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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP45/99

BETWEEN	IMPERIAL CONSOLIDIATED GROUP PLC First Plaintiff
AND	IMPERIAL CONSOLIDATED SECURITIES SA Second Plaintiff
AND	DAVID FREDERICK STEWART Defendant

Hearing: 13 and 14 September 2001

Appearances: J O Upton QC for the Plaintiffs
M R D Guest for Defendant

Judgment: 18 December 2001

RESERVED JUDGMENT OF WILLIAM YOUNG J

Introduction

[1] This unusual case relates to web pages placed on the internet by the defendant, Mr David Stewart, in July 1999. The text of the web page which is primarily relevant was as follows:-

Can These Companies Be Trusted With Your Money?.

Imperial Consolidated Group

An unofficial Web Site for information, comment and feedback from clients, former clients and anyone else who is interested in these firms.

Is this Investment firm honest and professional?.

We have documented evidence of at least one case where Imperial Consolidated has handed over client funds without the knowledge nor authority of the client. They then go into denial mode, refusing to sort the problem out or returning the money.

Can they be trusted to look after client interests?.

If you have had any dealings with this group (good or bad) and want to comment, click on the email tab and send your confidential comments. They can be added (anonymously) to this site if you wish. If you have had problems with this group and would like hints on resolving these, or names of authorities to alert, just include this in your email.

[2] This web page plainly referred to the plaintiffs, Imperial Consolidated Group Plc and Imperial Consolidated Securities SA. They issued proceedings on 3 August 1999 against Mr Stewart in respect of this web page alleging two causes of action: interference with contractual relations and deliberate interference with trade by unlawful means. An interim injunction was obtained *ex parte* on 5 August 1999 requiring Mr Stewart to remove from the internet his web page relating to the plaintiffs and preventing him placing on the internet any web page or internet site or any information relating to the plaintiffs.

[3] The striking feature of this case is that although the plaintiffs' primary complaint is that Mr Stewart has defamed them, defamation has not been pleaded.

[4] The case was tried before me on 13 and 14 September this year. My judgment has been delayed to allow the plaintiffs time to place additional material before the court; this for reasons to which I will refer shortly.

The parties

[5] The Imperial Consolidated group of companies is based in the United Kingdom. Imperial Consolidated Group Plc (now Imperial Consolidated Plc) is the parent company. There are a number of subsidiary companies. One of these is Imperial Consolidated Securities SA which is based in the Bahamas. Another subsidiary, Imperial Consolidated (Australia) Pty Ltd is based in Australia. Amongst the activities of the group is the promotion of financial products. Unless it

is necessary to distinguish between the various companies in the group I will refer to them as "Imperial Consolidated".

[6] The people associated with Imperial Consolidated whom I should mention are Messrs Lincoln Fraser and Jared Brook who, until recently, were the principal shareholders in Imperial Consolidated and its most senior executives, Mr Bill Godley, who was associated with the operation of Imperial Consolidated Securities SA (the Bahamas company), Mr Ian Finlayson (who was involved in the operation of Imperial Consolidated (Australia) Pty Ltd) and Mr Christopher Hubbard who is (or was) head of legal affairs for the Imperial Consolidated group of companies and who swore an affidavit in support of the application for an interim injunction.

[7] I should also mention Mr Michael Gilbert. He is a solicitor based in Nelson. He began acting for Imperial Consolidated in around April 1999 and is a director of at least one of its subsidiaries. As will be apparent from what I have to say shortly, he features in the case in another role. My impression is that this litigation has been run on behalf of Imperial Consolidated by Mr Gilbert. Apart from the initial affidavit which was sworn by Mr Hubbard I have seen no real evidence of involvement in the case by Imperial Consolidated' s executive team. For instance the list of documents filed on behalf of Imperial Consolidated seems to comprise only documents of which Mr Gilbert had possession in one or other of the roles which he has played in this case. When the opportunity arose at the end of the trial for further information to be placed before the court, Mr Gilbert made his own investigations and provided that information himself even though the information in question should have been able to be provided more easily by Imperial Consolidated. Mr Hubbard did not attend for cross-examination on his affidavit.

[8] Mr David Stewart was a financial adviser/broker based in Dunedin. He traded through a company known as Southern Brokers Ltd. He is presently an undischarged bankrupt.

[9] The dispute between Mr Stewart and Imperial Consolidated relates to what was known as the "Rusaust project" which was promoted by Imperial Consolidated Securities SA, and was introduced to Mr Stewart by Imperial Consolidated

(Australia) Pty Ltd. Mr Stewart participated in this project along with a Mr Wayne Goodwin. Mr Stewart and Mr Goodwin fell out. For reasons related to this falling out and also because Mr Stewart did not receive the rewards which he expected from the project he, in turn, fell out with Imperial Consolidated. Before I get to the issues in the case I will have to discuss all of this in some detail.

The Rusaust project

[10] In late 1997 Imperial Consolidated marketed what it referred to as the "Rusaust project". Investments in "modules" of $US150,000 were invited. "Modules" is an unusual word to use to denominate a unit of investment. In correspondence between Messrs Gilbert and Brook, an even odder word was used, "nodule". In this judgment I will use the expression "module" in the sense in which it was used in the marketing and contractual material produced by Imperial Consolidated. For the Rusaust project 10 modules were on offer. So the total amount to be raised was $US1,500,000.

[11] Those who made investments in this project did so pursuant to a standard form agreement. Each agreement provided that the investor (referred to in the agreement as "the Client") was to provide $US150,000 to be paid to Imperial Consolidated Securities SA (which is referred to in the agreement as "the Principal"). Clauses 3 and 4 of the agreement provide:-

> 3. **RETURN ON CAPITAL INVESTMENT**
>
> Both Principal and Client agree and acknowledge that the return on investment indicated herein is strictly on a best efforts basis. While the Principal will generate profits as indicated there is no guarantee that the profits will continue based on performance. The Client is to receive a proposed percent (9.25%) of his total cash investment every month over a period of eighteen months, paid at the end of every month in arrears, over the term of this Agreement unless the Agreement is otherwise terminated as provided for in this Agreement. The first payment shall commence at the end of month three.
>
> 4. **INVESTMENT RETURN**
>
> Subject to the conditions of paragraph 3 above investment returns will be paid three months after receipt of Funds into the Account and thereafter every month until fifteen consecutive payments have been

> made, thus completing the 18 month term [*this is to be a total of 16 payments*]

The words which I have italicised were added in handwriting. They tie into (in the sense of being consistent with) a document which was issued by Imperial Consolidated (Australia) Pty Ltd and referred to an "interest emergence profile" which listed 16 monthly payments two of which were expressed to be at 18.5% per month with the balance at 9.25%.

[12] Under the heading "Objectives and Purpose of Investment", the agreement provided:-

> The clients funds will be utilised in the investment of the company's business activities in the Russian Federation and in the main for the purpose of funding the preparation of Regional Government Euro Bond issues along with Stock Market, bank and regional securities management. Funds will be utilised diversely across these markets to return maximum benefits to the Client and principal.

[13] Security for the clients was provided in the form of an undertaking from an English solicitor which was in these terms:-

> I MICHAEL JOHN HARVEY, solicitor of the Supreme Court of England and Wales, hereby confirm that two authentic Promissory Notes of USD1,000,000 each in face value, issued and guaranteed by the Sakhacredit Bank of Yakutsk, Russian Federation, Issue Numbers C4 and C5, issued on 3rd February 1997 and maturing on 4 February 1998 with a total on maturity of USD2,000,000 are being held by me in my account, Number 75802, at Bank SCS, Alliance SA, Geneva, Switzerland for the specific purpose of providing security for the Rusaust Syndicate.
>
> I confirm that I have been irrevocably instructed by Imperial Consolidated Holdings Inc to keep the above Promissory Notes in my account and to collect value on maturity, said value to be remitted to each syndicate member of Rusaust, equal to the amount invested by each syndicate member with Imperial Consolidated Holdings via their securities subsidiary, Imperial Consolidated Securities SA, within 28 days of maturity if Imperial Consolidated Holdings, or any subsidiary thereof, defaults on its agreement with each and any syndicate member.

[14] The underlying commercial purpose and rationale of the Rusaust project is not spelt out anywhere with any great precision. I have referred to what the agreement had to say as to this, see para [12] above. A letter of 13 January 1998 from Imperial Consolidated (Australia) Pty Ltd to Mr Stewart provided some further details. It referred to a "proposed Eurobond issue for the St, Petersburg region". The

same letter described the Rusaust project as a "'one-off' investment purely for the purpose of initialising the bond issue".

