IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 137
EMPC 225/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KATHERINE BENNETT First Plaintiff
AND	FRANK VAN GEEMS Second Plaintiff
AND	SAMSURI ZAINOL Third Plaintiff
AND	SEAN MICHAELS First Defendant
AND	CORPORATE GROUP INTERNATIONAL LIMITED Second Defendant
AND	CORPORATE CLEANING SERVICES LIMITED Third Defendant
AND	CORPORATE PROTECTION AND SECURITY INTERNATIONAL LIMITED Fourth Defendant

Hearing:	23 June and 1 July 2016 (Heard at Auckland)
Appearances:	G Bennett, advocate and A Moghadam, counsel for plaintiffs S Michaels, (in person) and on behalf of second, third and fourth defendant companies
Judgment:	28 October 2016

JUDGMENT OF JUDGE M E PERKINS

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[1] These proceedings involved a challenge to a determination of the Employment Relations Authority (the Authority) dated 17 July 2015.[1] The plaintiffs sought a de novo hearing of the entire matter although the quantum of monetary awards made by the Authority is accepted.

[2] In the proceedings before the Court, as in the Authority proceedings, the plaintiffs (Katherine Bennett, Frank van Geems and Samsuri Zainol) have named Mr Sean Michaels and his three companies as defendants. In one document filed in the proceedings a further person was named as second defendant. That was done without any application for leave and it is accepted that he was mistakenly named and should not be a defendant in the challenge. He was not a party to or represented at the Authority's investigation meeting. He is not a party in the challenge.

[3] The remedies and orders now sought by the plaintiffs, which differ in some respects from those sought from the Authority, are as follows:

(a) That Ms Bennett is awarded $7,268.90 gross wages for the period 14 April to 28 May 2014 (as determined by the Employment Relations Authority);

(b) That Mr Zainol is awarded $11,652.90 gross wages for the period 21 March to 27 June 2014 (as determined by the Employment Relations Authority);

(c) That Mr van Geems is awarded $6,666.00 gross wages for the period 22 April to 20 May 2014 (as determined by the Employment Relations Authority);

(d) That the Court lift the corporate veil of the Second, Third and Fourth defendants and find that the true employer is Sean Michaels;

(e) That Mr Michaels misled or deceived the plaintiffs and therefore breached section 4 of the Employment Relations Act 2000;

(f) That Mr Michaels misled or deceived the plaintiffs and therefore breached section 12 of the Fair Trading Act 1986;

(g) That Mr Michaels personally aided and abetted the non-payment of wages causing a breach of the term of the employment agreement of the plaintiffs;

(h) That the plaintiffs were constructively dismissed;

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1 *Bennett v Michaels* [2015] NZERA Auckland 207.

(i) That interest be imposed on outstanding wages at the prescribed rate by the Judicature Act 1908;

(j) Compensation for each plaintiff in the amount of $30,000.00;

(k) Any other relief the Court deems fit to grant;

(l) Costs.

Procedural issues

[4] At the Authority's investigation meeting on 17 July 2015, Mr Michaels appeared and represented himself and the other respondents. When the papers commencing the challenge were served on Mr Michaels and his companies, no steps were taken in the proceedings by the defendants within the time specified. Accordingly, the matter was set down for a formal proof hearing. That hearing was to have proceeded on 23 June 2016.

[5] The day before the set hearing date, Mr Michaels approached the Court registry staff claiming that he had only just become aware of the proceedings and the fixture and that he had not been served with any of the papers. When the matter was called on 23 June 2016, Mr Michaels appeared and sought an adjournment to enable him the opportunity of obtaining legal advice. He then advised that the other defendant companies were being put into liquidation and he also alleged that he was facing bankruptcy proceedings.

