695

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.285-SD/99

[redacted]

BETWEEN	E. ALEXANDER First Plaintiff
AND	G. CORNELL Second Plaintiff
AND	BETTALIFE INTERNATIONAL (NZ) LIMITED Third Plaintiff
AND	COFIE HOLDINGS PTY LIMITED Fourth Plaintiff
AND	G. CLEGG First Defendant
AND	NEW IMAGE INTERNATIONAL LIMITED Second Defendant

Hearing: 6,7,8,9,10,13,14,15,16,17 May and 19 June 2002

Counsel: J. G. Miles QC and Z. G. Kennedy for Plaintiffs
A. H. Waalkens and C. Garvey for Defendants

Judgment: 12 July 2002

JUDGMENT OF SALMON J.

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Introduction

[1] The second defendant (New Image) is a New Zealand company engaged in network marketing. It has subsidiaries in Australia and in a number of Asian countries. The first and second plaintiffs were the chief executive officers respectively of the second defendant's Australian and Hong Kong subsidiaries. Both left their positions in 1998 and set up their own network marketing companies, the third and fourth plaintiffs, engaged in the sale of the same class of product as that sold by New Image. The first defendant, the effective owner of New Image, perceived this move as a serious threat to his company. He regarded the plaintiff's actions as disloyal in the extreme. He sent to his distributors in Australia and New Zealand a circular condemning the actions of the plaintiffs. It is that circular which has given rise to these proceedings in defamation and for injurious falsehood.

Background

[2] Mr Clegg is the founder and sole shareholder of New Image. The company was founded in June 1984 and manufactures and distributes health and lifestyle products through direct sales by the method known as network marketing.

[3] Network marketing is a term used to describe the system of distributing products through "networks" of private individual distributors rather than retail outlets. Each distributor can recruit other distributors into his or her network and thereby receive a share of the profits generated from the sale of products by those recruits. New Image relies on its distributors building and maintaining networks.

[4] New Image is the parent company and operates in New Zealand. There are subsidiary companies which operate in Australia, Indonesia, Philippines, Malaysia and Singapore. Until the end of 1999 there was also a subsidiary operating in Hong Kong. The Australian New Image company started in 1983 as a joint venture. Mr Alexander and his brother were foundation distributors in that company. After three

years Mr Clegg bought the other shareholder out. Mr Alexander had by that time left the Australian company and in May 1988 Mr Clegg persuaded him to move to New Zealand and to work for him here. Mr Alexander and Mr Clegg developed a very close relationship personally and professionally.

[5] Mr Alexander held various roles within the New Zealand company until 1990 when he was asked by Mr Clegg to become chief executive officer of the Australian company. He held that position until October 1993 at which time he was made international vice president of sales and moved back to New Zealand. In 1995 he was again asked to become chief executive officer of the Australian company and he remained in that position until he resigned on 2 September 1998. He left the employment of New Image on 14 October that year.

[6] It was the practice of New Image to require all distributors to sign an agreement. Mr Alexander was questioned as to the distributor agreement he had signed. Eventually he accepted that as a distributor in the 1988/89 year and indeed, up until June 1999, he would have been subject to the distributorship agreement current during those years, which contained a term providing that during the currency of the agreement or for six months after its termination, he would not recruit or solicit any distributor of New Image on his own behalf or on behalf of any other direct selling or network marketing company. He also acknowledged that Bettalife copied the New Image distributor agreement and that he arranged for that to be done. He said he did not sign the senior management confidentiality agreement although he acknowledged that he did sign some form of confidentiality agreement. Mr Clegg's evidence was that in 1995/96 all senior executives including Mr Alexander signed a confidentiality agreement. I conclude that Mr Alexander did sign such an agreement and that it was in the same form as one signed by Mr Cornell. The Australian company traded profitably during Mr Alexander's first term as chief executive officer. During his second term the company made a series of substantial losses, although the size of those losses was reduced in the financial years 1997 and 1998. The overall sales declined during this period as well.

[7] Mr Cornell's business experience is primarily in the automotive area. In 1993 he and his wife joined New Image in Australia as distributors. On 28 April

1995 he entered into a joint venture agreement with New Image whereby his nominee company purchased 26 per cent of New Image's Hong Kong subsidiary and was appointed managing director of New Image Hong Kong from 1 May 1995.

[8] Mr Cornell was also appointed as the principal distributor of the company's products in Hong Kong and signed a distributor agreement with New Zealand New Image which contained the same prohibition on recruitment or soliciting referred to above. He also signed a confidentiality agreement. In that agreement the employee acknowledges that all confidential information as to practice, business dealings or affairs of the company which may come into his or her possession during employment remains the property of the company, and the employee agrees not to take extracts from any such information without the company's consent. The employee also agrees not to disclose any confidential information relating to the practice, business dealings or affairs of the company. The agreement also contained a definition of confidential information. It included distributor lists and marketing plans.

[9] The Hong Kong company traded quite profitably in the years ended 30 June 1995 and 1996, but made large losses in the years ended 30 June 1997 and 1998. By May 1998 Mr Clegg received advice from a financial consultant to New Image that the Hong Kong company was insolvent. There were negotiations over a period of some weeks between Mr Clegg and Mr Cornell and after a meeting between the two men on 24 June 1998 a proposal was made for the sale of Mr Cornell's shares. The document of 24 June proposed a sale price for the shares of US$260,000.

[10] On 11 August 1998 a document prepared by Mr Cornell was signed. New Zealand New Image Ltd agreed to purchase Mr Cornell's interest in the business for US$260,000; US$65,000 was payable on execution of the document and the balance by monthly instalments. Mr Cornell's executive position with the company ceased as from 11 August, but the distributor agreement continued and he remained bound by the restraint clause referred to above.

[11] The above facts relating to the sale of Mr Cornell's interest in the Hong Kong business and some of those which follow are taken from the judgment of the Court

of Appeal in *New World Property Ltd v New Image International Ltd & Clegg* (CA151/01, judgment 26 March 2002). The appeal concerned an argument which arose over payment of the balance due pursuant to the agreement referred to above.

[12] A company known as Total Life acquired 50 per cent of the shares in the Hong Kong company. From the time of Mr Cornell's departure the company was run by appointees of Mr Sun of Total Life. The company did not prosper. By the end of 1998 Mr Clegg and Mr Sun closed down the company. It was treated as valueless and wound up. Mr Clegg and Mr Sun incorporated a new company which traded as from January 2000 but it too was unsuccessful and closed down the same year with large losses.

[13] Meanwhile, in August 1998 Mr Clegg received advice that Mr Cornell was proposing to set up a new network marketing company which was to be called Bettalife. He learned that Mr Cornell was actively engaged in approaching people to become involved as distributors in Hong Kong of this new company. Mr Clegg was advised that Mr Cornell was using New Image staff to assist him in this enterprise. Evidence given in the earlier proceedings was to the effect that rumours were rife in Australia, New Zealand, Hong Kong and Malaysia that Mr Cornell was setting up a network distribution company to be known as Bettalife. On 30 September Mr Clegg wrote to Mr Cornell concerning these rumours and expressing the view that Mr Cornell's activities were in breach of the agreement that he had signed in August. It appears that Mr Cornell did not reply to Mr Clegg's statements concerning these rumours and activities. Mr Clegg's letter also advised Mr Cornell that because his activities constituted a breach of the agreement no further payments would be made pursuant to the agreement to purchase Mr Cornell's interest in the business.

[14] On 21 October Mr Cornell's solicitors wrote demanding payment of the amount due under that agreement. No reference was made in that letter to Mr Clegg's allegations.

[15] It is pertinent at this stage to record that the Court of Appeal concluded that Mr Cornell was not in breach of the August agreement. The Court also held that

there was no evidence of any act of solicitation by Mr Cornell of staff or distributors of the Hong Kong company.

[16] At the commencement of the trial I held that that finding created an issue estoppel which prevented the defendants in these proceedings from contending that Mr Cornell solicited distributors of New Image Hong Kong to persuade them to join Bettalife.

[17] Mr Cornell incorporated the Bettalife Hong Kong company in December 1998 and it began its operations in April 1999.

[18] As mentioned above Mr Alexander was re-appointed as chief executive officer in Australia from February 1995. Apart from a small increase in the 1996/7 year, sales in Australia continued a decline which had commenced prior to that time.

[19] At the time of leaving New Image, Mr Alexander said that he intended to pursue a business venture in the automotive industry. In December 1998, Mr Clegg received numerous telephone calls from Mrs Sue Kenyon the administration manager of his Australian company concerning the proposal by Mr Alexander and Mr Cornell to set up Bettalife in Australia and New Zealand. On the basis of information he received, Mr Clegg understood that distributors of New Image were being approached to join Bettalife. Mr Clegg discovered that between May and September of 1998, there had been 206 telephone calls between Mr Alexander in Australia and Mr Cornell in Hong Kong. He was sent copies of documents, including the Bettalife registration form and distribution agreement both of which appeared to have been copied from New Image documents.

[20] Mr Cornell and Mr Alexander met in October 1998 in Auckland and in Sydney. A Mr Chia of a company called C-Tech, a manufacturer of skin care and nutritional products, was also involved in those discussions. Mr Alexander's evidence is that he decided to become involved in Mr Cornell's and Mr Chia's proposed venture. On 19 October he instructed his solicitor to purchase a shelf company. That company is the plaintiff, Cofie Holdings Pty Ltd. Its name was

subsequently changed to Bettalife International Australia Pty Ltd. Bettalife International (NZ) Ltd was incorporated on 4 December 1998.

