

**In the High Court of New Zealand
Wellington Registry**

CIV-2013-485-9825

Between **JG Szekely**

 Plaintiff

And **Muse on Allen Limited**

 First defendant

And **SR North**

 Second defendant

And **DV North**

 Third defendant

And **ML North**

 Fourth defendant

"DRAFT"

Amended Statement of Defence

Dated 17/12/2014

Next event date:

Judicial officer:

Malcolm North
Muse on Allen
16 Allen Street
Wellington
Phone: 04 384 1181



The defendants, by their solicitor, say in response to the Statement of Claim filed by the plaintiff dated 29 November 2013:

Parties

1. They admit paragraph 1.
2. They admit paragraph 2.
3. They admit paragraph 3.
4. They admit paragraph 4.

Background Facts

Overview

5. They admit paragraph 5.
6. In respect of paragraph 6, they admit the plaintiff worked as a chef and that the plaintiff and second defendant worked together to design the menu for the restaurant business of Muse on Allen Limited ('**Company**'), and further say:
 - a. The assistance provided by the plaintiff to the second defendant in terms of the design of the menu was limited, and the menu has been changed by the second defendant multiple times since the plaintiff left the business.
 - b. They otherwise deny paragraph 6.
7. In respect of paragraph 7, they admit that the plaintiff initially worked as a chef and managed the day-to-day operations at the restaurant and further say:
 - a. The plaintiff and second defendant initially agreed that the plaintiff would perform these roles at the restaurant and these were the plaintiff's roles from in or around August until December 2012.
 - b. The financial performance of the restaurant business, and correspondingly, Muse on Allen Limited ('**Company**') was disastrous during August until December 2012.
 - c. As a result of that financial performance, the first defendant was in danger of insolvency.
 - d. The plaintiff's performance of his roles directly contributed to this negative financial performance, including through the plaintiff's excessive ordering and lack of budget constraints.
 - e. The third and fourth plaintiffs provided significant capital injections to the business to ensure its survival, which totaled at various times:

- i. \$20,000 as at 13 August 2012.
 - ii. \$69,120 as at 29 October 2012.
 - iii. \$79,197 as at 31 March 2013.
 - iv. \$115,445.48 as at 27 June 2013.
 - f. The plaintiff and others agreed together in a written Shareholders' Agreement (**'Shareholders' Agreement'**) that the effect of the third and fourth defendants providing such capital injections would be that:
 - i. The third and fourth defendants would gain a commensurate interest in the Company pursuant to the Shareholders' Agreement
 - ii. The corresponding shares in the Company would be diluted in amount/and value accordingly
 - iii. Although these capital injections would affect the amount/value of the shares held by existing shareholders, including the plaintiff, it would not affect the operations of the restaurant business.
 - g. They otherwise deny paragraph 7.
8. In respect of paragraph 8 they:
- a. Admit that the plaintiff's shareholding was reduced during December 2012 and mid-February 2013, and further say that the plaintiff's shareholding had earlier been reduced as a result of one or more capital injections by the third and fourth defendants.
 - b. Admit that Malcolm and Debbie North and Amabelle Torrejos were appointed shareholders, but deny that this took place during December 2012 and mid-February 2013 and further say that this occurred on or around 13 August 2012.
 - c. Deny that all of the above actions referred to above at paragraph 8a to 8b were without the plaintiff's knowledge, repeat paragraph 7f, and further say that these actions were in accordance with the Shareholders' Agreement.
 - d. Admit that the plaintiff was removed as a director during this period, and further say:
 - i. Leading up to and during this period, the plaintiff's relationship with the officers of the Company, including the second, third and fourth defendants, was increasingly antagonistic, threatening, and hostile, including laying malicious and unfounded complaints to authorities.
 - ii. Despite the plaintiff's behaviour leading up to and during this period the second, third and fourth defendants initially attempted to continue to work with the plaintiff in relation to the restaurant and Company, and that these attempts were unsuccessful.

