

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 15/08  
WRC 22/06**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN FRANCIS WESTON  
Plaintiff

AND GARY FRASER  
Defendant

Hearing: 28 May 2008  
(Heard at New Plymouth)

Appearances: N R Harding and E Evans, Counsel for Plaintiff  
M W S Nutsford, Counsel for Defendant

Judgment: 4 July 2008

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**JUDGMENT OF JUDGE BS TRAVIS**

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[1] The plaintiff, Mr Weston, accepts, through his counsel, that the defendant, Mr Fraser, was an employee of a used car sales business and was unjustifiably dismissed. The issue in the case is: who was Mr Fraser's employer?

**The proceedings**

[2] On 18 April 2006 the Employment Relations Authority investigated Mr Fraser's claim that he was unjustifiably summarily dismissed. There was no appearance by Mr Weston at the investigation meeting. On 26 April 2006 the Authority issued in writing what it described as an oral determination recording the oral decision given at the conclusion of the investigation (WA 68/06). Mr Fraser's application to the Authority had described the respondent as "*Francis Weston t/a Sportscar World*".

The Authority noted that the respondent in a statement in reply had identified itself as “*Sportscar World Limited*”. The respondent claimed that Mr Fraser was an independent contractor and that Mr Weston traded as Sportscar World Limited a limited liability company. In answer to the question who was the employer, the Authority found as follows:

*25. I do not accept that Mr Fraser was employed, in any capacity, by Sportscar World Limited. Instead, I am satisfied that Mr Weston was the applicant's employer. I reach this conclusion because: there is no written employment agreement to the effect that the Company was the applicant's employer. While cash wages cheques were apparently drawn by “Sportscar World” that is not on its face the same entity as the company, and other cheques were drawn by “McLeod Trust” (par 11 of the applicant’s statement and reiterated by way of oral evidence).*

[3] The Authority was satisfied from Mr Fraser’s uncontested evidence that Mr Weston had made it clear from the outset that Mr Fraser would be working for him and he effectively controlled Mr Fraser throughout the duration of their employment relationship. There was no written employment agreement and the Authority found Mr Fraser had no reason to believe he was employed by anyone other than Mr Weston. The Authority concluded:

*If Mr Weston employed the applicant on behalf of his company he clearly failed to disclose that fact: Mr Fraser is therefore able to rely on the doctrine of “undisclosed principal” and proceed against Mr Weston (Cuttance v Purkis [1994] 2 ERNZ 321).*

[4] The Authority found that Mr Fraser was unjustifiably dismissed by Mr Weston and ordered Mr Weston to pay him holiday pay and lost wages totalling \$17,055, interest on the holiday pay, compensation for humiliation, distress and injury to feelings of \$8,000, and imposed a penalty of \$500 for breach of s130(4) of the Employment Relations Act 2000 for failing to provide wage and time records on request. The penalty was to be paid to the Crown.

[5] Mr Weston challenged the whole of the determination and sought a hearing de novo.

[6] Mr Weston then applied to the Authority to reopen its original investigation on the grounds that there had been a miscarriage of justice because the respondent was named incorrectly and the evidence the Authority heard was unchallenged. Mr

Weston's former solicitor had written to the Authority advising that Mr Weston, Sportscar World Limited's sole director, had been convicted of charges under s128A of the Insolvency Act 1967 on 30 September 2005 and that he was "*prohibited*" under s382 of the Companies Act 1993. As a result he was disqualified from registering as a motor vehicle trader (s24(i) of the Motor Vehicle Sales Act 2003). Mr Weston, through his solicitor advised that he believed he would be in breach of s382(1)(a) of the Companies Act 1993, which prohibits a person convicted on indictment of an offence from being directly or indirectly connected with the management of a company, were he to in any way participate in the Authority's investigation, and therefore he had declined to issue instructions to his solicitor to appear. The solicitor also advised the Authority that Sportscar World Ltd's trading licence had been cancelled. It did not trade, had no assets, and all its funds had been disbursed to secured creditors. It has since been liquidated.

[7] The application to reopen the investigation was rejected by a determination of another Employment Relations Authority Member on 23 November 2006 (WA 166/06). In a subsequent determination dated 15 February 2007 (WA 28/07) Mr Weston was required to pay to Mr Fraser a contribution of \$1,544.10 towards his costs together with disbursements of \$58.80.