[21] I mentioned above Mr Clegg's understanding that distributors of New Image were being approached to join Bettalife. I now propose to set out in more detail the evidence which Mr Clegg received, and evidence given at trial relating to those matters. So far as Hong Kong is concerned, the evidence is referred to in the decision of the Court of Appeal mentioned above. It is set out in paragraphs 15 to 19 of the Court of Appeal judgment as follows:

> [15] Evidence was given by a Mrs Fettes, who was not a New Image distributor, that in "early August" she had initiated a meeting with Mr Cornell as a result of learning from a Mr Johnston that Mr Cornell was leaving the Hong Kong company and was setting up a new network marketing company. He had confirmed to her that he was looking for investors and personnel. The new company was envisaged to be a supplier of skin care and nutritional supplement products to five countries and Mr Cornell and Ms Tryde were to be in the supplying operation. (In passing we note that this suggestion about Ms Tryde's proposed involvement at this time – i.e. prior to the transfer of the shares – had not been put to Mr Cornell when he gave evidence. Indeed, he said that this meeting occurred only a day before the second meeting to which we now refer. He was not cross-examined on this point either.)
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> [16] It does not appear from Mrs Fettes' evidence that Ms Tryde was present at this first meeting. She was however present at a second meeting with Mr Cornell and Mr and Mrs Fettes on 19 August where there were similar discussions but no decision was taken. In her brief of evidence, Mrs Fettes said that a company name like Bettalife was mentioned by Mr Cornell. In giving evidence, however, she suggested this had happened at the earlier meeting.
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> [17] A few days later Mrs Fettes told Mr Johnston what she had learned from Mr Cornell. Mr Johnston, the managing director of an Australian company which has products distributed through the New Image network, then contacted Mr Cornell who confirmed that he had approached Mrs Fettes and "many others" (it is not clear that any of those referred to were New Image distributors) and that he was using New Image staff to assist him. He had mentioned Ms Tryde as one of those. The nature of the assistance, and whether it related only to the approaches to others, was not made clear in Mr Johnston's evidence.

> [18] Mr Johnston alerted Mr Clegg to what was said to be happening. Mr Johnson's evidence was that rumours were rife in Australia, New Zealand, Hong Kong and Malaysia that Mr Cornell was setting up a network distribution company to be known as Bettalife.
>
> [19] On 28 September Mrs Fettes telephoned Mr Clegg and told him what she knew about Mr Cornell's activities.

[22] In response Mr Clegg wrote the letter of 30 September referred to in paragraph [13] of this judgment, and, as noted in that paragraph, there was no response from Mr Cornell.

[23] In his evidence Mr Clegg referred to telephone calls in December 1998 from Mrs Sue Kenyon, the administration manager of the Australian company. She told Mr Clegg about phone calls from or concerning distributors who were being enticed to join Bettalife. She told Mr Clegg that Mr Alexander and Mr Cornell were involved in this company and these activities. She also said that there were comments and rumours being made about New Image being in a precarious financial position.

[24] Mrs Kenyon also sent a facsimile to Mr Clegg around that time with notes that she had made on some of the calls. Mr Clegg's evidence is that he also received many telephone calls around this time from people connected with the New Image business who were concerned about the activities of Bettalife and about New Image's financial position. He also received facsimiles from Gwen Conlay in Adelaide and Murray Crawford in New Zealand. They were both New Image distributors.

[25] Mrs Conlay advised Mr Clegg in her written communication that Mr Alexander had contacted her a week or so after his resignation from New Image and asked her if she would like to join his new company Bettalife. She said that he offered to give her preferential status in his company because he had already recruited a number of her downline distributors and that she would retain them all in his organisation. She also says that Mr Alexander told her that New Image was in serious financial trouble, that distributors were owed large sums of money and that

he himself was owed a considerable sum of money. She says she was contacted a second time to ask if she wanted to join and was also contacted by his brother Hugh.

[26] Mr Clegg said in evidence that direct sales were a very personal type of business, that there were lots of stories and gossip, that it was difficult to glean the extent of contact with New Image members and that reports tended to be the tip of the iceberg. When asked why he did not ring Mr Alexander or fax him concerning these matters, he said that Mr Alexander had the opportunity to inform him what he was doing rather than the other way around. He believed he had clear evidence of what was going on and felt betrayed.

[27] In her evidence Mrs Kenyon confirmed receiving three or four calls in December 1998 from distributors, including Gwen Conlay. These distributors said that either Mr Alexander or a Mr Richardson had called them, and said that New Image companies were in a bad financial position, and that Mr Alexander had set up a new business.

[28] Mr Crawford, who had been a New Image distributor from November 1987 arranged through a third party to meet Mr Alexander in Palmerston North to discuss what Mr Alexander was doing. They met as planned in December 1998. Mr Alexander told him he was forming Bettalife. He told Mr Crawford that he would like him and his wife to join and that there were special privileges in joining early. Mr Crawford said that Mr Alexander told him that there were many New Image distributors joining and that he would have a thousand by early 1999. Mr Alexander said he considered that New Image would struggle to survive. He decided not to join Bettalife but nonetheless later heard that his name was being used to induce others to join Bettalife.

[29] Mr Alexander acknowledged that he met Mr Crawford but denied some of the detail of the conversation. In so far as there is conflict between the evidence of Mr Crawford and Mr Alexander, I prefer that of Mr Crawford.

[30] Mrs Conlay has been a New Image representative since 1989. In October 1998 she received a letter advising of Mr Alexander's resignation from New Image.

About one week after that, she received a telephone call from Mr Alexander in which he asked her whether she would like to join Bettalife. Her evidence is that Mr Alexander told her that all the key players in her Hong Kong network were joining him, and that New Image was in serious financial trouble and owed him a considerable amount of money. She passed this information on to Mr Clegg. On 23 December she received a lengthy facsimile from Mr Alexander outlining the Bettalife marketing plan and encouraging her to join. She says she declined his invitation because she believed his actions were unethical. She denied that Mr Alexander said that he was contacting her at the request of Neville Herbert.

[31] Again, in so far as there is conflict between Mrs Conlay's evidence and that of Mr Alexander, I prefer Mrs Conlay's evidence.

[32] Mr John Gaffney is a horse trainer, living in Melbourne. He has also been a distributor for New Image since January 1993. He was trained by Mr Alexander. He said that he was contacted by Mr Alexander on two occasions in October or November 1998. He was cross-examined extensively as to the date. I am satisfied that the calls were at the end of 1998. He said that Mr Alexander told him of the new company that he had started with Mr Cornell, and that a ground floor opportunity was available if he wanted it. He said Mr Alexander told him that he would have a greater earning capacity than he had with New Image, and that a number of New Image people had joined Bettalife. He said he was shocked and surprised that Mr Alexander would set up in competition and attempt to recruit New Image members to join him.

[33] Mr Chu has been a distributor for New Image in Western Australia since July 1995. He was advised that Mr Alexander had resigned from New Image. In December 1998 Mr Richardson telephoned to say that he had a fantastic opportunity, that Mr Alexander and Mr Cornell had formed a new company and that all of New Image's successful distributors were involved. Mr Chu says that shortly after he spoke to Mr Richardson he telephoned a number on a Bettalife form. Mr Alexander answered, said he was busy but returned his call later the same day. Mr Alexander asked if Tony Richardson had called him. Mr Chu agreed that he had. Mr Chu said that Mr Alexander then told him that he should join Bettalife quickly because

everyone was interested and they expected a thousand new members in New Zealand by the end of January. He said that Mr Alexander told him that Murray Crawford had joined and he mentioned some other names. Mr Chu's evidence was admitted by consent.

[34] Mr Richardson gave evidence for the plaintiffs. He said he knew Mr Alexander very well and that at one stage they were almost neighbours. He acknowledged that he joined Bettalife and that he contacted a number of New Image distributors who he identified from monthly magazines as being relatively successful. He said that Mr Alexander did not ask him or encourage him to contact these people and that in fact Mr Alexander told him he considered it unethical for him to do so. Mr Richardson was also a distributor of New Image and acknowledged that he knew it was unethical for him to approach the people he did.

[35] Mr Alexander confirmed in his evidence that he did not encourage Mr Richardson to approach New Image distributors and that he had told him it was unethical to do so. Nevertheless it is apparent that Mr Alexander was perfectly happy to talk to Mr Chu and to encourage him to join Bettalife.

[36] I am satisfied that Mr Alexander encouraged Mr Gaffney, Mrs Conlay, Mr Crawford and Mr Chuo join Bettalife at a time when they, to his knowledge, were distributors of New Image and when he was still bound by the restriction on his distributor agreement. I am satisfied too that Mr Alexander was aware that it was unethical for him to do this.

[37] So far as Mr Richardson is concerned, the state of the evidence does not justify a conclusion contrary to the statements of both Mr Alexander and Mr Richardson that Mr Richardson acted on his own initiative in approaching New Image distributors.

[38] I record that there were witnesses called for the plaintiffs who worked as distributors for Bettalife, and who regard Mr Alexander and Mr Cornell as men of integrity. I do not doubt that they are genuine in their opinions. However, in at least

the respects referred to above, I am satisfied that Mr Alexander acted in a way which he acknowledged was unethical.

