SUPREME COURT OF QUEENSLAND

CITATION:	*In the matter of CMI Limited* [2011] QSC 346
PARTIES:	**IN THE MATTER OF CMI LIMITED** **ACN 050 542 553** **TROJAN EQUITY LIMITED** **ACN 113 436 141** (Applicant) v **CMI LIMITED** **ACN 050 542 553** (First Respondent) **THE PERSONAL REPRESENTATIVES OF RAYMOND DAVID CATELAN (DECEASED)** (Second Respondent) **COLIN GREGORY RYAN** (Third Respondent) **DANNY HERCEG** (Fourth Respondent) **RICHARD DENIS CATELAN** (Fifth Respondent) **RP PROSPECTS PTY LTD as trustee for THE M & L TRUST** (Sixth Respondent) **RD CATELAN INVESTMENTS PTY LTD as trustee for RDC TRUST** (Seventh Respondent) **ASSETYLENE PTY LTD as trustee for RICHARD CATELAN FAMILY TRUST** (Eighth Respondent) **TINKERBELL ENTERPRISES PTY LTD** **as trustee for THE LEANNE CATELAN TRUST** (Ninth Respondent) **L J CATELAN SUPERANNUATION FUND PTY LTD as trustee for THE LEANNE CATELAN SUPERANNUATION FUND** (Tenth Respondent) **M L CATELAN SUPERANNUATION FUND PTY LTD as trustee for THE MICHELLE CATELAN SUPERANNUATION FUND** (Eleventh Respondent)

FILE NO/S:	BS 6828 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	23 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2011
JUDGE:	McMurdo J
ORDER:	**1. The application for an interlocutory injunction will be dismissed.** **2. The interlocutory application filed on 17 October 2011 will otherwise be adjourned to a date to be fixed.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – PROCEDURE – OTHER PROCEDURAL MATTERS – where the applicant is a minority shareholder in the company – where the applicant has instituted proceedings seeking final relief under sections 232, 233 and 461 of the *Corporations Act 2001* (Cth) – where the applicant seeks an injunction restraining the company from defending the proceedings – whether the company's case is being conducted on the instructions of the third respondent but without its authority – whether the company's active participation in the proceedings is necessary or expedient in the interest of the company as a whole – whether an injunction should be granted *Corporations Act 2001* (Cth), s 195, s 232, s 233, s 461 *Gusdote Pty Ltd v Ashley* (2011) 277 ALR 579, cited *Hawksford v Hawksford* [2005] NSWSC 463, cited *Nece Pty Ltd v Ritek Incorporation* (1997) 24 ACSR 38, applied *Pickering v Stephenson* (1872) LR 14 Eq 322, distinguished *Power v Ekstein* (2010) 77 ACSR 302, applied *Re A Company (No 004502 of 1988) Ex parte Johnson* [1992] BCLC 701, distinguished *Re A Company (No 1126 of 1992)* [1994] 2 BCLC 146, applied *Re D G Brims & Sons Pty Ltd* (1995) 16 ACSR 559, cited
COUNSEL:	JC Sheahan SC with SR Cooper for the applicant B O'Donnell QC with SB Hooper for the first respondent DG Clothier for the third and fourth respondents

SOLICITORS: Russells for the applicant
Allens Arthur Robinson for the first respondent
Minter Ellison for the third and fourth respondents

[1] The applicant ('Trojan') is a minority shareholder in the first respondent, which I will call the Company. Trojan seeks relief under sections 232, 233 and 461 of the *Corporations Act 2001* (Cth) on the grounds that the board of the Company has conducted its affairs in a manner which is contrary to the interests of the members as a whole and which is oppressive, unfairly prejudicial and unfairly discriminatory to its members. Trojan also alleges unlawful conduct in the buying and selling of shares in the Company, against a number of the respondents. It seeks, among other final relief, orders that the Company be wound up, that the Company purchase Trojan's shares or that the Company's capital be reduced by the number of those shares. It also seeks a declaration as to the proper construction of the Company's constitution in certain respects.

