**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV 2005 485 325**

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| BETWEEN | BARRY BLAKE ASSOCIATES LIMITED<br>First Plaintiff |
| AND | BARRY WAYNE BLAKE<br>Second Plaintiff |
| AND | CONSUMER INSTITUTE OF NEW ZEALAND INCORPORATED<br>First Defendant |
| AND | MARTIN CRAIG<br>Second Defendant |

Hearing: 23 February 2005

Appearances: P T Finnigan for the Plaintiffs
R J B Fowler for the Defendants

Judgment: 23 February 2005

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**ORAL JUDGMENT OF WILD J**

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[1] By application filed on 18 February, the plaintiffs seek an interim injunction restraining the first defendant from publishing an article entitled "Milking It" in the March issue of its magazine "Consumer".

[2] The first plaintiff is an Auckland company and the second plaintiff, along with his wife, is its proprietor and a director. The first plaintiff's business is marketing and selling 4Life products, and recruiting and training distributors to sell those products. The first plaintiff does that in accordance with a business system details of which are available on line. I will term it "the ABC system". 4Life

products are dietary supplement products. The second plaintiff, as well as being a proprietor and director of the first plaintiff, is one of its distributors.

[3] The first defendant (I will call it "Consumer") is an incorporated society which has the objective of protecting consumers' interests. For many years it has published a monthly magazine called "Consumer", with information about products and services, often comparing the virtues of comparable products. It has been established for many years. The second defendant is an employee of the first defendant and a reporter for the "Consumer" magazine.

**Factual background**

[4] On 7 February the second defendant telephoned the second plaintiff. After introducing himself and explaining that he was researching the 4Life products he asked the second plaintiff a number of questions, in particular about the ABC system. In the course of that conversation, the second plaintiff suggested to the second defendant that if Consumer was going to publish anything it should refer to 4Life.

[5] On 14 February the second defendant emailed the second plaintiff the draft of an article which Consumer was proposing to publish in its March issue. In the covering email the second defendant invited the second plaintiff to contact him via return email if he would like to make many – I think it was intended to read any – corrections or amendments to the article.

[6] On 16 February the second plaintiff received a further email from the second defendant enclosing a draft of the article and again inviting any corrections or amendments. That email stated that any corrections or amendments should be sent by 7 p.m. on 17 February in order that they could be made before the article was published.

[7] The plaintiffs did not respond to either of those emails, but just after midday on 17 February their solicitors gave notice to Consumer that proceedings would be issued if the defendants did not undertake by 4 p.m. that day to defer publication of

the proposed article, at least until April, to enable the plaintiffs to provide an orderly response. When the defendants did not provide such an undertaking, this proceeding was issued the following day, 18 February.

[8] In the course of their submissions today, counsel updated me as to subsequent developments. On 21 February a revised second version of the article was sent by the defendants' solicitors to the plaintiffs' solicitors. I am advised it had earlier (on 18 February) been sent directly by Consumer but had not been received by the plaintiffs' solicitors. The plaintiffs' solicitors responded by fax on 22 February, still taking exception to the article in a number of respects. Counsel have handed me a third version of the proposed article. It differs in only minor respects from the second one. The major changes were from the article originally sent to the plaintiffs for comment, to the second version.

[9] The article is headed:

> **WATCHDOG**
>
> ## Milking It
>
> **MARTIN CRAIG** checks out an online marketing scheme that we think smells a little sour.

[10] The relevant parts are:

> Psst. Want to work from home and make heaps of dosh? You don't even have to sell anything if you don't want to. Just visit www.working-from-home.biz, sign up for the "ABC Auto Biz Centre" and you could be "earning at least $100,000 a year ONLINE".
>
> Oh really?
>
> **How it works**
>
> The ABC system is simple. Every month, you buy about $250 of a dairy-based health supplement called 4Life. You can sell it if you want to, or you can keep it and use it yourself. You can even pour it down the sink – it doesn't really matter, because selling the product isn't how you'll make most of your money.
>
> Most of your income will come from recruiting other people to the sales network. Each new salesperson you recruit also spends $250 on supplements, and you get a cut of that. Then the people you've brought in will recruit other salespeople, and you'll get a cut of their purchases. And so on …

> According to ABC's promotional material, you can make big bucks with this system.
>
> …
>
> **It's the network that matters**
>
> …
>
> Salespeople also emphasise the importance of the network. "If you took out the network marketing side of it and all we did was sell product I wouldn't even be doing this", an ABC recruiter told us. "Say you're on a six-figure income, the customer side of what you do would probably be about 2 percent of what you do.
>
> …
>
> **Our advice**
>
> Stay away from ABC Auto Biz Centre, and www.working-from-home.biz. If you get involved, the odds are you'll just be helping to line someone else's pockets.

