* [2014] VSCA 235.

8. The relief sought by the applicant was no more than what was required to undo the steps taken in relation to the merger and to preserve the Kingswood golf course as the principal asset of the company. It included an injunction restraining the sale or any dealings with the Kingswood golf course, declarations that the resolutions passed on 17 September 2013 and 29 October 2013 were invalid and/or void and the repeal of the constitution passed on 29 October 2013 with the New Peninsula members joining in the vote. The applicant did not seek relief of a personal nature.

10 9. The trial judge found that the directors had breached their fiduciary duties in admitting the New Peninsula Members (TJ: [54], and see [69], [87]); that the merger required a constitutional amendment and therefore a 75 per cent vote (TJ: [68], [94]); that the deprivation of a constitutional amendment to effect the merger was unfair to the applicant and oppressive and that the oppression was continuing at the date of judgment (TJ: [98]). The trial judge also considered the board may not have been even-handed in investigating "the stay proposal" (as an alternative to the merger) (TJ: [75]) and that it was taking all possible steps to quell the stay proposal (based on past treatment of people who spoke out against the merger) (TJ: [76]).

20 10. By written submissions filed 12 September 2014 on the issue of costs the applicant contended that the respondent should pay two-thirds of the costs of trial because the proceeding took on much of the colour of a derivative action. Reference was made to *Farrow v Registrar of Building Societies*⁶ where the court held that where a proceeding is brought bona fide for the benefit of the company and not the plaintiff personally there is no reason why an indemnity order should not be made. The trial judge declined to make the order sought by the applicant and in a judgment delivered 25 September 2014 made no order as to costs of the proceeding.⁷

30 11. The applicant's summons of 14 October 2014 seeking an indemnity order was heard by the Court of Appeal with the respondent's application for security for costs on 15 October 2014. The application for security for costs was refused. The Court referred the applicant's summons for determination by the court hearing the appeal. However, it made several findings about the nature of the applicant's claim including:

40 a. "[the applicant] had demonstrated a real and genuine interest in pursuing the case on behalf of the company";⁸

b. the applicant was seeking to "preserve the principal asset of the company, namely the Dingley land in circumstances where the events that led to the sale transaction have been impugned by the Court";⁹

⁶ [1991] 2 VR 589 at 595.

⁷ *Falkingham v Peninsula Kingswood Country Golf Club Limited* [2014] VSC 483.

⁸ See *Falkingham v Peninsula Kingswood Country Golf Club* (Unreported, Court of Appeal of Victoria, Neave JA and Sloss AJA, 31 October 2014) at [38].

⁹ *Falkingham v Peninsula Kingswood Country Golf Club* (Unreported, Court of Appeal of Victoria, 31 October 2014) at [37].

c. "...there are features of [the applicant's] argument that involve the enforcement of the company's constitution and, in that sense, reflect notions of seeking to have the affairs of the company conducted in the best interests of members. In our view there are, to adopt the approach of Marks J in Farrow, 'reasonable grounds for the proceeding being brought' [by the applicant]. Whether the claim is ultimately to be characterized as one brought by him on behalf of the company may well be affected by the outcome of the contentions raised by [the respondent] in its notice."¹⁰

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12. Notwithstanding that the Court of Appeal did not disturb the trial judge's findings referred to in paragraph 9, and wholly rejected the respondent's notice of contention, the Court of Appeal declined to grant an indemnity order. The Court of Appeal reasoned that Pt 2F.1A abolished the exceptions to the rule in *Foss v Harbottle*¹¹ and established in its place a new statutory regime, which amongst other things, permitted the court to make an indemnity order for costs if leave was granted to bring a proceeding in the name of the company under that Part. It followed that if there was power independent of s 242 of the Act to order an indemnity "*it would only be in an exceptional case*" and there would need to be some good reason why leave was not sought notwithstanding that the action was otherwise brought bona fide to protect the company or to advance its interests.
13. It also held that although the Court had a wide discretion in relation to costs, where an application had not been made under Pt 2F.1A, indemnity orders of the kind made in *Wallersteiner v Moir*,¹² *Farrow and Wood v Links Golf Tasmania*¹³ would only be warranted in very unusual circumstances.¹⁴ The Court of Appeal found that an indemnity order was not warranted here because the applicant was pursuing a personal interest in bringing the proceeding - preserving his capacity to play golf at Kingswood - and chose not make an application under Pt 2F.1A.