[8] Mr Weston applied for a stay of the monetary awards made by the Authority. In a judgment dated 13 December 2006 (WC 24/06) Judge Shaw directed him to pay the amounts of the orders into Court and set the matter down for hearing with Mr Fraser being required to present his case first.

## **The evidence**

[9] Mr Fraser called as a witness Paul Francis Hamlin who leased a piece of land in Stratford in 2005. He described a verbal arrangement he had entered into with Francis Weston to sublease one-third of the yard for his car sales, Sportscar World. He said he was aware that Mr Weston "*was a dodgy operator*" so he kept him on a month to month basis. In about February 2005 he was approached by Mr Fraser who told him that Mr Weston would give him a job if he was able to extend the leasing arrangement. Mr Hamlin agreed to increase the lease to one-half of the total area.

Mr Hamlin said Mr Weston always paid him by cheque, sometimes from Sportscar World and sometimes from an entity called the McLeod Trust. Mr Hamlin considered his arrangement was with Mr Weston and did not consider at any time that he was dealing with Sportscar World Ltd. Mr Hamlin obtained from his bank a copy of the cheque processing which showed three cheques from Sportscar World and one from the McLeod Trust.

[10] Mr Fraser gave evidence that in about January 2005 he saw a car transporter unloading cars on the Stratford site, he introduced himself to Mr Weston and asked if there was any work there. Mr Weston responded that he needed a couple of weeks to get the yard up and running and then Mr Fraser should go and see him. In February 2005 Mr Fraser approached Mr Weston who told him he would be given a salesman's job if he could persuade the landlord to give Mr Weston more of the yard. Mr Fraser then saw Mr Hamlin and arranged for a lease of half the yard on a month to month rental. Mr Fraser was then offered a job as a car salesman and it was agreed that he would start on 11 February.

[11] He was to be paid weekly and was to give Marian Allen, Mr Weston's partner, who was doing all the office work, his IRD number. This he did on the day he started. He received \$400 net each week and was told he could use any car on the yard for his own use. He received his pay by cash cheque every Thursday, either a Sportscar World cheque or a McLeod Trust cheque. He claimed he thought the tax payments were being taken out and paid by Mr Weston through Sportscar World. There were later discussions about commissions on sales and the possibility of a raise. He was approached by Ms Allen just before his first raise, and, together with another staff member, he filled out tax forms.

[12] An issue later arose between the parties as to the registration of a Nissan vehicle. In view of the proper concession on behalf of Mr Weston that the subsequent dismissal was unjustifiable, there is no need to canvass this matter in any detail. Suffice it to say it did create some difficulties between the parties. As a result of this matter, Mr Fraser claims that Mr Weston dismissed him on 20 July 2005. He returned to the yard the following day and Ms Allen paid him the \$2,500 he said he was owed, less tax.

[13] There was a subsequent discussion between Mr Fraser and Mr Weston during which Mr Weston accused Mr Fraser of having stolen a motor vehicle. I am satisfied from the evidence I heard that this allegation was entirely without foundation and that Mr Fraser's acquisition of the vehicle was lawful. There was also a further exchange between Mr Weston and Mr Fraser during which Mr Weston said that Mr Fraser was an independent contractor with obligations to the Inland Revenue Department. As a result of this conversation, Mr Fraser made contact with the Inland Revenue Department and was interviewed about taxation liabilities. At the conclusion of the interview, and after showing the Inland Revenue inspector his receipts, Mr Fraser claims he was told that he was an employee of Sportscar World and that Mr Weston should have been paying tax on Mr Fraser's wages. That recollection is at variance with the letter Inland Revenue wrote to Mr Fraser, to which I will refer later.

[14] Mr Fraser produced, without objection, a facsimile transmission from the Inland Revenue Department summarising his earnings for the years ending 31 March 2005 and 2006. These did not show any earnings from Mr Weston, Sportscar World or Sportscar World Ltd. Nor did they show any PAYE deductions from those sources. As Mr Weston now asserts in his evidence that Mr Fraser's employer was Sportscar World Ltd, it appears to be strange that no PAYE deductions were made by that limited liability company.

