IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2193
[2016] NZHC 3185

UNDER	the Companies Act 1993
IN THE MATTER	of MPRE Limited
BETWEEN	MIKE PERO MORTGAGES LIMITED Plaintiff
AND	MIKE PERO First Defendant
	MIKE PERO MARKETING LIMITED Second Defendant
	MPRE LIMITED Third Defendant
	MP REAL ESTATE LIMITED Fourth Defendant

Hearing:	11,12,13,14,15,18,19 and 20 April 2016 (last submission received 9 June 2016)
Counsel:	G P Blanchard and J P Nolen for plaintiff D Bigio and A Malone for first and second defendants M Heard for third and fourth defendants (abiding decision of the Court)
Judgment:	21 December 2016

INTERIM JUDGMENT OF KATZ J

This judgment was delivered by me on 21 December 2016 at 3:30pm pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Solicitors:	Lowndes, Auckland Duncan Cotterill, Auckland Lee Salmon Long, Auckland
Counsel:	G Blanchard, Barrister, Auckland D Bigio, Shortland Chambers, Auckland

Introduction

[1] MPRE Limited ("MPRE") and its wholly owned subsidiary MP Real Estate Limited ("MP Real Estate") operate a nationwide real estate agency network. I will refer to them together as "the MPRE Companies". The MPRE Companies were set up as a joint venture by Mike Pero Mortgages Limited ("MP Mortgages"), a company ultimately owned by the Liberty Financial Group ("Liberty"), and Mike Pero Marketing Limited ("MP Marketing"), a company owned by Mike Pero.

[2] MP Mortgages and MP Marketing each hold a 50 per cent shareholding in MPRE. On 3 February 2011 they entered into a shareholders' agreement regarding their new real estate business. It provided, amongst other things, that Mr Pero would be paid $200,000 per annum for his executive role within the MPRE Companies. Obviously, if the new business did well, the shareholders would also have the potential to receive significant additional financial benefits, for example by way of dividends or increased value of their shareholdings.

[3] All of the start-up capital used to establish the new real estate business came from MP Mortgages. MP Mortgages also owned all of the intellectual property needed to establish the business, as it had acquired the "Mike Pero" trade mark when it had purchased Mr Pero's mortgage broking business in 2004. MP Mortgages agreed to licence its intellectual property to MPRE for $1.00. In addition to funding the new joint venture and providing the intellectual property, MP Mortgages supplied its human resources.

[4] The shareholders' agreement and constitution provided for each shareholder to appoint one director to the board. A quorum of directors was agreed to be two, being one director appointed by each shareholder. For a ten month period in 2012 and 2013, however, there was no MP Mortgages' appointee to the boards of the MPRE Companies. This was due to a dispute between Liberty and NZ Finance, who were the then shareholders of MP Mortgages. The dispute was later resolved, with Liberty acquiring NZ Finance's interest.

[5] Meanwhile, however, Mr Pero was the sole director of the MPRE Companies. As sole director, he purported to pass five directors' resolutions, all of

which involved some element of self interest. Even after MP Mortgages had appointed a director, Mr Pero purported to unilaterally pass a further two directors' resolutions, both of which also involved an element of self interest. In particular, through the resolutions Mr Pero dramatically increased his own remuneration package, provided himself with a car allowance and also authorised an additional "brand ambassador" payment to himself of $125,000 per annum. While Mr Pero was the sole director of the MPRE Companies no board resolutions were passed that did not involve an element of self interest.

[6] In these proceedings MP Mortgages seeks to have the seven resolutions ("Resolutions") declared unlawful and to have all the sums that have been paid to Mr Pero and MP Marketing, in excess of the amount agreed to in the shareholders' agreement, refunded to MPRE. It says that Mr Pero and MP Marketing have breached the shareholders' agreement, the MPRE constitution and the Companies Act 1993 ("Act"). MP Mortgages seeks relief as an unfairly prejudiced shareholder under s 174 of the Act.

Further factual background

[7] Many of the core facts are not in dispute and are apparent from the contemporaneous documents.

[8] Only the plaintiff called factual evidence at trial. This included evidence from Sherman Ma, a director of MP Mortgages and an alternate director of the MPRE Companies, and Mark Collins, the Chief Executive of MP Mortgages. Although the defendants rigorously tested the evidence of the plaintiff's various witnesses through cross-examination, they elected to call no factual evidence themselves. Of note, Mr Pero did not give evidence. Rather, the defendants' evidence was limited to expert evidence, on fairly narrow topics.

[9] Liberty first became a shareholder in MP Mortgages in 2006. Mr Ma (who is also a director of Liberty) and Mr Pero were co-directors of MP Mortgages from then until Mr Pero resigned as a director of MP Mortgages on 13 June 2014.