[15] A letter of 3 September 1997 from Imperial Consolidated (Australia) Pty Ltd to Mr Stewart referred to fees payable to "introducers" of $US5,000 per module per month for a total of 12 months producing a return to introducers of $US60,000 per module.

[16] On this basis the envisaged profits per module of $US150,000 over the 18 month period contemplated for the investment were significant, coming to no less than $US309,750 (comprising "yield" of $US249,750 and the $US60,000 to be paid to the "introducer").

[17] Mr Stewart and his associate, Mr Wayne Goodwin, decided to invest in this project and also to involve others in it. The vehicle for the investment was a company called Eurocorp Investments Ltd ("Eurocorp") which they formed, with the assistance of Cayman National Trust Co Ltd, in the Cayman Islands. The shares in Eurocorp were held beneficially for Messrs Goodwin and Stewart. Shares 1-100 were to be held for the benefit of Mr Stewart and shares 101-200 were to be held for Mr Goodwin. The shareholder was CNT (Nominees) Ltd which is obviously a company associated with Cayman National Trust Co Ltd.

[18] A total of $US632,000 was raised by Messrs Stewart and Goodwin. These funds were provided as to $US161,971 by clients associated with Mr Stewart and as to $US470,188.75 by clients associated with Mr Goodwin (or by Mr Goodwin himself). Eurocorp then took up four modules in the Rusaust project. They were numbered 1007, 1008, 1009 and 1010. Accordingly, $US600,000 was paid to Imperial Consolidated Securities SA in October 1997 and the balance was retained, for a while, in a bank account in the name of Eurocorp.

[19] Some payments were made relative to these investments by Imperial Consolidated in December 1997 and February 1998. $US44,000 went to Eurocorp in December 1997 and a further $US30,000 was paid on 20 February 1998. As well, $US10,000 was paid direct to Mr Stewart in December 1997 which he regarded as

being a part payment of the "introducers' fee" to which he thought that he was entitled. His evidence is that he was anticipating payments of $US20,000 *per* month as he regarded himself as being the introducer in respect of all 4 modules.

[20] I should, at this point, say something about the introducers' fees and Mr Stewart's contentions that such fees should have been paid to him. Mr Stewart regarded himself as being the "introducer" for all four modules. So, he was of the view that he was to be paid a total of $US240,000 by Imperial Consolidated Industries SA. He did not see his entitlement to introducers' fees as dependent upon him having obtained the informed consent of Eurocorp, Mr Goodwin or the people who actually put up the money. Mr Stewart contended that his arrangements with his investors were that they were to receive an annual return of 16% on their investments and thus commission/introducers fees were irrelevant as far as they were concerned. Whatever the position as between Mr Stewart and his investor clients, I do not see how he was entitled, vis-à-vis Eurocorp and Mr Goodwin, to take what were in effect secret commissions. As to all of this, he seems to me to have had (and still to have) a strange, strong and inappropriate sense of entitlement.

[21] By the letter of 13 January 1998 to Mr Stewart to which I have already referred (see para [14 above]), Imperial Consolidated advised that the Eurobond issue for the St Petersburg region had been postponed. The letter noted that the "Eurobond issue is required by the government to raise much needed capital and so therefore will proceed as soon as market conditions improve ...". Investors in the Rusaust Project were advised that they could withdraw their funds or, alternatively have their investments rolled into a managed fund (known as the "Managed II Fund") paying gross returns of 5% per month pending the reactivation of the Rusaust project. The letter continued:-

> The overall effect is that until the Eurobond is recommenced the investors will receive payments of (gross) 5.0% per month with the "RUSAUST" funding to be paid out to the tune of the proposed $249,750 before April '99 plus the return of capital this making the investments of $150,000 realise additional monies under the managed fund deal whilst the suspension of the Eurobond issue is in place

Mr Stewart and Mr Goodwin fall out

[22] On 15 January 1998 Mr Stewart sent a fax to Imperial Consolidated complaining about shortfalls (as he saw it) in yield and commission in respect of the payments made by Imperial Consolidated in respect of the $US600,000 which had been invested in the Rusaust project.

[23] It seems that Mr Goodwin became aware of the commission/introducer fees which Mr Stewart had received in December 1997 and was unhappy about the fact that he had not accounted for those fees to Eurocorp. On 24 January 1998 Mr Goodwin wrote to Cayman National Trust in these terms:-

> Further to our recent conversation concerning MR DAVID FREDRICK STEWART and his involvement with Eurocorp, I wish to advise you that we have good reason to suspect his operation. I would request that you cancel his Benefit of Shareholding in the Company (Nos. 1-100) and assign those shares in favour of myself. A copy of the new Nominee agreement faxed to myself would be appreciated.
>
> Thank-you for your co-operation in these matters.

[24] On 27 January 1998 Mr Goodwin wrote to Mr Phillip Sutcliffe of Cayman National Trust Co Ltd in these terms:-

> Thank-you again for your actions in these matters. I would be pleased if you could attend to the following two issues at your earliest convenience.
>
> 1). Could you please put in writing via fax that you have been advised to receive no further instructions from Mr Stewart.
>
> 2). Could you please advise approx. cost of registering another name for the Company.

[25] Without contacting Mr Stewart, the nominee company associated with Cayman National Trust Co Ltd then executed the following document:-

> Eurocorp Investment Co. Ltd.
>
> NOMINEE AGREEMENT
>
> We, CNT (Nominees) Ltd., being the registered owner of 200 shares, represented in Share Certificate No. 1 of Eurocorp Investment Co. Ltd. hereby agree that 100 shares 'Nos. 101-200' are registered in our name as Nominee for:
>
> Wayne Ernest Goodwin
>
> ("the Beneficial Owners") whose address is:

16 Glenbrook Drive
Mosgiel 9007
New Zealand

And that we have no legal, equitable or other interest in the said shares.

AND WE HEREBY AGREE as follows:-

(1) That we will account for and pay over to the Beneficial Owner all dividends, interest and other benefits which accrue to the said shares.

(2) That we will exercise any voting rights attached to the said shares in accordance with the instructions of the Beneficial Owner.

(3) That we will when requested so to do by the Beneficial Owner transfer the shares in accordance with his instructions.

[26] It also wrote to Mr Goodwin on 27 January in these terms:-

> We write to advise that we have been put on notice that it may not be in the interest of the company to continue to act on instructions received from Mr. David Stewart.
>
> In the circumstances, we attach a copy of our revised Nominee Agreement and confirm that future cost of the company will be borne solely by yourself.
>
> The Company name may be changed at a cost of US$ 150.00 please [advise] the new name you require.
>
> Alternatively, a new company may be established. The cost of incorporation for a Cayman Islands' Exempt Company is US$ 1,500.00 with a US$ 500.00 annual fee payable to the Government starting in the year following incorporation. Cayman National Trust Co. Ltd. Charges US$ 1,200.00 for provision of Registered Office only, or, US$ 2,000.00 (minimum) annually for administration costs where Directors are provided by ourselves.
>
> I attach a Letter of Instruction and Company Management Agreement for completion and return in the event that a new company is to be incorporated. ,
>
> Also attached is correspondence from Mr. Stewart received today for your attention.

[27] Mr Stewart discovered that something was going on around this time and he wrote to Cayman National Trust Co Ltd complaining about this on 28 January 1998. This is presumably the letter referred to in the last paragraph of the letter referred to in para [27]. I imagine that the apparent incongruity in relation to dates is a function of time differences between the Cayman Islands and New Zealand.

[28] Mr Stewart then placed the matter in the hands of Dunedin solicitors (Aspinall Joel Radford Bowler). Mr Goodwin was represented by Mr Michael Gilbert (to whom I have already referred). Quite when Mr Goodwin instructed Mr Gilbert is not entirely clear to me. He was certainly acting for him in February 1998 and, on his evidence, in January 1998 as well. There was correspondence between the solicitors and Cayman National Trust Co Ltd in February 1998 to which I need not refer in detail save to say:

1. From late January 1998 and certainly from 11 February 1998, Cayman National Trust Co Ltd was insisting that it would act only on the joint instructions of Messrs Stewart and Goodwin.

2. Three of the Rusaust investment modules (1008, 1009 and 1010) were treated as being held at the direction of Mr Goodwin (and in particular in the name of a company associated with Mr Goodwin, Corporate Capital Investments Co Ltd) and the fourth (1007) as being held at the direction of Mr Stewart and his clients. The evidence as to the detail of this is surprisingly vague.