[2] Until his death on 24 July 2011, Mr Raymond Catelan was the managing director of the Company and the sole director and shareholder of the companies which are the sixth and seventh respondents. His place as director and shareholder of the sixth and seventh respondents has been taken by one of his daughters, Leanne Catelan, and on 30 August 2011, she was appointed to the board of the Company.

[3] The third respondent, Mr Ryan, and the fourth respondent, Mr Herceg, are the other directors of the Company. As I will discuss, on or about 30 August 2011, Mr Ryan became the executive chairman and managing director of the Company.

[4] The fifth respondent, Richard Catelan, is the nephew of the late Raymond Catelan and is the sole director and shareholder of the eighth respondent. Until 30 August 2011, he was a director of the Company. The ninth and tenth respondents are companies of which the sole director and shareholder is Leanne Catelan and which have held shares in the Company. The eleventh respondent is controlled by another daughter of Raymond Catelan, Michelle Catelan, and it held shares in the Company at a relevant time.

[5] The trial of these proceedings is to commence on 19 March 2012. The present application is made by Trojan, which seeks an injunction restraining the Company from defending the proceedings, save that it should discharge its duty of disclosure. Trojan does not pursue what had been its alternative application, which was to strike out the Company's Defence.

[6] There are two arguments for the injunction which is sought. The first is that the board of the Company has left it to Mr Ryan to instruct the Company's solicitors, but Mr Ryan has not been duly authorised to do so, so that the Company's case is being conducted without instructions. The second is that the Company's active participation in the proceedings is not necessary or expedient in the interests of the Company as a whole, but instead is for the improper purpose of assisting other respondents, particularly the directors and, in the case of Leanne Catelan, the

companies which she controls. Each of these arguments is resisted by the Company through its counsel, and by counsel appearing for Mr Ryan and Mr Herceg.

The lack of authority ground

[7] The question is whether Mr Ryan has actual rather than ostensible authority.[1] The facts relevant to this question are neither extensive nor apparently in dispute. What is controversial is their legal effect.

[8] By cl 19.1 of the Company's constitution, the management and control of the business and affairs of the Company are vested in the board, which may exercise all powers and do all things as are within the power of the Company and which do not have to be exercised or done by the Company in general meeting. By cl 18.7, the board may delegate any of its powers to committees consisting of one or more directors or other persons as the board thinks fit. But it is not suggested that this power was exercised in this case.

[9] Clause 17.1 empowers the board to appoint a managing director. It provides:

> "The Board may from time to time appoint one of the Board to be Managing Director (who may bear that title or any other title determined by the Board) for a period ending on the happening of events (if any) stipulated by the Board, at a remuneration which may be by way of salary or commission on or participation in profits or by any or all of these methods (but not by a commission on or percentage of operating revenue) and otherwise on terms as determined by the Board from time to time. The Board may confer upon a Managing Director any of the powers exercisable under these rules by the Board as it thinks fit and upon any conditions it thinks expedient but the conferring of powers by the Board upon a Managing Director does not exclude the exercise of those powers by the Board."

[10] At a meeting of directors of the Company held on 30 August 2011, there were two relevant resolutions. The minutes record them as follows:

"Litigation – Trojan equities	The Board discussed the litigation with Trojan Equities Ltd. The Board have met with Clayton Utz and Allens Arthur Robertson (sic) to discuss representation. The revised advice from Clayton Utz is there is a conflict between the Company and the Directors and separate representations should be sought. The Board RESOLVED to appoint Allens Arthur Robertson (sic) to represent the

[1] *Hawksford v Hawksford* [2005] NSWSC 463 at [56].

Company in the proceedings.

…

Appointment of Executive Chairman:	The Board discussed the existing Company executive structure. The Board RESOLVED to appoint Colin Ryan as executive Chairman of the Company for a minimum of 3 months. The salary package for this executive position is $250,000 + superannuation with no leave entitlements. The Secretary was asked to inform the ASX. D Herceg is to draft a letter outlining the executive Chairman appointment."