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Part III: Applicant's summary of argument

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14. The Court of Appeal was wrong on authority and in principle to find that the introduction of Pt 2F.1A in any way curtailed its discretion to order an indemnity for costs where it was satisfied that a proceeding brought by a member in his own name (that is, not pursuant to Pt 2F.1A) was principally for the benefit of the company. The introduction of a requirement that exceptional or very unusual circumstances must exist to warrant such an order was without explanation or reasoning and should be rejected. Such a requirement restricts rather than advances minority shareholders interests in a case such as this where the claim is demonstrably for the benefit of the company and it is clear that those in control of the company would not pursue it themselves.

¹⁰ See *Falkingham v Peninsula Kingswood Country Golf Club* (Unreported, Court of Appeal of Victoria, Neave JA and Sloss AJA, 31 October 2014) at [56].

¹¹ (1843) 2 Hare 461; 67 ER 189.

12 [1975] 1 QB 373.

¹³ *Wood v Links Golf Tasmania Pty Ltd* [2010] FCA 570.

¹⁴ *Falkingham v Peninsula Kingswood Country Golf Club* [2015] VSCA 30 at [11].

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10 15. In *Wallersteiner*, the UK Court of Appeal recognized that where a minority shareholder brings an action for the benefit of the company the right to an indemnity arises out of the plainest principles of equity.¹⁵ Although *Foss v Harbottle* established the company is the proper plaintiff to sue for wrongs done to itself, an exception was recognized where the wrongdoers themselves control the company. As explained by Lord Denning MR, the principle is that "where the wrongdoers themselves control the company, an action can be brought on behalf of the company by the minority shareholders on the footing that they are its representatives to obtain redress on its behalf".¹⁶ The consequence is that the minority shareholder, being an agent of the company, is entitled to be indemnified by the company against all costs and expenses reasonably incurred by him in the course of his agency. It is analogous to the indemnity to which a trustee is entitled from his cestui que trust which is *sui juris*.¹⁷

20 16. Lord Justice Buckley said in *Wallersteiner*, that where a claim made in good faith and on reasonable grounds "the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, ... it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs"¹⁸

30 15. Adopting these principles, Marks J in *Farrow* held that the proceeding need not be exclusively derivative.¹⁹ Rather, "the important circumstance is that the relief sought is essentially for the benefit of the company. It is not to the point that the plaintiffs might obtain indirect benefit".²⁰ Marks J observed that the law invoked depended on the plaintiff "being a shareholder or a person in a sufficiently analogous position suing in the interests of a company under the control of a person or persons whose conflict of interest makes action by the company itself an unreality".²¹ The prospects of success of such a case were not relevant, only that reasonable grounds to bring the case existed.²² In such a case there is 'no good reason why the expenses should be met out of the private resources of one or more shareholders', even if they fail.²³

17. Part 2F.1A was introduced by *Corporate Law Economic Reform Program Act 1999* (Cth) to enable a shareholder to bring an action under the Act on behalf of a company for a wrong done against the company where the company is unwilling or unable to do so.²⁴ It was intended to address the difficulties confronting shareholders in pursuing actions under the 'exceptions' to the rule

40 ¹⁵ [1975] 1 QB 373 at 391.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ [1975] 1 QB 373 at 404.

¹⁹ This is also the position set out in the UK in *Clark v Cutland* [2004] 1 WLR 783 at [35] where the Court has said that where relief is for the benefit of the company, even though not brought as a derivative action, an order that the company pay the costs of appeal, and possibly below, was appropriate. This case has been applied in Australia, although on a different point. See *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55.

²⁰ [1991] 2 VR 589 at 590.

²¹ *Ibid* at 592.

²² *Ibid* at 592.

²³ *Ibid* at 594.

²⁴ Explanatory Memorandum, p 18 at [6.11].

in *Foss v Harbottle*, including the problem of securing funding for such proceedings.²⁵

10 18. The new statutory discretion to award an indemnity for costs under s 242 was described as being an "additional safeguard in respect of use of company funds ... to protect a bona fide shareholder against liability for costs, indemnifying them out of company funds while at the same time allowing the Court a further means of discouraging unmeritorious or doubtful action. This reflects the position that the company itself is the beneficiary in a successful derivative action" (p26 [6.19]).²⁶

20 19. In *Wood*, the Federal Court held that the principles adopted by Marks J in *Farrow* should continue to apply in determining whether to grant an indemnity order for costs under Part 2F.1A.²⁷

30 20. There is no justification for construing Part 2F.1A as operating to fetter the court's discretion to grant an indemnity for costs where it is satisfied that that a proceeding meets the requirements identified in *Wallersteiner* and *Farrow*; that is, it is brought bona fide for the benefit of the company, it is reasonable to have commenced it and the relief sought is primarily for the benefit of the company.