[10] In February 2011 Mr Ma and Mr Pero agreed (through their respective corporate vehicles MP Mortgages and MP Marketing) to embark on a real estate business together and established the MPRE Companies for this purpose. MPRE and MP Real Estate adopted their constitutions on 4 April 2011.

[11] Mr Ma's evidence was that he considered Mr Pero to have a lot of talent and to be a shrewd marketer. That was why he was keen to go into a new business with him, one in which Mr Pero would have the role of executive director. As previously noted, all of the start-up capital used to establish the business came from MP Mortgages. MP Mortgages also owned all of the intellectual property, but agreed to licence it to MPRE and provide human resources. Mr Pero acquired his 50 per cent shareholding in MPRE for only nominal consideration as it was recognised that he would add value to the business in other ways.

[12] MPRE is a holding company. It is the 100 per cent shareholder of MP Real Estate, which is the company that actually operates the business. At all times MPRE and MP Real Estate have had the same directors. In practice, board meetings of the two MPRE companies have been held at the same time.

[13] A shareholders' agreement was entered into on 3 February 2011. Amongst other things, it recorded that Mr Pero would be paid $200,000 per annum for his role in the business. On the same date, MPRE and MP Marketing signed a contract for services which mirrored this agreement. In particular, MP Marketing agreed to provide Mr Pero's services as managing director to MPRE for $200,000 plus GST per annum.

[14] Mr Pero was also MP Marketing's appointment as a director to the boards of the MPRE Companies until he resigned from this role on 24 August 2015, at which time he appointed a replacement director. After he resigned as a director Mr Pero continued as the chief executive officer of the real estate business.

[15] The shareholders' agreement and MPRE's constitution included various provisions relating to decision making by the board of MPRE. The combined effect of these provisions was that board resolutions could only be passed if they were

supported by both a director appointed by MP Mortgages and a director appointed by MP Marketing.

[16] Liberty and NZ Finance (at that time the two shareholders of MP Mortgages) could not agree on a director to replace their retiring appointee to the MP Mortgages' board. As a result the three then directors of MP Mortgages (Messrs Thornton, Ma and Pero) agreed, at a board meeting on 20 July 2012, that, until the dispute was resolved, Mr Pero would be the sole director of MPRE. The practical effect of this was that the board could not function, but it would still be possible for MPRE to function because Mr Pero could transact ordinary day to day business using his delegated authority as managing director under the delegated authorities manual.

[17] Mr Pero confirmed to Messrs Thorton and Ma at this time that there were no major commitments coming up, but if there were any significant issues he would contact them. Mr Pero said that he "would not do anything radical" and that he could not think of anything that would require significant commitment or expenditure. He confirmed that he would contact Messrs Thornton and Ma before making any significant decisions. As Mr Blanchard noted, this was important because, if there were no significant decisions that needed to be made, it would not matter that the board would be inquorate. If a significant decision did need to be made, however, MP Mortgages would need to make an appointment to the MPRE board.

[18] Mr Ma's evidence, which I accept, was that if MP Mortgages had known that Mr Pero wished to pass MPRE resolutions, a second director could have been appointed without undue delay. Indeed this is exactly what happened in May 2013 when Mr Pero first expressed concern that there was no MP Mortgages' appointed director on the MPRE board. Ms Gardiner responded on behalf of MP Mortgages the same day. MP Mortgages then immediately took steps to arrange for Ms Gardiner to be appointed to the MPRE board as a director.

[19] However, during the period that Mr Pero was the sole director of MPRE (and possibly even prior to that), without consulting either Mr Ma or Mr Thornton, Mr Pero arranged for his remuneration to be increased from $200,000 to (it appears) $300,000 and also gave himself a car allowance. From the management accounts it

appears that this initially occurred even prior to the passing of the Resolutions. MP Mortgages knew nothing of these changes at the time. Then, between 18 July 2012 and 27 May 2013, while Mr Pero was the sole director of the MPRE Companies, he signed the following five resolutions:

(a) **The Vistab resolution (17 October 2012)**: MPRE consented to MP Marketing having a financial interest in Vistab Limited ("Vistab") and for Mr Pero to become a director of Vistab.

(b) **The lease extension resolution (7 February 2013)**: MPRE agreed to extend the lease of premises in Christchurch owned by interests associated with Mr Pero, from an initial period of three years seven months to six years. The lease was due to expire on 21 January 2016 (some three years later). Mr Pero purported to extend the lease until 9 October 2018.

(c) **The car allowance resolution (18 February 2013)**: MPRE agreed to provide Mr Pero with a car allowance of $1,000 per month plus GST, plus fuel, tyres, insurance and registration.