[11] In that first resolution, the board resolved to appoint Allens Arthur Robinson to represent the Company in these proceedings. But that was not a resolution for the conduct of the Company's defence in any particular way. There was no decision thereby made as to whether the Company would resist all or even part of Trojan's case. Decisions of that kind were left, either for further consideration by the board, or for a decision by someone with delegated authority from the board.

[12] By the second of those resolutions, Mr Ryan was appointed as executive chairman. That title is not specifically recognised by the Company's constitution. Clause 18.5 provides that the board may elect a chairman and a deputy chairman of its meetings. The appointment of Mr Ryan as a chairman of the board or, if it be different, executive chairman, conferred no authority upon him to act on behalf of the Company. In particular, this resolution made no reference to the present proceedings and did not delegate to Mr Ryan the board's powers to determine what instructions should be given for the Company's response to them.

[13] That second resolution referred to a letter to be drafted by Mr Herceg. A letter was drafted and signed, apparently by Mr Herceg as a director of the Company and countersigned by Mr Ryan, to whom the letter was addressed. Mr Ryan says that he was appointed to the position of executive chairman and managing director of the Company on 30 August 2011. The letter is undated but I infer that it was signed by Mr Herceg and Mr Ryan on or about that date.

[14] The letter commenced as follows:

> "It is with pleasure that I write to confirm our offer of the position of Executive Chairman with CMI Limited ("the Company"), effective 30 August 2011. In confirmation of our discussions, set out below are the salient points related to your appointment.
>
> Position

Executive Chairman reporting to the full board.

The duties ("Duties") of the Executive Chairman include those of managing director. These duties include the following:

- Developing and, subject to adoption of the plan by the Board, implementing the company's strategic plan in the most effective and efficient manner;

- Responsibility and accountability for the overall performance of the company and for the day-to-day running and management of the Company's business, under delegated authority from the Board.

Authorities and Undertakings

Subject to any amendments approved by the Board from time to time, you will have the following delegated authorities, limited as set out below ("Authorities"):

- Operating Expenditure Authority - you may formally approve any operating expenditure, providing it is within the general policy guidelines set down by the Board and where the total amount of the item concerned does not exceed $500,000. You may also formally approve any expenditure within budget, or where it does not cause a variation of greater than 5% from budget;

- Capital Expenditure Authority (including Property Acquisitions) - Executive Chairman may formally approve any capital expenditure where the total amount of the item concerned does not exceed $150,000;

- Authority to Enter into Contracts - Executive Chairman may formally approve and appoint External Service Providers to contracts up to a total, or annual value of $500,000, providing the appointee is not a 'related party' of the Chairman (as defined in the Corporations Act);

- Authority to provide instructions - The Executive Chairman has authority to provide instructions to External Service Providers;

- Authority to appoint staff - The Executive Chairman is empowered to engage any staff or contractors, full time or part time, casual or for a term, in order to carry out the responsibilities set out in this document. The terms and conditions of such engagements are to be in accordance with the general policy guidelines set down by the board. The Board is to be consulted before the appointment of a person to a General Manager position.

…"

[15] The balance of the letter contained terms about things such as Mr Ryan's salary and leave entitlements. It is unnecessary to refer to any other part of the letter, except that it recorded that the letter set out the whole of the agreement between the parties.

[16] The letter of appointment went further than the resolution of the board because it appointed Mr Ryan not only as executive chairman, but also as managing director. However, a subsequent circular resolution of directors has confirmed that appointment. It is dated 7 November 2011 and signed by all three directors in these terms:

> "The directors of the abovementioned company resolve the following:
>
> 1. For the avoidance of any doubt, the Board confirms the appointment of Colin Ryan as Executive Chairman and Managing Director of the company on 30 August 2011, on the terms of the letter attached to these minutes.
>
> 2. For the avoidance of any doubt, the Board confirms that pursuant to cl.17.1 of the Constitution the Board confers on Mr Ryan, as managing director, all powers of the Board necessary or incidental to exercising the delegated authorities set out in the attached letter and to discharge the duties set out in the attached letter."