21. There is no reason why plaintiffs who bring proceedings analogous to the statutory derivative proceeding, which are bona fide for the benefit of the company and which would not otherwise be brought by the company itself, should be subject to the high threshold of "exceptional" or "very unusual circumstances" as found by the Court of Appeal. The longstanding principles identified in *Wallersteiner* and *Farrow* should continue to apply to a non-statutory derivative action which is brought bona fide for the benefit of the company and where the relief sought would flow to the company.

22. Such an approach would be consistent with Parliament's intention in introducing Part 2F.1A to encourage the bringing of claims to prevent conduct which involves harm to a company. A test requiring exceptional or unusual circumstances is entirely inconsistent with that approach.

23. The Court of Appeal should have found that where a claim is not commenced as a derivative proceeding under Part 2F.1A, but still has the character of a one brought for the benefit of the company, a plaintiff which meets the requirements of *Farrow* and *Wallersteiner* should be entitled to an indemnity order. Those principles were plainly satisfied in this case.

40 24. *First*, the applicant is seeking to remedy the substantial wrongs identified by the trial judge and the Court of Appeal. The trial judge's findings on the improper and unconstitutional admission of Peninsula members to

²⁵ *Ibid* (at p19, [6.15]).

²⁶ See section [6.19] of the Explanatory Memorandum cited in *Wood* at [8].

²⁷ *Wood* at [9] cited with approval by Neave JA and Sloss AJA in *Falkingham v Peninsula Kingswood Country Golf Club* (Unreported, Court of Appeal, 31 October 2014) at [49].

10 Kingswood²⁸ were undisturbed, as were the trial judge's findings about the conduct of the Kingswood board.²⁹ The wrongs were of the most serious corporate wrongs including breach of fiduciary duty, diluting the voting power of the membership, unfairness and oppression. Not unreasonably the applicant seeks to enforce the pre-merger constitution by which he was bound during his more than thirty years of membership. It is not to the point to say, as the Court of Appeal did,³⁰ that he was seeking to preserve his capacity to play golf at Kingswood. That was simply incidental to the primary relief which sought to restore and enforce the respondent's pre-merger constitution to remedy the oppression found to have occurred.

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25. Since the injunction application on 26 August 2014, the applicant's focus has been to protect the principal asset of the company - its land worth more than \$100M - from those in control of the company who sought to deal with it then (and subsequently did deal with it) other than in accordance with its pre-merger constitution.

26. *Secondly*, it is clear that the relevant wrongdoers remain in control of the company and would not have brought this proceeding.

27. The Court of Appeal who first considered the indemnity order was correct to find that the applicant had reasonable grounds for bringing the proceeding and for characterising the claim as referred to in paragraph 11. Once the notice of contention was dismissed and the trial judge's findings of misconduct were upheld it was plainly unjust to refuse the indemnity order. On established principles the indemnity order should have been made notwithstanding the ultimate outcome of the appeal.³¹

30 Part IV: Reasons Why Special Leave Should Be Granted

28. Special leave should be granted because the order below is attended with serious doubt and it concerns matters of public importance, being:

- a. the impact, if any, of Part 2F.1A of the Act on applications for indemnity for costs in a proceeding brought for the benefit of the company but not commenced under that Part; and
- b. the correct test for determining when an indemnity for costs should be granted in a proceeding not brought under Part 2F.1A.

40 29. Special leave should also be granted for the reasons set out in Application No M31 of 2015 for special leave to appeal the substantive orders of the Court of Appeal. If special leave is granted in that matter, the applicant should be

²⁸ *Falkingham v Peninsula Kingswood Country Golf Club* [2015] VSCA 16 at [101].

²⁹ See for example, *Falkingham v Peninsula Kingswood Country Golf Club* [2014] VSC 437 [68], [69], [70], [79], [80], [89] – [93], [94] and [95].

³⁰ *Falkingham v Peninsula Kingswood Country Golf Club* [2015] VSCA 30 at [11].

³¹ As found by Marks J in *Farrow* at 594.

entitled to contest the ruling on the indemnity in the Full Court. It is only because of the Court of Appeal's failure to dispose of the indemnity application at the time of handing down its judgment on the substantive matters that the applicant was been forced to pursue separate special leave applications.