(d) **The remuneration resolution (12 May 2013)**: MPRE agreed to a remuneration package for Mr Pero that included, amongst other things, an increase in base salary from $200,000 to $340,000, a bonus formula, a provision for payment of an amount on redundancy, a penalty interest provision for any late payments, repetition of the vehicle allowance and provision for annual holidays starting at four weeks' leave and increasing year by year.

(e) **The brand ambassador resolution (16 May 2013)**: MPRE agreed to pay Mr Pero the sum of $125,000 per annum plus GST for his role as 'brand ambassador' for the 'Mike Pero' brand, with effect from 1 April 2013. Such payment was to be over and above his remuneration as chief executive officer.

[20] On 27 May 2013 MP Mortgages appointed Peter Rollason to the boards of the MPRE Companies. Despite now having a second director, Mr Pero went on to unilaterally pass two further MPRE resolutions:

(a) **The shareholders' loans resolution (18 February 2014)**: MPRE agreed to pay the final amount of the shareholder loans to the value of $200,000, with $100,000 payable to MP Marketing and $100,000 to MP Mortgages. Such payments were recorded as being in full and final settlement of the shareholder loans. The two payments of $100,000 were subsequently made by MPRE.

(b) **The dividend resolution (8 April 2014)**: Mr Pero signed a director's resolution by which MPRE purported to agree to pay each of the shareholders a dividend of $100,000 each on that date.

[21] As Mr Blanchard noted, all of the Resolutions involved an element of self interest. Mr Pero did not pass any resolutions that did not involve self-interest. Nor did he communicate in any way with MP Mortgages about any of the Resolutions, or suggest that he was in difficulty because there were resolutions that could not be passed because the board was inquorate. I accept the plaintiff's submission that he had ample opportunity to do so, given that he was in regular communication with Mr Rollason and Mr Ma, and also met personally with Mr Rollason in Auckland in March 2013 and Mr Ma in Melbourne on 7 May 2013.

[22] On 9 June 2014, Mr Ma requested copies of all board minutes and related documents and any information relating to the business of MPRE which may be relevant to a decision or proposed decision of the board or the shareholders. He repeated this request the following day. MP Mortgages' solicitors then wrote letters on 12 and 17 June, and 3 July 2014 repeating this request. In around mid-July 2014 some (but not all) of the requested documents were provided. Those documents included the Resolutions. This was the first time that MP Mortgages became aware of the Resolutions. MP Mortgages demanded that the increased remuneration payments cease immediately, and that Mr Pero repay the overpayments that he had received. Mr Pero refused to do so. These proceedings ensued.

Were the Resolutions and the prior increases in Mr Pero's remuneration package lawful?

[23] In closing, Mr Bigio conceded on behalf of the defendants that "prima facie" the Resolutions do not comply with either the constitutions of the MPRE Companies or the shareholders' agreement. The use of the qualifier "prima facie" in this context is inapt, however. This is not a case where the resolutions "on their face" fail to comply with the relevant documents, but on closer analysis are indeed compliant. It is overwhelmingly clear that the Resolutions are in breach of the MPRE constitutions and the shareholders' agreement, for the reasons set out below.

[24] The relevant provisions of the shareholders' agreement are as follows:

(a) The directors must act in good faith and in the best interests of MPRE as a whole at all times (clause 1.9(a)).

(b) Mr Pero is to receive remuneration of $200,000 per annum as executive director of MPRE (clause 2.3).

(c) A quorum at directors' meetings, including adjourned meetings, is at least two, comprising one director appointed by MP Marketing and one appointed by MP Mortgages (clauses 3.3 and 3.5).

(d) Directors' resolutions must be decided by a simple majority who are present and not disqualified from voting on the resolution(s) for decision (clause 3.6).

(e) Unless otherwise agreed, directors must receive seven days' written notice of a meeting and of the subject of the resolution to be considered at any meeting (clauses 3.8 and 3.9).

(f) Clause 3.10 provides a dispute resolution mechanism to apply if there is a deadlock on a fundamental issue relating to MPRE.

(g) The rights and remedies provided under the shareholders' agreement are in addition to other rights and remedies given by law independently of the agreement (clause 12.5).

(h) The shareholders' agreement and the constitution of MPRE constitute the entire agreement of the parties (clause 12.14).

(i) To the extent of any inconsistencies between the shareholders' agreement and the constitution, then the shareholders' agreement prevails (clause 12.16).

[25] The relevant provisions of the MPRE constitution are as follows:

(a) The minimum number of directors is two, with each of MP Marketing and MP Mortgages being entitled to appoint one director (clauses 11 and 12). The maximum number of directors is three. A third director may only be appointed with the unanimous consent of the shareholders.