[6] Over the opposition of Mr Moghadam, appearing as counsel for the plaintiffs, the Court granted an adjournment for one week to enable Mr Michaels to obtain legal advice and representation. He and the other defendants would have needed to have sought leave to defend the proceedings and in view of the assertion by Mr Michaels that the defendants had not received notice of the proceedings and the fixture, the adjournment was reluctantly granted. In view of the steps taken by the plaintiffs to serve Mr Michaels and his companies and the contents of the affidavit of such service filed with the Court, there was some scepticism at Mr Michaels' assertions. The adjournment for one week was conditional upon Mr Michaels obtaining legal advice and representation and taking steps in the proceedings. In addition the defendants were ordered to pay costs on the adjournment of $1,000 and

that sum was to be paid to the solicitors acting for the plaintiffs. Such costs were to be paid on or before 4 pm on 28 June 2016. If costs were not paid within that time, the defendants would not be entitled to participate further in the proceedings and the matter would proceed to formal proof.

[7] At this hearing Mr Michaels named a solicitor and legal firm he alleged were dealing with bankruptcy proceedings against him. During the adjournment, inquiries were made of the named legal firm and it was discovered that this information given to the Court by Mr Michaels was false.

[8] When the matter was recalled on 1 July 2016, Mr Michaels again appeared on his own behalf and for the respondents. He had not used the period of the adjournment to obtain legal advice and the defendants had not paid the costs as ordered. He sought a further adjournment which was declined. During the course of discussions about the matter, Mr Michaels left the Court, indicating that he had a funeral to attend. The matter proceeded from that point as a formal proof hearing.

The Authority's determination

[9] The primary focus at the investigation meeting before the Authority was to have the Authority pierce the corporate veil in respect of the second, third and fourth defendants (who were respondents before the Authority) in order to show that it was in fact Mr Michaels who was the true employer of the three plaintiffs and that liability for the claims rested with him. In addition, the plaintiffs claimed that they had a personal grievance for having been unjustifiably constructively dismissed and were owed wages for the periods when they were employed either by Mr Michaels or one or other of the three companies. There were also claims for penalties for breach of good faith, aiding and abetting breach of the employment agreements and for misleading and deceptive conduct pursuant to the Fair Trading Act 1986.

[10] The Authority Member decided, after hearing the evidence, that it was not an appropriate case for piercing the corporate veil to find that Mr Michaels was personally liable. Insofar as the claim for unjustifiable constructive dismissal was concerned, that application by each of the three plaintiffs was dismissed, as no

personal grievance had ever been raised with Mr Michaels or the three companies. No application appears to have been made before the Authority for leave to raise a personal grievance out of time.

[11] Insofar as the claims for wages were concerned, Corporate Protection and Security International Ltd was ordered to pay outstanding wages to Katherine Bennett and Samsuri Zainol. Corporate Group International Ltd was ordered to pay outstanding wages to Frank van Geems.

[12] The determination records that the claims for penalties were only raised for the first time at the Investigation Meeting and the Authority Member invited further submissions from the parties on these issues so that the investigation could continue at a later date to consider them.[2] Those claims do not appear to have been pursued further before the Authority, but are now raised in the challenge to the Court before there has been a final determination by the Authority. Costs were reserved in the Authority until the matter there was concluded, including matters yet to be resolved there.

Factual background

[13] Ms Bennett described the circumstances of her commencement of employment. She had previously met Mr Michaels when she was Operations Manager and he was a security supervisor at Vector Arena. She applied for a position and was employed to work for the fourth defendant (Corporate Protection and Security International Ltd) as Marketing Manager. She described unusual circumstances surrounding interviews for the position (eg meetings conducted at a coffee bar rather than at office premises as she would have expected). She further described unsatisfactory circumstances surrounding the office premises with purchase of office furniture and its subsequent repossession, computer equipment being purchased and repossessed and her being given a mobile phone which was not activated for use. She did not receive payment of wages the entire time she remained in employment. She was given cheques for wages which were rejected by the bank. She described meetings with Mr Michaels where statements were made about

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2 At [47].

financiers and investors agreeing to back the companies and invest capital, which proved to be false. She stated that she believed Mr Michaels was invoicing clients for work undertaken during the period she was employed and that any payments from customers were being retained by Mr Michaels personally and diverted to his personal bank account. Evidence from Ms Bennett and bank statements recovered and produced in evidence show Mr Michaels shuffling money between various accounts at different banks to cover the impecuniosity of the corporate entities. Looking back, Ms Bennett considers the defendant companies were mere shells without assets and that her employment with them was a fraudulent sham on Mr Michaels' part. She considers he relied upon the companies as protecting him from personal liability when in fact he was her true employer.