Part V: Costs

10 30. If this application is refused, the respondent should not be awarded costs because (1) the application is brought bona fide for the benefit of the respondent (it involving abuse of fiduciary duties on the part of directors and there not being in prospect any personal pecuniary gain for the applicant);³² and/or (2) the application raises questions of law of public importance and is brought otherwise than substantially for any private benefit.³³

Part VI: Relevant Provisions

31. See annexure.

Part VII: Oral Argument

20 32. The applicant seeks to supplement these written submissions with oral argument.

Dated 17 April 2015

C. M. Kenny

C. E. M. Exell

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A. F. Solomon-Bridge

Counsel for the Applicant

Per Lyttleton Lawyers
Lyttletons Lawyers, Solicitors for the Applicant

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³² Cf. *Farrow* at 595; *Wallersteiner; Wood*.

³³ *Smith v Airservices Australia* (2005) 146 FCR 37 at 55-57.

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Annexure: Relevant Provisions*Corporations Act 2001 (Cth):***Part 2F.1A – Proceedings on behalf of a company by members and others****236 Bringing, or intervening in, proceedings on behalf of a company**

10 (1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

20 (ii) an officer or former officer of the company; and

(b) the person is acting with leave granted under section 237.

(2) Proceedings brought on behalf of a company must be brought in the company's name.

(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

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237 Applying for and granting leave

(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

40 (b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings--there is a serious question to be tried; and

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10 (e) either:

- (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
- (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

10 (3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:

20 (a) the proceedings are:

- (i) by the company against a third party; or
- (ii) by a third party against the company; and

20 (b) the company has decided:

- (i) not to bring the proceedings; or
- (ii) not to defend the proceedings; or
- (iii) to discontinue, settle or compromise the proceedings; and

30 (c) all of the directors who participated in that decision:

- (i) acted in good faith for a proper purpose; and
- (ii) did not have a material personal interest in the decision; and
- (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
- (iv) rationally believed that the decision was in the best interests of the company.

40 The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

40 (4) For the purposes of subsection (3):

50 (a) a person is a third party if:

- (i) the company is a public company and the person is not a related party of the company; or

(ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

242 Power of the Court to make costs orders

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The Court may at any time make any orders it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under section 237 or an application for leave under that section:

- (a) the person who applied for or was granted leave;
- (b) the company;
- (c) any other party to the proceedings or application.

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An order under this section may require indemnification for costs.

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 44 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

EXHIBIT COVERSHEET

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This is the Affidavit of Pranesh Hoteswar Lal sworn 12 November 2014 referred to in **footnote 2** of the Applicant's summary of argument dated 17 April 2015.

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Filed on behalf of the Applicant
Prepared by:
50 Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895
Fax: 8555 3865
Ref: Pranesh Lal

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

FILE No. S ACPI 2014 0109

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

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BETWEEN

WILLIAM FALKINGHAM

Appellant

and

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

Respondent

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AFFIDAVIT OF PRANESH HOTESHWAR LAL

Date of document: 12 November 2014

Solicitor's firm code: 106703

Filed on behalf of: The Appellant

DX: 33401 DINGLEY

Prepared by:

Tel: 03 9551 3155

Lyttletons

Ref: 214360

53 Marcus Rd,
Dingley Village VIC 3172

Attention: Pranesh Lal

Email: plal@lyttletons.com.au

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I PRANESH HOTESHWAR LAL of 53 Marcus Avenue, Dingley Village **MAKE OATH
AND SAY** as follows:

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1. I am the Principal of Lyttletons Lawyers Pty Ltd in Dingley Village and have the care and conduct of this proceeding on behalf of the appellant. Except where stated to the contrary I make this affidavit from my own knowledge.
2. This affidavit is filed in support of an application by the appellant to restrain the respondent from dealing with the deposit received from the purported sale of the Kingswood golf course for \$125 million pursuant to a contract of sale dated 5 September 2014. I have not reproduced the contract of sale which exceeds 300 pages as a copy of it is exhibit GPR-4 to the affidavit of Gerard Patrick Ryan sworn 16 September 2014 (Ryan's affidavit).

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Now produced and shown to me and marked exhibit PHL-22 is a bundle of documents paginated from page 1 to 100 including Ryan's affidavit.