(b) The board's power to authorise remuneration and other benefits may be exercised only if approved by special resolution of shareholders or the prior written agreement of all entitled persons (clause 20).

(c) Notice of board meetings is required to be given to all directors, with such notice to include details of the date, time, place of meeting and matters to be discussed (clauses I to 4, first schedule).

(d) The quorum necessary for transaction of business at a meeting of the board is one director appointed by MP Mortgages and one director appointed by MP Marketing. No business may be transacted at a meeting of the board unless there is a quorum present (clause 8, first schedule).

(e) A written resolution signed or assented to by at least one director appointed by MP Mortgages and one director appointed by MP Marketing is as valid and effective as if it had been passed at a meeting of the board duly convened.

[26] The constitution further provides that, subject to the Act, if there is any inconsistency between the shareholders' agreement and the constitution the shareholders' agreement is to prevail (clause 1.8). MP Real Estate's constitution contains provisions that are the same or substantially the same.

[27] Additionally, Mr Pero was also governed by the general director's duties set out in the Act. In particular, s 131 provides that a director of a company must act in good faith and in what the director believes to be the best interests of the company. In addition, s 134 of the Act states that a director must not act in a manner that contravenes the Act or the constitution of the Company.

[28] All of the Resolutions were passed in breach of key provisions of the shareholders' agreement and the MPRE constitution. The board was inquorate when each Resolution was passed. In purporting to pass the Resolutions, Mr Pero failed to comply with various provisions in the shareholders' agreement and MPRE constitution that relate to board decision-making. Those provisions have the combined effect that board resolutions can only be passed if they are supported by both a director appointed by MP Mortgages and a director appointed by MP Marketing.

[29] Further, each of the three Resolutions relating to aspects of Mr Pero's remuneration ("Remuneration Resolutions") breached clause 20 of the MPRE constitution. Pursuant to that clause the board was required to obtain express shareholder approval before any resolution could be passed in relation to Mr Pero's remuneration or benefits. Mr Pero never sought such approval. Mr Pero's remuneration was therefore limited to the $200,000 per annum set out in clause 2.3 of the shareholders' agreement.

[30] The failure of Mr Pero to act in accordance with the constitution renders the Resolutions invalid. If a resolution has been invalidly passed, there are two circumstances in which it can nevertheless bind the company, despite that invalidity:

(a) through the operation of s 18 of the Act; or

(b) ratification by unanimous shareholder assent.[1]

[31] Section 18 does not apply in this case because Mr Pero, who was acquiring rights or interests from MPRE, knew or ought to have known that the Act and the constitution had not been complied with. Further, there is no suggestion of any ratification of the Resolutions by unanimous shareholder assent, as evidenced by these proceedings. It necessarily follows that the Resolutions are invalid and do not bind MPRE. This reflects the long standing principle that a decision by a board which lacks a quorum is of no effect and does not bind the company.[2]

[32] Mr Pero elected not to give evidence. The defence position, however, as advanced through cross-examination of the plaintiff's witnesses, and in submissions, was that at the time the first five resolutions were passed Mr Pero did not have the support of a fellow director. Further, at the time the final two resolutions were passed he had a fellow director but that person was uninvolved in the business. Mr Bigio did not suggest in closing, however, that either of these factors could convert what were otherwise legally invalid resolutions into legally valid ones. This issue is accordingly not relevant to the lawfulness of the Resolutions, but can only be potentially relevant to the issue of relief.

[33] In my view, however, the relevant facts (which I have summarised at [16] to [21] above) neither justify nor mitigate Mr Pero's high handed and unilateral actions in passing the Resolutions. Mr Pero was a director of MP Mortgages himself and was fully aware of the reasons why MP Mortgages had not appointed a director at the time. He did not suggest to MP Mortgages that a director should be appointed as there were outstanding matters that required a board resolution. Mr Pero's co-directors in MP Mortgages had assured him that they were accessible should he

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1 Refer s 177 of the Act, and also *Attorney-General v Ririnui* [2015] NZCA 160 at[52].

2 See for example *Re Greymouth Point Elizabeth Railway and Coal Ltd* [1904] 1 Ch 32 (Ch).

need their input on any matter in relation to the MPRE Companies. He did not avail himself of that opportunity. Nor, after Mr Rollason was appointed, did he notify him of the final two proposed resolutions, or invite him to a board meeting to consider those resolutions. Mr Rollason's lack of day to day involvement in the business, even if true, could not justify Mr Pero's flagrant breaches of MPRE's constitution.