- iii. In response to the second, third and fourth defendants' attempts to work with the plaintiff, in January 2013, the plaintiff walked out of the restaurant and announced that he would not come back, without informing the second, third or fourth defendants in advance of his decision.
 - iv. Ultimately, the third defendant spoke to the Companies Office and, in reliance on that conversation, the second, third and fourth defendants held a meeting of the directors of the Company, which resolved to formally remove the plaintiff as a director.
- e. Deny that the plaintiff was removed as a shareholder, and further say:
- i. They rely on paragraph 7f above.
 - ii. The current shareholders of the Company are those persons who have provided funds in accordance with the terms of the Shareholders' Agreement.
 - iii. The Companies Office records stating otherwise are in error, and that the plaintiff remains a shareholder in the company, although his shareholding has been diluted in accordance with the Shareholders' Agreement as discussed at paragraph 7f.
- f. Deny that the plaintiff was excluded from the Company and further say:
- i. The plaintiff abandoned the business.
 - ii. The plaintiff was given opportunities to collect his belongings but failed to do so.
 - iii. The plaintiff retains a key to the restaurant business.
9. To the extent paragraph 9 contains matters of law, they are not required to plead to that paragraph. To the extent it contains allegations of fact, they have no knowledge of and therefore deny paragraph 9.

Incorporation of the Defendant Company

10. They admit paragraph 10.

11. In respect of paragraph 11, they:

- a. Admit that the plaintiff provided \$65,000 to the business at the time of its incorporation.
- b. Otherwise have insufficient knowledge of and therefore deny paragraph 11.

12. They deny paragraph 12, and further rely on the Shareholders' Agreement as if pleaded in full and refer clause 7e.

13. They admit paragraph 13.

14. In respect of paragraph 14, they:

- a. Admit that the second defendant contemplated that the third defendant would act as an alternate director in relation to the operations of the Defendant Company.
- b. Deny that the second defendant contemplated the third defendant would act in this manner solely for the second defendant.
- c. Otherwise have insufficient knowledge and therefore deny paragraph 14.

15. They admit paragraph 15.

16. They admit paragraph 16.

Transfer of the Plaintiff's shares

17. In respect of paragraph 17, they:

- a. Admit that the second defendant amended the Companies Office register to record a change of shares on or around 19 December 2012.
- b. Otherwise deny paragraph 16 and rely on the terms of the Shareholders' Agreement as if pleaded in full.

18. They deny paragraph 18, and they rely on the terms of the Shareholders' Agreement as if pleaded in full.

19. They deny paragraph 19, and further rely on the terms of the Shareholders' Agreement as if pleaded in full.

20. They deny paragraph 20.

21. They admit paragraph 21.

22. In respect of paragraph 22, they admit that the plaintiff became a minority shareholder as a result of the above transfer on or around 19 December 2012, and that the Companies Office register then recorded the plaintiff as holding 49 shares and the second defendant as holding 51 shares, but deny that this was to the plaintiff's detriment and further say that this was in accordance with the Shareholders' Agreement.

Appointment of fourth defendant as a director

23. In respect of paragraph 23, they admit that the fourth defendant was appointed as a director of the Company on or around 9 January 2013 and that the second defendant amended the Companies Office records to record this appointment, and further say:

- a. The fourth defendant was assisting with negotiations with the bank at that time, which required him to be an officer of the Company.
- b. The second and third defendants resolved to appoint the fourth defendant as a director in order to help to improve the Company's financial situation.

24. They admit paragraph 24.

25. They admit paragraph 25, and further say this was as a result of the plaintiff's behaviour referred to above at 8d.

26. They deny paragraph 26, and further say that the plaintiff acknowledged the appointment of the fourth defendant as a director by email on 12 January 2013.

27. They deny paragraph 27.

Removal of the plaintiff as a director

28. In respect of paragraph 28, they admit that the plaintiff was removed as a director and that the second defendant amended the Companies Office Register for the Company on or around 11 January 2013 to record this removal, and further say:

- a. The plaintiff was removed following, and in reliance on, discussions by telephone with the Companies Office on or around that same date, as referred to at the response at paragraph 8d.
- b. The plaintiff was given verbal notice of the meeting.
- c. Following the meeting, the second, third, and fourth defendants posted a notice recording that the plaintiff had ceased being a director of the Company on the restaurant's noticeboard on or around 10 January 2013 and providing reasons for this removal.

