

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2013-485-9825
[2017] NZHC 703**

UNDER s 174 of the Companies Act 1993

IN THE MATTER OF Muse on Allen Restaurant

BETWEEN JOZSEF GABOR SZEKELY
Plaintiff

AND MUSE ON ALLEN LIMITED
First Defendant

SAMUEL RAYMOND NORTH
Second Defendant

DEBBIE VIVIAN NORTH
Third Defendant

MALCOLM LESLIE NORTH
Fourth Defendant

Hearing: 7 and 8 February 2017

Appearances: Q S Haines for the Plaintiff
No appearance for the First and Third Defendants
Second and Fourth Defendants appearing in person

Judgment: 11 April 2017

JUDGMENT OF MALLON J

Introduction	[1]
Facts	[5]
Liability	[37]
Compensation	[42]
<i>Mr Rendell's approach</i>	<i>[42]</i>
<i>Mr Sutherland's approach</i>	<i>[51]</i>
<i>My assessment</i>	<i>[59]</i>
Result.....	[75]

Introduction

[1] Jozsef Szekely (the plaintiff) and Samuel North (the second defendant) are chefs. In 2012 they decided to open a restaurant together. They each invested money in establishing the business. Money was also invested by Samuel's parents, Debbie and Malcolm North (the third and fourth defendants) and Samuel's partner Amabelle Torrejos. The business was established as a company, Muse on Allen Limited (the first defendant).

[2] Within a short period there was a serious breakdown in the relationship between Jozsef and the Norths. As a result, Jozsef stopped working at the restaurant and Samuel transferred Jozsef's shares into his own name. Jozsef had no further involvement in the business. The restaurant was unsuccessful and the company is in liquidation.

[3] Jozsef contends the Norths conducted the company's affairs in an oppressive, unfairly discriminatory, or unfairly prejudicial manner. He seeks compensation from the Norths of \$97,449.60, together with interest and costs, under s 174 of the Companies Act 1993 (the Act). The Norths contend they did not conduct the company's affairs in an oppressive, unfairly discriminatory or unfairly prejudicial manner because Jozsef walked out of the business and left them in a difficult position. They also say his shares were worthless at the time his involvement in the business ceased. They therefore contend no compensation should be awarded.

[4] Relief against the company or against its property is no longer sought because it is in liquidation and the liquidators have not consented to litigation seeking such relief.¹

Facts

[5] Jozsef and Samuel were friends who had worked together as chefs. In 2012, when Jozsef was age 31 and Samuel was 21, they decided to open a restaurant together. They looked for suitable premises. They decided upon premises which had operated as a Malaysian restaurant, Satay Kampong, located in Allen Street, Wellington. The owners of Satay Kampong owned the building.

¹ Companies Act 1993, s 248(1)(c).

[6] Satay Kampong was a different style of restaurant from the fine dining restaurant Jozsef and Samuel intended to open. Jozsef and Samuel regarded Allen Street to be a desirable location for their restaurant and for this reason the Satay Kampong premises was suitable.

[7] On 19 July 2012 they entered into an agreement to purchase the Satay Kampong business. The purchase price was \$90,000. This was described as being made up of \$50,000 for tangible assets and \$40,000 for intangible assets. The possession date was 3 September 2012. The vendors provided Jozsef and Samuel with a list of chattels. Their associated book value was \$69,399.²

[8] On 27 July 2012 Muse on Allen Limited was incorporated. Jozsef held 70 shares and Samuel held 30 shares. The directors were Jozsef, Samuel and Debbie. Jozsef says that Debbie was appointed as a director because she could assist the company with the business paperwork. The company did not have a written constitution.

[9] On 2 August 2012 Jozsef deposited \$65,000 into the company's bank account. At around the same time Samuel deposited \$10,000, Amabelle deposited \$8,000, and Malcolm and Debbie deposited \$20,000.

[10] On 9 August 2012 the vendors of Satay Kampong invoiced the company for \$90,000. The breakdown was again recorded as \$50,000 for the tangible assets and \$40,000 for intangible assets.

[11] On 13 August 2012 Jozsef, Samuel, Amabelle, Debbie and Malcolm signed a document entitled "Muse on Allen Partnership". The document stated:

	\$	%
Jozsef Szekely	65,000.00	63.2
Samuel North	10,000.00	9.7

² Mr Rendell's evidence says this was accepted as an accurate inventory and valuation of the chattels being purchased. He was the expert called by Jozsef. He was not challenged on this. The agreement for sale and purchase provided for the vendor to supply a list of tangible and intangible assets within five working days for approval by the purchaser within three working days. Evidence of express approval has not been provided.