[29] As will become apparent in a moment, the position as to Corporate Capital Investment Co Ltd is far from satisfactory. As I have already noted, Mr Goodwin wrote on 27 January 1998 to Cayman National Trust Co Ltd inquiring as to the cost of registering another name for Eurocorp (see para [24] above). The response from Cayman National Trust Co Ltd of the same day gives the cost as requested but also suggested the formation of another company (see para [26] above). On 2 February 1998, Mr Goodwin wrote to Mr Gilbert saying:-

> I was speaking with Ian Finlayson this afternoon. He thinks there is no need to actually move the Capital Funds around and all the opinion he had agrees. He suggests 'Recontracting' the Funds under my signature since Mr Stewart no longer has any shareholding in Eurocorp. I also suggested that we park the Jan. '98 returns (held at present) in Scotia [bank account held for Mr Goodwin] in the meantime.

On 3 February 1998, Mr Gilbert wrote to Mr Bill Godley of Imperial Consolidated Securities SA in these terms:-

> I have been instructed by Wayne Goodwin to formally instruct you to forward all profit funds attributable to Eurocorp to Wayne's Scotia account.

> I am instructed that you have the co-ordinates for the Scotia account and that Wayne has spoken to you in respect of this matter.
>
> I confirm Wayne's verbal instructions requesting you to form a new IBC with a name similar to Colonial Investment company Limited. The final choice of name can rest with yourself and Wayne wishes to have this company formed at the earliest opportunity then to transfer to the company all Eurocorp contracts.
>
> Wayne will authorise his Scotia account to forward you a draft of US$1,000.00 to cover the costs of formation of the company.
>
> I thank you for your assistance in this matter.

Some documents are backdated

[30] At this point I should mention an issue which was raised as to the alleged backdating of some documents.

[31] As I have noted, Mr Michael Gilbert has been acting for Imperial Consolidated in relation to this litigation. As is apparent from what I have just said he was acting for Mr Goodwin during the first half of 1998. In his affidavit of 23 August 2001 which was sworn in anticipation of the hearing in September, Mr Gilbert said this:-

> On 12 January 1998 Wayne Goodwin had reinvested Modules 1008, 1009 and 1010 into the Managed II Fund investment with fresh contracts in the name of a new IBC called Corporate Capital Investment Co. Ltd (of which he was the beneficial owner.) Goodwin had dealt directly with ICS to arrange the reinvestment. This investment was in the Managed II Fund for a term of twelve months. Each investment was for US$150,000.00 and the contracts are to be found as exhibit 'D' in the affidavit of Christopher John Hubbard filed herein. I have witnessed Goodwin's signature to each of the reinvestment contracts.

The Mr Hubbard referred to is the gentleman who swore an affidavit in support of the application for an interim injunction. Exhibit D to his affidavit consisted of three agreements between Imperial Consolidated Securities SA and Corporate Capital Investment Co Ltd. The agreements were in standard form which was styled "Managed II Fund Agreement". The form of agreement is broadly similar to the Rusaust project agreement form. Plainly they purport to be replacements of the three Rusaust investment agreements which were attributed to Mr Goodwin. The agreements purport to have been signed on 12 January 1998 by Mr Goodwin (with

his signature witnessed by Mr Gilbert) and on 15 January 1998 by Mr Bill Godley of Imperial Consolidated. Attached to (and forming part of) these agreements are undertakings (unsigned) from the same solicitors who provided an undertaking in respect of the Rusaust project. These undertakings are addressed directly to Corporate Capital Investments Co Ltd. There are also signed versions of these undertakings in the same format each of which is dated 12 January 1998.

[32] On the basis of the material to which I have just referred, it might reasonably be thought that the Imperial Consolidated/Corporate Capital Investments Co Ltd agreements which purport to have been executed on 12/15 January 1998 were backdated:-

1. Well after 15 January 1998, Mr Goodwin and Mr Gilbert were dealing with Cayman National Trust Co Ltd and Imperial Consolidated on the basis that Eurocorp was still the owner of the various investment modules in the Rusaust project.

2. On 20 February 1998 a payment referable to the funds invested in the Rusaust project was made to Eurocorp.

3. The proposal to form a new company on behalf of Mr Goodwin did not emerge until after 15 January 1998.

4. It might be thought likely that Corporate Capital Investment Co Ltd was formed at the instance of Mr Bill Godley as a result of a letter written to him by Mr Gilbert on 3 February 1998 which is referred to in para [29] above.

5. The first undoubtedly authentic reference to "recontracting" is in the letter from Mr Goodwin to Mr Gilbert of 2 February (referred to in paragraph [29] above). This was a very odd letter for Mr Goodwin to send to Mr Gilbert if the "recontracting" had already occurred.

[33] The documents which the parties produced to me were not arranged in chronological sequence. Had they been so arranged, the implausibility of Mr

Gilbert's evidence would have been obvious. Surprisingly, Mr Gilbert was not really pressed on this issue in cross-examination. As it was, the significance of the various dates did not really strike me until Mr Stewart discussed the matter in his evidence. In the course of Mr Upton's closing submissions, I expressed some concerns about the apparent backdating of these documents (and some other concerns as to the implausibility of the indicated yields in respect of the Rusaust project and its apparent resemblance to a prime bank instrument scam). Mr Upton sought time to deal with these two issues and the opportunity to adduce further evidence. I granted leave for him to do so.

[34] On the backdating issue, Mr Upton subsequently filed a memorandum of 12 October in which he said:-

> [1] You will recall that the case was adjourned on 14 September 2001 part way through my final submissions, at my request, to allow me to make certain inquiries. The reason being that Your Honour had expressed concern about whether Corporate Capital Investment Co Ltd was in existence at the time that various contracts were entered into in January 1998. Your Honour also expressed concern about the activities of Imperial Consolidated Group - because, as counsel recalls it, you thought that those activities had the hallmarks of a "scam" company, presumably because of the high returns being offered to investors.
>
> [2] The delay in providing the further information is due to the fact that it had been necessary to carry out inquiries overseas – in Australia, the Caribbean and the United Kingdom.
>
> [3] Inquiries revealed that Corporate Capital Investment Co Ltd was incorporated in the Bahamas. A company search carried out over there indicates that the company was struck off the register as from 1 January 2000 for non-payment of fees. The advice received is that the file can only be accessed and activated if all outstanding fees together with penalties are paid.

[35] This produced a response from Mr Stewart in the form of an affidavit of 26 October in which Mr Stewart said:-

> I believe the case was adjourned to allow the plaintiffs to obtain a copy of the Certificate of Incorporation for Corporate Capital Investment Co Ltd. Attached is a copy of the Certificate of Incorporation for Corporate Capital Investment Co Ltd. This is attached and marked with the letter "A". A copy of this certificate was given to the plaintiffs and their counsel by Mr Goodwin on 14 September 2001. This certificate is available to the public from the relevant Authority in the Bahamas. The Authority is the Registrar-General's Department, Registrar of Companies, phone 1242 322 3317 or Fax 1242 322 5553. Enquiries to this Authority show that the Certificate of

> Incorporation for a Bahamas International Business Company is a publicly available document, and that the Authority will immediately provide, over the phone, the incorporation date and number for any company. In the case of Corporate Capital Investment Co Ltd, the incorporation date is 4 February 1998 and the company number is 71,731B.

He exhibited to his affidavit a copy of the certificate of incorporation for Corporate Capital Investment Co Ltd which, indeed, shows that it was not incorporated until 4 February 1998 (around three weeks after it purportedly entered into the contracts to which I have referred and the day after the letter from Mr Gilbert to Mr Godley of 3 February 1998 to which I have referred in para [29]). As is apparent from what I have said, Corporate Capital Investment Co Ltd was registered in the Bahamas which is where one might have expected Mr Godley to register a company if he complied with the requests made of him by Mr Gilbert in the latter's letter of 3 February 1998.