29. They deny paragraph 29.

30. In respect of paragraph 30, they repeat the response given at paragraph 8d.

31. They deny paragraph 31.

32. In respect of paragraph 32, they repeat the response given at paragraph 8f and further say that the termination of the plaintiff's email address occurred after, and as a result of:

- a. The abandonment of the business by the plaintiff
- b. The receipt of threatening emails by the third defendant from the plaintiff.

Removal of the plaintiff as a shareholder

33. In respect of paragraph 33, they deny that the plaintiff was removed as a shareholder, although admit that the Companies Officer register was amended by the second defendant on or around 23 February 2013 to show the second defendant as holding all 100 shares in the Defendant Company, and repeat the response given at paragraph 8e.

34. They deny paragraph 34, and:

- a. Repeat the response given at paragraph 8e.

- b. Further say that the plaintiff provided no forwarding details to the defendants following his abandonment of the restaurant and Company.

35. They deny paragraph 35, and:

- a. Repeat the response given at paragraph 8e.
- b. Rely on the terms of the Shareholders' Agreement as if pleaded in full.

36. They deny paragraph 36.

37. The plaintiff had at all times access to all banking transactions, the use of an Eft-pos Company Card and never questioned expenditure with the third defendant who was the other signatory to the Company's Bank Account.

- i. Personal loan from Ross North, fourth defendant's brother to ensure survival of business.
- ii. Repayment of \$15,000 loan to GE Money.
- iii. Drawings detailed in Schedule 1.

38. They deny paragraph 38 and further say:

- a. The plaintiff signed the Shareholders' Agreement and consented to the dilution of his shareholding in the Company, as discussed at paragraph 7f above.
- b. The plaintiff acknowledged the appointment of the fourth defendant as a director on 9 January 2013.
- c. The amendment of the Company's Office register on or around 24 February 2013 was an error, and the plaintiff remains a minority shareholder of the Company.
- d. The plaintiff became increasingly aggressive, threatening, and hostile towards the second, third and fourth defendants from late 2012 onwards, as discussed above at paragraph 8d.
- e. In January 2013 the plaintiff failed or refused to communicate with the second, third and fourth defendants altogether, and abandoned the Company.

39. They deny paragraph 39 and further say that the plaintiff has been provided with company information, including the Shareholders' Agreement and financial information.

40. They deny paragraph 40, and further say:

- a. Any prejudice resulting to the plaintiff has been caused by his own actions, and resulted from his inability to work with the second, third and fourth defendants and his decision to abandon the restaurant, as discussed above at paragraph 8d.
- b. The actions of the defendants were necessary, fair, and reasonable in all circumstances in light of:

- i. The best interests of the Company, which required additional capital to be contributed and proper management to be exercised.
 - ii. Initial and ongoing agreement between the plaintiff and the second, third and fourth defendants as to how the Company would be financed and managed.
 - iii. The plaintiff's subsequent detrimental, harmful, and prejudicial conduct both to the Company, as discussed at the response to paragraph 7d.
 - iv. The plaintiff's refusal to comment with the second, third and fourth defendants and decision to abandon the Company and restaurant.
- c. It would therefore not be just or equitable to grant the plaintiff relief in light of the actions of the parties overall.

41. They deny paragraph 41, and further repeat the responses to paragraph 40 above.

Second cause of action" supposed failure to comply with the Companies Act 1993 ('Act')

Transfer of shares

42. They admit paragraph 42.
43. They admit paragraph 43.
44. They deny paragraph 44, and further say that this was in accordance with the Shareholders' Agreement agreed between the parties.
45. They admit paragraph 45, and further say that the second, third, and fourth defendants were unable to attend the meet at the time originally scheduled by the plaintiff.
46. They deny paragraph 46, and repeat paragraph 45, and further say that the plaintiff declined or failed to reschedule the meeting.
47. They deny that the transfer of shares and subsequent recording of it with the Companies Office was unlawful, and further say that it was in accordance with the Shareholders' Agreement.