[34] Mr Bigio submitted that the Remuneration Resolutions could, in effect, be "saved" by s 161 of the Act, which relevantly provides:

> **161 Remuneration and other benefits**
>
> (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise—
>
> (a) The payment of remuneration or the provision of other benefits by the company to a director for services as a director or in any other capacity.
>
> …
>
> if the board is satisfied to do so is fair to the company.
>
> (2) The board must ensure forthwith after authorising the making of the payment or the provision of the benefit … particulars of the payment or benefit are entered into the interests register.
>
> …
>
> (4) Directors who vote in favour of authorising a payment, benefit … under subsection (1) of this section must sign a certificate stating that, in their opinion, the making of the payment or the provision of the benefit … is fair to the company, and the grounds for that opinion.
>
> (5) Where a payment is made or other benefit provided... to which subsection (1) of this section applies and either –
>
> (a) The provisions of subsections (1) and (4) of this section have not been complied with; or
>
> (b) Reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4) of this section, —
>
> The director or former director to whom the payment is made or the benefit is provided... is personally liable to the company for the amount of the payment, or the monetary value of the benefit..., except to the extent to which he or she proves that the payment or benefit... was fair to the company at the time it was made, provided or given.
>
> …

[35] Accordingly, subject to the company's constitution, the board may authorise the payment of remuneration or other benefits to a director if it is satisfied that doing so is fair to the company. Particulars must be entered in the interests register. Directors voting in favour of such proposals must certify that, in their opinion, they are fair to the company, and give reasons for their opinion. Where the procedures are not followed or there is no reasonable ground for the opinion that the proposal is fair to the company, the director who received the remuneration or benefit is personally liable to the company except to the extent he or she proves that the remuneration or benefit was fair to the company at the time given. Mr Pero sought to prove that the increased remuneration he had conferred on himself was fair to MPRE and called expert evidence to that effect.

[36] Section 161 would apply if, for example, the MPRE board had passed resolutions that were legally valid in under the terms of the constitution, but did not comply with subsections (2) or (4) of s 161. Section 161 can have no application in the present circumstances, however. The board's power to authorise changes in remuneration under s 161(1) is "subject to any restrictions contained in the constitution of the company". As I have set out above, the Remuneration Resolutions were legally invalid because under the MPRE constitution the board was inquorate at the time the Resolutions were passed. The MPRE constitution further provided that the board's power to authorise remuneration and other benefits could be exercised only if approved by special resolution of shareholders or the prior written agreement of all entitled persons (clause 20). This provision was also not complied with. Section 161 is accordingly not engaged.

[37] It is not open to Mr Pero to purport to unilaterally increase his own remuneration, in egregious breach MPRE's constitution and the shareholders' agreement, and then seek to benefit from his own wrongful actions by arguing that he should be able to keep his ill-gotten gains under s 161 because his increased remuneration was "fair to the company." Pursuant to the MPRE constitution and the shareholders' agreement Mr Pero was simply not entitled to act in the way he did. He cannot now circumvent the requirements of those documents by relying on s 161. One way or another, MP Mortgages consent was required before Mr Pero's remuneration could be increased.

Have the defendants' conducted the affairs of MPRE in a way that has unfairly prejudiced MP Mortgages as shareholder?

[38] MP Mortgages claim that Mr Pero's conduct in purporting to pass the Resolutions, and also in causing the MPRE Companies to make overpayments to him and MP Marketing in respect of his remuneration and associated allowances, was oppressive, unfairly discriminatory, or unfairly prejudicial to it in terms of s 174 of the Act. That section relevantly provides:

> **Prejudiced shareholders**
>
> (1) A shareholder…of a company…who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the Court for an order under this section.
>
> (2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order-
>
> (a) Requiring the company or any other person to acquire the shareholder's shares; or
>
> (b) Requiring the company or any other person to pay compensation to a person; or
>
> (c) Regulating the future conduct of the company's affairs; or
>
> (d) Altering or adding to the company's constitution; or
>
> (e) Appointing a receiver of the company; or
>
> (f) Directing the rectification of the records of the company; or
>
> (g) Putting the company into liquidation; or
>
> (h) Setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

[39] In the leading case of *Thomas v H W Thomas Ltd*, Richardson J stated:[3]

> Taking the ordinary dictionary definition of the words from the Shorter Oxford English Dictionary: oppressive is "unjustly burdensome"; unfair is "not fair or equitable; unjust"; discriminate is "to make or constitute a

[3] *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686 (CA) at 693.

> difference in or between; to differentiate"; and prejudicial, "causing prejudice, detrimental, damaging (to rights, interests, etc)". I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under [s 174 of the Act]. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards them on the part of those in control of the company.