[15] Mr Fraser also produced a series of receipts from New Zealand Post Ltd showing the cashing of cheques which Mr Fraser said he received from Mr Weston. He claimed that most of them were from the McLeod Trust, which he thought had something to do with Sportscar World, and there were a few from Sportscar World itself. No attempt was made to link these cheques to any particular accounts so I have no way of knowing from viewing this series of receipts on which bank account the cheques were drawn. Mr Fraser also asserted that Mr Weston had a number of other companies including Sure Way Holdings, Sure Way Finance, Stortford Finance and SCW Holdings. He accepted that he could have worked for any one of Mr Weston's companies.

[16] Mr Fraser was shown copies of supplier information notices, also known as window cards, which are placed in the window of secondhand vehicles and, when the vehicles are sold, the supplier must provide the purchaser with a copy of the card to keep. He was also shown the corresponding set of vehicle offer and sale agreements (the “sale agreements”) showing the sale of the vehicles that had been shown in the window cards. Reference was made to a total of 55 window cards and 55 vehicle offer and sale agreements recording sales made by Mr Fraser although 5 window cards and 6 sale agreements were missing from the bundle produced to the Court. Mr Fraser had signed both the window cards and the sale agreements in each of the 49 transactions shown in the bundle produced to the Court for which he had been responsible.

[17] Many of the window cards are headed up:

### **Sportscar World**

*A trading name of Sportscar World Ltd*

Registered trader: **Yes**

Francis Weston

Trader registration no: **M106406**

414 Broadway South  
Stratford

[18] Some of the window cards showed different addresses in Taranaki. Each of the sale agreements bore exactly the same number and the evidence was that these were simply photocopied instead of being written out on a carbonised block with copies for the motor vehicle dealer and the client. I have analysed the bundle of documents and find that Mr Fraser appears to have signed all copies of the sales agreements and on 20 copies wrote in the words “*Sportscar World*” as the motor vehicle trader and on the remaining 29 placed a stamp which, in block letters, read “*SPORTSCAR WORLD LTD*”. On one example, for the sale of a Daewoo Lanos the letters “*LTD*” on the stamped version had been crossed out but Mr Fraser could not explain why that had been done.

[19] Mr Fraser’s explanation for his use of the “Limited” stamp was that for some reason Mr Weston decided that they were all going to be stamped with “*SPORTSCAR WORLD LTD*”.

[20] In cross-examination Mr Fraser confirmed that he was an experienced motor vehicle salesman, that the purpose of window cards was to ensure that the consumers knew what they were buying and from whom and that he was familiar with the details on the window cards of the vehicles he sold. It was put to him that he accepted he worked for an entity called Sportscar World but the dispute was whether Sportscar World was Mr Weston or some limited liability company and he responded:

*I was of the understanding that Francis Weston was Sportscar World. When I got given the job, I was told that he was the director and I took all this from him and Marion.*

[21] He then confirmed that Mr Weston had told him he was the director of Sportscar World and had started the company from scratch, originally in Hawera. He was asked:

- Q. And, right, so just to be clear here because its an important point, you're happy that at the time you began employment at that yard and I'll just refer to it as the yard, so we both know what we're talking about, because obviously we have different views of what that means. But when you started working at that yard, it was your understanding you were working for a company called Sportscar World, that Mr Weston had started, and that Mr Weston had told you he was a director of.*
- A. Of yes that's right.*

[22] He confirmed that from the very beginning he believed he was working for Sportscar World and they were paying the appropriate tax. He accepted that of the 55 odd vehicles he had sold, on each of them was a clear statement on the window cards that Sportscar World was the trading name of Sportscar World Ltd.

[23] Mr Fraser also confirmed that Mr Weston had told him that he would be working for Mr Weston's company of which Mr Weston was a director, but he claimed at no time did he believe he was working for Sportscar World Ltd. He was then shown a brief of evidence he had prepared for the Employment Relations Authority in March 2006. The backing sheet records Mr Fraser as the applicant and "FRANCIS WESTON t/a SPORTSCAR WORLD LIMITED" as the respondent. In paragraph 11 of that brief when dealing with his pay cheques, his evidence states:

*... they were always made out for cash and I always thought that Sportscar World Ltd was paying the appropriate Tax.*

[24] In paragraph 27 when dealing with the motor vehicle that he was alleged to have stolen, he stated:

*This car was in no way ever associated with Sportscar World Ltd.*

[25] In paragraph 31 of his brief of evidence concerning his dealings with the Inland Revenue Department about tax he stated:

*...I decided to ring the IRD and see where I stood as I didn't want to have to pay tax which I thought Sportscar World Ltd was.*

[26] He then went on to say that the IRD were:

*...happy and that they thought I was definitely an employee of Sportscar World Ltd for 7 months and that Francis Weston should have been paying Tax on my wages. They gave me a letter confirming this.*

[27] Mr Fraser agreed that the brief of evidence was prepared in accordance with his instructions and was signed by him. He claimed that the references to Sportscar World Ltd in his brief of evidence were an oversight. He was then asked:

*Q. Now Mr Fraser I put it to you that you were aware that Sportscar World was a trading name of Sportscar World Ltd.*

*A. No I was under the impression that Sportscar World Ltd was trading as Francis Weston trading as Sportscar World Ltd. I was always under the impression that the business was called Sportscar World.*

*Q. So let me just make sure I understand you, is it your response that you thought Mr Weston was running a business -*

*A. Called Sportscar World trading as -*

*Q. Trading as what?*

*A. Trading – Francis Weston trading as Sportscar World.*

*Q. Now didn't you just say earlier that your understanding was that he was trading as Sportscar World Ltd.*

*A. I haven't said that.*



[28] He continued to maintain, however, that he was under the impression that Mr Weston was running a business as Sportscar World being his company of which he was a director.

[29] In re-examination Mr Fraser produced the letter from an investigator of the Inland Revenue Department, dated 19 December 2005, which stated:

*I have completed my enquiries and am able to advise you that I consider that from 11 February 2005, until your dismissal on 23 August 2005, you were an employee of Sportscar World Limited.*

[30] At the conclusion of the re-examination Mr Nutsford referred Mr Fraser to the wording on the window cards which says “**Sportscar World** – a trading name of **Sportscar World Ltd**” and the appearance of the name Francis Weston. Mr Nutsford asked Mr Fraser if this had any bearing as to how Mr Fraser had interpreted the trading arrangement. Mr Fraser answered:

*Well the big letters at the top is all I ever used. And I just naturally thought that Francis Weston was trading as Sportscar World Ltd.*

[31] The evidence also appeared clear that Sportscar World Limited was the registered motor vehicle trader under the Motor Vehicle Sales Act 2003 under the number M106406 as shown on the window cards at all relevant times.

[32] Mr Weston gave evidence by way of a video link from Brisbane. He confirmed that he was a director of Sportscar World Ltd at the time Mr Fraser was employed by that company. He claimed that if he was to employ Mr Fraser trading as himself he would have required a motor vehicle traders licence. He also claimed Mr Fraser signed all paperwork in the name of Sportscar World Ltd which clearly showed who was his employer. With reference to Mr Fraser’s evidence that he was paid by a cash cheque either from Sportscar World or the McLeod Trust, Mr Weston explained that the McLeod Trust held funds and was an independent broker which provided financing.

[33] In answer to a question why Inland Revenue had not received any PAYE in relation to Mr Fraser on behalf of Sportscar World Ltd or any of the other companies that Mr Weston had run, Mr Weston claimed that the tax would have been paid to the accountants in Hawera and that he had had no access to any of the books on Sportscar World Ltd and this was the first he had heard of the matter. He also maintained that it was Sportscar World Ltd that had dealings with local suppliers, such as Taranaki Newspapers, a tyre company and a local garage.

[34] In answer to questions in cross-examination, Mr Weston explained that his partner, Marian Allen, was a trustee of the McLeod Trust which in turn was funding part of Sportscar World Ltd.

### **Submissions**

[35] Mr Harding referred to the cases which had demonstrated in law the separate identity of a limited liability company from an individual who may even be the sole managing director: see for example *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC). Mr Harding submitted that the limited liability company had bound itself to Mr Fraser through the agency of its sole director, Mr Weston. He submitted that the question then became whether or not Mr Weston as the agent of the limited liability company properly discharged his obligation to make it clear to Mr Fraser that it was the company Mr Fraser would be working for and not Mr Weston as an individual. He referred to the decision relied on by the Employment Relations Authority, *Cuttance (t/a Olympus Fitness Centres) v Purkis* [1994] 2 ERNZ 321, which he submitted was ultimately unhelpful because of the unique factual situation in that case. The Employment Court had approved the reasoning of the Employment Tribunal which had cited from Cheshire & Fifoots Law of Contract, 8th New Zealand Edition on pages 498 and 499:

*'Where an agent, having authority to contract on behalf of another, makes the contract in his or her own name, concealing the fact [that] he or she is only a [sic] representative, the doctrine of the undisclosed principal comes into play. By this doctrine either the agent, or the principal when*