Amabelle Torrejos	8,000.00	7.7
Malcolm & Debbie North	20,000.00	19.4

- Any partner wishing to sell must offer other partners first option on their shares.
- Further cash injection by partners will alter share %.
- Any profit or losses will be paid for on % of partners.

[12] The parties' names, signatures and the date appeared immediately below this. The document was prepared and executed around the Norths' kitchen table. Legal advice was not obtained in preparing and executing the document and no-one suggested it should be.³

[13] On 28 August 2012 the vendors' solicitors provided a settlement statement for settlement on 10 September 2012. The amount required to settle was \$75,598. That sum was made up of the purchase price of \$90,000, less the deposit paid of \$15,000, plus solicitors' fees for the lease of \$598.

[14] The new restaurant, trading under the name Muse on Allen, opened its doors on 24 September 2012. From the beginning the restaurant patronage was well short of what Jozsef and Samuel had forecast. They had put together a cash flow forecast for the year forecasting monthly sales varying between \$52,203 and \$74,453 depending on the month. With that level of sales the forecasted net cash flow ranged from \$1,194 in September 2012 to \$11,599 in August 2013.

[15] To meet those forecasts Samuel's evidence, not challenged in cross examination or other evidence, was that the restaurant would have needed around 40 to 50 customers every night. Instead, however, the restaurant was a "ghost town" most nights. They would often only get four or five customers a night. On the busier nights they would get 10 customers. The busiest night they had was in December 2012 when they had 60 customers, but that included a number of friends and Malcolm and Debbie North.

³ The Norths' solicitor was instructed in relation to settling the agreement to purchase the business and executing the lease and advising the parties to set up a company for the business.

[16] Malcolm’s evidence is that he and his wife were called upon to invest further funds in the company in October 2012. He produced an unsigned document dated 29 October 2012 which is described as the “Muse Restaurant Partnership” as at 29 October 2012. This records the following contributions:

			\$	65,000.00
Jozsef	\$	65,000.00	48.5%	
Debbie & Malcolm				
Credit cards	\$	6,120.00		
Cash	\$	45,000.00		
Samuel	\$	10,000.00		
Lovely	\$	<u>8,000.00</u>		\$ 69,120.00
	\$	69,120.00	51.5%	
		Paid up		<u>\$ 134,120.00</u>

[17] Jozsef says he does not know whether this occurred. He does recall Malcolm coming into the restaurant and saying the business needed another \$5,000 to \$6,000. He recalls Malcolm saying he would pay this with his credit card and would take it out of the business later.

[18] Malcolm’s evidence of this contribution is to some extent supported by the company’s accounts for the year end dated 31 March 2013. The accounts record the shareholders current accounts at \$69,352 (close to the original sums invested by Jozsef and Samuel).⁴ The term liabilities include a loan⁵ from Malcolm and Debbie of \$79,197⁶ and a loan from Amabelle of \$8,000.⁷

⁴ The shareholders current accounts refer to funds introduced by Jozsef of \$70,487 less drawings of \$6,369 (\$64,118) and funds introduced by Samuel of \$11,795 less drawings of \$6,500 (\$5,235). It is unclear when Jozsef introduced further funds after his initial contribution.

⁵ It is unclear why the accounts refer to these as loans rather than shareholders’ current accounts in light of the 13 August 2012 document.

⁶ The amount is described as being “as at” 29 October 2012. This would appear to mean the \$45,000 cash contribution referred to includes the initial contribution of \$20,000. The percentages set out in the document are also consistent with this. The evidence was, however, confusing about this. At times it was contended that the \$49,000 was new funding contributed by Malcolm and Debbie at this date in addition to the original \$20,000 contribution. In any case, the 31 March 2013 accounts indicate that, by that date, further substantial contributions were made by the Norths after their initial contribution of \$20,000 and by 31 March 2013.

[19] There is not much in the way of detail about what happened over the next few months or subsequently. However it is clear that soon after the opening of the restaurant Jozsef's relationship with the Norths deteriorated. Jozsef says this was because the Norths' friends and family were receiving free food and beverages from the restaurant on a regular basis. Jozsef was concerned about this because it was a new business which needed to start on a strong footing. He says he tried to raise the issue with Samuel but was unable to gain any traction.