[14] Mr van Geems and Mr Zainol described similar circumstances of apparent fraudulent behaviour by Mr Michaels in their employment. Mr van Geems is now resident abroad and did not present evidence formally at the hearing. In his brief of evidence he described being offered a shareholding and directorship in Corporate Group International Ltd. He was also offered the position of Operations and Training Manager. He was to receive a salary of $80,000 per annum. He was to receive a company car in addition to shares and a directorship. He similarly described the under-handed dealings of Mr Michaels. This included cheques not being met, repossession of vehicles purchased, promises of investors and financial backers for the business never eventuating, fraudulent dealings with bank accounts and shuffling of dealings between banks. He did not receive any salary during the time he was employed. He was aware also that Mr Michaels was diverting money received for completing contracts into Mr Michaels' personal account.

[15] Mr Zainol described similar behaviour. He was employed to work for the fourth defendant. He was lured to New Zealand from Singapore by a promise of employment by Mr Michaels. He described interviews at a coffee bar. He was also employed as an Operations/Training Manager. He was to be paid $50,000 per annum, provided with a mobile phone and have use of a company motor car. He received no income during his employment. He did not receive a mobile phone or the motor car to use. As he had moved to New Zealand with his wife and young children, he got into serious financial difficulties as a result of Mr Michaels'

duplicitous behaviour. He described receiving cheques from Mr Michaels to cover his rental and his children's school expenses which were not met by the bank. He described office furniture being purchased and then repossessed and statements from Mr Michaels about backers and financiers of the companies which never eventuated. He also stated he was aware Mr Michaels was diverting money paid by clients into his own personal bank account.

[16] Each of the witnesses left the employment because of not being paid. They each described their humiliation and stress at the hands of Mr Michaels. However, while it is clear they were constructively dismissed, none of them initiated a personal grievance and therefore their claims to compensation for this cannot succeed.

[17] By the time the plaintiffs' challenges and claims came to be heard by the Court, it was conceded by them that the primary issue to be heard was that aimed at lifting the corporate veil so that the wages claims could be pursued against Mr Michaels personally. For reasons expressed by the Authority in its determination and in this judgment, the claims to constructive dismissal and compensation cannot succeed. The Authority remains seized of the claims against Mr Michaels personally for penalties for aiding and abetting breaches of the employment agreement and under the Fair Trading Act 1986. As these claims are not yet finally resolved by the Authority, they cannot be included in the challenge to the Court.

[18] On the face of it, the plaintiffs initially believed that they were being employed validly by corporate entities established by Mr Michaels. It soon became apparent to them, however, that use of the companies by Mr Michaels in this way was for the purposes of avoiding legal responsibility not only to the employees but also to commercial creditors.

Principles applying

[19] The principles applying to situations where the corporate veil will be pierced or lifted are now well established. As stated in Butterworths New Zealand Law Dictionary, 'corporate veil' is a "description of the principle of limited liability of individual members of a company, who are treated as legal entities separate from the

company and are not liable for the company's debts".[3] Black's Law Dictionary describes piercing of the corporate veil as "The judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation's wrongful acts …"[4]

[20] The following discussion of decisions in which lifting or piercing the corporate veil has been considered provide valuable pointers to how the Court should deal with the situation in the present case.

[21] *Prest v Petrodel Resources Ltd* is the leading United Kingdom case on the subject and has been influential in New Zealand.[5] There are also New Zealand authorities which pre-date this judgment. In *Prest* at first instance,[6] the High Court in this matrimonial property case relied on the following principles, (as summarised at the Supreme Court):[7]

> (a) Ownership and control were not in themselves sufficient to pierce the corporate veil. (b) Even where there was no unconnected third party interest the veil could not be pierced only because it is necessary in the interests of justice. (c) The veil can only be pierced if there is impropriety. (d) The impropriety must be linked to the use of the company structure to avoid or conceal liability. (e) In order to pierce the veil, both control by the wrongdoer and impropriety must be demonstrated. (f) A company may be a façade even though originally incorporated without deceptive intent.

[22] The first instance decision was reversed at the Court of Appeal, but that decision was itself overturned by the Supreme Court. While not directly addressing the list of principles expressed by the High Court Judge (Moylan J) at first instance, the Supreme Court elucidated their meaning and application.