[40] This approach has been confirmed in a number of subsequent cases including *Latimer Holdings Ltd v SEA Holdings NZ Ltd*[4] and *Stilwell v Ice Group Ltd.*[5]

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4 *Latimer Holdings Ltd v SEA Holdings Ltd* [2005] 2 NZLR 328 (CA).

5 *Stilwell v Ice Group (NZ) Ltd* [2012] NZCA 136.

[41] Mr Pero's actions in passing the Resolutions, three of which had the combined effect of dramatically increasing his own remuneration package, involved, in my view, egregious and clearly deliberate breaches of provisions of the shareholders' agreement and MPRE's constitution. The effect of those documents, as Mr Pero must have known, was that board resolutions could only be passed if they were supported by both a director appointed by MP Mortgages and a director appointed by MP Marketing. Further, the Remuneration Resolutions breached the requirement that the board's power to authorise remuneration and other benefits could be exercised only if approved by special resolution of shareholders or the prior written agreement of all entitled persons.

[42] The shareholders' agreed in their shareholders' agreement that Mr Pero would receive remuneration of $200,000 per annum. This was repeated in his contract for services with MPRE. While there was clear potential for both parties to receive significant additional financial benefits in their shareholder capacities, any additional remuneration for Mr Pero in his chief executive officer capacity required the approval of his fellow shareholder.

[43] Mr Pero's actions also breached his obligation to act in good faith and in the best interests of MPRE in terms of clause 1.9(a) of the shareholders' agreement, as well as his director's duties to both MP Mortgages and MPRE under the Act.

[44] The MPRE Companies are entirely under the day-to-day management of Mr Pero. MP Mortgages' protections are limited to those matters provided for in the shareholders' agreement, the constitution and the Act. A critical requirement, flagrantly breached by Mr Pero, was that both shareholders' consent be obtained before his remuneration could be adjusted.

[45] Mr Pero had a personal financial interest in each of the Resolutions. As a consequence, he had a significant conflict of interest in relation to them. All of them were commercially significant, albeit some more so than others. Although a full accounting has yet to be provided by Mr Pero, MP Mortgages' estimates that he has arranged for MPRE to overpay him, in his capacity as an executive director of MPRE, by an amount in excess of $1.5 million.

[46] Taking all of the matters I have outlined into account, I am satisfied the affairs of MPRE have been operated in a way that is oppressive, unfairly discriminatory, and unfairly prejudicial to MP Mortgages in its capacity as shareholder of MPRE. I will consider the issue of the appropriate relief after briefly considering Mr Pero's counterclaim.

Is MP Mortgages required to pay $8,625 to Mr Pero in director's fees?

[47] Mr Pero counterclaims for director's fees of $8,625.00, as at June 2014. He pleads that this sum was outstanding at the time that he resigned as a director of Mortgages. Given Mr Pero's election not to give evidence there is very little information before me regarding this claim.

[48] The background appears to be that, following the sale of the MP Mortgages business in 2004, Mr Pero remained involved as a director of MP Mortgages. He held this role until 13 June 2014. In his brief of evidence Mr Ma commented on evidence that was contained in Mr Pero's proposed witness statement (which was not ultimately given in evidence). Mr Ma's evidence was that there was no agreement that Mr Pero (or any other director of MP Mortgages) would be paid director's fees. He said that he was not aware that Mr Pero was ever paid a director's fee. Mr Ma does not deny, however, having signed the 2007 annual report for MP Mortgages in which a director's fee to Mr Pero is recorded.

[49] Mr Pero bears the onus of proving that he is owed the sum of $8,625.00 in directors' fees as at June 2014, on the balance of probabilities. He has failed to discharge that onus. Whatever the position may have been in 2007, there is simply insufficient evidence to show that, when Mr Pero resigned seven years later, there was an outstanding balance of director's fees owing, in the sum of $8,625.00 (or any other amount).

What relief is appropriate?

[50] At the outset of trial, Mr Blanchard advised that the plaintiff had been unable to establish a specific figure in terms of the quantum of relief sought. This was due, he said, to the failure by the defendants to provide discovery of documentation showing the extent of the "overpayments" made by MPRE to the defendants. Mr Blanchard submitted that the defendants had also failed to comply with their obligations under the Act and the shareholders' agreement to provide this information, despite repeated requests to do so. As a result, the plaintiff's expert had been unable to calculate the precise quantum of any overpayment.

[51] The plaintiff had anticipated that the deficiency would be remedied in Mr Pero's brief of evidence, and that he would set out full details of the remuneration and allowances he had received pursuant to the Remuneration Resolutions. He failed to do so, however. Given the resulting lacuna in the evidence, Mr Blanchard submitted that a further hearing may be required to determine quantum, in the event that liability was established.