[17] Trojan argues that the letter of appointment does not authorise Mr Ryan to give instructions for the Company in these proceedings. Of the delegated authorities set out in the letter (as extracted above), the potentially relevant one is the authority to "provide instructions to External Service Providers". The lawyers for the Company would seem to be within that description. But Trojan argues that this power (and the others delegated by the letter) must be understood in the context of the agreed duties of Mr Ryan. His duties are to implement an approved strategic plan for the Company and to manage the day-to-day running of the Company's business. I accept that he has no agreed duty to make decisions for the Company as to its response to these proceedings or to implement decisions in that respect as made by the board. The response to these proceedings is outside the day-to-day conduct of the Company's business. That is why a managing director usually has no implied authority to oppose a winding up application of any apparent substance, as Lehane J said in *Nece Pty Ltd v Ritek Incorporation*.[2]

[18] The resolution to appoint Mr Ryan contained no indication that he was to have responsibility for the conduct of these proceedings. At the same meeting, the board resolved to appoint Allens Arthur Robinson to represent the Company, rather than to delegate to Mr Ryan the authority to make that decision. The circular resolution takes the matter no further than the letter of appointment. It does confer "all powers of the board necessary or incidental to exercising the delegated authorities set out in

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2 (1997) 24 ACSR 38 at 43 applied in *Hawksford v Hawksford* [2005] NSWSC 463 at [69] and *Gusdote Pty Ltd v Ashley* (2011) 277 ALR 579 at 608 [141].

the attached letter and to discharge the duties set out in the attached letter". But that begs the question as to the scope of the delegated authority.

[19] In my view, the delegated authority to provide instructions to lawyers as External Service Providers does not extend to instructions for the conduct of the Company's defence to these proceedings. Rather, it is limited to circumstances, in the discharge of his duties, where Mr Ryan has authority to decide the content of those instructions. He has power to instruct lawyers for the purposes of the usual conduct of the Company's business and otherwise in order to discharge his express duties. But the present proceedings are outside that context.

[20] If it be the case, contrary to my view, that he is authorised to instruct the lawyers for the Company in this case, it is another thing to say that the board has delegated to him the power to decide in all respects what should be the Company's response to Trojan's claim. For example, could it be thought that by this general authority contained in the letter of appointment that he has been authorised to make admissions on behalf of the Company as to allegations of fact which his co-directors dispute? Or could he be thought to be authorised to agree to some particular relief, in the event that Trojan makes out a case for relief? At its highest, this authority to give instructions would permit him to instruct the lawyers for the Company in this case in a way which would give effect to a decision of the board on such questions.

[21] Mr Herceg's evidence is that he is informed by Mr Ryan and believes that Mr Ryan is providing instructions to Allens on behalf of the Company. He says that he, Mr Herceg, has not provided or been involved in providing instructions to Allens. But he does not say that he has been uninvolved in deciding what instructions should be given or, more generally, on what should be the Company's response to the claim.

[22] The generality of the language, by which Mr Ryan is said to have been relevantly authorised, is curious. And the directors did not use the opportunity of the circular resolution, which was made after the filing and on the eve of the hearing of this application, to clarify the extent of Mr Ryan's authority. One explanation may be that Mr Herceg and Ms Catelan are concerned about the possible impact of s 195 of the *Corporations Act*. Each could be thought to have a material personal interest in the matter of the Company's response to this case. On one view, they appear to have considered that they should disassociate themselves from any decision about this litigation by leaving it all to Mr Ryan. But they have not resolved in terms of delegating that duty and its associated authority to him, perhaps because it was thought that a specific delegation of that kind would be a decision which would engage s 195. I have the impression that the other directors believe that by appointing Mr Ryan as managing director, upon the premise that he would be given thereby the necessary authority to decide what instructions should be given for the Company, a potential problem under s 195 could be avoided.