[11] The statement of claim sets out the various parts of the article to which I have referred, although it also sets out part of the original article which has since been deleted. That was a section describing what a pyramid scheme was, and expressing the view that the ABC scheme "fits the Ministry's definition of a classic pyramid scheme". The statement of claim then alleges that the article, in its natural and ordinary meaning, means:

a) That the first plaintiff makes its money recruiting other people to its sales network rather than from selling product;

b) That anyone signing up can earn at least $100,000 without selling any product;

c) That the first plaintiff makes less than 2% of its income from selling product;

d) That the first plaintiff's business system is a scam, is unfair and is illegal.

[12] Although the opinion that the ABC scheme is an illegal pyramid scheme is no longer in the article, Mr Finnigan submits that it still carries the message - the innuendo - that the ABC scheme is an illegal pyramid scheme.

[13] Alternatively, the statement of claim alleges that the meanings to which I have referred are the innuendoes in the proposed article. It is alleged then that those meanings or innuendoes are false in the following respects:

> 16. a) the business system of BBAL (the first plaintiff) is a multi-level marketing business system aimed at selling product and not a pyramid selling scheme which is prohibited by s24 of the FTA.
>
> b) BBAL makes its income as the result of sales of product made by itself and other distributors which BBAL recruits.
>
> c) BBAL does not represent that distributors which it recruits will earn at least $100,000.
>
> d) BBAL does not make any income from recruitment of distributors. It makes its income from sales of product made by itself and the distributors it recruits.
>
> e) BBAL's business system is not a scam nor is it unfair.

[14] It is next alleged that damage to the plaintiffs and their distributors will be the result of publication. Damages and a permanent injunction are sought along with indemnity costs.

**General interim injunction principles**

[15] These are well established. The threshold is a serious case for trial. The determination then is conventionally stated as involving striking "the balance of convenience". I prefer to state the aim for a Judge at this interim stage as attempting to determine what course runs the least risk of ultimate injustice. Injustice, that is, to the plaintiffs if interim relief is refused, but they ultimately succeed at trial; injustice to the defendants if interim relief is granted but the plaintiffs' claim fails at trial.

[16] I need to add something about the principles applying when, as here, an interim injunction is sought to restrain an alleged prospective defamatory publication. Jurisdiction to restrain exists: *Auckland Area Health Board v*

*Television New Zealand Ltd* [1992] 3 NZLR 406; *TV Network v Eveready New Zealand Ltd* [1993] 3 NZLR 435 and *Hosking v Runting* [2005] 1 NZLR 1, all decisions of the Court of Appeal.

[17] If it seems odd to have to assert that the jurisdiction exists, then I add by way of explanation that the doubt about that was because the action for defamation developed in the common law as attracting a remedy only in damages and the availability and adequacy of damages as a remedy generally tells against the grant of injunctive relief.

[18] The Court of Appeal has emphasised that the jurisdiction is to be exercised with considerable circumspection. It did that in the following terms in *Auckland Area Health Board*:

> By reason follow the principle of freedom to the media, which has been emphasised by this Court in those cases and others including *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180 (the *Spycatcher* case) and *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1, and which is reinforced by s14 of the New Zealand Bill of Rights Act 1990 as to the right of freedom of expression, ***it is a jurisdiction exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published***. In relation to a possible defence of justification, we put the matter in this way in the *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA) at p7:
>
> > It is true, as Mr Upton says, that this Court has not yet had to consider whether the principle restricting interim injunctions in defamation cases applies in New Zealand. But we think that the ideas underlying it are equally applicable in this country. As Oliver J put it, ***when justification [now of course truth] is to be relied on as a defence an injunction will not be granted except in cases where the statement is obviously untruthful and libellous***.
> >
> > One way of showing that may be to show that there is no reasonable foundation for the defence. Whether or not that is so in any particular case cannot be answered by an abstract test; it must depend on the facts of the particular case so far as they are known to the Court when hearing the application.
>
> (at p407, emphasis added)

[19] And in *Hosking v Runting*:

> [152] Traditionally in applications for interim injunctive relief in defamation cases, the Courts have been extremely alert to prior restraint issues. The English Courts have always been reluctant to restrain publication before trial where the publisher has indicated it will rely on a defence of truth, qualified privilege or honest opinion: see *Herbage v Pressdram Ltd* [1984] 2 All ER 769; *Quartz Hill Consolidated Gold Mining Co v Beall* (19882) 20 Ch D 501; and *Fraser v Evans* [1969] 1 QB 349. New Zealand Courts have taken a similar position: see *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4; *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406; and *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129. In such cases, exceptional, clear and compelling reasons are required before injunctive relief will be made available.

[20] The factors which I identify as relevant here in assessing whether or not to grant the relief sought are these. First, I am not satisfied that the contents of the article in its third and most recent version are obviously untruthful and libellous, or that that article constitutes a defamation for which there is no reasonable possibility of a legal defence, those being the tests as I have just stated them.

[21] Mr Fowler has, in his submissions this afternoon, advised that Consumer will plead truth to every aspect of the article it is proposing to publish, whether the allegation be as to plain meaning or innuendo. He has advised that that defence will rest upon the documentary material which is already in evidence and upon interviews with distributors of the 4Life products who are working in the first plaintiff's business system, the ABC system. Mr Fowler has advised that, if necessary, the first defendant will fall back upon the defence of honest opinion.