Prior Injunction Applications

10 3. After judgment was delivered *ex tempore* on 3 September 2014 Senior Counsel for the appellant made application to the trial judge, the Honourable Justice Robson, for an injunction preventing the sale of the Kingswood golf course until the appellant had an opportunity to consider his appeal rights. The injunction was refused, Justice Robson stating that that the balance of convenience was against the appellant. At that stage the named purchaser to the contract of sale, AS Residential Property No 1 Pty Ltd (ACN 601 592 661) (**ASRP**) had submitted an offer for the sale of the Kingswood golf course on 29 August 2014 which remained open for 30 days. The offer which was exhibit MGW-2 to the affidavit of Marcus Willison sworn 2 September 2014 is pages 10-11 of exhibit PHL-22

20 4. The following day (4 September 2014) I contacted the Court of Appeal Registry and endeavoured to have the matter listed for an urgent injunction application. I was informed that, notwithstanding that Justice Robson's written judgment was not yet available, the matter would not be listed unless a Notice of Appeal was filed and served. On the same day I wrote two letters to Maddocks, the solicitors for the respondent, putting the Respondent on notice, *inter alia*, that our client was considering his position on an appeal and that if he filed an appeal he would seek to have any contract entered into set aside.

30 5. On 5 September 2014 I was informed by the appellant that the respondent had entered or was about to enter a contract of sale. On that day I served a Notice of Appeal and a summons seeking, among others, an injunction preventing the dissipation of the proceeds of sale pending the hearing and determination of the appeal. I also wrote a further letter to Maddocks putting them on notice that my client intended to appeal the decision of Justice Robson, would seek to have the contract of sale set aside and requested an undertaking that the respondent would not deal with the proceeds of sale. The letters I sent to Maddocks on 4

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A handwritten signature and initials, likely belonging to the author of the affidavit, are located at the bottom right of the page. The signature is a stylized 'J' and the initials are 'D' and 'J' enclosed in a circle.

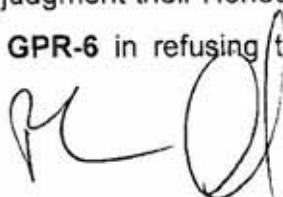
and 5 September, 2014 and their response to those letters are at pages 13-16 of **exhibit PHL-22**.

10 6. I was in contact with the Court of Appeal Registry on several occasions in the ensuing weeks to find out when the application for an injunction would be listed. On the 16 September 2014 I received an email at 9.50am from the Registry informing the parties that the matter *might* be listed for hearing on 17 September 2014 and directing that my client file an outline of submissions by 12.30pm that day. The Respondent was to provide its outline of submissions opposing my client's application by 4.30pm.

20 7. Then on the 16 September 2014, I received an email at 1.42pm from the Registry informing the parties that the matter was listed for hearing on 17 September 2014 at 2.15pm.

30 8. On the 16 September 2014 at 6.59 pm I received a copy of Mr Ryan's affidavit, but not the contract of sale (**exhibit GPR-4**) or documents allegedly relating to the financial accounts of the Respondent which were contained in **exhibits GPR-5 and GPR-6** and over which a confidentiality order was sought. It was during the hearing of the injunction application on 17 September that the appellant's legal practitioners were granted access to these key documents. However, access to these documents was denied to the appellant notwithstanding the submission from Senior Counsel for the appellant that the documents were not confidential or deserving any greater protection than that already available under the *Harman* principle. (The appellant eventually gained access to the contract of sale after a further application made to their Honours Neave JA and Sloss AJA on 15 October 2014. The appellant gained access to exhibits **GPR-5 and GPR-6** by a consent order made on 6 November 2014).

40 9. The application on 17 September 2014 to restrain the respondent dealing with the deposit of \$20 million, which was to be released shortly after the application, was denied by their Honours Kyrou JA and Garde AJA: *Falkingham v Peninsula Kingswood Country Golf Club* [2014] VSCA 235. In the judgment their Honours placed considerable reliance on exhibits **GPR-5 and GPR-6** in refusing the



injunction: *Falkingham v Peninsula Kingswood Country Golf Club* [2014] VSCA 235 [10,12 and 15].

10. Having now had the opportunity to discuss the accounting information with my client, and to conduct corporate and land searches, I believe that Mr Ryan's affidavit is wrong in several important respects and that exhibit **GPR-5** provides a misleading picture of the financial position of the respondent. In particular in paragraph 19 Mr Ryan deposes, in reliance on **GPR-5** and **GPR-6**, that if an injunction was granted *the Respondent (Kingswood)* will be unable to meet its current liabilities. However, **GPR-5** purports to show the position of "the club" and is not confined to the liabilities of Kingswood but also appears to include those of Peninsula. It is also apparent from the evidence during the trial, which I refer to below, that the significant debts shown in **GPR-5** belong to Peninsula 20 and not to Kingswood.