[36] Mr Gilbert's affidavit in response to Mr Stewart's affidavit and pursuant to the leave which I granted on 14 September to file further evidence, dealt with this issue in this way:-

> 1. I ... have previously given evidence on behalf of the plaintiffs in connection with this matter. This affidavit addresses two issues.
>
> 2. The first relates to whether Corporate Capital Investment Company Limited was in existence at the time that various contracts were entered into in January 1998. As to that, as a result of discussion with Mr Goodwin after the case was adjourned, I obtained from him a copy of a certificate of incorporation for Corporate Capital Investment Company Limited dated 4 February 1998 in the Bahamas. I then caused a company search on Corporate Capital Investment Company Limited to be carried out in the Bahamas. That revealed that the company had been struck off the Register for non-payment of annual fees since January 1999, and that the file could only be accessed and activated if the outstanding fees together with penalties were made.
>
> 3. It is not possible for me to now say with any certainty just when the three Managed II fund agreements 1009 [*sic*], 1009 and 1010 were signed by Mr Goodwin. What is certain is that by January 1998, Mr Goodwin had verbally arranged with Imperial Consolidated Securities SA for the transfer of the Eurocorp funds and their reinvestment. By that stage he had certainly arranged for all shares in Eurocorp Investment Company Limited to be transferred over to him. That was something that he must have handled direct (note plaintiff's B.O.D.24). I certainly had no part in that. I was acting for him at the time on other aspects of his business affairs with Mr

Stewart. I was not acting as solicitor for the plaintiff. I did not act as solicitor for the plaintiffs until much later – round April 1999.

4. Even though I am clear in my own mind that steps were taken by Mr Goodwin in January 1998 to transfer the funds formerly in the name of Eurocorp into the name of another company owned or to be owned by Mr Goodwin, when that was actually put into contractual form, I cannot now say. I have an electronic diary. Since early 1998, I have had two computer upgrades. During one of those – I am not sure which – my diaries which had been archived were lost. It is possible therefore that the contracts were signed later by Mr Goodwin and then backdated to 12 January 1998.

5. Against that possibility, I have to point out the following features

    (b) My fax log shows that on 14 January 1998 New Zealand time I sent 24 pages to Imperial Consolidated Securities in Nassau. That number (24 pages) coincides precisely with the number of pages in the three contracts shown as having been signed and initialled as appropriate by Mr Bill Godley in Nassau on 15 January 1998. A copy of the relevant fax log is attached and marked 'A'.

    (c) The agreements (but not the original letters from Harveys Solicitors to Corporate Capital Investment Company Limited dated January 12 1998) each have the following word processor code on them:

        'Managed II Fund – Conversion date: Janury 98'

    That indicates the documents were printed in January 1998

    (d) The letter which accompanied each contract from Harveys Solicitors addressed to Corporate Capital Investment Company Limited is also dated 12 January 1998 and addressed by Harveys to that company at an address in Nassau, which tells me that by that date at the latest Mr Goodwin had made whatever arrangements he considered necessary to have the funds transferred by Imperial Consolidated Securities SA from Eurocorp to Corporate Capital Investment Company Limited.

6. I refer now to para 38 of my affidavit dated 23 August 2001. At the time, I prepared that affidavit I had in front of me copies of the three contracts in question. It was my belief at the time based on what appeared in those contracts that the reinvestment took place on 12 January 1998.

[37] Having regard to all the evidence provided to me (including the evidence provided after the hearing which I have just set out) I have no doubt that the documents in question were backdated. I am also seriously unimpressed by Mr Gilbert's evidence and conduct as to this:-

1. Corporate Capital Investment Co Ltd was not incorporated until 4 February 1998 and it is reasonable to infer that this was a result of the letter from Mr Gilbert to Mr Godley of 3 February 1998 (see para [29] above).

2. It is also reasonable to infer that the recontracting of modules 1008, 1009 and 1010 purportedly effected by the agreements of 12/15 January 1998 was what was referred to in the letter of 2 February 1998 from Mr Goodwin to Mr Gilbert (see para [29] above).

3. Corporate Capital Investment Co Ltd could not have entered into the agreements of 12/15 January 1998 on those dates because it was not then in existence.

4. Accordingly, the agreements of 12/15 January 1998 are not what they purport to be. Given that Corporate Capital Investment Co Ltd was not thought of until February 1998, it follows that the documents represent a deliberate attempt to mislead any one who might later look at them. They contain a January 1998 word processing notation which is false (although I suppose it is possible that the agreements are on a template which was first created in January 1998). But they also have attached to them forms of solicitors undertakings which are dated 12 January and in respect of those undertakings the false date must have been deliberately chosen and typed. The signed versions of these undertakings are also falsely dated. Mr Gilbert would appear to be a party to this given that he has witnessed Mr Goodwin's signature. So whoever concocted these documents on a backdated basis, did so with a reasonable degree of care.

5. Looking back on the evidence which Mr Gilbert gave on this point, I think that he was well aware of the difficulties associated with these documents and deliberately attempted to provide a context which might make the dates on them credible. I will refer in a moment to the particular aspects of his evidence which trouble me.

6. Mr Gilbert's conduct after the trial was extraordinary. He admits that he received a copy of the certificate of incorporation of Corporate Capital Investments Co Ltd from Mr Goodwin on or about 14 September this year (which was the second day of the hearing in front of me). The obvious purpose of the memorandum of his counsel (see para [34] above (which was no doubt filed on his instructions) was to suggest to the court that it was not practical to obtain a copy of the certificate of incorporation. It is very difficult to see this as anything other than a further attempt to mislead me.

[38] I am not much impressed by the explanation given by Mr Gilbert in his affidavit. As to para 5 of that affidavit, I agree that the 24 pages referred to corresponds with the number of pages in the contracts which were signed and initialled although I might have expected to hear from Imperial Consolidated as to what was received in Nassau on 14 January. The simple fact of the matter, however, is that it is impossible for these agreements to have been executed on their apparent dates given that Corporate Capital Investment Co Ltd was not formed until 4 February 1998 and, indeed, given my conclusion that such an entity was not even thought of until early February.

[39] The aspects of Mr Gilbert's evidence which particularly trouble me are as follows:-

1. In Mr Gilbert's affidavit of August this year he said:-

> From my own knowledge of the Rusaust Project I was by early January 1998, certainly before the date of the letter of 15 January 1998 (Stewart Document 101 BOD 21), aware that the Rusaust Project would not proceed. I informed Goodwin, at that stage, that the Rusaust Project was dead.

This seems to me to be a little suspect. The letter of 13 January 1998 to Mr Stewart (see para [21] above) does not suggest that the Rusaust project was "dead" but simply on hold. I cannot help but think that this aspect of Mr Gilbert's evidence was intended to provide a context which would make more plausible the dating of the Managed II Fund agreements.

2. Mr Gilbert was asked re-examination about the letter of 3 February 1998:-

> You have explained why you had been instructed to have all the profit funds attributable to Eurocorp sent to Mr Goodwin's Scotia account?...correct. You then go on to refer to the form of the new company?...correct. Mr Goodwin asked me to have Mr Godley form a new company for them. Just so there is no risk of confusion is that a separate company from Corporate Capital Investment Co Ltd?...it was.

Again, I simply do not believe what Mr Gilbert has said. It is perfectly clear to me that the company referred to in the 3 February 1998 letter is what became Corporate Capital Investment Co Ltd. By way of completeness, I note that there is no evidence to suggest that another company was formed as a result of the 3 February 1998 letter.

What later happened

[40] The evidence as to financial dealings which occurred after February 1998 was vague to say the least. Broadly it appears that the modules which were attributed to Mr Goodwin/ Corporate Capital Investments Co Ltd were assigned to people associated with a Mr David Hobbs and that the clients who Mr Stewart introduced were paid back their investments in or around August 1998. The detail of all of this is obscure.

1. There was no attempt made in evidence to reconcile the payments in and out of the Eurocorp bank account. I was left with the impression that Mr Stewart and Mr Goodwin regarded the surplus funds left in the account as available to them for their own purposes and prior to their falling out each received some of these funds. Mr Goodwin emptied the account out on 26 January 1998 (removing some $US61,250). What happened to the approximately $US30,000 which was paid into the account by Imperial Consolidated on 20 February 1998 is unclear to me. I have seen an analysis of this account which was made available to the Official Assignee in respect of Mr Stewart's bankruptcy. But this has not enabled me to ascertain with precision what happened to this money.

2. The evidence pointed to Mr Stewart's clients being repaid as a result of a payment by Imperial Consolidated of $US150,000 to Eurocorp in late August

1998. The analysis of the Eurocorp bank account indicates that approximately this amount was paid into that account on 28 August 1998. On 31 August 1998 $US169,639.90 was paid out (in effect the $US150,000 received on 28 August 1998 together with approximately $US20,000 of the $US30,000 which was paid into the account by Imperial Consolidated on 20 February 1998). This is consistent with Mr Stewart's clients receiving back the $US161,971 which they paid. Whether they received any return on their investments is not entirely clear. In a letter from Deloitte Touche Tomatsu to Mr Stewart of 23 April 1999 (which was produced in evidence) it is indicated that Mr Stewart's clients received back not only their initial investments but also a return at the rate of 16% per annum for 10 months. Although I cannot fully recreate the arithmetic, it is possible that this was achieved by reason of the approximately $US170,000 transferred out of the Eurocorp account on 31 August together with a top-up funded from the $US61,050 removed by Mr Goodwin from the Eurocorp account in January 1998 and possibly with some supplementary payments from Mr Stewart.