The circular of February 1999

[39] I have referred above to the information which came to Mr Clegg concerning the activities of Mr Alexander and Mr Cornell. He was very upset by what was happening. He considered that they were behaving in an underhand way in setting up the competing company without any advice to him. He considered the competing company and the activities of Mr Alexander and Mr Cornell to be a serious threat to his company. He decided, therefore, to advise his distributors in New Zealand and Australia of what was happening. He prepared the circular, the subject of this claim. It was issued in February 1999 and was forwarded to distributors with other material. It consisted of five pages prepared by Mr Clegg and a sixth page which reprinted a document headed "There is no right way to do a wrong thing. Ethics and integrity will not be compromised", which had originally been prepared in 1996 and had been included in training manuals from August 1996 onwards. The circular was sent to 1,041 distributors in New Zealand and 473 in Australia.

[40] The plaintiffs consider that they have been substantially damaged in their reputation and their business by the article and issued these proceedings.

The proceedings

[41] The amended statement of claim contains two causes of action. The first is for defamation. It alleges that the circular contained false and malicious statements relating to the plaintiff. It sets out extracts from the circular. Some of those extracts are from the five pages written for the occasion by Mr Clegg, some of them are from the sixth page which is a reproduction of the document originally prepared in 1996.

I am satisfied from the evidence that the 1996 document was widely distributed and used and is likely to have been familiar to most New Image distributors. The circular is headed "For the long-term players this is a great industry – let's keep it that way" and in a box below the heading, "We must keep our industry clean".

[42] The extracts from the five pages of the circular written for the occasion by Mr Clegg, which are relied upon by the plaintiff are set out in paragraph 14 of the statement of claim as follows:

(a) **"We must keep our industry clean.**

We are deeply saddened and upset that recent unethical and unacceptable activities detrimental to the security of our members, networks and businesses have necessitated the actions we have been forced to embark upon.

There is no deeper hurt than betrayal.

Eddie Alexander is involved in the systematic recruitment of New Image members to join another company - Bettalife.

For some time now we have been receiving numerous calls from distributors in Australia and New Zealand upset about approaches being made to them and their downlines to join a company called Bettalife.

The main complaint is that the integrity of our system is being undermined by what appears to be a blatant attempt to discredit our company. There is ill-feeling that ex-employees of the company would use name lists and confidential information to contact networks. This activity is causing dissension amongst members and is obviously an attempt for quick personal gain with no regard for the consequences."

(b) "*Australia*

An application to register Cofie Holdings Pty Ltd (subsequently trading as Bettalife) was made on 19 October 1998. As at the 23 October 1998 the share capital is five ordinary $5 shares held by: Kay Choong Chia, (3) Eddie Alexander (1) and Graham Cornell (1). The registered office is 4 Mildura Place, Eleebana, New South Wales, the home address of Eddie Alexander. Applications have been made to reserve a name change to Bettalife International (Aust) Pty Ltd.

New Zealand

Bettalife International (NZ) Ltd was incorporated on the 4/12/98 with 100 shares. The sole shareholder is Mr E R Alexander. The Directors are Mr E A Alexander and Mr Richard Alexander, (Eddie's son). The

address is 112 Selwyn Road, Howick, Auckland (Mr Richard Alexander's home address)."

"An embarrassing statistic of the networking industry is the fact that 80% of companies fail in the first two years. The reasons for this are:

undercapitalised

inexperienced

lack of business acumen

ordinary products

money game/pyramid type marketing plans.

One of the main weaknesses is trying to run and develop a business from cash flow (Distributors' money) or inducing large sums of money from distributors in return for granting special status positions.

The network business is individually very personal and when companies crash the consequences are disastrous for those that TRUSTED THEIR LEADERS:

1. shattered dreams
2. loss of trust, disbelief and betrayal
3. absolute loss of all time committed
4. loss of future income and belief in the industry.

New Image has been in business for 15 years and over that period of time, from our own manufacturing plant we have developed a number of truly exceptional, market leading products. It would be unusual to think that a new company could accidentally come into possession of an exceptional product that could become a market leader. Statistically, the odds just do not stack up. It would be fair to say, the bigger the promises, the bigger the inducements and the harder the talk, the more suspicious one should be. Use Due Diligence when checking a company out."

(c) "*Hong Kong*

We are very proud of the day that Graham Cornell became a joint venture partner in Hong Kong. When following company policy, the Hong Kong company was very profitable and the prosperity was shared with many distributors making high incomes. Unfortunately, there was a shift in product emphasis and the core business over the last 18 months. A serious deterioration in sales took place, culminating in a decision to restructure the joint venture. This was announced in our birthday edition newsletter of October. The new joint venture is proceeding successfully with brand new offices in Kowloon. Obviously, the joint venture settlement with Graham Cornell contains many confidential aspects, but

the audited accounts verify a very good profit in the 1995/96 year and unacceptable losses in 1996/97 and 1997/98 necessitating the restructuring.

Graham Cornell introduced a company called C-Tech to partner him but they declined to support his proposal when we met in Hong Kong. Only then did we enter into negotiations with Totalife Taiwan.

Mr Alan Stewart, Chartered Accountant from New Zealand assisted with the documentation for the Cornell settlement. The following clause becomes quite relevant under the circumstances.

"Cornell to use his best endeavours to protect the goodwill of NZ New Image Hong Kong Limited and New Image International, including assisting with the handover to new management, maintaining good relationships with staff and distributors and not in any way upset the good relationship of all parties."

On the 11th August New Image paid a very substantial US dollar part payment to Graham Cornell to activate the agreement. It deeply saddened me that within days of signing this agreement, I was informed from a number of sources that Graham Cornell was talking with people in Hong Kong about forming Bettalife and trying to attract people and financial capital. I must confess, this behaviour was totally unexpected and unacceptable.

As Graham Cornell is totally implicated in the Bettalife company and strategy, I feel responsible to make it publicly known that his 26% shareholding investment in Hong Kong was all borrowed money."

(d) "It will be obvious from the above information that New Image International is totally committed on a long term basis to the Australian company and see it as a very important member of our Group. The magnitude of our financial support will be a surprise to many members. It must give great confidence to everyone to know their New Image cheques will always be honoured and their efforts rewarded because of our commitment. It is our intention to make Australia the flagship of our company."

(e) "Names of key New Image people are being touted as converts to Bettalife. Murray Crawford, Sau Yip, John Tay and Patrick and Helen Chong are angry that their names have been unscrupulously used. Murray Crawford is on circuit in Australia in March conducting New Image meetings and reinforcing that our product range is unsurpassed in the industry. Name dropping is a common tactic mostly used by unscrupulous people."

(f) "It is regretful that Eddie appears to be similarly implicated in the same tactics that he took some distributors to task about in West Australia a couple of years ago. He therefore knows exactly the values, morals and ethics related to this behaviour.

He also knows the consequences. New Image did not instigate this unfortunate matter or in any way put stories in the market place. The perpetrators chose to conduct a systematic campaign to solicit our people and make the statements answered in this communication. This forced our official response and if our members become aware of additional statements detrimental to and unfair about our company, they should be reported immediately. The management assures all members of our total support to protect the integrity of the system - to protect your networks - to protect your livelihood and income from exploitation and unfair attacks."

[43] The extracts from the final page of the circular, that is to say the reprinted 1996 document that are relied upon are as follows:

(g) **"There is no right way to do a wrong thing. Ethics and integrity will not be compromised.**

New Image is committed to the protection of the sponsorship principles which professional and respectable companies in the Direct Sales Industry consider are sacrosanct. Most members are unable to defend themselves from unethical predators who use their positions and proprietary information to steal vulnerable people from their network. In normal business, actions like shoplifting, insider trading, breach of trust, proselytizing and use of proprietary information for personal pecuniary advantage is dealt with severely by the courts. Poaching other people's members is a crime."

(h) "Tactics of this nature are used by greedy people everywhere and, when they are unable to succeed in creating a large Direct Sales Team themselves, they succumb to the temptation of trying to get to the top on the backs of others. This only leads to resentment with people being hurt."

(i) "All members should be aware that there is a temptation for unscrupulous people to try to reverse the hierarchy through unethical practices instead of hard work. The law of the universe says: Persist and get it right and ownership will be yours.

The Direct Sales Industry is brought into disrepute when vulnerable people are enticed by unrealistic promises and inducements which are offered with the express purpose of benefiting the perpetrator.

Eventually people will realise they were used, but the unfortunate result is many casualties. Most people know right from wrong and avoid temptation. Obviously these tactics are morally wrong and distributors themselves should take a firm stand and stamp the practice out."

(j) "As a distributor you are the "guardian of the dream". If you witness illegal and unethical practices you have a responsibility to all members

to report matters to the company. Let's keep our whole industry clean and respectful."

[44] The claim alleges that the statements referred to, in the context of the circulars as a whole, in their natural and ordinary meaning, meant, and were intended to mean, that the first and second plaintiffs were deceitful, unethical predators, financially untrustworthy, men of no financial standing, lacking business skills and that they were criminals. In relation to the third and fourth plaintiffs it is said that the meaning is that the companies were engaged in unethical and dishonest business practices, were financially unsound, were likely to fail and that because of the above factors, no competent of honest person would work or be associated with them.

[45] It is claimed that the first and second plaintiffs have been seriously injured in their personal and business reputations and have suffered embarrassment and hurt to their feelings, and have suffered and will continue to suffer pecuniary loss. As to the third and fourth defendants, it is alleged that their business reputations have been seriously injured, and that they have suffered and are likely to suffer pecuniary loss.