[20] The Norths have a different view about what caused the breakdown of their relationship with Jozsef. They learned that Jozsef called the Wellington City Council on 12 December 2012 about the restaurant's liquor licence. Jozsef says he was concerned the Norths were going to breach their liquor licence by holding a family Christmas function at the restaurant and he wanted clarification from the Council to ensure he was not fined. This incensed the Norths. As I understand it, they also do not accept they were taking free food from the restaurant.

[21] On 19 December 2012 Samuel altered the Companies Office records to show his shareholding as 51 shares (rather than 30) and Jozsef as having 49 shares (rather than 70). Samuel did this unilaterally. He felt justified in doing this to take into account the additional financial contributions his parents had made.

[22] The relationship continued to deteriorate in January 2013. Although the precise details of what occurred are not clear, the issues which arose included the following:

- (a) On 6 January 2013 Samuel applied to the bank for an extension to the company's overdraft of \$10,000. The Norths say Jozsef, who was a signatory to the account, refused to sign the application.
- (b) Jozsef cut his finger at some point which meant, the Norths say, he could not perform his usual duties.⁸

⁷ This is consistent with her contribution referred to in the 13 August 2012 document.

⁸ Jozsef says that even with his cut finger he was the first to arrive at the kitchen each day and the last to leave.

- (c) On 8 January 2013 Jozsef called the police regarding an alleged assault by Malcolm. This concerned an altercation of some kind at the restaurant which Jozsef says occurred when he confronted the Norths about changing his shareholding.
- (d) On 9 January 2013 Malcolm called the police to remove Jozsef from the premises. Jozsef says he left the premises on the advice of the police to ensure his safety.
- (e) Around this time (it is unclear precisely when), Jozsef worked his shift and then informed staff he would not be returning. Jozsef says this was on the advice of his lawyers. He says it is difficult to recall the details but, if he did not say why he was not coming back, that would have been because he did not think it was appropriate to explain to staff that this was because of a breakdown in the relationship between the owners of the business.

[23] In addition to these events, on 9 January 2013 Samuel added Malcolm as a director of the company. At 10.15 pm on 10 January 2013 the Norths met at their property where they decided to remove Jozsef as a director. They say they invited him to attend by text message. This was not put to Jozsef and I do not know if he accepts they did. A minute of the meeting records this action was taken because Jozsef had threatened the Norths with defamation proceedings, threatened to lay an assault charge against Malcolm when the police had said there was no substance to this, lacked an understanding of the financial position of the business, implied the directors had stolen money from the restaurant, and had shared confidential information to a third party. In accordance with the resolution, on 11 January 2013 the Companies Office records were updated to remove Jozsef as a director.

[24] On 14 January 2013 the company's bank account was frozen. The bank advised the Norths and Jozsef of this by email. The Bank said it had taken this action because it was getting different messages and instructions and it was clear there was a dispute between the account signatories. The Bank also noted that,

although the Companies Office records showed Jozsef was removed as a director, he remained a signatory on the bank account.

[25] On 16 January 2013 solicitors (Mr Jefferies) acting for Jozsef wrote to Malcolm. The letter noted Jozsef's contribution of \$65,000 in return for which he held a 63.2 per cent shareholding in the company and was appointed a director.⁹ The letter referred to the changes made in the Companies Office records. Mr Jeffries requested an urgent meeting, preferably within 24 hours, with the Norths, their solicitor, and the company accountant at which he and Jozsef would also attend.

[26] A meeting took place sometime in February 2013. There is little in the way of evidence about what took place at this meeting. Jozsef says the outcome was that he was not going back to the premises until the situation was resolved. Malcolm says Mr Jefferies failed to turn up to a meeting but it is not clear if this refers to an earlier meeting. Samuel says that Mr Jefferies attended a meeting but was asleep and/or affected by drugs. In any case, Jozsef subsequently engaged Duncan Cotterill and the Norths engaged Kensington Swan to act for them. No resolution was achieved.

[27] On 20 February 2013 the company's registered office was changed to Malcolm's address. On 24 February 2013 Samuel altered the Companies Office records by transferring all of Jozsef's shares into his own name. He says he did this because of Jozsef's actions, which had included calling the Council, emailing the landlord and having the bank account frozen, and because Jozsef had walked away from the business. Samuel was frustrated with the situation he was in. He felt the shares were worthless because the business was floundering.