[41] I should at this point refer to a letter which was sent by Mr Brook of Imperial Consolidated to Mr Stewart on 15 July 1998 (ie prior to the repayment being made to Mr Stewart's clients):-

> Further to our conversation of today, I am most concerned at the issues you have raised, which we will be investigating in full.
>
> However, firstly I wish to advise the following:
>
> Contracts: AU\00\M2F\221-1007 $150,000
> AU\00\M2F\221-1008 $150,000
> AU\00\M2F\221-1009 $150,000
> AU\00\M2F\221-1010 $150,000
>
> are active at present valuation 100% of capital (4 x $150,000) = $600,000
>
> The contracts were named Nodule "x" Newco to be formed and are now named Corporate Capital Investment Company Ltd as instructed.
>
> I.) Since February all statements have been sent to Ian Finlayson who has forwarded them to Michael Gilbert.
>
> II.) Yields have been transferred as instructed to:
>
> 1007 Wayne Goodwin – 100%
> 1008 Michael Gilbert Trust – 85% D. Hobbs – 15%

1009 Michael Gilbert Trust – 100%
1010 Michael Gilbert Trust – 100%

The current status is as follows:

a) An instruction to liquidate contract AU\00\M2F\221-1007 has been made, such liquidation to have occurred today in favour of bank co-ordinates in the Cayman Islands.

b) Yield for this period for all 4 contracts collectively is 2.5% gross = $15,000.00 due to have been remitted to co-ordinates (II).

In view of your enquiry and in light of the strained relationships in both New Zealand and your relationship with Mr Goodwin, the above actions have been suspended and we will now act on the following instruction basis only.

(1) A letter signed by both you and Mr Goodwin confirming <u>who</u> has signing control over the respective accounts, notarised with attorneys responsibility.

(2) Confirmation as to where yield is to be sent by way of signed and notarised instructions from the authorised signatories.

(3) Signed and notarised instructions to liquidate an account (if applicable) by the duly authorised signatory in (1).

The confirmation in (1) must be delivered to Imperial Consolidated Securities S.A., Nassau, for the attention of Mr Bill Godley.

These accounts were suspended effective 10am, 15th July 1998, and will remain so until we receive the instructions as required under section (1) above.

Our priority is to protect the interests of the investors and as a result of the conflicts in question, you have placed us in a position of constructive trust you must now therefore jointly confirm responsibilities on your parts before we can proceed further or act on any instructions.

Regarding claims that clients have not received yield since January, this as outlined has been remitted monthly by Imperial Consolidated Securities to the co-ordinates in (II), as against instructions up to and including June 15th 1998.

Further we have acted against instruction in all matters and have complied with all elements of our agreements and do not accept any responsibility for the breakdown between you, Wayne Goodwin or Michael Gilbert solicitors.

Once you have all sorted out your internal wranglings and complied with our requirements in point (I), we will be pleased to continue business on a direct, clear understandings basis.

If you are unable to meet the requirements as outlined then please provide precise co-ordinates of each individual beneficial owner of funds within the syndicates listed so that we may handle matters directly.

In the meantime we shall be investigating this entire matter with vigour.

[42] This letter is not entirely easy to follow. However it would appear that Imperial Consolidated was claiming *inter alia*:-

1. Module 1007 in the Rusaust project had been, at some stage, reinvested in the Managed II Fund. I say this given the contract reference, "AU\00\M2F\221-1007".

2. Since February 1998 Mr Goodwin had been treated as being the beneficial owner of this investment in that all statements had been sent to his solicitor and the "yield" in relation to it had been transferred to Mr Goodwin.

3. There was outstanding "yield" which had been earned but not then paid in relation to this investment.

[43] This is an unfortunate letter from the point of view of Imperial Consolidated. If what is said there is true, it follows that profits attributable to module 1007 were paid to Mr Goodwin even though he had no entitlement to those profits. It also follows that there were profits on hand as at 15 July 1998 associated with module 1007 which, on the undisputed evidence that only $US150,000 was repaid to the relevant investors, has never been properly accounted for.

[44] Mr Gilbert was not a named recipient of this letter. However he received a copy either of it or a similar letter because he wrote to Mr Brook on 16 July. In his letter he said, *inter alia*:-

> 4. Mr Goodwin the owner of Corporate Capital Investment Company Limited, and the investment advisor to the investors in Rusaust nodules [*sic*] 1008, 1009 and 1010 reinvested the nodules in the Managed Fund 2 in the name of Corporate Capital Investment Company Ltd. It is my understanding Imperial Consolidated Securities S.A. does not hold an authority to reinvest Rusaust nodule 1007 and is therefore an unwilling escrow agent in respect of that nodule alone. The nodule is being held in escrow on behalf of Eurocorp Investment Co. Ltd. I will return to 1007 below. ...
>
> 10. Regarding nodule 1007 I received instructions from the investors via David Stewart's solicitor to request the repayment of their funds to Atlantic International Investment Company. (Atlantic) [*sic*]. I

queried these instructions as the contract with Imperial Consolidated Securities S.A. is with Eurocorp. I was further concerned that Atlantic is a company controlled by David Stewart.

11. David Stewart owes Wayne Goodwin several hundred thousand dollars, cannot meet his obligations and has to appear in Court in August to defend proceedings issued by Wayne to recover his debt. Ian Finlayson, Wayne Goodwin and myself are all concerned that the funds may not be repaid to the investors but used to repay Mr Stewart's debt to Wayne or other debts Mr Stewart has to Countrywide Bank Incorporation Ltd.

12. I raised this issue with Mr Stewart's solicitor who confirmed the instructions to repay Atlantic. Copies of the correspondence follow. The instructions are now to pay to Eurocorp. These funds can only be accessed with both Stewart's and Goodwin's authority.

13. I understood that 1007 was to be repaid on 30 June. I am disappointed I was not advised it had not been repaid.. This unilateral action has caused me professional embarrassment.

[45] There would appear to have been a letter or fax or 16 July 1998 from Mr Brook to Mr Gilbert which is not in evidence. In any event, Mr Gilbert wrote to Mr Brook again on 17 July 1998 and said:-

> Nodules 1008, 1009 and 1010. I undertake that since syndicates purchased the nodules I have received the return from Imperial Consolidated and have credited the same to the beneficial owners. I am happy to provide copies of statements if required. I have not yet received any yield in respect of Unit 1007 and confirm my understanding is the same as yours in that the yield has been forwarded to Mr Goodwin's account. I am not in possession of the knowledge to comment as to whether they have been passed on to clients but have faxed your fax of 16th July to Mr Goodwin.

[46] In his closing submissions, Mr Upton QC for Imperial Consolidated claimed that Mr Brook made a mistake in his letter of 15 July 1998. Mr Upton said that this is apparent when one has regard to the two letter sent by Mr Gilbert of 16 and 17 July 1998 and paragraph 54 of Mr Gilbert's August 2001 affidavit. It may be that there are mistakes in Mr Brook's letter. However what is significant is that he and Mr Gilbert were corresponding in July 1998 on the apparently agreed basis that Mr Goodwin had received the yield attributable to module 1007.

Events leading to these proceedings

[47] Mr Stewart became very dissatisfied with the conduct of Imperial Consolidated. There are a number of aspects to his dissatisfaction. It related in part to the fact that the investments were taken out of Eurocorp on the say so of Mr Goodwin. It also related to his irritation about not receiving fees to which he considered himself entitled as an introducer. He also felt that there was income which must have been earned but which had not been remitted to him. His position seems to be that he had met all his obligations to his investors and that the profits which he believed were earned on module 1007 at least must be regarded as belonging to him. This dissatisfaction can be traced through the correspondence between him and Imperial Consolidated.

[48] There was a good deal of correspondence about this during 1998. Given Mr Brooks' letter of 15 July 1998, there did seem to be a gap between what was due in relation to module 1007 and what was eventually paid at the end of August 1998. Mr Stewart, in his correspondence, did seek explanations as to this and never, to my way of thinking, received a straight answer.

[49] I should, as well, refer to the letters which directly preceded the commencement of litigation.