[52] Mr Bigio advised that the defendants had not interpreted the statement of claim as requiring that quantum be determined by the Court at this stage, and they had conducted discovery accordingly. Rather, the defendants' understanding was that the statement of claim, in effect, sought an account of profits in the event that liability was established. As a result, a further hearing on quantum would only be necessary of the plaintiffs were not satisfied with any account of profits provided by the defendants, following a liability finding. He summarised the defendants' position as follows:

> **MR BIGIO:** Yes, the statement of claim is expressed – the original statement of claim shows consequential orders for repayments which frankly, your Honour, I interpreted it as the equivalent of an "account of profits" so there's no need for a split trial. If your Honour finds in favour of the plaintiff then your Honour would make a consequential order directing the defendants to account for the monies that were paid under the Remuneration Resolutions that are in issue and only if we could not reach, or only if the plaintiff challenged that accounting would there be a need for further Court time. So it's not an issue of a split trial Ma'am. We're just saying we interpreted the statement of claim as requiring an account of profits, assuming the plaintiff was successful, and that is the basis on which we conduct the claim today.

[53] By the time of his closing address, Mr Bigio's position had changed quite significantly, possibly reflecting that by that stage the defendants had all but conceded that the Resolutions were unlawful. In closing, Mr Bigio submitted that even if s 174 of the Act was engaged, the defendants should not be required (in these proceedings at least) to account to MPRE for the monies that were paid under the Remuneration Resolutions. Mr Bigio noted that the plaintiff does not seek an order that compensation be paid direct to it. Rather, it seeks that MPRE be reimbursed for any "overpayments" in excess of the $200,000 provided for in the shareholders' agreement. He submitted, in effect, that it should be left to MPRE to decide whether it wishes to seek to recover any overpayments from Mr Pero and, if necessary, to issue separate proceedings against him for money had and received.

[54] The difficulty with such a proposition is obvious, however. Given the quorum requirements I have set out above, and the fact that one of the two directors of MPRE is an appointee of MP Marketing, the prospects of a board deadlock in relation to the Remuneration Resolutions (requiring further court proceedings) must be high. The plaintiffs did not necessarily oppose, however, it being left to the MPRE board to determine what steps should be taken to regularise the position in relation to the loan repayments referred to in the resolution dated 18 February 2014 and the $100,000 dividend payment referred to in the resolution dated 8 April 2014, in the event that those resolutions were found to be invalid. Those two resolutions differ from the Remuneration Resolutions in that they benefitted each shareholder equally.

[55] Mr Bigio further submitted that it had not been proven that MPRE had suffered any loss as a result of the overpayments because, based on expert evidence given on behalf of Mr Pero at trial, his revised remuneration package was at market rates for his role:

> If one accepts that Mr Pero believed the remuneration review was to market then he would have been fully incentivised to perform. The results in the three year period since the resolutions are undeniably strong and this is readily admitted by the plaintiff. There is, therefore, no evidence to support a conclusion that Real Estate has suffered any detriment.

[56] The argument appears to be that if Mr Pero had not dramatically increased his own remuneration via the Remuneration Resolutions he would have been less incentivised to perform. As a consequence, MPRE would have been less profitable.

[57] This is a highly speculative submission that is without evidential foundation, given Mr Pero's decision not to give evidence. It also overlooks that a key performance incentive for Mr Pero is the fact that he is a 50 per cent shareholder in the MPRE. He is therefore highly incentivised to maximise the overall performance of the business, regardless of his level of remuneration as chief executive officer. He is not simply an employee, but an owner of the business. Nor am I satisfied that Mr Pero has proven, on the balance of probabilities, that his increased remuneration was at market rates. In particular, the expert witnesses called by Mr Pero failed to have proper regard to the fact that he was not simply an employee, but an owner of the business. Further, in relation to the "Brand Ambassador" payment, little or no regard was had to the fact that MP Mortgages already owned the "Mike Pero" trademark.

[58] I have found that the Resolutions, including the Remuneration Resolutions, were invalid and of no effect. MPRE has paid Mr Pero very significant sums of money to which he is not legally entitled, possibly in excess of $1.5 million. MPRE would be entitled to recover such amounts in restitution by means of the common law cause of action of money had and received.[6] It is neither necessary, nor appropriate, however, for the parties to now have to embark on another round of litigation. It is abundantly clear that, as a 50 per cent shareholder in MPRE, MP Mortgages has been unfairly prejudiced by Mr Pero's actions in causing MPRE to pay him and/or MP Marketing a very significant sum of money in excess of that to which they were entitled. If not paid out in that way, those funds would have been retained in the business or (possibly) distributed to the shareholders 50/50 by way of dividend payments. MP Mortgages has undoubtedly been prejudiced in its capacity as a shareholder of MPRE by Mr Pero's unilateral actions in essentially diverting MPRE funds to himself.