[28] Consistent with the evidence that the business was not going well, the company's financial accounts for the year ending 31 March 2013 show a net deficit of \$77,144. The accounts also record the annual sales revenue as being \$180,303. This was significantly below the estimated sales revenue of \$406,764 for this period as set out in Samuel's budget.¹⁰

⁹ Compared with the 31 March 2013 accounts: see above n 4.

¹⁰ Refer [14] above.

[29] On 29 November 2013 Jozsef brought this proceeding against the company and the Norths. Sometime in 2013 or 2014 there were communications between the solicitors seeking to resolve the matter. The details are not before me. It appears Jozsef made an offer for Samuel to buy him out which was not accepted. Although Jozsef was vague about this, it seems that Jozsef did not offer to buy Samuel's shares. In any event, no settlement occurred. At some point the Norths decided to self-represent, having spent \$22,000 in legal fees with no result. They say they had several communications with Duncan Cotterill but no settlement was achieved because Jozsef was unrealistic.

[30] Meanwhile the business continued to trade at a loss. A letter from the company's accountant to Malcolm dated 27 June 2013 is consistent with Malcolm's evidence that he and Debbie had contributed further funds by that date. The letter states: "... I confirm that the personal contribution of funds to the business of Muse on Allen to 27 June 2013 now amounts to \$115,445.58." The financial accounts for the year ending 31 March 2014 show Malcolm and Debbie's contribution by this stage as \$117,019 (again described as a loan) and Amabelle's contribution as \$15,150 (again described as a loan). The net deficit for the year was \$49,675. Total sales for the year were \$483,634 which was again well short of the projected figures in the original budget.

[31] On 24 November 2014 Jozsef sought advice from Crowe Howarth, accountants, about the value of his shares in the company. The advice was as follows:

...

The company at 31 March 2013 had negative shareholders funds of \$77,144 which means that it was insolvent.

... we are of the opinion that a full valuation of the shares in the company would not deliver benefit to you since:

- 1) The company is continuing to trade at a loss.
- 2) The company would be wound up, the company if wound up would be unable to deliver any return to shareholders.

We are happy to discuss this matter further if you so desire.

[32] In 2014 Jozsef hired a private investigator, Grace Haden. Jozsef says he hired her to make a report to the Companies Office and the police. He says that neither the Companies Office nor the police were interested in dealing with these matters because by this stage litigation was on foot. She also acted as his “McKenzie friend” in the litigation with the Norths. Matters further deteriorated with Ms Haden’s involvement. The Norths became highly incensed about Ms Haden’s actions, which they say included (amongst other things) sharing confidential information about the dispute and the companies’ financial position with third parties and posting defamatory material on the Transparency NZ website. In his evidence, Jozsef sought to distance himself from Ms Haden’s actions but it was not until very late in the piece that he took action to have information removed from the Transparency NZ website. This occurred once his current solicitor was instructed, who told Jozsef that terminating Ms Haden’s services was a condition of his involvement.

[33] On 19 June 2015 the company brought a claim in the District Court against Jozsef. This alleged Jozsef had failed to comply with the partnership agreement signed on 13 August 2012 to contribute to the losses suffered by the company. The claimed losses were \$77,144 as per the 31 March 2013 accounts and \$49,675 as per the 31 March 2014 accounts. The claim against Jozsef was for \$80,530 being 63.2 per cent of the losses.

[34] This claim was transferred to the High Court in 2015. On 27 May 2016 the claim was struck out.¹¹ This was for two reasons. First, the claim had been brought by the company, which was not a party to the 13 August 2012 agreement. Secondly, the company was the plaintiff and as such the proceeding had to be brought by a lawyer.

[35] The company was put into liquidation on 6 September 2016. Samuel’s view, in hindsight, was that it was a mistake to go into Allen Street. The area had worked for Satay Kampong, but it was selling \$10 curries which was a different market to their business. There was also a short period in 2013, following an award won by Samuel, when the customer numbers were good but the restaurant still was not full

¹¹ *Muse on Allen Limited v Szekely* [2016] NZHC 1131.

most nights. It took a long time and hard work for things to improve. But even with all this hard work the business was not making money.

[36] Samuel is now head chef at a new restaurant, Muse Eatery, operating out of different premises. The business is owned by his family trust.

Liability

[37] A shareholder or former shareholder may apply to the Court for an order under s 174(2) of the Act where they consider the affairs of the company have been conducted in a manner which is “oppressive, unfairly discriminatory, or unfairly prejudicial” to him. An order under s 174(2) is made if the Court considers it is “just and equitable” to do so.