[23] Lord Sumption in the Supreme Court stated that the veil could only be pierced when there was an existing legal obligation which was deliberately evaded by the establishment and use of a company. The veil could be pierced only for the purpose of depriving the company or its controller of the advantage they would otherwise obtain from the company's separate legal personality. He said:

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3 Peter Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington, 2011).

4 Bryan A Garner (ed) *Blacks Law Dictionary* (10th ed, Thomson Reuters, USA, 2009).

5 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [106].

6 *Prest v Prest* **[**2011] EWHC 2956 (Fam).

7 *Prest* (SC) at [37]. These principles were not questioned on appeal.

> [17] Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in *Case concerning Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations ….
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> [18] English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712:
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> > "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever …"
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> …
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> [34] These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about....
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> [35] I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

[24] These statements establish that the company has to have been set up with the *intention* of evading the legal responsibility of the person, if the courts are to pierce the corporate veil to expose that person to personal liability. This will happen rarely.

[25] Lord Sumption stated that there must always be the ability for the law to respond to cases of abuse:[8]

> In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

[26] Lord Neuberger, who surveyed other jurisdictions, concluded that it would not be right for courts to "step in and undo transactions, save where there is a well-established and principled ground for doing so."[9] He accepted that "fraud unravels everything".[10]

[27] *Prest* makes clear that control is not a factor to be considered. LJ Rimer stated that, "… it makes no difference to the fact of a company's separate entity that a single individual controls all its shares. That is, and always has been, a commonplace circumstance".[11]

[28] It is clear from those statements that where a finding is not made that the company was created to evade a legal or fiduciary obligation, the veil cannot be lifted.

[29] The notion of "a sham" came into expression with the much older English case of *Gilford Motor Co Ltd*:[12]

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8 At [27].
9 At [83].
10 At [18] adopting Sumption LJ, quoting *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712 per Denning LJ.
11 At [100].
12 *Gilford Motor Co Ltd v Horne* [1933] All ER 109, [1933] Ch 935 at 114,956.

> I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr. E. B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.

[30] This description supports the view later expressed in *Prest* that the company must have been formed for a purpose which was a sham.

[31] *Square 1 Service Group Ltd v Butler* is the main Employment Court case referred to in later Authority determinations and judgments on the subject.[13] In that case the issue was whether the company was created as a sham in order to disadvantage the particular litigant; and the Court found that that purpose was not a prerequisite. It was enough that a sham had been created for any reason. However, the influence of the equity and good conscience jurisdiction of the Employment Court was noted:[14]

> I acknowledge the generally cautious approach taken by Courts in interfering with the long established law of corporate separateness confirmed as long and as authoritatively ago by the Privy Council in *Salomon v Salomon* & *Co Ltd* [1897] AC 22; [1895-9] All ER Rep 33. The cautious approach of Courts even now is illustrated by judgments such as that of the Court of Appeal in *Re Securitibank Ltd (No* 2) [1978] 2 NZLR 136, at pp 158 and 159 per Richmond P.
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> In this Court and in the Employment Tribunal such cautions must be considered in light of the statutory requirement to act in equity and good conscience and given the special nature of employment relationships, especially between individual persons and corporations. This is illustrated by decisions such as *NZ Seamens IUOW* v *Gearbulk Shipping (NZ) Ltd* [1990] 1 NZILR 688, 698.

[32] In *Gearbulk*, while the Labour Court found that it did not need to look behind the corporate veil (to find out whether the actions of the parent company could be fixed on its subsidiary NZ company), it nevertheless acknowledged in obiter its equitable jurisdiction to do so:[15]

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13 *Square 1 Service Group Ltd v Butler* [1994] 1 ERNZ 667 (EC) at 679. This was criticised as "flawed" in a later case (*Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA)) but not on this point.

14 At 679.

15 *NZ Seamens IUOW* v *Gearbulk Shipping (NZ) Ltd* [1990] 1 NZILR 688 (LC) at 698.