Appointment of fourth defendant as director

48. They admit paragraph 48.
49. They admit paragraph 49.
50. They admit paragraph 50.
51. They admit paragraph 51, and further say that this was taken as a result of the plaintiff's behaviour referred to in paragraph 8c.

52. They admit paragraph 52, and further say that the second, third and fourth defendants were acting in reliance on communications with the Companies Office as detailed at 8d above.

53. They deny paragraph 53, and further say:

- a. The appointment of the fourth defendant as a director was in the best interests of the Company.
- b. The plaintiff accepted the involvement of the fourth defendant with the Company and acknowledged the appointment of the fourth defendant as a director, as discussed at paragraph 8d above.

Removal of plaintiff as director

54. They repeat their response to paragraphs 48 to 50 above.

55. They admit paragraph 55.

56. They admit paragraph 56.

57. They admit paragraph 57, and further:

- a. Repeat the response given at paragraph 8d above.
- b. Say that this action was in the best interests of the Company in light of the Company's financial situation, the plaintiff's mismanagement, and the plaintiff's inability to work with the second, third, and fourth defendants.

58. They admit paragraph 58, and further say that this action was taken following, and in reliance on, a conversation with the Companies Office by telephone, as detailed in paragraph 8d above.

59. They deny paragraph 59, and say that the plaintiff was given notice of this meeting, as detailed at paragraph 28b above.

60. They deny paragraph 60, and repeat their response at paragraph 54 above.

61. In respect of paragraph 61, they:

- a. Admit that the second, third and fourth defendants held a meeting without the plaintiff in attendance.
- b. Further say that the plaintiff was advised of, but failed to attend the meeting, as discussed at paragraph 8d above.
- c. Admit that the plaintiff's decision to abandon this office of director was formalised at that meeting.
- d. Otherwise deny paragraph 61.

62. In respect of paragraph 62, they:

- a. Deny that any aspect of the meeting did not comply with the requirements of the Act.
- b. Further say that this meeting simply formalised the plaintiff's earlier decision to resign.
- c. Deny that any aspect of the meeting was unlawful.

Removal of plaintiff as shareholder

63. They repeat paragraph 33 above.

64. They admit paragraph 64.

65. They admit paragraph 65.

66. They admit paragraph 66, and further say that the operation of the Shareholders' Agreement provided a contractually agreed mechanism for dilution of shares in the Company, as discussed at paragraph 7f above.

67. They admit paragraph 67, and further say that the plaintiff's shares have been diluted as a result of the operation of the Shareholders' Agreement, as discussed at 7f, and 82 above.

68. They deny paragraph 68 and say that:

- a. The plaintiff's shares have not been removed, and that the Companies Office register is in error, as discussed in paragraph 8e.
- b. They repeat their responses at paragraphs 66 and 67 above.

69. They deny paragraph 69, and repeat the responses given at paragraphs 67 and 68 above.

Access to information

Access to records

70. They admit paragraph 70.

71. They deny paragraph 71, and repeat paragraph 38 above.

Treatment of dividends

72. They admit paragraph 72.

73. In respect of paragraph 73, they say that there have been no dividends paid out.

74. In respect of paragraph 75, they:

- a. Repeat paragraph 67 above.
- b. Repeat paragraph 73.

Remuneration and other benefits

75. They admit to paragraph 75.

76. In respect of paragraph 76, they say that no remuneration or other benefits have been paid out of the Company, or authorised by the defendants to the shareholders in their capacity as shareholders.

77. They admit paragraph 77, and repeat paragraph 76 above.

Minutes of meetings

78. They admit paragraph 78.

79. They admit paragraph 79, and further say the plaintiff has received various Company documentation as discussed at paragraph 39 above.

Annual report and financial statements

80. They admit paragraph 80.

81. They deny paragraph 81, and repeat paragraph 39 above.

The defendants by their solicitor further say:

Affirmative defence – estoppel by agreement – second cause of action

- a. Individuals involved with companies, including shareholders, are free to agree to deal with their own interests by contract as they think fit, and these agreements will have contractual force.
- b. The plaintiff agreed with the defendants:
 - i. That the individual shareholders' interests in the Company would be altered based on capital injections into the Company, under the Shareholders' Agreement.
 - ii. That the fourth defendant could be involved in the Company, which included acknowledging the fourth defendant's appointment as a director.
 - iii. That the operations, finances, and management of the Company generally could be carried out in the manner they were.
 - iv. Overall, to authorise the various actions alleged to be in breach of the Act described by the plaintiff 42 to 81 above.
- c. Given these agreements, there have therefore been no breaches of the Act, and the plaintiff would be estopped from asserting any, in any event.