[38] Jozsef’s position is that he had a dream, like most chefs, to open his own restaurant. He put his life savings into that dream and the Norths took that dream away from him. The Norths altered the share registry and alienated him from the company and the operation of the business. He submits it is just and equitable to grant him relief.¹²

[39] The Norths’ position is that Jozsef acted irresponsibly when he was involved in the business, walked out on them and then set about destroying the business. They say their actions were not oppressive, or unfairly discriminatory or prejudicial to Jozsef essentially because their actions were justified by Jozsef’s conduct. It is their position that it is not just to make an order in Jozsef’s favour under s 174(2).

[40] In my view it is not necessary to decide who was at fault in the breakdown of the relationship. What is relevant is that Jozsef had contributed at least \$65,000 into a business in which it had become intolerable to both Jozsef and the Norths for him to remain. The Norths continued to operate the business as though Jozsef no longer had any rights in it. They transferred Jozsef’s shares into Samuel’s name, removed Jozsef as a director and no longer included him in any business decisions. As it was

¹² In support of his claim Jozsef relied on written submissions from Mr McKenzie QC which his counsel in this case adopted. This is primarily directed at the invalidity of Samuel’s actions in altering the Company Office records. It is also submitted that Jozsef should be compensated for any liabilities to which he is exposed (none are pleaded) and for the fair value of his shares.

said in *O'Neill v Phillips* in relation to a shareholder excluded from the management of the business, “unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer” to buy his shares at a fair value or make some other fair arrangement.¹³

[41] The Norths say they made reasonable attempts to resolve the matter. I have not been provided with the details of this. They also say Jozsef’s shares were of no value when he left the business, and that remained the case as the business continued to suffer losses. If the Norths are correct the shares had no value then it would not be appropriate to order compensation. If the shares had some value then I consider it potentially would be just and equitable to order compensation for Jozsef’s shareholding at the time he was excluded from the business even if that exclusion was partly or even substantially a result of his own actions. The starting point for any such compensation would be the fair value of the shareholding at this time. It is therefore necessary to consider the expert evidence on this point.

Compensation

Mr Rendell’s approach

[42] Jozsef called expert evidence from Mr Rendell. He is a chartered accountant operating as a sole practitioner. He was previously a senior managing partner of his own accounting practice for 25 years. Before that he spent eight years at Ernst & Young and five years at Arthur Young in the United Kingdom.

[43] Mr Rendell’s approach is to treat Jozsef as having sold his shares to Samuel but as not having received payment for them. He says Jozsef should be paid the value of his shareholding at that time.

[44] Mr Rendell takes 24 February 2013 as the relevant date for valuation as that was the date Jozsef ceased being a shareholder in the company. He says that valuing the company after 24 February 2013 is probably disadvantageous to Jozsef because the company was trading at a loss. He also says independent accounts should have

¹³ *Re a Company (No 00709 of 1992)*; *O'Neill v Phillips* [1999] 2 ALL ER 961 at 975, per Lord Hoffman.

been prepared on that date. He says the 31 March 2013 accounts are not independent and are based on book values.

[45] He puts forward two methods to measure the compensation payable to Jozsef for the effective sale of his shares to Samuel. They are as follows:

- (a) Method 1: The business valuation would be based on the asset valuations of the chattels/plant and equipment (\$84,716) plus the value of the goodwill (\$40,000). This gives a total value of \$124,716. Jozsef had 70 per cent of the shares on issue. Therefore the value of his shares (70 per cent of \$124,716) was \$87,301.20.
- (b) Method 2: An alternative method of valuing Jozsef's interest in the company is to use the value of his shareholders current account (\$70,487) and to deduct this figure from the total assets of the company as set out in the 31 March 2013 accounts (\$56,900 plus \$40,000 plus current assets).¹⁴ This gives a figure of \$38,518 net value of which Jozsef is entitled to 70 per cent, being \$26,962.60. This is then added to his shareholders current account (\$70,487) to give a figure of \$97,449.60 as the value of Jozsef's loss at 24 February 2013.

[46] To these figures, Mr Rendell would add compensation for the costs of obtaining this sum because Jozsef has had to bring proceedings when there ought to have been a negotiation between the parties for the sale of the shares. He would also add interest. Mr Rendell considers Jozsef is not liable for any losses once he was removed as a shareholder. Jozsef also lost a means of income when he was removed from the business. However Mr Rendell has not quantified this in his assessment of Jozsef's loss.