[23] Whatever has been the reason for the absence of a specific resolution to confer the necessary authority upon Mr Ryan, the present position is, in my view, that he lacks that authority. It remains the board's duty to decide upon the Company's responses

to the allegations in Trojan's case and more generally to its claim. And it remains for the board to delegate an authority to communicate the Company's instructions to its lawyers in these proceedings, because the authority to instruct lawyers as External Service Providers does not extend to the context of these proceedings. If a majority of the board is precluded from deciding those matters, because of s 195 or for some other reason, it does not follow that Mr Ryan should have the authority by necessary implication.

[24] Accordingly, Trojan has established that the Company's case is being conducted on the instructions of Mr Ryan, but without its authority. But that defect may be curable and therefore at present this point, of itself, does not warrant the injunction which Trojan seeks.

Trojan's second ground

[25] Trojan argues that this dispute is between certain shareholders and that therefore the Company's money should not be expended upon it. The argument cites what was said by Byrne J in *Re D G Brims & Sons Pty Ltd* as follows:

> "Many thousands of dollars of company funds have been spent on lawyers, accountants and valuers in defending these proceedings on behalf of the majority shareholders. This is unfair and infringes the basal principle that 'the powers, and the funds, of a company may be used only for the purposes of the company'. No doubt a small part of the expenditure was justifiable; for example, in discovery, and in resisting such orders as that the company purchase the shares or pay a dividend for 1991. Expenditure to protect its discrete interests or for other proper purposes of the company may be made from company resources. The essential dispute here, however, is between the shareholders; and company funds should not have been used to defend the majority shareholders."[3]

[26] The authorities were recently reviewed by Austin J in *Power v Ekstein*.[4] His Honour concluded that the preponderance of Australian authority accorded with the principles set out by Lindsay J in *Re A Company (No 1126 of 1992)* as follows:

> "… there is no rule that necessarily and in all cases…active participation and expenditure is improper.
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> … the test of whether the company's participation and expenditure is proper is whether it is necessary or expedient in the interest of the company as a whole…
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> … in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has

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3 (1995) 16 ACSR 559 at 591-592.
4 (2010) 77 ACSR 302.

> actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case."[5]

[27] At this point some circumstances should be noted. The first is that unlike many oppression proceedings, not all of the members of the company are on one side or the other of the record. The Company's issued capital consists of 33,752,634 ordinary shares which are held by 1,271 members together with 28,005,311 class A shares which are held by 1,119 members. More than 99 per cent of the ordinary members, holding nearly 46 per cent of the ordinary shares, are not parties. More than 99 per cent of the class A members, holding 80.5 per cent of the class A shares, are not parties. Accordingly, there are many shareholders who are at least potentially affected by the outcome of these proceedings, at least insofar as relief is claimed against the Company. This is not a case of the kind in *Pickering v Stephenson*, where Sir John Wickens V-C said:

> "It seems to me that where a *quasi* partnership of this sort is divided into a majority and a minority who differ on the question of internal administration, and litigation results from the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund…"[6]

Shareholders who are not parties have an interest in the outcome as shareholders, such that a proper participation in the proceedings by the Company would serve a legitimate purpose as distinct from merely assisting one side of the dispute against the other.

[28] Trojan argues that it can be appropriate for a company whose affairs are the subject of oppression proceedings to be heard on the appropriate form of relief, but not to participate in the preceding litigation by which an entitlement to relief is determined. In other words, it is suggested that the Company be permitted to participate only after the facts have been found. That approach has support in some of the authorities.[7] However, the proceedings involve allegations which it is in the Company's interest to contest. For example, there is an issue as to the proper construction of the constitution of the Company, specifically in its provision for dividends to be paid to class A shareholders. The Company has a clear interest in the outcome of that issue. There are other issues for which the Company, as a listed public company, has a proper interest in the findings to be made as well as in the ultimate relief, because of the potential for those findings to affect the market for its shares. For example, the Company has pleaded to allegations concerning its financial position at various times, the conduct of and results of voting at meetings of the Company, the use of company resources, the validity of decision-making by its directors and whether it has complied with requirements of the *Corporations Act*.