Third cause of action: alleged breach of fiduciary duty

82. They deny paragraph 82, and further say:

- a. Directors to not ordinarily owe fiduciary duties to shareholders.
- b. These particular facts are not sufficient to displace this ordinary rule, in light of the matters discussed above at paragraph 8, which indicate that the plaintiff did not at the material times vest confidence and trust in the second and third defendants.

83. They deny paragraph 83, and further:

- a. Repeat paragraph 82 and reiterate that no fiduciary duties were owed in these circumstances.
- b. Further say even if a fiduciary duty was recognized in these circumstances it would not extend to a general obligation to supervise the share register.

84. They deny paragraph 84, and repeat paragraphs 82 and 83 above.

85. In response to paragraph 85, they:

- a. Admit that the second defendant altered the Companies Office register to record a transfer of 21 shares on or about 19 December 2012, and repeat paragraph 8a above.
- b. Admit that the second defendant altered the Companies Office register to record a transfer of 49 shares on or about 24 February 2013, and repeat paragraph 8e above.
- c. Deny that these actions were in defiance of any legal rights of the plaintiff, and repeat paragraph 8 above.

86. They deny paragraph 86, and further say:

- a. They repeat paragraphs 82 and 83 above.
- b. They say that, even if a fiduciary duty to supervise the share register was owed (a point denied), the defendants' conduct did not breach this duty.

87. They deny paragraph 87, and repeat paragraphs 82 and 83 above, and further say that the shares are worthless.

88. In response to paragraph 88, they repeat paragraphs 82, 83 and 87 above, and further say that there have been no profits, dividends or other remuneration made or paid out by the Company.

The defendants by their solicitor further say:

Affirmative defence – clean hands – first, second, and third causes of action

- a. The Court has a discretion to deny relief to a plaintiff who has not come to the court with clean hands, as part of assessing.
 - i. Whether it is just and equitable to grant relief under the Act.
 - ii. Whether the plaintiff is entitled to relief in any other relevant sense, including in a claim for oppression, breach of fiduciary duties, or breach of any other relevant common law or equitable maxim.
- b. This discretion extends to an application for relief by a shareholder against a company and its office holders.
- c. On balance, relief should be denied to the plaintiff in light of a comparison between the plaintiff's and defendants' conduct, described above, including that at paragraphs 7 and 8 in particular.

This document is filed by Malcolm Leslie North for the respondent.