[50] On 18 May 1999 Mr Stewart wrote to Imperial Consolidated:

> I have made numerous attempts to settle this matter through both yourself, Mr Godley and Mr Finlayson. Information requested on a number of occasions has not been provided as promised. I am not prepared to allow this situation to continue.
>
> Still to be settled is return of capital on three contracts, and profits on all four contracts as well as commissions due.
>
> Unless this matter is settled to my satisfaction within the nest [*sic*] seven days I will commence the following action.
>
> 1. Post warnings to the various internet sites which warn of investment scams.
>
> 2. Establish a number of new internet sites warning of the dangers of doing business with Imperial Consolidated.
>
> 3. Lodge complaints with the relevant authorities in all of the jurisdictions where Imperial operate.

> 4. Attached is the media release from the New Zealand Securities Commission relating to Imperial. I will need to inform them that Imperial are <u>not in fact honouring its offer to redeem all New Zealand investor holdings.</u>

[51] On 23 June 1999 Mr Stewart wrote:

> I refer to my letter to you dated 18 May 1999.
>
> In the five weeks since then I have received many promises but none of the information requested.
>
> Nothing has changed. What a surprise!
>
> There is little point in replying with more empty promises. Only the arrival of the information requested on 18 May will convince me that your firm has any intention of dealing with this matter honestly.
>
> In the meantime I will proceed with the actions outlined in my letter of 18 May.

[52] On 8 July 1999, Mr Stewart wrote to Mr Brook in these terms:-

> There is information to which I am entitled as a 50% shareholder in Eurocorp and signatory to the above contracts [a reference to Rusaust contract 1007, 1008, 1009 and 1010] and I require this by immediate return fax. This is:
>
> 1. Copies of the RusAust contracts with Eurocorp as forwarded to Imperial by courier and carrying original (not faxed) signatures
>
> 2. Copies of any instructions given on behalf of Eurocorp which resulted in these contracts no longer being held by Eurocorp.
>
> I have been more than patient in seeking this information, and as it has not arrived have had to proceed as previously advised. Initial web page is attached. Obviously these will need to be upgraded, with new pages added daily.
>
> Should your firm change its mind and decide to be honest, then the public will no longer need these warnings.
>
> As you are probably aware, Mr Goodwin is pursuing legal action against me for a debt I may be unable to pay as a result of you giving him Eurocorp funds. Should this action due to be heard or the 13th of this month be successful, you will be held fully liable for the consequences.
>
> Again, the public will need to be suitably warned.

[53] Also sent with that fax was a copy of the web page which I set out earlier in this judgment.

[54] Imperial Consolidated responded on 9 July 1999:

> We are in receipt of your letter dated July 8th 1999.
>
> As previously stated, prior to any form of action Imperial Consolidated Securities SA sought information from the Trustee's [*sic*] of Eurocorp. Information received from the Trustees, Cayman National Trust Company, stated that a Wayne Goodwin was the sole beneficial owner of the company Eurocorp Investment Ltd.
>
> Regardless, of these purported changes, the previous beneficial investors of contract numbers 1008, 1009, 1010 withdrew their interests and these contracts were refinanced by clients of a David Hobbs.
>
> These contracts have almost been fully redeemed.
>
> Nevertheless, as has been previously noted we require correspondence with your representatives Messrs Caldwells with regard to Mr Goodwin. If we release information concerning these contracts and Mr Goodwin is later proved to have acted within the law we will have placed ourselves in an extremely tenuous position.
>
> These are matters we wish to discuss with Mr Barton of Messrs Caldwells and a copy of this letter with yours of July 8th 1999 shall be forwarded to his office.
>
> However, we have again enquired of the Cayman National Trust Company and their position remains as previously stated.
>
> In your letter of July 8th you state that Mr Goodwin is pursuing legal action against yourself for a debt. We would be obliged if you could inform whether a counter-claim has been made against Mr Goodwin on this subject matter or the reasons why you have been advised against such action.
>
> Furthermore, we advise you that in our opinion the action you outline in your letter of July 8th may constitute defamation and possible blackmail. If this site is found in existence we shall not hesitate to seek remedy under all jurisdictions that may be affected and also bring this matter to the attention of the relevant authorities in New Zealand.
>
> We look forward to your reply and undertaking that such action shall not be necessary.

[55] It is apparent from this exchange of correspondence that the web page which I have set out earlier in the judgment was on the internet by 8 July 1999. Mr Stewart also published the contents of this web page in a slightly bowdlerised form but this is of no moment and the case can be best dealt with by reference to the full and unexpurgated version which I have set out.

Overview of issues

[56] The causes of actions alleged are interference with contractual relationships and interference with trade by unlawful means.

[57] As to the first cause of action, the contractual relationships involved are said to be those of the plaintiffs with investors and potential investors. The plaintiff claims that Mr Stewart interfered with these relationships by publishing defamatory material about it. As to the second cause of action, the interference with Imperial Consolidated's trading relationships, is said to be unlawful as being defamatory or as in breach of implied contractual obligations on the part of Mr Stewart, or as misuse or unauthorised disclosure of confidential information.

[58] There was no contractual relationship between Mr Stewart and Imperial Consolidated other than in relation to his role as an introducer. I see no scope for the contention that this contract contains express or implied terms as to confidentiality. So it cannot be said that the publications were in breach of any contractual term. Further I see no credible basis upon which it can be said that Mr Stewart was under an obligation to maintain confidence *vis à vis* what happened.

[59] This leaves in contention unlawfulness associated with defamation. Imperial Consolidated was driven, in the end, to put forward its case to me primarily on the basis that I should treat it as incorporating a defamation claim. But there are real difficulties with this approach.

[60] In the first place, there is a good deal to be said for the view that where the gravamen of a plaintiff's complaint is the publication of defamatory material, the claim should be in defamation. This is discussed generally in the Court of Appeal decision *Bell Booth Group Ltd* v *Attorney-General* [1989] 3 NZLR at 148 and also in my decision *Collier* v *Butterworths New Zealand Ltd* (1998) 12 PRNZ 38 in which I referred to judicial developments which have occurred since *Bell-Booth* was decided.

[61] Secondly there are some practical considerations. If defamation had been pleaded, I would have expected Imperial Consolidated to have identified in its pleadings, the defamatory meanings which it alleged that the web page conveyed and

for defences of truth, honest opinion, and qualified privilege to have been advanced. In this context it should be noted that Mr Stewart's ability to run (and succeed on) a defence of truth would not necessarily have depended on him showing that the precise allegations he made were true. I say this given s 8, Defamation Act 1992 and the cases to which I will be referring shortly.

[62] However despite my reservations about the form in which the case was presented, I think that I have no choice but to deal with it on the basis proposed by Mr Upton. I say this as Mr Guest, for Mr Stewart, was content for the case to be run in this way.

[63] In those circumstances, I think it is appropriate to consider first what the web page means and, secondly, whether, in respect of those meanings, Mr Stewart has defences of truth and honest opinion.

What defamatory meanings, if any, does the web page convey

[64] I think that the web page can be treated as making two allegations: one general and one specific.

[65] The specific allegation is that there is at least one case where Imperial Consolidated handed over client funds without knowledge or authority of the client, then went into denial mode and refused to sort the problem out or return the money. I think the relevant part of the web page can fairly be construed literally and Mr Upton did not argue otherwise.

[66] Three questions are asked on the web page. They seem to me to convey a general allegation that there is a substantial basis for questioning whether the Imperial Consolidated group of companies can be trusted with the money of investors, is "honest and professional" and can be trusted to look after client interests. They are also, I think, in the nature of an expression of opinion and are thus susceptible to the defence of honest opinion.

[67] In his closing submissions, Mr Upton contended that the web page meant that the Imperial Consolidated group is neither trustworthy, nor honest, nor professional. I agree that that is a possible approach to what the web page means and if this case had been tried by a jury I would have been prepared to leave that meaning to the jury. However, personally I prefer a more (although not completely) literal approach to what was said. It is fair to say, however, that the result of the case would be the same even if I held that the meaning of the words was as contended for by Mr Upton.

An irrelevancy

[68] Before discussing the defences of truth and honest opinion, I should dispose of an irrelevancy.

[69] Imperial Consolidated has had much very adverse publicity. A good deal of this originates with an American journalist, Mr David Marchant and a newsletter which he has published styled "Offshore Alert". Imperial Consolidated has also been the subject of bad publicity originating with a Spanish newspaper, *El Mundo*. The allegations which have been made against Imperial Consolidated and its principal shareholders and directors have been extensive and, perhaps, florid. For instance, Imperial Consolidated has been accused of operating as a front for Osama bin Laden and in association with an arms dealer, Monzer al-Kasser.