[29] Further, the distinction between factual findings, for which the Company is said by Trojan to have no interest, and the ultimate relief in the case is not so clear because

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5 [1994] 2 BCLC 146 at 155-156, set out in *Power v Ekstein* at 331 [114].

6 (1872) LR 14 Eq 322 at 340-341.

7 See eg *Re A Company (No 004502 of 1988) ex parte Johnson* [1992] BCLC 701 at 703, 706.

the exercise of the Court's discretion as to the appropriate relief could be affected, to the Company's disadvantage, by the particular findings which are made.

[30] In many respects then, it is necessary or expedient for the Company to participate in this litigation throughout its course, and for its funds to be expended in doing so. There is no basis for restraining the Company from participating in any respect.

[31] Trojan argues that the Company has pleaded to allegations which are relevant only to relief sought against other respondents. Trojan suggests two examples, the first being the response to Trojan's case by which it seeks damages and other relief from the directors in respect of the directors' abandonment of a share buy back proposal. The relevant allegations are pleaded in paragraphs 165 to 177 of the statement of claim. Trojan pleads that the decision of the directors to abandon the buy back was made in bad faith, for a collateral purpose and in contravention of their duties in s 181(1) of the *Corporations Act* (paragraph 174). The Company pleads a detailed case for what it says were the true reasons for the abandonment of the proposed buy back and denies the allegations of wrongdoing by the directors.[8] The plaintiff's allegations in this respect are relevant to relief sought against other respondents. But findings in terms of those allegations could affect the Company, because of the potential impact upon the confidence of investors in the governance of this listed company.

[32] In *Power v Ekstein*, Austin J restrained those in control of the relevant company from applying its funds to the defence of the proceedings but with certain important exceptions. One was "to the extent that the plaintiff in the proceedings seeks a compulsory purchase order against that company…".[9] In that respect, the company's participation was permitted throughout the litigation rather than only upon the final arguments for relief. Secondly, the company was permitted to defend the claim so far as they sought relief which challenged the validity of the company's actions. Austin J said:

> "[120] It also seems to me that a company has a legitimate interest in responding to a challenge to the validity of its decision-making, and hence the Companies should be permitted to respond to the plaintiff's allegations about failure to comply with constitutional provisions about rotation of directors leading to an absence of directors. That argument does not just affect the directors; it affects integrity of the company and the interests of its members as a whole, by challenging the validity of its corporation actions."[10]

[33] Similarly, Trojan complains of the Company's pleading to allegations that the directors misused company funds, as pleaded in paragraphs 158 to 162 of the statement of claim. Trojan alleges that this involved the giving of a financial benefit to related parties in non-compliance with s 208 of the *Corporations Act*.

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8 Paragraphs 97 to 101 of its Defence.
9 (2010) 77 ACSR 302 at 333 [121].
10 Ibid at 333.

The Company has a proper interest in defeating findings to that effect, if it believes that the allegations are untrue.

[34] It is further submitted that the participation by the Company is unnecessary, at least prior to the Court's consideration of the appropriate relief, because the same defences are put forward by other respondents. There are two difficulties with that submission in the present case. The first is that although the Company's pleaded case might be substantially the same as that of some other respondents, in respect of some issues, the Company's interests are different from those respondents. The outcome of litigation such as this is affected not only by the terms of the pleadings, but by the many steps taken and decisions made in the preparation for and conduct of the trial. Because the respondents have different interests, it is not inevitable that the conduct of their respective cases will be identical throughout this litigation. Secondly, there are some respects in which the Company's pleaded case is more extensive than that of other respondents and some ten examples were given in the supplementary written submissions for the Company.