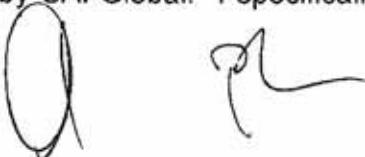
11. I am also concerned that the directors are using the deposit proceeds to pay capital works for Peninsula (such as the dam works referred to in paragraph 13 of Ryan's affidavit) and debts which are not yet due and payable. With respect to the latter I refer to the affidavit of **Anthony Maxwell Rawlings** sworn 12 November 2014 in support of this application.

30 **Peninsula and Kingswood separate companies**

12. On 29 October 2014 I obtained company searches for Peninsula and Kingswood. As part of these searches, I also undertook a relationship search of both Peninsula and Kingswood to ascertain if these companies are associated. The searches show Peninsula and Kingswood are separate companies and are not legally related.

40 The SAI Global search results for Peninsula and Kingswood including the relationship search reports are page 17 of exhibit **PHL-22**.

13. To confirm the search results, on 29 October 2014, I called ASIC to ascertain if their records matched the results given by SAI Global. I specifically enquired

A handwritten signature consisting of a large, stylized letter 'A' and a smaller, more fluid signature to its right, likely representing initials.

whether Kingswood was Peninsula's holding or parent company. ASIC informed me that their information did not show Kingswood was Peninsula's holding/parent company or vice versa and that the SAI Global information I had obtained reflected the information they have on their records.

10 14. Also on 29 October 2014, my office undertook a Landata and title search on a number of properties relating to Peninsula's golf course in Frankston. The information we obtained indicates there are approximately 10 land lots that make up the Peninsula golf course and that Peninsula is the sole proprietor of the 10 land lots.

The Landata and title searches of 29 October 2014 on Peninsula's landholding are page 43 of exhibit PHL-22.

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Directors of Peninsula and Kingswood

15. A search undertaken of the directors of Kingswood shortly before the merger vote by Kingswood members on 17 September 2013 reveals that the then directors were Peter Sweeney, Ian Fleming, Annette Hawkins, Brian Smith, Michael Seers, Kenneth Brown, Martin O'Meara, Philip John Hedley, and Frank Mileo. Justice Robson found these directors had breached their fiduciary duty in connection with the steps taken to merge the Peninsula and Kingswood golf clubs: *Re Peninsula Kingswood Country Golf Club* [2014] VSC 437 [54, 75 and 87]. Those directors appear on pages 21-23 of exhibit PHL-22.

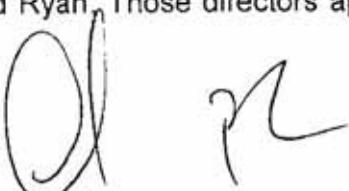
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16. The present directors of Kingswood comprise five of the six pre-merger directors and six directors who joined Kingswood for \$2 following the admission of more than 1000 members of Peninsula which Justice Robson found to be unconstitutional: *Re Peninsula Kingswood Country Golf Club* [2014] VSC 437 [68, 76, 94 and 95]. Those directors appear on pages 21-23 of exhibit PHL-22.

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17. Three of the directors of Kingswood are also directors of Peninsula. They are Peter Sweeney, Robert Dowling and Gerald Ryan. Those directors appear on pages 17-18 of exhibit PHL-22.

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(iv) \$403,000 of non-current liability for "Certificate of Deposit No 1" – this was the "loan" given by members in or around December 2007 to Kingswood.

24. Page 60 of exhibit **PHL-22** also shows Kingswood's had cash or cash equivalent of \$1.09 million (made up of cash in bank of \$767,002 and investments of \$325,331). In addition to this, Kingswood, as shown on page 63, was receiving interest income of approximately \$40,000 a year, it appears, from its cash investments.

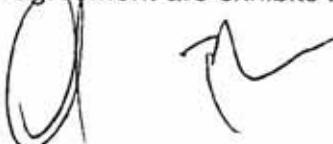
25. From financial information presented in Kingswood's 2013 financial reports, the only genuine long term liability it had appears to be the \$403,000 it owed its members.

26. In contrast to Kingswood, as shown at page 50 of exhibit **GPR-1** of Mr Ryan's 16 September 2014 affidavit - the merger booklet – Peninsula had total liabilities in 2012 of \$5.7 million in 2012 and \$5.2 million in 2013. This document appears at p 71 of exhibit **PHL-22**.

27. Having regard to these matters there is no evidence that the \$2,287,000 ANZ Bank Loan referred to in **GPR-5** was a debt of Kingswood. The staff provision of \$831,690 appears to include Peninsula staff entitlements and the Dam Construction, Tract Consultants and OCCM Consultants all relate to capital works to be carried out on the Peninsula golf course.