[46] It is claimed that the first and second plaintiffs are entitled to aggravated damages. The relief sought is an injunction to prevent publication of statements similar to those in the circular and damages in the sum of $400,000 for the first and second plaintiffs. In respect of the third and fourth plaintiffs, unquantified damages are sought.

[47] The second cause of action alleges injurious falsehood. It is alleged that the circulars were false in the following respects:

[a] That the plaintiffs did not use lists of employees of the second defendant or confidential information to recruit employees.

[b] That the third and fourth plaintiffs were adequately capitalised.

[c] That the products which the third and fourth plaintiffs intended to sell were of as good or better quality as those sold by the second defendant.

[d] That none of the plaintiffs have acted criminally, deceitfully or unethically.

[48] The statement of claim pleads that the plaintiffs published the words maliciously and the following particulars of malice are pleaded:

> (a) The second defendant is a trade rival of the third and fourth plaintiffs.
>
> (b) The defendants published or caused to be published the words complained of knowing them to be false or recklessly not caring whether they were true or false and or with no honest belief that they were true. In so doing the defendant was actuated by the dominant motive of damaging the plaintiff in its business.

An injunction and damages are sought.

[49] In its third amended statement of defence which was before the Court during trial the defendants admit that the first defendant wrote the circular and distributed it to the second defendant's distributors. They admit that some of the statements referred to meant and were intended to mean that the first and second plaintiffs were unethical, but otherwise deny the allegations. They admit that some of the words used were meant and intended to mean that the third and fourth plaintiffs were engaged or likely to be engaged in unethical business practices. A fourth amended statement of defence referred to later in this judgment withdrew the admission in relation to the third and fourth plaintiffs.

[50] The defendants plead that the statements were true and refer to the confidentiality and distributor agreements signed by the first and second plaintiffs.

[51] The statement of defence alleges that the first and second plaintiff contacted members of the second defendant's distributor network with the intention of recruiting them. It says that the plaintiffs were of limited financial means at the time of the publication of the circulars and were lacking in business skills. Alternative defences of honest opinion and qualified privilege are raised.

[52] In respect of the first cause of action, no notice was filed pursuant to s.41 of the Defamation Act 1992. That section provides as follows:

41 Particulars of ill will

(1) Where, in any proceedings for defamation,—

(a) The defendant relies on a defence of qualified privilege; and

(b) The plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—

the plaintiff shall serve on the defendant a notice to that effect.

(2) If the plaintiff intends to rely on any particular facts or circumstances in support of that allegation, the notice required by subsection (1) of this section shall include particulars specifying those facts and circumstances.

(3) The notice required by subsection (1) of this section shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

[53] The failure of the plaintiffs to file a s.41 notice was referred to by Mr Waalkens, in his final submissions for the defendant. Mr Miles' response was that an allegation of malice had always been a part of the proceedings through its incorporation in the second cause of action. He said that if necessary, he would file a notice and that because the defendant had filed an amended statement of defence at the commencement of the trial, he would still be within time in terms of s.41(3). No application was filed.

[54] I later became concerned that the consequences of the failure to file the notice had not been adequately argued and arranged for the hearing to be resumed so that this could be done. In a memorandum to counsel I suggested that the plaintiffs should consider filing an application to extend time for the provision of such a notice.

[55] On 13 June 2002 the plaintiffs filed a notice of application for leave to serve a notice under s.41 of the Act. The accompanying notice stated that:

> ... the plaintiff intends to allege that the defendants were predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> Particulars
>
> 1. The second defendant is a trade rival of the third and fourth plaintiffs.
>
> 2. The defendants published or caused to be published the words complained of knowing them to be false or recklessly not caring whether they were true or false and or with no honest belief that they were true. In so doing the defendant was actuated by the dominant motive of damaging the plaintiff in its business.

[56] It will be observed that the particulars are in the same form as those provided in the second cause of action of the statement of claim.

[57] Mr Miles submitted that there is no significant distinction between the concept of ill will or taking improper advantage in defamation, and the concept of malice in injurious falsehood. He acknowledged that a notice should have been filed and that the failure to do so was an oversight on the part of the plaintiffs' legal advisors. He said that the plaintiffs' allegation that the defendants' conduct was predominantly motivated by malice or ill will was an issue specifically raised with counsel for the defendants during the defendants' opening, and that no indication was given by counsel that the absence of such notice was intended to be relied upon by the defendants. He submitted that the defendants had not been prejudiced in any way as a result of what he described as the technical omission to file a s.41 notice. He repeated his submission that malice was fairly and squarely raised in the pleadings from the outset. He referred to the decision of Master Faire in *Mahuta v ATN Ltd* (1998) 11 PRNZ 321 where a series of guidelines were set out relating to the grant of leave pursuant to s.41(3). The Master considered that an overriding factor must always be whether the refusal to grant leave could potentially cause a miscarriage of justice and an important aspect was whether the defendant would be prejudiced by the grant of leave. Mr Miles also referred to *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) where the Court of Appeal upheld a decision to permit amendments to the statement of claim during closing submissions. In that case, the Court of Appeal identified three hurdles which an applicant for an

amendment must surmount – that the amendment was in the interests of justice, would not significantly prejudice defendants and would not cause significant delay. The Court also referred to the need to determine the real controversy between the parties.

[58] Mr Miles submitted that there would be a miscarriage of justice if leave were not granted and noted that the issue of malice would need to be determined in any case in the second cause of action.

[59] Mr Waalkens noted that the requirement to file a notice of particulars of ill will is mandatory, and that the notice is required to be served within 10 working days of the service of the notice of defence, which in this case occurred on about 3 December 1999. No notice was served, nor was any indication given by the plaintiffs of an intention to do so. He submitted that the requirement that the notice be served within 10 working days of the filing of the statement of defence was significant in that it illustrated the importance of a defendant having notice at an early stage, of a plaintiff's intention to rebut a pleading of qualified privilege. He noted that some 30 months have passed since the service of the original statement of defence and that subsequent amended statements have retained the qualified privilege plea. He submitted that it was unreasonable for the plaintiffs to assert that the time for serving the notice ran from the date of the third amended statement of defence filed on 7 May 2002, because this was filed solely to address matters affected by my ruling on issue estoppel and did not effect the qualified privilege pleading at all. He observed that there was no mention in the plaintiffs' opening nor in the plaintiff's statements of evidence served prior to trial, which indicated that a s.19 rebuttal of qualified privilege was to be an issue at trial. He said the first hint that a s.19 rebuttal was to be an issue was at the conclusion of his opening when counsel for the plaintiffs turned to counsel for the defendants and said, "and malice". He submitted that the purpose of requiring a notice to be served is to ensure that the pleadings in respect of the rebuttal of qualified privilege are properly given and particularised and he referred to subs.(2) which requires the notice to specify any particular facts and circumstances on which the plaintiff intends to rely.

[60] He submitted that the defendants were prejudiced by the late notice in the following respects:

[a] The defendants have been deprived of the opportunity to be advised in that regard as to the risks of trial.

[b] The notice is in general terms. Had it been served at the proper time in that state particulars would have been required.

[c] In any event in its closing submissions the plaintiffs did rely on "particular facts or circumstances".

[d] The defendants were deprived of the opportunity of briefing their witnesses in preparing them for these issues as a rebuttal to the defence of qualified privilege.

[e] If particulars had been given the defendants would have had the opportunity of leading evidence in anticipation.

[61] He observed that in *Mahuta* the delay in filing the notice was only two months and had not affected any interlocutory step planned by either party.

[62] Wild J considered an application for leave under s.41 in *Gillespie v McKay* (1999) 13 PRNZ 90. There the application was filed some 17 months after the statement of defence. Leave was refused. The Judge held that the delay was inexcusable. He agreed that the overriding factor was whether the refusal to grant leave could potentially cause a miscarriage of justice. He noted that without s.41 particulars, the defendants could not make a proper overall assessment of the merits and risks of the proceeding brought against them, nor could they make properly informed decisions as to their future conduct of the proceeding. In declining leave he said that this would allow the plaintiff to proceed but would fix him with the consequences of his delay rather than visiting those consequences, including possible serious prejudice upon the defendants who were not responsible for them.

[63] There is no doubt that there has been inordinate delay in filing this application. I do not accept Mr Miles' submission that the ten working days runs from the filing of the most recent statement of defence. The need to file that statement of defence arose from the ruling that I made on the question of issue estoppel. The clear intent of s.41 is that the notice should be filed as soon as the defence of qualified privilege is raised. No excuse was proffered for the failure to file the notice. In the end the application for leave was only made after the suggestion from the Court.

[64] The overriding factor, however, must be whether the defendants will be seriously prejudiced by the grant of leave at this late stage.

[65] There are important distinctions between proceedings for defamation and those for malicious or injurious falsehood. The latter are proceedings for damage wilfully and intentionally done without lawful occasion or excuse. The onus is on the plaintiff to show that the words are false, in contrast to defamation where falsity is presumed – see *Laws of New Zealand, Defamation* para.259.

[66] But more importantly in this case, the plaintiff does rely on particulars. In his final submissions Mr Miles set out a list of 13 particulars in support of his claim that the defendants were motivated by the ulterior motive of destroying Bettalife's business. The obvious purpose of s.41 is to provide a defendant with a full opportunity to address such particulars in evidence. The consequences of a failure to provide that opportunity became apparent during the course of evidence when the defendant Mr Clegg was cross-examined in respect of matters later referred to in the plaintiffs' submissions, in respect of which he was obviously unprepared. As a consequence, last minute and not entirely satisfactory searches for documents were made. In my view the defendant has been seriously prejudiced by the failure to provide the notice.