[22] I note that in his affidavit in support the second plaintiff, Mr Blake, deposed:

> 7. As a consequence of the conduct of the BBAL business, BBAL receives revenue from 4Life solely from direct sales of the dietary products from customers and, in addition, receives commission as the result of sales of the dietary products made by distributors of 4Life whom BBAL has recruited and other 4Life distributors in the network recruited by other distributors in the BBAL network.
>
> …
>
> 18. I summarise in what respects the Article is defamatory:
>
> a) the business system of BBAL is a multi-level marketing business system aimed at selling product and not a pyramid selling scheme which is prohibited by s24 of the FTA.

b) BBAL makes its income as the result of sales of product made by itself and other distributors which BBAL recruits.

c) BBAL does not represent that distributors which it recruits will earn at least $100,000.

d) BBAL does not make any income from recruitment of distributors. It makes its income from sales of product made by itself and the distributors it recruits, paid to BBAL by 4Life Research.

e) BBAL's business system is not a scam nor is it unfair.

[23] Insofar as the article in its most recent version does carry the innuendo that the scheme is a pyramid scheme, I remain unconvinced of the difference between the ABC scheme as Mr Blake describes it in those passages, and a pyramid scheme. That is my view, notwithstanding the differences between this scheme and the scheme which O'Regan J considered in *Commerce Commission v Alpha Club New Zealand Ltd* (2002) 10 TCLR 569.

[24] As to the alleged defamation, in that the article alleges that distributors will earn at least $100,000, I refer to the ABC report, that is the online presentation of the first plaintiff's scheme, the ABC scheme, and in particular to the statements:

> Fact, I have been using the net to generate my personal $100,000 plus (plus) a year for a few years now, just by helping others to do the same thing.
>
> The #1 secret to earning at least $100,000 a year online from a guy who's doing that right now and shows you how you can do it too.
>
> So no matter if you're wanting a part time income of $300 to $3,000 a month - or you're looking for a fulltime career income of $10,000 or more a month, this is a **proven plan you can use**.
>
> Some people using the ABC banked $150 last month, some $500, some $1,000, some $5,000, some $10,000 and some much MUCH more than that.

[25] The second factor is that an opportunity was afforded, but not taken, by the plaintiffs to respond to the two emails from the second defendant. Events have, of course, moved on since then. There is now a second version, a response from the plaintiffs' solicitors and, as a result, a third version of the proposed article. As to opportunity to comment, I refer to what the Court of Appeal said in *Auckland Area Health Board*:

> The argument has satisfied us, however, that this is not one of the exceptional cases in which either an injunction or an order for production of the script would be justified. We uphold Fisher J in that conclusion.
>
> The reason why we take that view is that an analysis of the affidavits shows that a general description and considerable particulars of the proposed programme have been supplied and that what are apparently the main criticisms or allegations were put to Mr Nicholson, at least by way of primary examples, and his replies are to appear in the programme. Specifically we refer to and rely upon an affidavit from Mr Nicholson himself, sworn on 27 March 1992, and the affidavits on the other side of Mr P G Norris and Mr P Cutler, sworn on the same date.
>
> (p408)

[26] Thirdly, the article expresses the view and gives the advice of a long established society which exists to protect consumer interests. Whilst it is alleged that the article, admittedly in its original form, was calculated to damage the plaintiffs, and whilst Mr Finnigan has not shrunk from that allegation in his submissions this afternoon, I consider that a better view is that the article has the aim of protecting consumers' interests. Mr Fowler submitted that the first defendant is entitled to attack multi-level marketing as not in consumers' best interests. He has made the point that "Consumer" magazine has done that for a long time, and will continue doing it.

[27] Fourthly, and this is a minor point and not a concern raised by Mr Fowler, I have some concerns about the undertaking as to damages which has been given by the plaintiffs. That is because the second plaintiff has deposed:

> 26. I have given an undertaking as to damages. I own BBAL with my wife as equal shareholders. Besides the goodwill of the business, BBAL owns two vehicles (estimated value of $60,000) plus office equipment which would have a current value of $10,000. BBAL has no debts other than regular trading debts. ***The assets of my wife and I are in family trusts.*** The trust assets would be worth close to 2 million, including real estate of 1.5 million. The trust has no debts.
>
> (emhasis added)

[28] Accordingly, I have some doubts as to the worth of the plaintiffs' undertaking. This is something which could probably be remedied were I otherwise minded to grant injunctive relief.

## Result

[29] In the result, the application fails, and is dismissed. I decline to enjoin the publication of the article as it has been shown to me in its third and, as I understand it, final version.

## Costs

[30] Given that the defendants have not yet filed any papers, and given also that Consumer has significantly altered its proposed article, I consider that costs of $1,250, the figure suggested by Mr Finnigan, are appropriate. I allow against the plaintiffs to the defendants, costs accordingly. There will not be any disbursements.

Solicitors:

Duthie Whyte, Auckland for the Plaintiffs

Phillips Fox, Wellington for the Defendants