[70] I understand that Imperial Consolidated is bringing defamation proceedings against both Mr Marchant and his company and *El Mundo*.

[71] Mr Upton contends, and I accept, that these allegations are irrelevant for the purposes of this case.

Events which have occurred since July 1999

[72] I have heard some evidence which related to events which have occurred since July 1999. These are strictly irrelevant to the question whether the web page was defamatory of the plaintiffs when it was published. They are not, however,

irrelevant to the question whether injunctive relief is appropriate. In other words Mr Stewart can hardly be restrained now from publishing the truth merely because it was not true when it was first published.

The defence of truth

[73] Is there a substantial basis for questioning whether the Imperial Consolidated group of companies can be trusted with the money of investors, is "honest and professional" and can be trusted to look after client interests?

[74] On 3 May 1999, the New Zealand Securities Commission issued a media release:-

> **WARNING** – Imperial Consolidated Securities S.A.
>
> People should exercise great care before placing any money with Imperial Consolidated Securities S.A.
>
> Advertisements of this company have been banned by the Securities Commission. This action was taken under section 38B of the Securities Act 1978. It was taken because the Commission formed the opinion that the company's investments have been promoted to the public without an investment statement and a registered prospectus.
>
> ...
>
> Imperial Consolidated Securities S.A. is based in Nassau in the Bahamas. It has been offering a number of different overseas funds in New Zealand. These funds are described as investing in the 'factoring of top European company trade instruments and in 'zero coupon bonds'. The promotional material claims various returns of:
>
> - 1.75% per month - guaranteed
> - a minimum expected level of 1.0% and a target of 2.5% per month
> - a target yield of 5% per month.
>
> The investments have been actively promoted in the Nelson area. Two New Zealand companies have been associated with the securities. The first is ICNZ Limited. The directors of this company are Alison Bolger and Jeffery Law. The second is Dominoe Developments Limited the director of which is Michael Gilbert who is a solicitor in Nelson.

[75] As a result of the action taken by the New Zealand Securities Commission, Imperial Consolidated SA is listed on web pages associated with the New Zealand Ministry of Consumer Affairs under the heading "Scam Watch".

[76] All of this happened prior to the commencement of these proceedings

[77] Mr Lincoln Fraser was adjudicated bankrupt in England although this bankruptcy was later annulled. This was conceded by Mr Gilbert in his evidence but he was not specific as to dates. Documents which were produced suggest that the bankruptcy was in 1996 and the annulment was in 1997. There was no specific challenge to the admissibility of this hearsay evidence but likewise no general acceptance that this material was admissible so I put the timing issue on one side.

[78] On 12 July this year Messrs Lincoln Fraser and Jared Brook were each disqualified from acting as a director of a company. In each case the disqualification was for a period of four years. Mr Gilbert accepted that this was so and indicated in his evidence that both gentlemen sold their shares in Imperial Consolidated and resigned all company positions prior to the disqualifications being imposed.

[79] Both the Rusaust project and the Managed II Fund offered implausibly high projected returns. The very high rates of return, the vague way in which the proposed investment activities were referred to and the language of the agreements did suggest to me that what was involved may have been a prime bank instrument fraud, or something similar. Indeed, if the Rusaust project documentation is right, there was, tucked into the project, a "prime bank instrument" in the form of the promissory note "issued and guaranteed by the Sakhacredit Bank of Yakutsk" referred to in the letter of undertaking (see para [13] above).

[80] It will be recalled that I expressed concerns as to this and particularly as to the implausibly high returns proposed in the documentation when Mr Upton was making his closing submissions. At his invitation, I gave Imperial Consolidated the opportunity to file additional evidence on this aspect of the case. In Mr Gilbert's affidavit of 16 November 2001, filed pursuant to leave, he said this:-

> As far as the returns available on investment in Russia in 1997 are concerned, those offered by Imperial Consolidated through the Rusaust Project in 1997 are well inside what had been available in Russia up to that time. The best evidence I have been able to get on the state of the Russian financial markets in 1997 and the returns available is through a search I carried out on the internet on 15 November 2001. That search shows that in the 1996/1997 financial year, returns on offshore funds invested in Russia were as high as 378.9% per annum. That was an exceptional year. In the 1997/1998 financial year, the market collapsed. That was why the Rusaust Project could not proceed at the end of 1997. Copies of two reports I have obtained from my internet search are attached to this affidavit … .

[81] The material produced by Mr Gilbert does, on its face, suggest that very substantial returns were made in the 1996/1997 year by the top funds which invested in the Russian market. The same material suggests that the 1997/1998 year was catastrophic for those funds with losses of between 80% and 92% being recorded.

[82] I should note that this material is not particularly closely associated with the particulars of the Rusaust project as marketed or as described in the letter of 13 January 1998 or with the steady (if substantial) monthly returns projected for the Managed II Fund. It is also strange, to my way of thinking, that the material on this point should be supplied to me by Mr Gilbert rather than direct from Imperial Consolidated. As I have noted a surprising feature of the case as a whole has been the comparative absence of material originating with Imperial Consolidated. It would not have been too difficult for Imperial Consolidated to have produced affidavit evidence as to the details of the Rusaust project and how it was anticipated that the returns referred to in the documentation were intended to be derived. Likewise, it would have been easy enough, I would have thought, for Imperial Consolidated to have given a break down of the actual trading activities of the Managed II Fund.

[83] Despite my suspicions, it would not be right for me to decide the case on the basis that the Rusaust project was just a prime bank instrument scam or something similar. I say this for the following reasons:-

1. This is not the way the case was run. Indeed, Mr Stewart's complaint is not that the Rusaust project or the Managed II Fund or Imperial Consolidated's investment activities generally were scams; it is rather than he did not get the

profits which he assumes were made or the commissions to which he claims to be entitled.

2. Imperial Consolidated, although perhaps listing badly with the disqualification of its two former principal shareholders and directors, Messrs Lincoln Fraser and Jared Brook, is still afloat four years after the Rusaust project funds were received.

3. Mr Stewart's clients received their money back and indeed there is no evidence that any New Zealand investor in Imperial Consolidated schemes has lost money. According to Mr Gilbert, Imperial Consolidated, in the aftermath of its difficulties with the New Zealand Securities Commission, offered to repay all New Zealand investors and subsequently did so when this was requested.

4. The evidence adduced by Mr Gilbert does point to high profits being made on Russian investments in the 1996-97 year.

But nonetheless, companies which offer (even on an indicative basis) the sort of returns indicated as being available in relation to the Rusaust project and the Managed II Fund do, in my view, legitimately invite questions as to their probity. That this is so is, I think, illustrated by the New Zealand Securities Commission release on 3 May 1999.

[84] Before answering the question which I posed in para [73] I should turn to consider issues more closely associated with the particular dealings between Mr Stewart and Imperial Consolidated and in particular whether Mr Stewart was truthful when he said on the web page that there is at least one case where Imperial Consolidated has handed over client funds without knowledge or authority of the client, then went into denial mode and refused to sort the problem out or return the money.

[85] I have already found that the agreements between Capital Corporate Investment Co Ltd and Imperial Consolidated Securities SA which were apparently

executed on 12/15 January 1998 were backdated. I do not know why these documents were backdated. On the material which I have, a motive for such backdating is not clear. It is, however, possible to hypothesise that the purpose of the backdating, in the eyes of Messrs Goodwin and Gilbert and Imperial Consolidated, was to avoid any necessity to pay "yield" earned after January 1998 to Eurocorp given that, by the end of January or beginning of February 1998, Cayman National Trust Co Ltd was only acting on the joint instructions of Messrs Goodwin and Stewart. Given the concerns which Mr Goodwin had as to Mr Stewart having received commissions, it is understandable that he would have been reluctant to see returns generated by funds which he had contributed to paid into a bank account which he could only access with the concurrence of Mr Stewart. Whether this is so or not, however, is immaterial. I am perfectly satisfied that these documents have, indeed, been backdated.

[86] This raises something of a conundrum.

[87] If the 12/15 January documentation was authentic, then Mr Stewart's allegation that client money had been handed over without the authority or knowledge of the client would have been well-founded. This is because Imperial Consolidated, on this hypothesis, would have transferred investments held in the name of Eurocorp to Corporate Capital Investment Co Ltd without the authority of Eurocorp. I say this because it is perfectly clear that Eurocorp (which was controlled by directors appointed by Cayman National Trust Co Ltd) had not taken any steps to authorise the transfer of the investments as early as 12/15 January 1998. As well, I do not accept that Mr Goodwin was entitled to speak for Eurocorp in its dealings with outsiders.