[35] In my conclusion, Trojan has failed to establish that the Company's participation would involve the improper use of the Company's funds. Trojan has failed to demonstrate that it is neither necessary nor expedient for the Company in its own interests to contest its claim.

[36] However, there remains a real concern that the content of the Company's response to the proceedings is being affected by the interests of or associated with some or all of its directors. As I have discussed, it may be the case that whilst the Company's instructions to its lawyers are being conveyed by Mr Ryan, the content of those instructions has been contributed to by other directors. So whilst it would not be improper for the Company's funds to be spent upon an active response to Trojan's claim, there may be an impropriety in the way in which that response is formulated. Moreover, Mr Ryan is not a disinterested party, because he is one of several respondents against whom Trojan claims compensation for the board's dividend policy and the non-payment of dividends from 30 June 2010.

[37] The question then is whether this risk, that the content of the Company's case will be affected by the distinct interest of its directors or others associated with them, warrants the injunction which Trojan seeks. That injunction would protect the Company against the misuse of its funds by advancing what might ultimately appear to be an unmeritorious case which it has pleaded. Against that, of course, is the possibility that the Company would be unfairly prejudiced by being precluded from duly participating in litigation in which it has a proper interest. It is no light thing to prevent a defendant from contesting a plaintiff's claim where it has a proper interest in doing so.

[38] If the outcome is that the Company's defence in these proceedings is proved to be unmeritorious and the consequence of the conduct of one or more of the directors in preferring their own interests, the Company would be entitled to be compensated by that director or directors for its costs. But Trojan argues that there is a risk that those directors would be unable to pay that compensation. There is little evidence

going to that question, save that the respondents to this application claimed that the directors would have the benefit of an insurance policy in that circumstance.

[39] Trojan submits that the insurance cover may be insufficient, when it is considered that all class A shareholders might make claims against them, of the kind which Trojan makes, if Trojan's case succeeds. It further submits that a particular endorsement to the policy would exclude the cover in the circumstances of this case. In the context of the present application, it is not possible to determine those questions. What can be said in Trojan's favour is that it is far from certain that the directors would be able to compensate the Company for the relevant cost from the proceeds of this insurance. Of course, that is only part of the picture because it would also be necessary to examine the personal circumstances of the directors to assess the prospect that the Company could recover from them. Overall, Trojan has demonstrated a substantial risk that the Company would be unable to recover its costs in the defence of the claim from the director or directors who were responsible for it. I note that Dalton J, in ordering that the Company be restrained from paying the directors' costs of their defences to the claim,[11] observed that it would have been a simple matter for the directors to have led evidence as to their financial worth in response to that application.

[40] Ultimately, I am not persuaded to grant the injunction which is sought. The Company has a genuine interest of its own in defending these proceedings and it should be permitted to do so. There is a real risk that its funds will be misspent. To an extent, that risk is diminished by the fact that the Company is represented by separate solicitors and counsel. But as matters can presently be assessed, Trojan's case may be quite unmeritorious and it may be to the Company's substantial detriment if it is precluded from participating.

[41] I return to the first ground for the application. I have found the Mr Ryan does not have the Company's authority to instruct its lawyers in this case. Therefore I expect that the lawyers will not continue to act if this position is not remedied. They must satisfy themselves that they are in receipt of instructions from a person duly authorised to provide them, consistently with this judgment. This is a concern not only in the interests of the Company. It is also the Court's concern, because it involves its process, that a litigant's case be conducted according to the client's instructions. To that end, there should be evidence provided to the Court as to the remedy of the present want of authority. In particular, there should be an affidavit from one of the Company's solicitors, explaining what has been done to rectify the position. I will hear the parties as to the precise form of order in that respect. If the position is not remedied, consideration will then have to be given to the striking out of the Defence, because it follows from this judgment that it was pleaded on Mr Ryan's instructions which he was not authorised to provide. With that possibility in mind, the application for the injunction will be dismissed but the interlocutory application filed on 17 October 2011 will be adjourned to a date to be fixed.

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[11] By an order made on 18 August 2011.