[47] For the first method, Mr Rendell's obtains the \$84,716 value of the plant and equipment/chattel as follows. He begins by taking the value of the list of chattels as provided by the vendors after the agreement for sale and purchase was signed

¹⁴ This is mostly made up of stock on hand and funds in bank accounts.

(\$69,399).¹⁵ He considers this is the appropriate figure because the book value of chattels often differs from the tangible and intangible assets listed in the sale and purchase agreement. He says this can have tax advantages for the vendor.

[48] He then adds the items from the asset depreciation schedule as at 31 March 2013 which were not included in the chattels list provided by the vendors (\$15,317) to give a total value for chattels of \$84,716. This is because he concludes the additional assets in the asset depreciation schedule must have been purchased between the date the business was purchased and 31 March 2013 when the accounts were prepared.

[49] Mr Rendell notes the chattels, post depreciation, as included in the accounts as at 31 March 2013 are \$56,900. He considers it is not appropriate to use this figure because the date of valuation should be 24 February 2013, which he says is prior to depreciation being applied. However, his second method takes the value of the assets as per the financial accounts.

[50] Mr Rendell notes the 31 March 2013 accounts record Jozsef's introduced capital at \$70,487. As this is included as a current liability, Mr Rendell says it is repayable to Jozsef when he was removed as a shareholder. The Norths should be treated as having bought his shares but having failed to pay him.

Mr Sutherland's approach

[51] The Norths called expert evidence from Mr Sutherland. He is a chartered accountant practising in Wellington. He has been a chartered accountant since 1982. Since 1991 he has practised as the principal of Sutherland Forensic Accountants, which specialises in forensic investigation of the financial affairs of companies, trusts and individuals.

[52] Mr Sutherland does not disagree that 24 February 2013 is the relevant valuation date. However he says for practical purposes the 31 March 2013 financial

¹⁵ Refer [7] above.

accounts can be taken as representing the position as at 24 February 2013 absent information of any material change between those two dates.

[53] Mr Sutherland’s view is that Jozsef’s shareholding had no value. The business was unprofitable and unable to support itself. He has prepared revised financial accounts for the years ending 31 March 2013 and 31 March 2014 to take account of three matters:

- (a) updating the shareholdings based on the financial contributions made during the financial year in accordance with the 13 August 2012 agreement;
- (b) removing the goodwill from the assets; and
- (c) adjusting the assets to remove obsolete chattels.

[54] On the basis of these adjustments Mr Sutherland has calculated the financial position of the company to have equity of \$18,445 for the year ending 31 March 2013 and equity of \$13,742 for the year ending 31 March 2014. He says that this would be the amount available in a liquidation situation. However, as fixed assets are the only material assets available and they are “used” fixed assets, in his opinion the shareholders’ investment is lost, meaning that there are no funds to repay shareholders’ capital of \$156,550¹⁶ or \$201,522¹⁷ for each of these years.

[55] His shareholding adjustments are as follows:

Muse on Allen Ltd – shareholder changes			
Shareholder	Aug-12	Mar-13	Mar-14
North – Malcolm & Debbie	19.4%	50.6%	58.1%
North – Samuel	9.7%	3.3%	2.6%
Szekely – Jozsef	63.2%	41.0%	31.8%
Torrejos – Amabelle	7.7%	5.1%	7.5%
	100%	100%	100%

¹⁶ Malcolm and Debbie (\$79,197), Samuel (\$5,235), Jozsef (\$64,118) and Amabelle (\$8,000).

¹⁷ Malcolm and Debbie (\$117,019), Samuel (\$5,235), Jozsef (\$64,118) and Amabelle (\$15,150).

[56] In relation to goodwill Mr Sutherland's view is that the \$40,000 paid was an immediate loss. That is because the goodwill related to a Malaysian cuisine restaurant serving 140 customers daily. With the change to a European fine dining restaurant, a name change, a change in clientele, and a change in dining numbers to 40, the goodwill purchased was lost. He says it was a mistake to buy the business, to get their foot into Allen Street, because the \$40,000 paid for that was wasted capital.

[57] As to the adjustment for obsolete assets, Mr Sutherland's approach is to first take the value of the chattels as stated in the 31 March 2013 accounts. He then reduces that value on the basis of Samuel's advice to him that some of the assets were of no value to them and were disposed of.