[67] By way of contrast, the plaintiff has the opportunity to establish the existence of malice in its second cause of action so to that extent, is not prejudiced by the refusal to allow the filing of the notice.

[68] The plaintiffs' application is declined.

[69] There was a further issue which was the subject of submissions at the resumed hearing. I have already noted the defendants' admission that words in the circular meant, and were intended to mean, that the third and fourth plaintiffs were engaged or likely to be engaged in unethical business practices. I asked counsel to address me on the question of the consequences of a finding by me that words pleaded in the statement of claim were not capable of bearing that meaning in relation to the third and fourth plaintiffs. In response to that request the defendant has filed a further statement of defence effectively withdrawing that concession.

[70] Mr Miles acknowledged that the plaintiff could not claim prejudice as a result of that proposed amendment. Accordingly, I propose to allow it, so that the possibility I raised can be properly addressed. Reference will be made to that issue later in this judgment.

Are the comments pleaded defamatory?

[71] In their fourth amended statement of defence the defendants admit that some of the statements are defamatory. In particular it is admitted that the statements in paragraphs 14(a), (e) and (f) meant and were intended to mean that the first plaintiff was unethical, and that the words in paragraph 14 meant and were intended to mean that the second plaintiff was unethical. Despite the admission, it should be noted that a person publishing defamatory words may be liable even though there was no intention to defame. What matters is not what the defendant intended the words to convey, but rather, what they do convey to a reasonable reader or listener - *Todd, Law of Torts in New Zealand* (3rd ed) para. 16.3.7.

[72] The statement of claim goes further than the admissions, so the question arises as to whether the words used are capable of bearing the additional meanings alleged. My conclusions are as follows, all by reference to paragraph 14 of the statement of claim.

[73] Sub-paragraph (a) – The words certainly are capable of and do bear the meaning that Mr Alexander was engaged in unethical practices. I do not consider that the word deceitful as used in the pleadings adds anything to that.

[74] Sub-paragraph (b) – This consists of two quotations, a passage between them has been excluded. Nonetheless I am satisfied, that read in context and in the context of the whole of the circular, the passages are capable of bearing the meaning and do in fact mean that Mr Alexander and Mr Cornell are likely to fail in their business activities and that they lack business skills. The paragraphs also are capable of meaning and do mean that the companies were financially unsound and likely to fail, both because of under capitalisation and because of the alleged lack of business acumen of Mr Alexander and Mr Cornell.

[75] Sub-paragraph (c) – The passage is capable of meaning and does mean that Mr Cornell was acting unethically and that he lacked business skills. Mr Miles submitted that the reference to Mr Cornell being totally implicated in the Bettalife company and strategy was a reference to the allegedly unacceptable conduct of the third and fourth plaintiffs. I accept that that is so.

[76] Sub-paragraph (d) – I do not consider that it contains any statement defamatory to any of the plaintiffs. It is concerned just with the virtues of New Image.

[77] Sub-paragraph (e) – The words are capable of meaning and do mean that Mr Alexander and Mr Cornell are acting unscrupulously, which again in context is probably synonymous with the allegation that they are acting unethically or deceitfully.

[78] Sub-paragraph (f) – It is certainly capable of bearing the meaning and I conclude does bear the meaning that Mr Alexander, and by the use of the plural of the word "perpetrator", Mr Cornell are acting unethically and are lacking in integrity.

[79] The remaining paragraphs relate to the reprinted document earlier circulated. In context I conclude that the statements in them are meant to apply to Mr Alexander and Mr Cornell.

[80] Sub-paragraph (g) – Is certainly capable of bearing the meaning and I consider does bear the meaning that Mr Alexander and Mr Cornell are unethical predators who are using proprietary information to steal vulnerable people from their network. There is reference to poaching other people's members being a crime. I consider that word is used in a colloquial rather than a legal sense and would not be understood as suggesting that they were criminals in the ordinary sense of that word.

[81] Sub-paragraph (h) – Again, it is capable of meaning and I hold that the words do mean that the first and second plaintiffs are unethical.

[82] Sub-paragraph (i) – Again the meaning is that the first and second plaintiffs are unethical and unreliable.

[83] Sub-paragraph (j) – I consider to be exhortatory and not defamatory of any of the plaintiffs.

[84] Mr Miles submits that allegations of unethical, unscrupulous or dishonest behaviour levelled against the first and second plaintiffs inevitably reflect on the third and fourth plaintiffs and the conduct of their business. This is because the third and fourth plaintiffs are closely held companies owned and managed primarily by the first and second plaintiffs and may be regarded as the alter-egos of the plaintiff. He referred to the case of *Bargold Pty Ltd v Mirror Newspapers Ltd & Another* [1981] 1 NSWLR 9 where it was said:

> I accept that, where such matter reflects solely upon a director or an officer of a company, the company itself cannot complain of its publication, but the emphasis must be placed upon the word "solely". *Bognor Regis Urban District Council v Campion* [1972] 2 QB1 69 at P1 75. However an imputation concerning such a director or officer may in many cases reflect also upon the company itself; whether it may or does must depend upon the part that director or officer is alleged to have played in the operations of the company and upon the extent to which the one is identified with or considered to be the alter ego of the other.

[85] I accept Mr Miles' submission that in this case, imputations against the owners and directors of the company must necessarily reflect adversely upon the companies themselves so that an allegation that the owners and directors are acting unethically in their activities in relation to the company must also reflect upon the companies as well.

[86] In so far then as I have held that the words used have a defamatory meaning in relation to the first and second plaintiffs, the same defamatory meaning exists in relation to the third and fourth plaintiffs.

[87] Save as outlined in the above paragraphs, I do not consider the words used to be capable of the meanings claimed in paragraphs 15 and 16 of the statement of claim.

Qualified Privilege

[88] The defendants claim that the circular is protected by qualified privilege. It is appropriate to consider that defence first.

[89] On the grounds of public policy the law affords protection from liability in defamation to certain occasions where a person acting in good faith and without any improper motive makes an untrue and defamatory statement – *Laws of New Zealand, Defamation* para.98.

[90] There must be a correspondence of duty or interest

> In order for the publication of defamatory matter to be protected by qualified privilege, the communication must be made by a person having an interest or duty, whether legal, social or moral, to make it to the person to whom it is made; further the person to whom it is made must have a corresponding interest or duty to receive the communication. The privilege extends only to communications concerning the subject with respect to which privilege exists; it does not extend to anything that is not relevant and pertinent to the discharge of the duty the exercise of the right or the safeguarding of the interest which creates the privilege. Examples are statements made for the protection or furtherance of an interest to a person who has a common or corresponding interest to receive them, statements

> made in protection of a common interest, and statements made in answer to inquiries; alternatively, there must be an appropriate status and subject matter to confer the privilege, such as exists in the case of fair and accurate reports of judicial or parliamentary proceedings. Irrelevant matter is not privileged; however, it does not destroy the privilege attaching to the rest of the material. (*Laws of New Zealand, Defamation* para.101)

[91] For the defendants it was submitted that once Mr Clegg learned of the considered threat to the New Image distributor/network business and to the separate businesses of their distributors, the defendants had a duty to bring these concerns to the attention of at least the current registered distributors. Those distributors had an interest in receiving the information. Alternatively, it was submitted there was a common interest in both the defendants and the distributors in the integrity of the entire distribution network.

[92] Mr Waalkens submitted that there is an analogy with trade association cases which have traditionally protected communications about the commercial credit of a person with whom the trader intends to do business.

[93] On behalf of the plaintiffs Mr Miles submitted that the defence of qualified privilege is not available. He submitted that the allegations made in the circular went well beyond any interest or duty which the defendants could be said to have had in respect of the publication of any information to the second defendant's distributors. He submitted that the defendants were motivated by the ulterior motive of destroying Bettalife's business or alternatively, the defendants made the statements irresponsibly and recklessly and were indifferent to their truth or otherwise.

[94] The Court of Appeal in *Lange v Atkinson* [2000] 3 NZLR 385 at 389 said in reference to qualified privilege and its misuse:

> While there is potential for factual overlap, it is of first importance to keep conceptually separate the questions whether the occasion is privileged and, if so, whether the occasion has been misused: see for example the speech of Lord Buckmaster LC in *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at p 23. The dichotomy between occasion and misuse is mirrored by the roles of Judge and jury in this field. Subject to the resolution of any dispute

> about primary facts, which is for the jury, the Judge decides whether the occasion is privileged. The jury decides whether a privileged occasion has been misused.

It is appropriate to determine first whether the occasion is privileged, and if that is established, to determine whether the occasion has been misused.

[95] The justification for the circular appears in its early paragraphs where reference is made to Mr Alexander being involved in the systematic recruitment of New Image members to join Bettalife and the undermining of the integrity of New Image's system by a blatant attempt to discredit the company. In his evidence Mr Clegg referred to rumours, presumably in Hong Kong, that New Image was "going under". He referred to rumours that large numbers of New Image distributors were joining Bettalife and that incentives were being offered to persuade distributors to bring their "down line" with them. (The down line being the distributors recruited by a head distributor.)

[96] He also referred to rumours that he was about to leave New Image and move to Singapore and that he had removed significant funds from the company which had put it in a precarious financial position.