> If there be any doubt, we consider that the wide jurisdiction enjoyed by this Court under s.279(4) of the Labour Relations Act 1987 enables us to conduct our consideration of the case by recourse to equitable principles. The drawing aside or piercing of a corporate veil is an equitable doctrine in the Courts of ordinary jurisdiction.

[33] In *Musa*, the Employment Court referred, again in obiter, to the discretion to lift the corporate veil, saying:[16]

> The discretion to lift the corporate veil is one to be exercised rarely and sparingly although that has been done by the Employment Court and its predecessors in a few cases. In those rare cases where the veil has been lifted it has been done so in relation to companies and where there has been a finding of a deliberate sham or arrangement which is a mere façade designed to conceal the true facts. The DHB is not a company and it is not appropriate for the application of the discretion.

[34] *Empress Abalone Ltd v Langdon* is one of the very few employment cases where the corporate veil has been lifted.[17] In that case it was necessary to do so because one of the defendants had had a prior employment relationship on his own account with the plaintiff, and the issue involved the use of confidential information received from his previous employer, to the advantage of his own company. These reasons for lifting the corporate veil would not meet the criteria laid down in *Prest*; and it could be argued that applying the doctrine was not necessary in that case given the personal confidentiality obligations of the previous employee.

[35] While there is discussion in the authorities about the circumstances in which the corporate veil can be lifted, and cautions commonly given about whether it is open to the Court to lift the veil in most circumstances, the authorities are united in accepting that the one established ground for lifting the corporate veil is in the event of a sham or deliberate fraud.

Conclusion and disposition

[36] Applying these principles to the present case, it is clear that this is an appropriate case for the piercing or lifting of the corporate veil to hold Mr Michaels personally liable. This is a different conclusion from that reached by the Authority in

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16 *Musa v Whanganui District Health Board* WC20/08, 18 November 2008 (EmpC) at [30].
17 *Empress Abalone Ltd v Langdon* [1999] 1 ERNZ 762 (EC).

its determination. Mr Michaels apparently gave evidence to the investigation meeting before the Authority, which may have persuaded the Authority to decline to order personal liability on his part. My assessment of Mr Michaels, from his brief appearances before the Court as described earlier, would be that Mr Michaels would probably prove to be far from a reliable witness.

[37] It is clear, from the evidence given by the plaintiffs at the formal proof hearing as to Mr Michaels' dealings with the three plaintiffs and commercial creditors of the companies, that Mr Michaels deliberately created and used the corporate entities in order to hide behind them and to divert any income received from the running of the businesses to himself personally while avoiding liability. This is evidenced by the curious behaviour towards the plaintiffs in establishing their employment and the way in which he manipulated creditors who supplied furniture and business equipment to the business, his false representations as to obtaining backing and financial advances from investors, the way he persistently issued cheques which he must have known had no possibility of being met by the banks, and also the concerning evidence of him manipulating entries between banks to obtain funds. Each of the three plaintiffs speaks of their knowledge of his having funds personally available as a result of him diverting income ostensibly received from the trading of the companies into his personal account.

[38] Mr Michaels' treatment of the three plaintiffs was reprehensible and fraudulent, but unfortunately none of them has submitted a personal grievance which would entitle either the Authority or the Court to consider compensation in circumstances where, at the time they left employment, a constructive dismissal existed. Some reimbursement for this may be obtainable by them returning to the Authority to have it consider the penalty actions against Mr Michaels personally and asking the Authority to direct that either part or the whole of the penalties be paid to them.

[39] Insofar as quantum in the challenge is concerned, it appears that the plaintiffs are satisfied with the quantification which the Authority made in respect of their wages for the periods when they were employed and the Court is not asked to revisit those calculations.

[40] Accordingly, judgment is entered for the three plaintiffs for the sums which were awarded by the Authority for lost wages. That judgment is against Mr Michaels personally. The plaintiffs should contact the Authority registry if they wish to have the hearing completed in respect of the penalty claims and any costs award.

[41] Insofar as costs on this challenge are concerned, they will follow the event and each of the plaintiffs is entitled to an award of costs against Mr Michaels. Such costs are reserved to enable the plaintiffs to file written submissions concerning the quantification of their claims to costs. These should be filed within 14 days from the date of this judgment.

M E Perkins
Judge

Judgment signed at 2.45 pm on 28 October 2016