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[6] See for example *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839 at [163]-[179].

[59] The Court has a wide discretion under s 174 to make such orders as it considers just and equitable. I am satisfied that the interests of justice in this case require that the defendants disgorge any financial benefits they have received as a result of the Resolutions and any other actions on the part of Mr Pero that have resulted in his remuneration from MPRE being increased beyond the $200,000 per annum to which he was lawfully entitled.

[60] The plaintiff seeks declarations declaring the Resolutions (as well as any prior decisions or actions increasing Mr Pero's remuneration) unlawful and of no effect. In addition the plaintiff seeks orders that require the defendants to reimburse MPRE for any overpayments of remuneration, and various associated directions (including directions in relation to disclosure of information). The plaintiff does not, however, seek an order under s 174 that MP Marketing sell its shares in MPRE to it. Its preference is to continue to work with Mr Pero to grow the business, for the benefit of both shareholders.

[61] I note that in respect of the Lease Resolution, the parties have now reached agreement as to the appropriate way forward. In respect of the Vistab Resolution, Mr Pero no longer has an interest in that company. No relief is accordingly sought in relation to those matters, other than a declaration declaring the relevant resolutions invalid. In respect of the Loan Resolution and the Dividend Resolution, the plaintiffs were not opposed to those matters (which impacted both shareholders equally) being addressed by the MPRE board, following any declaration by this Court as to the legal validity of the relevant resolutions. I do not therefore propose to make any specific orders for repayment of the dividends or loans. Otherwise, however, I am satisfied that it is just and equitable to make the various orders sought by the plaintiff.

Result

[62] The Court declares that:

(a) the first defendant's decision to increase his remuneration by the third defendant and/or the fourth defendant above $200,000 prior to the

31 March 2014 financial year was invalid and was not (and never has been) binding on the third and fourth defendants;

(b) the seven resolutions of the third defendant and/or the fourth defendant which the first defendant purported to pass as sole signatory dated 17 October 2012, 7 and 18 February 2013, 12 and 16 May 2013, 18 February 2014, and 8 April 2014 were invalid and are not (and never have been) binding on the third and fourth defendants.

[63] The Court orders that:

(a) the first and second defendants must pay to the third and fourth defendants all amounts received by them or their related entities in excess of $200,000 per annum for services provided by the first defendant and/or the second defendant in relation to the businesses of the third and fourth defendants and their related entities.

(b) From the date of this order the first and second defendants and their related entities must be paid no more than $200,000 per annum ($16,666 per month) for services provided by them in relation to the businesses of the third and fourth defendants and their related entities. For the avoidance of doubt, this order does not prevent the amounts to be paid to the first and second defendants and their related entities being increased above $200,000 per annum if the increase is made in accordance with the Companies Act 1993 and the constitutions of the third and fourth defendants, as modified by the shareholders' agreement between the plaintiff and the second and third defendants dated 3 February 2011, an agreement by the plaintiff and the second and third defendants to vary clause 2.3 of the shareholders' agreement, and the services agreement.

(c) The first and second defendants must, by 27 January 2017:

(i) provide the plaintiff with a statement of all amounts received by them or their related entities in excess of $200,000 per

annum for services provided by the first and second defendants in relation to the businesses of the third and fourth defendants and their related entities.

(ii) disclose to the plaintiff all documents in their control relevant to quantification of the amount in subparagraph (a) above.

(d) The parties will have 15 working days from the date of receipt by the plaintiff of the information and documents in paragraph (c) above, to agree on the precise amount that is payable under subparagraph (a) above.

(e) If the parties are able to reach agreement on the amount payable under subparagraph (a) above, they should file a joint memorandum advising the amount agreed on, and the Court will issue a final judgment requiring that amount to be paid by the first and second defendants to the third and fourth defendants.

(f) The first and second defendants must pay interest under the Judicature Act 1908 to the third and fourth defendant on all amounts payable under subparagraph (a) from the date of receipt by the first and second defendants or their related entities of each payment in excess of $200,000 in any financial year.

(g) If the parties are unable to reach agreement on the amount payable under subparagraph (a) above, they should file a joint memorandum advising the amount the first and second defendants accept is payable, and the Court will:

(i) issue a further interim judgment requiring that amount, together with interest on that amount in accordance with subparagraph (f) above, to be paid by the first and second defendants to the third and fourth defendants;

(ii) make directions for a further hearing to determine the further amount, if any, that is payable by the first and second defendants to the third and fourth defendants.

[64] Leave is reserved to seek any further directions that may be necessary to implement these orders and directions.

[65] Costs are reserved pending resolution of the outstanding matters.

Katz J