[97] Mr Clegg received information relating to Mr Cornell setting up Bettalife in Hong Kong and he received telephone calls and written information regarding the activities of Mr Alexander in Australia and New Zealand. He also received copies of the Bettalife registration form and distribution agreement which were in virtually identical terms to those used by New Image. He said that past experience had taught him that for ever distributor that reports unethical activities to the company there are ten who do not, and that such reports tend to be the tip of the iceberg. He said that in the light of all this information he considered it vital to warn the New Image distribution network that the threat existed to undermine the New Image business and the distribution network. He said that New Image as an organisation had a duty to protect its networks as these are the only assets that sponsors have.

[98] I accept the proposition that the company had a duty, or at least the right, to protect its distributors and their networks. I conclude that New Image did have an

interest or duty to communicate information relating to threats to distributors and their networks and in relation to attempts to discredit New Image and that the distributors had a corresponding interest to receive such information. It is, of course, relevant that the communication was just to the distributors who had that interest.

[99] As mentioned above, Mr Miles submitted that the allegations made in the circular went well beyond any interest or duty which the defendants could be said to have. He said that that prevented the defence of qualified privilege being available.

[100] It is necessary to distinguish the circumstance where s.19 is relied upon to rebut a defence of qualified privilege with the circumstance where the shared interest test is not met. As the Court said in *Lange v Atkinson* at page 393:

> A statement the subject-matter of which qualifies for protection is not by dint of that fact alone always made on an occasion of privilege. Ordinarily that will be so because the shared interest test is likely to be satisfied. But there may be times when a communication within that subject-matter will not be made on an occasion of qualified privilege, because there is in the particular circumstances no shared interest in the particular communication between its maker and recipients.

The Court gives the example of a gratuitous slur upon a politician in a publication concerned with a quite different topic. The Court goes on to say:

> This requirement for the occasion to qualify, as well as the subject-matter, may sometimes lead to difficulties at the margins, but in reality there is likely to be comparatively little uncertainty in this area.

[101] I do not consider that this case falls within the circumstances described by the Court of Appeal. The question here is not whether the occasion was one of qualified privilege – I am satisfied that in fact it was – but rather, whether s.19 of the Act applies.

[102] That section provides:

> **19. Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was

> predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[103] However, before a plaintiff can rely upon s.19 it is necessary to serve the notice required by s.41. I have held that no such notice was served within the time specified by that section and I have refused leave to file the notice out of time.

[104] Privilege is not necessarily lost as a result of the use of excessively strong language. In *Adam v Ward* [1917] AC 309 at 339 Lord Atkinson said in relation to this issue after discussing authorities:

> These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of the privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

Insofar as the language in the circular might be thought to be excessively strong, I am satisfied that in the circumstances Mr Clegg did honestly and on reasonable grounds believe that what was written was necessary in the circumstances.

[105] The next issue for consideration is whether all the words used are within the privileged occasion and if not, the consequence of that. On that question Lord Atkinson said at page 340:

> A more difficult question, however, remains upon which the authorities cited give little, if any assistance. It is this: What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer to any extent privileged, or would those portions of the libel, which would have been within the protection of the privileged occasion if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the

> absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle and I think it is, in law, the true result.

[106] That view has been adopted in New Zealand in *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 961 at 968. Macarthur J said:

> As a matter of law, if on an occasion of qualified privilege a person goes into matters wholly unconnected with, and irrelevant to, the duty or interest that gave rise to the privilege, no privilege will attach to the statement *in so far* as it refers to such matters:

His Honour referred to Gatley and to the opinion of Lord Atkinson in *Adam v Ward* and continued:

> That opinion is to the following effect, viz that the effect of embodying separable foreign and irrelevant matter in a defamatory document published on a privileged occasion is not to render the occasion no longer privileged; those portions of the document which would have been privileged if they had stood alone and constituted the entire libel still continue to be protected; and it is only the irrelevant and foreign matter that is not privileged.

[107] The question that arises in this case is whether any of the defamatory material was "wholly unconnected with, and irrelevant to, the duty or interest which gives rise to the privilege". The privilege arises from the duty or right to protect the business of distributors from poaching or soliciting and to address perceived derogatory statements concerning the second defendant. Much of the defamatory material is directed at the financial standing of all four plaintiffs. The only way in which this could be said to be relevant is as a warning to distributors not to join the plaintiffs and their companies, because by doing so they will ally themselves with an organisation which is likely to fail. In my view, that warning is unconnected with and irrelevant to the duty giving rise to the privilege.

[108] The result of that finding is that the statements regarding the financial standing of all four plaintiffs are not protected by the defence of qualified privilege. It is necessary, therefore, to consider in relation to those statements the other defences raised.

The defence of truth

[109] Section 38 of the Defamation Act requires a defendant to give particulars specifying the statements which the defendant alleges are statements of fact and the facts and circumstances on which the defendant relies in support of the allegation that those statements are true. The following sub-paragraphs of paragraph 12A of the statement of defence are relevant.

> (o) At the time material to the publication of the circulars in issue in this proceeding, the plaintiffs were of limited financial means, in particular the first and second plaintiffs had outstanding loans and/or debts which were in default including:
>
> (i) In the case of the first plaintiff:
>
> - $5412.61 owing to the second defendant as of August 1995
> - $33,727.00 owing to the first defendant since August 1996.
> - Other debts details of which are presently unknown but which will be particularised prior to the hearing of this action.
>
> (ii) As to the second plaintiff:
>
> - Borrowed US$260,000 from Bob Ell.
> - Other outstanding debts details of which are presently unknown but which will be particularised prior to the hearing of this action.
>
> (p) As to business skills – the Australian business of the second defendant was run down and suffered at the stewardship of the first plaintiff; and its business in Hong Kong was run down and suffered at the stewardship of the second plaintiff.

[110] The defendant further pleads that the circulars taken as a whole were in substance true or not materially different from the truth. Section 8(3) of the Defamation Act provides:

> **8 Truth**
>
> (1) ...
>
> (2) ...

> (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.

[111] The defendant submits, based on paragraph (b) of subs. (3) that a plea of truth may still succeed if the words not proved true are immaterial in the context of the whole. He referred to *Gatley on Libel and Slander* (9th ed) para.11.7 where it is noted that if a defendant proves that:

> ...the main charge, or gist, of the "libel" is true he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable ... As much must be justified as meets the sting of the charge and if anything be contained in a charge which does not add to the sting of it that need not be justified.

[112] The evidence does establish that Mr Alexander owed the moneys referred to in paragraph (o)(i). No other debts were particularised, nor was any other evidence called to establish that the plaintiffs were of limited financial means. As to Mr Cornell, it was not established that he borrowed US$260,000 from Bob Ell nor were any other outstanding debts proved.

[113] From the plaintiffs' perspective, Mr Alexander gave evidence that he brought proceedings against New Image for unpaid wages and holiday pay and these were settled by Mr Clegg agreeing to pay him $14,000. In other words, his claims against the defendants exceeded those of the defendants against him. He gave evidence that since April 1999 he and Mr Cornell have injected A$300,000 into the third and fourth plaintiffs. He said that that had to be done because of the effect on the company's trading caused by the circular. He also says that Mr Cornell has not drawn a salary since Bettalife started trading in December 1998 and that he did not draw one until September 2001.

[114] Mr Cornell says that by the time he sold his shares in the Hong Kong company he was owed approximately HK$2 million in past salary and company expenses. He confirmed that from March 1999 he and Mr Alexander advanced more than A$300,000 to the third and fourth plaintiffs.

[115] As to the initial capitalisation of Bettalife, it had initially been proposed that a company called C-Tech would provide a letter of credit for $396,000. In fact it did not do so and Mr Cornell personally provided $200,000 which was required in January 1999. It seems that sum was in addition to the $300,000 referred to above. I note that from an answer to question from the Court, Mr Cornell said that he put some A$400,000 to $500,000 into the Australian company.

[116] It is also the case, of course that, prior to writing the circular, Mr Clegg's company had entered into an agreement with Mr Cornell to pay him US$260,000. Therefore, I hold that the defendants have not made out the truth of the allegation that the plaintiffs were of limited financial means.

[117] As to business skills, evidence was given on behalf of the defendant by Mr Campbell, Mr Morton and Mr Hewlett. Mr Campbell is now the chief executive officer of a company manufacturing pharmaceuticals and toiletry items and employing some 250 people. He was managing director and general manager of the second defendant from 1988 until January 1998. He has also held a number of positions of responsibility on trade-related organisations.

[118] He gave evidence that neither Mr Cornell nor Mr Alexander presented realistic budgets and that he repeatedly tried to curb their "profligate lifestyle and spending habits". He said that as a member of the board he was opposed to Mr Alexander remaining as managing director of the Australian company because of its continued poor performance and his failure to respond to the board's requests.

[119] He said that while both were good salesmen he did not consider either Mr Alexander or Mr Cornell competent to operate an international business. He listed the following as characteristic of their management:

[a] Excessive spending

[b] Disregard for the company's policies and procedures

[c] A dismissive approach to internal audits

[d] Lack of planning in terms of stock movements

[e] Poor cash flow planning.

[120] He said that these factors all contributed to the companies under their control losing money and having to rely on financial support from elsewhere in the New Image group.

[121] Mr Campbell was cross-examined at some length as to his views. He acknowledged that in December 1996, after Mr Alexander had been chief executive officer in Australia for two years, he offered him the title of managing director in Australia. He acknowledged that Mr Alexander had problems with the short supply of stock from New Zealand, but that that was brought about because of his failure to pay for earlier stock supplied.