Provision for Member Debentures in **GPR-5**

28. Exhibit **GPR- 5** represented to the court that members' debentures were payable over the next three years and the amount of \$1,221,663 was included to represent that Kingswood would reach a negative cash position if the injunction was granted. As mentioned in paragraph 24, this amount is inconsistent with the \$403,000 shown in Kingswood's 2013 financial reports. In addition, am informed by Anthony Rawlings, and believe, that Kingswood recently, unsolicited by him, repaid the debenture loan he provided to Kingswood in 2007. I am aware that the repayment confirmation and debenture agreement are exhibits **AMR-1** and

A photograph of two handwritten signatures. The signature on the left is a stylized 'J' and the signature on the right is a more fluid, cursive 'J'.

AMR-2 to the affidavit of **Anthony Maxwell Rawlings** of 12 November 2013 sworn in relation to this summons.

10 **Provision for Stamp Duty in GPR-5**

29. The provision made for stamp duty of \$2,287,000 in **GPR-5** will not arise if the appeal is successful and the merger is unwound. The potential liability is based on the potential that after the merger Kingswood would "control" Peninsula. This was explained in a letter sent by PricewaterhouseCoopers dated 12 November 2013 to the Victorian Commissioner of State Revenue that:

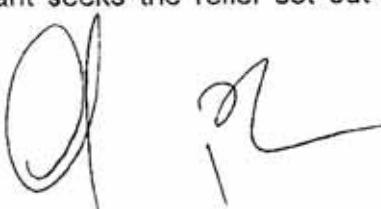
20 *For completeness, [Kingswood] will be acquire "control" (as defined in the Act) of Peninsula. We understand from our discussions that the control provisions are intended to apply in circumstances where the relevant person could exercise control for their own benefit. In light of the not-for-profit restrictions that prevent distributions to members of Peninsula on a winding up or otherwise), [Kingswood] would not be in a position to exercise such control for the benefit of any of the members of [Kingswood].*

30 30 A copy of that letter, which was exhibit **HWW-2** to the affidavit of Mr Wilson of 28 August 2014 appears at page 82 of exhibit **PHL-22**.

40 **November letter to Maddocks**

30. On 2 November 2014, my firm wrote to Kingswood's solicitors (Maddocks) setting out our concerns on a number of issues including the shareholding of Kingswood, ownership of the Peninsula golf course and Kingswood's debts and/or liabilities. Maddocks responded to our letter on 4 November 2014. The letter and Maddock's response appears at pages 89-94 of exhibit **PHL-22**.

31. Having regard to these matters the Appellant seeks the relief set out in the summons.



SWORN by PRANESH HOTESHWAR LAL
At Dingley this 12 November 2014



Before me:



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NICOLE MICHELLE TWEEDLY B.Com. LL.B.
117 Centre Dandenong Road
Dingley Village 3172
An Australian Legal Practitioner under the
Legal Profession Act 2004

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. 44 of 2015

B E T W E E N:

WILLIAM FALKINGHAM
Applicant

-and-

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PENINSULA KINGSWOOD COUNTRY GOLF CLUB LIMITED
(ACN 004 208 076)
Respondent

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EXHIBIT COVERSHEET

This is Exhibit WPF-12 to the Affidavit of William Falkingham sworn 20 August 2014 referred to in **footnote 3** of the Applicant's summary of argument dated 17 April 2015.

This Exhibit is exactly the same as Exhibit PJS-28 to the Affidavit of Peter John Sweeney sworn 25 August 2014.

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Filed on behalf of the Applicant
Prepared by:
Lyttletons Lawyers
2/128 Centre Dandenong Road
Dingley VIC 3172

Telephone: 8555 3895

Fax: 8555 3865

Ref: Pranesh Lal

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Maddocks

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
 COMMERCIAL AND EQUITY DIVISION
 COMMERCIAL COURT

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IN THE MATTER OF

No. S CI 2014 04329

PENINSULA KINGSWOOD COUNTRY GOLF CLUB LTD (ACN 004 208 075) (formerly
 known as KINGSWOOD GOLF CLUB LIMITED)

BETWEEN:

WILLIAM FALKINGHAM

and

Plaintiff

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

Defendant

AFFIDAVIT OF PETER JOHN SWEENEY

Date of document: 25 August 2014
 Filed on behalf of: The Defendant

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: 6175682
 Attention: Gina Wilson

E-mail Address: gina.wilson@maddocks.com.au

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This is the exhibit marked "PJS-28" now produced and shown to Peter John Sweeney at the
 time of swearing his affidavit on 25 August 2014.