[58] Mr Sutherland makes the following comments on Mr Rendell's approach:

- (a) Method 1 inflates the value of the assets, ignores liabilities, ignores that goodwill was lost when the business became a fine European dining restaurant, and provides a return on Jozsef's investment of \$23,184 after a seven month period, a 36 per cent return over seven months.
- (b) Method 2 inflates Jozsef's capital contribution, ignores liabilities, ignores the loss of goodwill, does not take into account the market value of the fixed assets, and provides a return on his investment of \$33,332 after a seven month period, a 52 per cent return over seven months.
- (c) Both methods do not take into account the commercial reality of the company's financial situation, namely that it was unprofitable, in a negative asset position, and required additional ongoing shareholder financial support, yet Mr Rendell's approach would have Jozsef receiving his investment back together with a substantial return.

My assessment

[59] I agree with Mr Rendell that 24 February 2013 is the date Jozsef was excluded from the business. However I agree with Mr Sutherland that it is appropriate to take the 31 March 2013 accounts as representing the financial position of the company as at 24 February 2013, in the absence of any better evidence of the financial position at this date. The 31 March 2013 accounts therefore provide the starting point for determining the fair value of Jozsef's shares as at 24 February 2013.

[60] Mr Sutherland accepts a net asset valuation is an appropriate method for valuing the shares, but says Mr Rendell has not taken into account relevant matters when carrying out his approach.¹⁸ I agree with Mr Sutherland about this. It is apparent Mr Rendell's methods inflate the value of Jozsef's shares as at 24 February 2013 because they produce an unrealistic return on Jozsef's investment in light of the realities. Under method one Jozsef receives a return on his investment (\$64,118) of \$23,184 (36 per cent) and under method two the return is \$33,332 (52 per cent) over a seven month period.¹⁹ Yet the business was failing throughout that period.

[61] Mr Rendell's response to this point was as follows. His experience is that a partner would often pay out another partner more than their share of the business because they wished that partner to leave. A reasonable person would do this. He considered Jozsef should get his investment back, and perhaps a bit more, because he had been denied the opportunity to make profits, which must have been anticipated at this stage as otherwise the business would have stopped operating by 24 February 2013.

[62] I do not accept this is the correct approach. The breakdown in the relationship, which made it intolerable for Jozsef to remain in the business, occurred when the business was failing. The business continued to operate only because of substantial cash contributions from Malcolm and Debbie. There is no evidential

¹⁸ See *New Zealand Insurance Company Ltd v Commissioner of Inland Revenue* [1956] NZLR 501 (HC) at 503 as to what this method entails.

¹⁹ Annualised this is a return of 62 per cent or 89 per cent respectively.

basis to conclude the business would have become profitable if Jozsef had remained involved in it.

[63] I consider there are a number of errors in Mr Rendell's approach which have resulted in an inflated value of Jozsef's shareholding. The first is his approach to the assets. The vendors provided a chattels list showing the assets purchased and their book value. In accepting the chattels list, the company was not adopting the stated value. The value the company placed on them is represented by the purchase price they agreed to pay for them. The company valued the tangible assets purchased at \$50,000. Whether the vendor had any motivation to agree to a lower price for the tangible assets as compared with the intangible assets is speculative and, in any event, of no relevance. It may simply be that some of the assets purchased had no value to the new business.

[64] I also do not accept Mr Rendell's approach to depreciation. While depreciation is reflected in the accounts at year end, it reflects the decline in value of the assets over the period. As at 31 March 2013 the value of the tangible assets was said to be to \$56,900.²⁰ In the absence of any better evidence of the assets' value as at 24 February 2013 it is appropriate to use the 31 March 2013 figure.

[65] I also do not accept Mr Sutherland's approach to assets. He has deducted obsolete items based on advice from Samuel that they were disposed of because they were of no value to the business. The value of the assets held, taking into account items disposed of and items purchased other than from the vendors, should be reflected in the accounts at 31 March 2013. Mr Sutherland explains these were not included in the 31 March 2013 accounts as the information was not provided to the company's accountant. However it was up to the directors at the time to ensure the accounts were correct.