[88] The problem, however, is that this documentation, on my appreciation, is false. In fact, Imperial Consolidated did fund the return to Mr Stewart's clients of the money which they invested in the Rusaust scheme. The division up of the Eurocorp investments into module 1007 (which was attributed to Mr Stewart's clients) and modules 1008, 1009 and 1010 which was attributed to Mr Goodwin and his clients in the end seems to have been with the grudging acquiescence of Mr Stewart. In saying that, I should say that the evidence on this point was not entirely

clear and certainly not complete. Overall, however, I would find it difficult to criticise Imperial Consolidated for electing to deal with Mr Goodwin in relation to modules 1008, 1009 and 1010.

[89] A second complaint made by Mr Stewart is that he and Eurocorp did not receive the yield which he believes was made by Imperial Consolidated on the funds invested between the date of investment (October 1997) and their return (August 1998).

[90] Again, there is something of a conundrum.

[91] The Imperial Consolidated position as advanced by Mr Brook in his letter of 15 July 1998 was that the relevant funds were safely invested and earning appropriate returns which, up to 15 June 1998 had been paid to Mr Goodwin. Yet all that was eventually paid Eurocorp in relation to module 1007 was the amount of the original investment. On this basis, it might be thought that Imperial Consolidated paid to Mr Goodwin income earned up to 15 June 1998 on module 1007 which ought to have been paid to Mr Stewart/Eurocorp and either paid income subsequently earned to Mr Goodwin or alternatively retained it.

[92] Because of my scepticism as to the investment activities of Imperial Consolidated, I am a little doubtful whether any profit was ever made. Indeed, I think that Mr Stewart's investor clients were extremely lucky to get their money back and particularly lucky if they also received income at the rate of 16% per annum calculated over the 10 month period of their investments. On the other hand, if Mr Jared Brook's claims are taken at face value, money was paid to Mr Goodwin which ought to have been paid to Mr Stewart or Eurocorp. This seems to have been the position which was adopted by Mr Gilbert in July 1998 (see para [45] above). Since this is the position which was espoused by Imperial Consolidated and I have had no direct evidence to the contrary, I think it appropriate to take Imperial Consolidated at its word. On this basis, it would also appear to follow that there was income derived between 15 June 1998 and at least 15 July and possibly up to the end of August on module 1007 which was not accounted for to Mr Stewart and Eurocorp.

[93] Accordingly, in this respect, I think that the statement on the web page was correct (or close enough, see para [99] below) when it alleged that there was one case:

> where Imperial Consolidated has handed over client funds without knowledge or authority of the client

In saying this, I think that payment to Mr Goodwin of interest/yield in relation to module 1007 is tantamount to a handing over of "client funds", and this must be regarded as having occurred without the knowledge or authority of the client. At no time has Imperial Consolidated pointed to any authority from either Eurocorp or Mr Stewart for such payments being made to Mr Goodwin. I also think that the allegation that Imperial Consolidated later went into denial mode on this issue is also true given the correspondence to which I have referred (see para [48] above) and the absence of any explanation from Imperial Consolidated as to what actually happened to the funds.

[94] A third area of complaint related to Mr Stewart's continuing (although I think highly inappropriate) sense of grievance about the fact that he was not paid introducer's fees continuously in relation to all SUS600,000 which was invested. He did not have the informed consent of Eurocorp and Mr Goodwin to obtaining commissions of this sort. Absent such consent, it was inappropriate for him to seek or obtain commissions. He also did not have the informed consent of his investor client although he claimed that such consent was irrelevant given the terms on which they invested.

[95] Although I am critical of this aspect of Mr Stewart's conduct, I did regard him as being fundamentally a witness of truth. His position was that Imperial Consolidated was far more punctilious as to the ethics of the commission arrangements after the difficulty between him and Mr Goodwin arose than had been the case in the latter part of 1997. He said that up until January 1998, the understanding between him and the Imperial Consolidated people with whom he was dealing was that he would receive commissions and that there was, at that time, no quibbling about fiduciary obligations which he might have to Mr Goodwin or possibly the investors. His evidence on the point is consistent, at least in general

terms, with the documentation. The pre-January 1998 Imperial Consolidated material dealing with fees payable to introducers does not refer to obligations of disclosure and the like – points which are made clearly enough (and on the face of it entirely appropriately) in later communications.

[96] I should at this point refer to *Polly Peck (Holdings) Plc* v *Trelford* [1986] 1 QB 1000, *Williams* v *Reason* [1988] 1 All ER 262 and *Bookbinder* v *Tebbit*, [1989] 1 All ER 1169. The effect of these cases is that where there are several defamatory statements in the publication complained of which have a "common sting", the defendant is entitled to justify the sting even though the plaintiff does not complain about some of the individual defamatory statements contained in the publication. Further, if the specific allegations in the publication complained of are expressed as being instances of a broader charge, the defendant may justify that broader charge by establishing instances of which are not referred to in the publication which is complained of.

[97] The drift of these cases was inconsistent with the approach adopted in New Zealand prior to the enactment of the Defamation Act 1992, see *Templeton* v *Jones* [1984] 1 NZLR 448 and *Broadcasting Corporation of New Zealand* v *Crush* [1988] 2 NZLR 234. The extent to which the New Zealand cases still represent the law in light of the enactment of s 8 of the Defamation Act is, however, unclear.

[98] Section 8 of the Defamation Act provides:-

> (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.
>
> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) In proceedings for defamation, a defence of truth shall succeed if—
>
> > (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or

(b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[99] The metes and bounds of s 8 are not yet entirely clear and this is certainly not the case to explore them in any detail. I think it inescapable that the allegations on the web page both in relation to the specific allegation which was made (see para [65] above) and in respect of the general allegations whether construed as I prefer (see para [66] above) or as Mr Upton contends (see para [67] above) were also true (which is what I think to be the case) or at the very least sufficiently close to the truth to warrant a defence under any conceivable interpretation of s 8; this given the general matters to which I have referred in paras [74], [75] and [79]-[83], the fact that Imperial Consolidated engaged in the backdating of the documentation which purported to have been signed on 12/15 January 1998 and the dealings with Mr Goodwin referred to in the correspondence involving Mr Brook (see paras [41]–[45] above), as I interpret them, see para [93] above.

[100] Obviously the case for an injunction was not improved when Messrs Lincoln Fraser and Jared Brook were disqualified from acting as directors in July this year. As well, I am not much impressed by the commission/introducer fee arrangements. But these are matters which can be put on one side. I have also put on side issues associated with difficulties which Imperial Consolidated has had with the Australian Securities and Investments Commission which were explained by Mr Gilbert in evidence in a way which was not the subject of any specific challenge.

Honest opinion

[101] Given my conclusions as to the defence of truth I can deal with this defence briefly.

[102] In my view this defence is also made out. To the extent to which specific allegations of fact are made, they are true. I regard the questions as being in the nature of an expression of opinion which was genuinely held by Mr Stewart which can be regarded as having been fairly open on the facts which have been proved.

Conclusions as to defamation

[103] For those reasons I am satisfied that the tort of defamation has not been established

[104] Having found for Mr Stewart on the defences of truth and honest opinion, I see no reason to go on to consider the defence of qualified privilege.

Non disclosure of information when interim injunction obtained

[105] When the interim injunction was obtained *ex parte* in August 1999, no mention was made of the New Zealand Securities Commission warning in respect of Imperial Consolidated Securities SA. It is inescapable that this failure to refer to the warning was a breach of the obligation of disclosure to which the plaintiffs were subject when making an application *ex parte*.

[106] Mr Gilbert was cross-examined on this point. I heard no adequate explanation for the failure to disclose the warning.

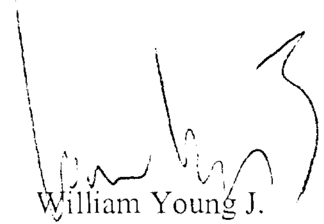
[107] Given my conclusions on the merits, it is unnecessary to consider whether this breach of the disclosure obligation should be reflected by a withholding of relief.

Disposition

[108] Accordingly, the claim is dismissed.

[109] The order which I made restricting rights of search in relation to the court file is revoked. No orders for confidentiality are made.

[110] I understand that Mr Stewart is legally aided. If an application for costs is to be made, on behalf of Mr Stewart, this is to be filed by 15 February 2002. The plaintiffs will then have 14 days to respond.



Signed at: 2.15 pm on: 18 December 2001 William Young J.

Solicitors:
Michael Gilbert, Nelson for Plaintiffs
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