*discovered, may be sued; and either the agent or the principal may sue the other party to the contract.*

*'There is nothing remarkable in this doctrine so far as it concerns the agent. The existence of an enforceable contract between the agent and a [sic] third party is scarcely deniable, for he or she purports to act on his or her own behalf and the other party is content with this apparent state of affairs. At any rate it is well settled that the contract is enforceable either by or against the agent. There is an onus on persons entering into such contracts and claiming to be entering them as agents to make the fact of agency and the identity of the principal plain to the other party to the contract. Without such the inference otherwise to be drawn of personal liability is not displaced.'*

*"So the answer to the dilemma would seem to be clear. Mrs Purkis is entitled to sue Mr Cuttance personally if she so wishes."*

[36] Mr Harding submitted that as Mr Weston had disclosed the identity of the third party, which was the employing company, to Mr Fraser and had represented himself as its director, Mr Weston had discharged his obligation to disclose the existence of the principal as a separate legal entity. He submitted Mr Fraser should have been aware that he was not dealing with an individual but was dealing with a limited liability company. He submitted that in these circumstances had Mr Fraser turned his mind to the matter, it would have been reasonable for him to have concluded that in his dealings with Mr Weston he was dealing with the director of a limited liability company.

[37] Mr Harding also relied on the window cards, which showed that Sportscar World was a trading name of Sportscar World Ltd. He pointed to Mr Fraser's acknowledgment that he was aware of this. He submitted that the wording on the top of the window cards did not imply that the registered trader was Francis Weston and, on an objective test, it appeared clear that the limited liability company was the registered motor vehicle trader and this was confirmed by exhibit L which showed the registration number.

[38] Mr Nutsford submitted that Mr Weston had operated a number of companies which had operated a number of car yards and that Mr Fraser was under the impression from day one, when he had gone to see Mr Weston, that he had been employed by Mr Weston and not by a limited liability company. He observed that it had not been said by Mr Weston that Mr Fraser was going to be working for the company. He accepted Mr Fraser understood that Mr Weston was Sportscar World, but Mr Weston had told him he was the director and that he was to take orders from him and his partner. Mr Fraser also accepted that he was working for a company called Sportscar World and that Mr Weston had told him he was a director of it.

[39] Mr Nutsford submitted that one of the matters that led Mr Fraser into believing that he was working for Mr Weston, as the relationship developed, was that the majority of the cash payments for wages were made by cheques from the McLeod Trust which appeared to bear no relationship to Sportscar World. Those that had come from Sportscar World apparently did not contain the word "limited". He submitted that Mr Fraser had the impression that he could have been redeployed to any one of the entities that Mr Weston ran at the time. He submitted that because the payments appeared to originate from entities other than Sportscar World Ltd that should lead to the conclusion that Mr Weston employed Mr Fraser personally. Mr Nutsford relied on these cheques as evidence which convinced Mr Fraser and should convince the Court that Mr Weston was the employer at the time.

[40] Further Mr Nutsford submitted that the window cards state very clearly that the motor vehicle trader is Mr Weston and that would have supported Mr Fraser's view.

[41] In reply, Mr Harding submitted that there was no evidence of a personal cheque from Mr Weston being used to pay wages. He accepted that it was not put to Mr Weston whether or not he could confirm that the cheques from Sportscar World had the word "Limited" or the letters "Ltd" after them. Mr Fraser could not recall whether any of the cash cheques he received had the statement "Ltd" on them. Mr Harding also relied on the brief of evidence which Mr Fraser had confirmed in re-examination that he had prepared himself without any assistance, which referred to Sportscar World Ltd. He submitted that it was not possible for Mr Weston to have

traded as Sportscar World Ltd for, as a matter of legal principle, a limited liability company is its own legal entity.

## **Discussion**

[42] This is a hearing de novo and the Court must make its own decision on the matter (s183 of the Employment Relations Act 2000). The onus was on Mr Fraser to establish that Mr Weston was his employer. Mr Fraser discharged that onus to the satisfaction of the Authority which did not have the benefit of hearing from Mr Weston or of having Mr Fraser cross-examined by Mr Weston's representative.