[66] I accept Mr Sutherland's evidence that the goodwill as at 31 March 2013 was overstated. Mr Sutherland's evidence is that goodwill became redundant once the business was changed from a Malaysian Satay restaurant to a fine dining European

²⁰ Even if it had been appropriate to deduct depreciation the correct approach would have been to take the book value of the assets and add on the depreciation removed that year. This would give a figure of \$64,910 not \$84,716.

one. I accept that for those reasons, and that the new business was not operating successfully, goodwill was unlikely to have remained valued at the level stated in the accounts.

[67] I also accept Mr Sutherland's view that both of Mr Rendell's methods fail to take into account the company's liabilities. The business was only operating because the Norths had contributed further funds but even then it was trading at a loss. The accounts recorded these contributions as a loan. Under Mr Rendell's first method he has applied Jozsef's 70 per cent shareholding to the asset position without regard to its liabilities. If all liabilities are taken into account the net asset position is negative \$77,144. Therefore Jozsef would not receive anything. This would be the case even if I were to assume that the financial position as at 24 February 2013 was slightly better than as at 31 March 2013.

[68] Mr Rendell's second method assumes Jozsef would be repaid the amount in his shareholders current account even though the company was not in a financial position to do so. It also gives Jozsef a percentage of the asset value without requiring him to pay a percentage of the liabilities. I do not accept this represents a fair value of Jozsef's shares as at 24 February 2013. It also does not take into account the amount invested by Samuel.

[69] It is appropriate to consider the 13 August 2012 "partnership" agreement in determining Jozsef's compensation for the loss of his shares. On the basis of the 31 March 2013 accounts Jozsef was entitled to 40 per cent of the profits (or losses) of the business. Consistent with the effect of the partnership agreement by treating Malcolm, Debbie and Amabelle's funds as capital contributions rather than loans, and without reducing the value of the goodwill, the net financial position of the company as at 31 March 2013 was \$10,053.²¹ The value of the goodwill, however, needs to be reduced because it was overstated in the accounts. In my view once the overstatement is recognised there would be no value in Jozsef's shares. I consider that would also have been the case as at 24 February 2013 when the financial position may have been only slightly better if anything than as at 31 March 2013.

²¹ Total assets of \$109,005 (chattels of \$56,900, goodwill of \$40,000 and current assets of \$12,105) less liabilities of \$98,952 (excluding the term liabilities of \$87,197) equals \$10,053.

[70] Whichever way the Norths' financial contributions are taken into account the result is that Jozsef's shares were of no value by the time he was excluded from the business. This assessment is consistent with Crowe Howarth's advice to Jozsef in November 2014 that the company was trading at a loss and there would be no return to shareholders if wound up. Jozsef's investment was lost at this point.

[71] I consider there should be no compensation for Jozsef's loss of a means of income. Samuel's evidence is that he received very little in the way of income. His partner had to pay their rent. Even when the restaurant was going well he received no more than about \$600 a month. There is nothing to suggest the position would have changed if Jozsef had continued to work in the business. Moreover, Jozsef found employment as a chef at another restaurant soon after.

[72] Because, in my view, Jozsef's shares were of no value, no question of interest arises. Nor is Jozsef entitled to costs.

[73] An order for costs in the Norths' favour may be appropriate depending on when the Norths began representing themselves. Costs can be awarded for steps taken by solicitors in this proceeding from the date the proceedings were issued. The amount of any order for costs for those steps is determined by the High Court Rules. Costs incurred in related proceedings or matters arising prior to this proceeding commencing cannot be awarded in this proceeding. Nor are costs awarded to self-represented parties, because they have not incurred legal costs. The Norths can, however, claim disbursements incurred in the proceeding such as filing fees paid and reasonable expert fees (here, Mr Sutherland's fee). This does not include, for example, loss of earnings while responding to the claim or appearing in court.

[74] The Norths' closing submissions sought damages for emotional and psychological damage, and for damage to their reputation and financial situation as a result of Ms Haden's involvement. This is outside the scope of the pleadings.

Result

[75] Jozsef's application for relief under s 174 of the Companies Act is dismissed.

[76] The Norths may be entitled to costs for the period from 29 November 2013 (when the proceedings were issued) until the date they became self represented. They will need to provide details of what steps (as set out in the High Court Rules) were taken by solicitors on their behalf in this proceeding during that period. They will also need to provide details of disbursements incurred in the proceeding. If they made a written offer to settle the proceeding, which involved a payment being made to Jozsef, then they should provide a copy of that letter as that may be relevant to the amount of any costs award. They are to provide this information within 14 days of today's date. Jozsef will then have 14 days to file any response to this information. I will then determine the question of costs.

Mallon J