Schedule 1: Particulars of withdrawals and transactions

Date	Payer	Particulars	\$ Amount	Reasons
05/02/2013		Public	\$190.50	Directors' lunch
Undated		Tony Chow	\$104.00	Staff training
Undated		Capitol	\$277.00	Staff training
Undated		Public	\$32.50	Directors' lunch
Undated		Public	\$16.00	Coffee with clients
07/03/2013		Samuel North – rent	\$400.00	In Lieu of Wages
02/04/2013		Samuel North – rent	\$450.00	In Lieu of Wages
07/07/2013		Sam – Credit Card – Global plus	\$100.00	Company Expense
20/08/2013	M D North	Repay	\$160.77	Repay loan GE Money
28/08/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
03/09/2013	M D North	Repay GE	\$160.77	Repay loan GE Money
04/09/2013		Vodafone – Sam	\$226.67	Owners phone a/c
04/09/2013		Global Plus Visa	\$500.00	Company expense
04/09/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
05/09/2013		Vodafone	\$150.00	Company Expense
09/09/2013	Sam North	Rent	\$900.00	In Lieu of Wages
10/09/2013		Global Plus Visa	\$100.00	Company Expense
12/09/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
17/09/2013	MD North	Repay GE	\$160.77	Repay GE Money
18/09/2013		Global Plus Visa	\$100.00	Company Expenses
26/09/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
01/10/2013	MD North	Repay GE	\$160.77	Repay GE Money
02/10/2013		Global Plus Visa	225.29	Company Expense
03/10/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
08/10/2013	Samuel North	Rent	\$900.00	In Lieu of Wages
08/10/2013			\$100.00	
11/10/2013	Sam North	Drawings	\$100.00	In Lieu of Wages
15/10/2013	MD North	Repay GE	\$160.77	Repay GE Money
29/10/2013	MD North	Repay GE	\$160.77	Repay GE Money
04/10/2013		Steer and Beer	\$146.00	Company Expense
04/10/2013		Fast Cash	\$100.00	Company Expense
12/11/2013	MD North	Repay GE	\$160.77	Repay GE Money
26/11/2013	Sam North	Drawings	\$100.00	In Lieu of Wages
26/11/2013	MD North	Repay GE	\$160.77	Repay GE Money
29/11/2013	Sam North	Drawings	\$900.00	Rent in Lieu of Wages
03/12/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
09/12/2013	Ross North	Loan	\$1,000.00	Re Ross North (\$7,000) loan
09/12/2013	Sam North	Drawings	\$900.00	Rent – In Lieu of Wages

Date	Payer	Particulars	\$ Amount	Reasons
10/12/2013	MD North	Repay GE	\$160.77	Repay GE Money
13/12/2013	Sam North	Drawings	\$500.00	In Lieu of Wages
18/12/2013	Sam North	Drawings	\$900.00	Rent in Lieu of Wages
20/12/2013		Vodafone – Sam	\$126.21	Mobile Phone/Owner
24/12/2013	Sam North	Drawings	\$1,000.00	In Lieu of Wages
24/12/2013	MD North	Repay GE	\$160.77	Repay GE Money
07/01/2014	MD North	Repay GE	\$160.77	Repay GE Money
21/01/2014	MD North	Repay GE	\$160.77	Repay GE Money
30/01/2014		Vodafone – Sam	\$151.41	Mobile Phone/Owner
30/01/2014		Skirt boards	\$285.00	Restaurant repairs
04/02/2014	MD North	Repay GE	\$160.77	Repay GE Money
18/02/2014	MD North	Repay GE	\$160.77	Repay GE Money
04/03/2013	MD North	Repay GE	\$160.77	Repay GE Money
10/03/2013		Vodafone – Sam	\$81.01	Mobile Phone/Owner
18/03/2014	MD North	Repay GE	\$160.77	Repay GE Money
31/03/2014		Fast Cash – Cambridge Ho	\$120.00	Cash for Vegetable Market
01/04/2014	MD North	Repay GE	\$160.77	Repay GE Money
07/04/2014		Vodafone – Sam	\$71.68	Mobile Phone/Owner
15/04/2014	MD North	Repay GE	\$160.77	Repay GE Money
22/04/2014		Withdrawal Cambridge Ho	\$120.00	Cash for Vegetable Market
28/04/2014		Withdrawal Cambridge Ho	\$50.00	Cash for Vegetable Market
29/04/2014	MD North	Repay GE	\$160.77	Repay GE Money
06/05/2014		Vodafone – Sam	\$96.78	Mobile Phone/Owner
13/05/2014	MD North	Repay GE	\$160.77	Repay GE Money
27/05/2014	MD North	Repay GE	\$160.77	Repay GE Money
10/06/2014	MD North	Repay GE	\$160.77	Repay GE Money
11/06/2014		Vodafone – Sam	\$84.85	Mobile Phone/Owner
16/06/2014		Fast Cash – Cambridge Ho	\$100.00	Cash for Vegetable Market
24/06/2014	MD North	Repay GE	\$160.77	Repay GE Money
30/06/2014		Fast Cash – Cambridge Ho	\$100.00	Cash for Vegetable Market
22/07/2014	MD North	Repay GE	\$160.77	Repay GE Money
21/07/2014		Withdrawal	\$400.00	Pay Electrician repairs
08/07/2014	MD North	Repay GE	\$160.77	Repay GE Money
Total			\$22,224.15	