[122] As to Mr Cornell, Mr Campbell was referred to an appraisal with which he had been involved which describes Mr Cornell's performance in November 1997 in quite glowing terms. However, he referred to a part of that document which he personally wrote and which reads:

> Poor financial performance overshadows some quite good indicators. Leadership development must remain a key priority to broaden his influence and information base. Must restore sales and profit to reduce companies indebtedness.
>
> Says Cornell poor at listening to local needs and requirements and then taking action.

[123] In this document Mr Cornell himself wrote:

> Disappointed with financial results. Difficulty with cultural differences. Frustrated on occasion with time zones when urgency to discuss business situations occur. The remoteness of Head Office to

the market and understanding of local circumstances is of annoyance from time to time...

[124] Mr Campbell agreed that at the time of that assessment he regarded Mr Cornell's quality of work as good and at times excellent and his integrity as excellent.

[125] Mr Lee, is a chartered accountant. He was group cost and management accountant for the second defendant from June 1991 to June 1998. He expressed the view that under Mr Cornell's management the Hong Kong operation suffered considerably in terms of office administration, company image, profitability, business activities and cash flow.

[126] Mr Lee listed problems which he said were characteristic of Mr Cornell's management and which largely contributed to the difficulties:

[a] A consistent bending of the rules.

[b] Little or no adherence to the "hexagon marketing plan" (a plan proposed by head office).

[c] A consistent failure to meet head office requirements for reports.

[d] Inaccurate stock management and what he considered reckless stock forecasting and planning.

[e] Poor cash flow and cost management exacerbated by excessive rebate payments and high management expenses.

[f] Staff management practices which impeded the ability of staff to furnish head office with accounting information.

[127] As to the management of New Image Australia by Mr Alexander, he said that in terms of profitability, cash flow, business activities and company image, the Australian company also suffered under Mr Alexander. He considered Mr Alexander lacked the appropriate discipline to deal with financial difficulties and

commitments, including his personal finances. He was unhappy with the manner in which the Australian company was being run.

[128] Mr Lee was not cross-examined, but Mr Miles advised the Court that this did not mean that he accepted the truth or accuracy of the evidence given.

[129] Mr Peter Mawston is also a chartered accountant. He was employed by the second defendant from October 1989 to January 1998 initially as financial controller and later as group financial controller and company secretary. He said that on numerous occasions, both Mr Alexander and Mr Cornell predicted inflated estimates of expected future sales levels and that those estimates were translated into manufactured product and shipped to the markets. When the companies failed to achieve their projected sales levels they were unable to generate enough cash to settle the amounts owing for inventory, thus precipitating a cash flow shortfall for the group as a whole. He said that both the Australian and Hong Kong companies spent considerably more on travel, entertainment, food and accommodation than their counterparts for the return achieved.

[130] He acknowledged that for a time up until 1998 the company had a policy that it would not supply more stock if previous stock was unpaid for, and that if they did not have the stock they could not sell. He said, however, that the reality was that essential product was supplied where a failure to do so would jeopardise the performance of the subsidiary.

[131] The plaintiffs, unsurprisingly, denied the allegations of business incompetence. Mr Carroll, who was country manager of New Image Philippines for a period of 14 months in the mid 1990s said that he held the management skills of Messrs Alexander and Cornell in high regard and considered that the difficulties experienced by them were caused by the uncommercial and unreasonable attitude of head office. He considered that the hexagon plan had a negative effect.

[132] Mr Richardson, who knew Mr Alexander well, said he had a great deal of respect for him as an experienced businessman. Other witnesses expressed similar sentiments.

[133] Mr Cornell gave evidence that he was involved in a very successful business enterprise as a distributor for Suzuki motor vehicles and other products in the 1970s and 1980s. Mr Alexander was sufficiently highly regarded by Mr Clegg to have been appointed chief executive officer in Australia on two occasions, and international sales manager for the intervening period. His first period as chief executive officer was very successful in terms of the results achieved.

[134] It is also the case that the plaintiffs' have built up a very successful networking business in New Zealand. Total sales for the year ended 31 March 2002 were $1,627,000 for a business which effectively started in August 1999.

[135] Whilst I consider that there is some validity in the criticisms made of the plaintiffs' business practices while running the Australian and Hong Kong companies, I do not consider that the evidence reaches the required standard of proof to enable me to be satisfied that the fate of the Australian and Hong Kong companies was entirely the responsibility of the plaintiffs.

[136] I conclude that the defence of truth in relation to the allegations relating to the financial standing of all four plaintiffs has not been made out.

The defence of honest opinion

[137] Section 11 of the Act provides:

> **11 Defendant not required to prove truth of every statement of fact**
>
> In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—
>
> > (a) Those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or

(b) Any other facts that were generally known at the time of the publication and are proved to be true.

[138] In so far as the views expressed which I have held to be defamatory include an expression of opinion, the defence must fail because of the findings I have made in relation to the defence of truth.

Second cause of action – Injurious Falsehood

[139] In order to establish injurious falsehood the plaintiff must prove that there has been a false statement, that the statement was published maliciously and that damage resulted. In this cause of action the onus of proof is on the plaintiff. In order to determine whether a statement is false it is necessary to determine its meaning and for this purpose the law is the same as in defamation. The issue is, what is the ordinary meaning of the words, what would the words convey to the ordinary reader. As to whether the statements were published maliciously, there is still some uncertainty as to the definition of malice in the context of malicious or injurious falsehood. At paragraph 265 *Laws of New Zealand, Defamation* the matter is put in this way:

> In this context it is probable that the plaintiff must establish actual malice; that is a dominant motive which is indirect or dishonest. Several inaccuracies may constitute evidence of malice. There is no evidence of malice if all that is shown is that the defendant wrote or spoke honestly, even though wrongly, in defence of a real or supposed right or title to the property. Nor will there be evidence of malice if the defendant spoke carelessly, believing the words to be true. Further, malice will not be shown where the defendant made the statement merely for the purpose of advancing the sale of his or her own goods, or if the statement was made pursuant to a duty.

[140] In *British Railway Traffic & Electric Co. Ltd v CRC Co. Ltd [1922]* 2 KB 260 at 271 McHardy J concluded that what is required is a dishonest motive or lack of good faith. The most recent New Zealand discussion is that of Mahon J in *Customglass Boats Ltd v Salthouse Brothers Ltd* [1976] 1 NZLR 36. At page 49 the Judge said:

> That sense [of malice] includes an intent to injure the true owner of the property or, alternatively, publication with an indirect or dishonest motive. The formulation preferred in *Joyce v Motor Surveys Ltd* [1948] Ch 252 was "an intent to injure without just cause or excuse".

[141] In the *Law of Torts in New Zealand* (3rd ed) at paragraph 15.12.2 after referring to the above cases it is said:

> It would appear that if the natural result of the defendant's statements is to produce damage, and if the defendant knew those statements were false, or was reckless whether they were true or false, the defendant will be held to have been malicious. Such a finding is also likely to be made even in cases where the defendant believes his or her statement to be true, if his or her sole or dominant motive was to injure the plaintiff.

[142] As relevant to the present case I am prepared to accept the law as being that malice will be established in the following circumstances:

1. Where the publication was with an indirect or dishonest motive.

2. Where the natural result of the statements is to produce damage and the defendant knew those statements were false or was reckless whether they were true or false.

3. Where even if the defendant believed the statements to be true his sole or dominant motive was to injure the plaintiff.

[143] The plaintiff relies upon four allegedly false statements which it says were contained within the circular. The first is that the plaintiffs used lists of employees of the second defendant or confidential information relating to the second defendant in order to recruit employees.

[144] So far as the first plaintiff is concerned, the document contains the statement that:

> Eddie Alexander is involved in the systematic recruitment of New Image members to join another company – Bettalife.

This is followed by paragraphs which include the statement:

> There is ill feeling that ex employees of the company would use name lists and confidential information to contact networks.

I am satisfied that the ordinary reader would take from those words the conclusion that Mr Alexander was using name lists and confidential information.

[145] As to Mr Cornell, there is an allegation that:

> ... is totally implicated in the Bettalife company and strategy.

Then from the earlier document incorporated as part of the circular there is the statement:

> Most members are unable to defend themselves from unethical predators who use their positions and proprietary information to steal vulnerable people from their network.

[146] There is also a reference in the document to a clause which appears in both the Bettalife distributor agreement and the New Image agreement concerning a prohibition on the use of network lists and that is followed by a reference to Bettalife executives disregarding their obligations with New Image. There is then the statement that Mr Clegg was informed that Mr Cornell was talking with people in Hong Kong about forming Bettalife and trying to attract people and financial capital.

[147] Reading the document as a whole I consider that a reader would conclude that Mr Cornell was also involved in using name lists to contact people. There is no difficulty in finding that that statement is false. The plaintiffs deny it and there is no evidence that they did so. This finding applies just in relation to the first and second plaintiffs.

[148] The second false statement alleged is that the third and fourth plaintiffs were not adequately capitalised to fund their respective businesses. The statements relied on here are the references to the shareholding in the companies. There is no dispute that those statements are correct. On the basis of the information available from the Companies Offices in Australia and New Zealand it would be reasonable to conclude that the companies were not adequately capitalised to conduct the business in which

they were engaged. Money was provided to the companies by way of loan, but it seems that this did not happen until after the circular had been published. I do not consider that it has been established that any meaning that can be taken from the circular to the effect that the companies were not adequately capitalised was made by the defendant knowing such a statement was false or reckless.