[43] This Court and its predecessors have been frequently called upon to identify the employer and have resolved the issue objectively on the facts presented. Some examples of this approach are to be found in *McManus v University of Otago and Wellington Cancer and Medical Research Institute* [1985] ACJ 219; *NZ Insurance IUOW v Parsons and Hobdell (t/a The Insurance Centre)* [1988] NZILR 547; and *New Zealand Building Trades Union v Dallimore and Colonial Homes Ltd* [1991] 1 ERNZ 252.

[44] A recent helpful case which refers to a number of previous decisions is *Colosimo v Parker* AC 68/06, 6 December 2006. Judge Perkins confirmed that the onus is on the employee on the balance of probabilities to prove the identity of the employer and it should be determined at the outset of the employment, for the identity of the employer may have changed during the course of the employment. If it has changed there must be a mutual agreement to the change. Judge Perkins referred to a number of cases where the identity of the employer has been determined in situations where the employee was clearly never made aware during the course of the employment of the name of the employer and thus the failure to notify or make the employee aware is not conclusive. He observed that contemporaneous documentation may be very helpful in determining the true identity of the employer as may the payment of the employee's wages from a personal rather than a company account. It also appears that frequently the legal identity of the employer will not be a matter that is of great moment to the employee, until legal advice is taken. In the present case, the issue could have been put beyond doubt by the employer complying

with the statutory obligation to reduce an individual employment agreement to writing (s65(1)(a) of the Act).

[45] I accept Mr Harding's submission that Mr Fraser is not assisted by the principle of the undisclosed principal. On Mr Fraser's own evidence Mr Weston made it clear that he was a director of a company at the time that the parties were negotiating the employment agreement. The Companies Act 1993 requires people who set up in business who wish to obtain the benefit of limited liability incorporation to make that clear to others with whom they deal. The use of "Limited" or "Ltd" in the business name is therefore an important indicator. Officers or servants of a limited liability company may be found to have assumed personal obligations in conducting dealings on behalf of that company if they fail to specify that limited liability was intended: see *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

[46] In the present case the only relevant documents that Mr Fraser saw and handled frequently were the window cards and the sale agreements. The window cards make it clear that Sportscar World is the trading name of Sportscar World Ltd. It is also sufficiently clear from the window cards that the limited liability company is the registered motor vehicle trader. Further Mr Fraser accepted that he was directed by Mr Weston to place the stamp showing Sportscar World Ltd on the sale agreements. Of the more than 50 vehicles Mr Fraser sold, well over half of those documents do contain those stamps. As it was Mr Fraser who had the responsibility of preparing those documents he must have been aware of the identity of the limited liability company.

[47] It is most unfortunate that neither the cheques nor the bank account records of the entity referred to in the documents as "Sportscar World" were produced to see whether they were from a limited liability company. If the Inland Revenue documents that Mr Fraser said he signed were available for inspection they may have supported Mr Fraser's case. In the absence of that documentation, I am left solely with the sale agreements and the window cards, and Mr Fraser's acceptance that Mr Weston referred to his company and said he was a director of it.

[48] I also take the view that Mr Fraser appeared to be somewhat indifferent as to precisely who his employer was. He accepted in questions from Mr Nutsford that he could have been redeployed to any of the entities which Mr Weston was running.

[49] The totality of this evidence persuades me that Mr Fraser has failed to discharge the onus of showing that Mr Weston was his employer. It appears that the Inland Revenue Department may have reached the same result, namely that Sportscar World Ltd was Mr Fraser's employer. Mr Weston's challenge therefore succeeds and the Authority's conclusion that Mr Weston was Mr Fraser's employer and the consequent remedies awarded against Mr Weston personally must be set aside.

[50] At the request of Mr Harding the issue of costs is reserved. The matter is not without its complexity because of the interlocutory applications to which I have previously referred. I observe however that this is not necessarily a case in which costs will follow the event. Mr Nutsford drew attention to a passage in *Colosimo* where Judge Perkins stated:

*While Mr Colosimo has prevailed in his challenge he was a director and indirectly is a shareholder in the second plaintiff. The actions of the company were carried out by him. I am not satisfied as a matter of equity and good conscience that he should recover costs against Mr Parker. There will be no order for costs.*

[51] Once costs have been determined then the Court will deal with the funds that have been paid in.

[52] If costs cannot be agreed they may be the subject of an exchange of memoranda, the first of which is to be filed within 60 days from the date of this judgment with a further 30 days to reply.

B S Travis  
Judge

Judgment signed at 4.45pm on 4 July 2008