Before me:

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Signature of person taking affidavit

GINA LOUISE WILSON
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004.

Exhibit PJS-28
 Original information pack

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[6175682: 13442459_1]

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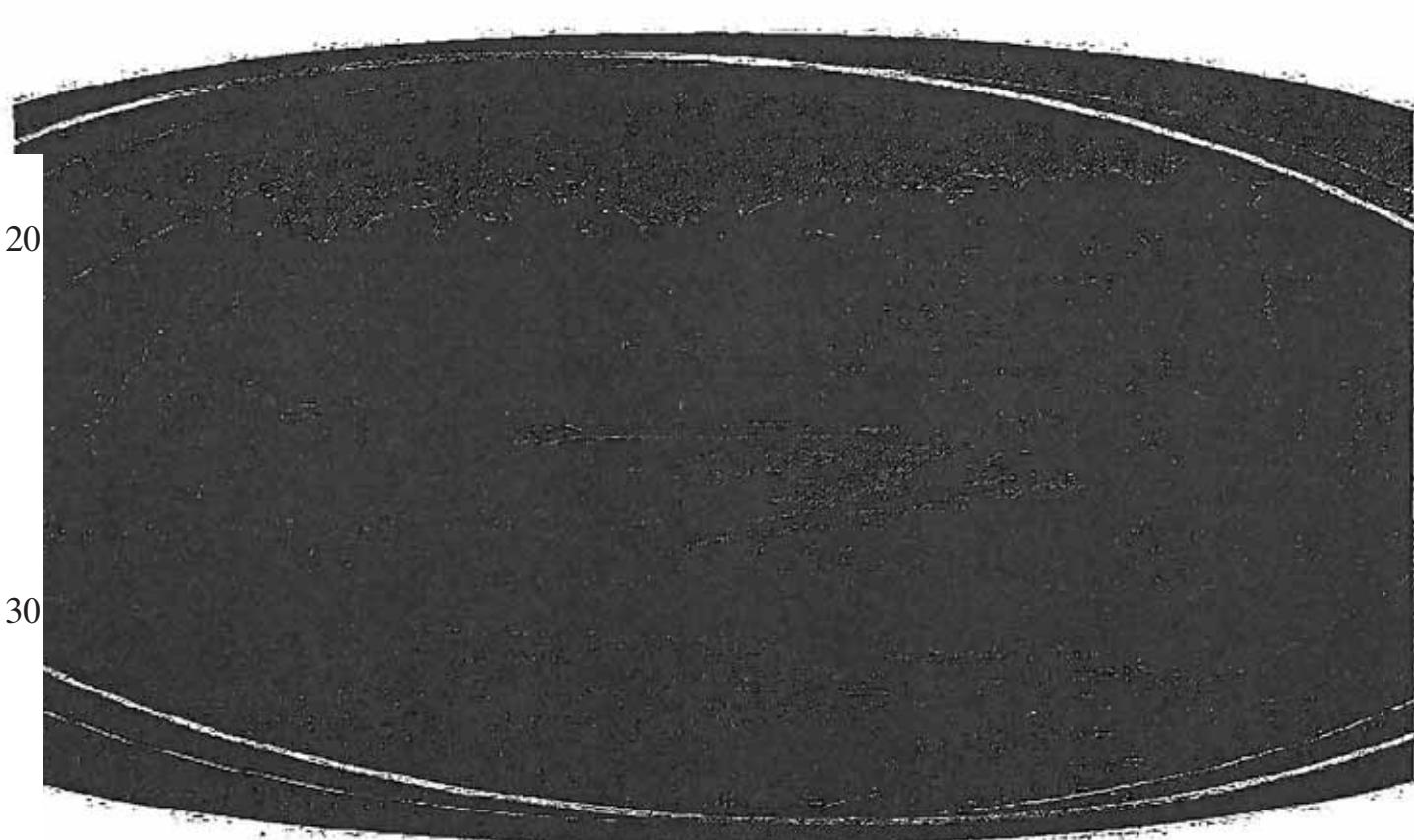


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KINGSWOOD
GOLF CLUB



THE PENINSULA
COUNTRY GOLF CLUB

~ SECURING OUR FUTURE ~



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PROPOSED MERGER OF
KINGSWOOD GOLF CLUB
AND
PENINSULA COUNTRY GOLF CLUB

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- MEMBERS' INFORMATION AND VOTING PACK -

AUGUST 2013

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