[149] The third statement relied upon is that the plaintiffs' products were not sourced from reputable suppliers and were not of the quality of those sold by the second defendant. I do not consider that there are any statements in the circular that would bear those meanings.

[150] Finally, it is claimed that the circular was false in stating that the plaintiffs personally or in trade have acted criminally, deceitfully or unethically. I have already concluded that the evidence established that Mr Alexander acted unethically. In the context of the documents the reference to a crime appears in the sentence:

> Poaching other people's members is a crime.

In my view a reader would not take that as meaning that that action was a breach of the criminal law, but rather than in the word of network marketing, such an action was regarded very seriously. In context I do not consider that the reference would be taken as meaning anything more than that the plaintiffs had acted unethically.

[151] As to whether Mr Cornell has acted unethically, there is an allegation of unethical behaviour contained in the circular which has not been referred to in the statement of claim. There is a reference to a Bettalife document referring to lateral transfer. That document is alleged to be a "blatant, systematic enticement option clearly breaching the World Direct Selling Federation's Code of Ethics". Evidence was given by Mr Garth Wyllie, the executive director of the Direct Selling Association of New Zealand. He was shown the lateral transfer document, and said that in terms of the Association's Code of Practice that document would be deemed to be enticement. He said that in 1999 there was no enticement provision within the New Zealand Code, but it was within the World Federation Code. He said that the lateral transfer document was regarded as unethical because of the damage it would

cause to the other companies' business by removing income streams and damaging the income streams of the distributor forces.

[152] Mr Clegg's comment on that document was that it gave him great concern because it indicated a campaign to target New Image top leaders. Mr Alexander described lateral transfer as the recruitment of previous or existing managers who have been involved in the industry. If they achieve a certain volume of sales they can retain the status they had in the previous company.

[153] The unchallenged evidence is that lateral transfer was contrary to the World Federation Code of Ethics. It seems then, that within the ethical framework accepted as appropriate in the industry Mr Cornell has indeed acted unethically in being associated with the lateral transfer programme of Bettalife.

[154] The question then is whether in respect of the claim that the plaintiffs used lists of employees, such statements were made maliciously. Mr Clegg's evidence did not specifically address the statement that the plaintiffs used lists of employees. He was aware that some of the documents prepared for Bettalife were almost identical in their wording to documents used by New Image. He had received reports that New Image members were being solicited. In reliance on the information that he received, particularly from Mrs Kenyon and Mrs Fettes, he drew the conclusion that Mr Alexander and Mr Cornell were attempting to start a business based on New Image contacts including its distributors. It seems he made the assumption that name lists were being used. On the evidence his assumption was incorrect. The question is, whether in the circumstances that was a reasonable assumption.

[155] Mr Clegg said that he believed the statements he made in the circular were true. He obviously believed on the basis of what he had heard, that there was a very serious threat to the company. He felt betrayed that two executives who he considered he had supported should set up a competing business without any notice to, or discussion with him. He said that with the lateral transfer programme being undertaken by Bettalife his company could have been wiped out if six key leaders were induced to cross. I have no doubt that Mr Clegg genuinely concluded that there

was a very serious threat to his business. In those circumstances I do not consider that the statement about the use of lists of names was made recklessly as to whether the statement was true or false, nor do I consider that his sole or dominant motive was to injure the plaintiffs or that publication was with an indirect or dishonest motive.

[156] Accordingly, I am not satisfied that the plaintiffs have discharged the onus upon them of establishing malice. The second cause of action, therefore, must fail.

Summary of findings

1. Defamation

[157] I have held that the statements regarding the financial standing of all four plaintiffs were defamatory and were not protected by the defence of qualified privilege or any of the other defences raised.

2. Injurious falsehood

[158] I have found that the plaintiffs have not established the allegations of injurious falsehood.

Damages

[159] The basis of an award of damages is described in *The Laws of New Zealand Defamation* title as follows:

> In proceedings for defamation damages are awarded to compensate for the injury to the plaintiff's reputation, for natural injury to his or her feelings and for the grief and distress caused by the publication. Such damages are at large; that is they are not limited to any pecuniary loss that can be specifically proved. They operate to vindicate the plaintiff to the public and to provide consultation for the wrong done; they are better viewed as a solatium than as monetary recompense for harm measurable in money terms. Special damages over and above such general damages may be awarded in respect of

particular temporal injuries proved to have been sustained as a natural result of the words complained of. – para.225.

[160] Matters such as improper motive, failure to apologise, and a plea of truth which is not made out may all be factors tending to aggravate the damages. The whole of the conduct of the plaintiff may be taken into account in considering the question of damages. In this case too, it would in my view be relevant when considering the question of damages to take into account the fact that the Court of Appeal has held that Mr Cornell did not solicit New Image distributors. To that extent he was vindicated by those proceedings.

[161] Damages awarded in other cases are of little help because of the wide variation in facts and circumstances which exist. The plaintiffs have given evidence of the effect that publication of the circular had on their health. Evidence has been given of the effect on reputation. I must be careful in awarding damages in this case to distinguish between the comments in those parts of the circular that are the subject of qualified privilege and to confine the assessment to those defamatory comments which I have held are not protected by any of the defences raised.

[162] As to aggravating factors, I am satisfied for reasons I have already outlined, that at the time Mr Clegg made the statements concerning the financial standing of the plaintiffs, he believed them to be true. In assessing damages my findings that both Mr Alexander and Mr Cornell acted unethically should be taken into account. On the evidence Mr Alexander's unethical activity exceeded that of Mr Cornell. In my view Mr Alexander's conduct should bar him from receiving more than nominal damages which I fix at $1,000. In respect of Mr Cornell there is not the evidence of soliciting distributors as exists in the case of Mr Alexander. Accordingly, I conclude that he should be awarded damages in the sum of $25,000.

[163] So far as the third and fourth plaintiffs are concerned, they are not entitled to damages for loss of reputation, but they are entitled to damages for loss of profits that can be attributed to the defamatory statements. An award in favour of the companies in that respect will also compensate for any special damages claimed by the first and second plaintiffs.

[164] Each side called expert evidence on the question of damages. For the plaintiff evidence was given by Mr Den Heijer, a director of Staples Rodway Ltd. For the defendant, evidence was given by Mr John Hagen, chairman of the New Zealand partnership in the international accounting firm of Deloitte Touche Tomatsu. Both witnesses purported to adopt the same methodology, that is to calculate the loss of income suffered by the companies as a result of the effect of the circular. There is no doubt that the circular had an effect on the establishment of the two companies. It is best seen in relation to the New Zealand company. After a relatively promising start in terms of registration of distributors between December 1998 and February 1999 the company made virtually no progress at all until August/September 1999. I am satisfied that a lack of progress in that intervening period was due to the effect of the circular.

[165] Mr Den Heijer has calculated that the loss to the New Zealand company as a result of the loss of growth in the seven month period, February 1999 to August 1999 was $332,624 including loss of interest. This calculation is based on performance up to March 2002. The loss figure varies depending on the cut off date chosen.

[166] He also did a loss calculation based upon the proposition that the performance of the company had been hindered for a 16 month period from February 1999 to May 2000. I do not accept that that was so. The proper period to take into account in my view is March 1999 to August 1999. After that period the company appears to have achieved reasonable and natural growth.

[167] Mr Hagen's assessment is that the loss to the New Zealand business, through to the month ending March 2002 was $12,567 plus interest of $1,285. I prefer the basis of Mr Hagen's calculations. I accept his proposition that what happened was that the start up of the company was interrupted for a period of six months. Thereafter it grew as much as would be expected of a new company. Therefore, the proper assessment of loss of profits is to calculate the profits that would have been generated during that six month period. That is the basis of Mr Hagen's calculation.

[168] The Australian company presents a more difficult assessment. This is because it has never become established. The plaintiffs say that the reason for this is the effect of the circular. I do not accept that. In fact what happened, is that the first and second plaintiffs decided to concentrate their efforts in New Zealand and Hong Kong. I am satisfied that after the initial effect of the circular was felt there was very little effort to promote and develop the Australian company. There is no good reason why, had the same effort been put into that company, it would not have prospered in the same way as the New Zealand company has.

[169] It is significant that in June 2001 when Bettalife flew 18 experienced networkers from New Zealand to Australia, the company experienced an increase in sales. Once those networkers returned to New Zealand the Australian sales fell off again.

[170] Mr Den Heijer's assessment of damages is based on losses extending from the beginning of 1999 down to the present time. I do not accept that that is an appropriate way in which to assess damages for the Australian company.

[171] Mr Hagen has made an assessment of loss using the same methodology as was used for New Zealand. He arrived at a figure of $1,459 in lost earnings and $146 for interest. I note that in December 1998 and January and February 1999 28 distributors were signed up in Australia. In the same period in New Zealand 46 distributors were registered. As best as I can assess the situation I have concluded that Mr Hagen's calculation is too low. I would assess the loss in Australia at $7,000 plus interest calculated in the manner adopted by Mr Hagen.

[172] The plaintiffs in their relief seek injunctions as well as damages. There is no suggestion of any repetition by the defendants of the statements I have found to be defamatory. Accordingly, I see no need to grant the injunctions sought.

Conclusion

[173] The plaintiffs are entitled to judgment for the sums referred to above. Costs shall be assessed on a Category 2 Band B basis. The parties may make submissions in that regard if they are unable to agree.

Delivered at 9 a.m./~~p.m.~~ on 12/7/ 2002.