

WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd and Others
[2008] SGHC 114

Case Number : Suit 466/2006
Decision Date : 17 July 2008
Tribunal/Court : High Court
Coram : Andrew Ang J
Counsel Name(s) : Gabriel Peter and Peter Calista Marella (Gabriel Law Corporation) for the plaintiff;
Michael Loh and Montague Choy (Clifford Law Corporation) for the defendants
Parties : WBG Network (Singapore) Pte Ltd — Meridian Life International Pte Ltd; Lim Jit Shyan; Tan Siong Wei

Civil Procedure – Pleadings – Allegations not fully traversed – Effect of lack of traversal

Tort – Defamation – Whether statements published – Whether defences of justification and fair comment established – Meaning of "calculated" in s 5 Defamation Act (Cap 75, 1985 Rev Ed)

Tort – Malicious falsehood – Whether malice proved – Whether statements likely to produce pecuniary damage in respect of business carried on at time of publication – Section 6(1)(b) Defamation Act (Cap 75, 1985 Rev Ed)

17 July 2008

Judgment reserved.

Andrew Ang J:

1 The plaintiff, WBG Network (Singapore) Pte Ltd ("WBG"), and the first defendant, Meridian Life International Pte Ltd ("Meridian Life"), are multi-level marketing ("MLM") companies competing in the business of selling, *inter alia*, algae health products. WBG was established in 1997 and is now said to have an annual turnover of about \$45m. Meridian Life is a relative newcomer established in 2004. In this suit, WBG alleges that the second defendant, Lim Jit Shyan ("Shyan"), and the third defendant, Tan Siong Woei ("Ivan"), both employees of Meridian Life, had spoken words that constituted slander and malicious falsehood and is seeking a substantial sum of \$12m in special damages.

Facts

2 Prior to joining Meridian Life, Shyan and Ivan were involved in the distribution of WBG's star health products known as the Hunza range, which comprised, *inter alia*, Fibre Plus, Vitality Plus and Indinine Formula. Those products contained an alga called "Cryptomonadales" (hereinafter referred to as "CM"). The products had been distributed in Singapore since 1997 by WBG under licence from a Taiwanese manufacturer, a Professor Wang Shun Te ("Prof Wang") and his company, International Chlorella Co Ltd. CM is actually a trade name owned by Prof Wang or his company. The scientific name of the alga is Chlorella Sorokiniana ("CS"), which is a sub-species within the Chlorella family of algae.

3 According to WBG's marketing brochures at the material time, CM is an oval-shaped unicellular alga plant which reproduces itself by cell division from one to four or even 16 full-grown algae plants within 24 hours. This "life force", when translated into the human body, helps to rejuvenate human cells. Indinine is a complex that is extracted from the nucleus of CM and its medicinal properties reputedly include enhancing tissue repair, detoxification at the cellular level, improvement of bowel

functions and stimulation of the immune system.

4 For many years, WBG trumpeted CM as the star ingredient and did not disclose to its consumers or distributors that CM was actually a trade name for CS. In fact, in its brochures, WBG extolled the health properties of CM and sought to distinguish CM as being of a "different breed" superior to Chlorella and Spirulina, two other kinds of algae products in the market. WBG's distributors, including Shyan and Ivan, were also taught that Prof Wang was the only supplier of CM and that he supplied CM only to WBG. CM was thus exclusive to WBG.

5 Shyan and Ivan left WBG in late 2003. In July 2005, WBG lost the licence to distribute Prof Wang's products and to use the trade name CM. This licence was subsequently granted by Prof Wang to Meridian Life. In November 2005, Shyan and Ivan were employed by Meridian Life and began to distribute Meridian Life's algae health product "Crypto+" which was similarly marketed as containing the wonder ingredient CM. The distributors usually referred to CM by a shorter name "Crypto". Around that time, Shyan and Ivan discovered that CM was actually a trade name and that CS was the scientific name of the alga.

6 WBG had anticipated the breakdown of its relationship with Prof Wang and, beginning from late 2004, it had updated its Hunza range to consist of, *inter alia*, two new products called Indinine3000 and Vplus ExV. These were new formulations and the packaging of the products now showed CS as the main ingredient. For example, Indinine3000, which was introduced in December 2004 as a product upgrade for Indinine, contains CS mixed with an algae-sourced organic DHA (also known as "Cryptocodinium Cohnii"). WBG had managed to obtain the CS from another Taiwanese manufacturer. Shyan and Ivan were aware that the new packaging showed CS as the main ingredient.

7 The alleged defamatory statements were made on two occasions at Meridian Life's premises. WBG alleged that the first occasion was on 30 March 2006 when the following statements were allegedly made by Shyan and/or Ivan during a sales presentation to a Mr Bruce Cai Qing ("Bruce") and his wife Mrs Doreen Soon Bee Yun ("Doreen"):

(a) The "no CS statement" –

The products sold by WBG no longer contains Cryptomonadales (*ie*, Chlorella Sorokiniana).

(b) The "third party website statement" –

If WBG was doing true business practices, WBG would not refer to a third party website for their products.

(c) The "misrepresentation statement" –

WBG labelling their products as containing Chlorella Sorokiniana amounted to a misrepresentation.

(d) The "circuitous route statement" –

WBG had obtained Chlorella Sorokiniana from a Professor Wang Shun Te by way of a circuitous route from the United States of America.

(e) The "lack of transparency statement" – (attributed to Shyan)

I had quit from WBG because I had to be true to my conscience, and I had joined WBG

because WBG was very transparent in its business dealings and would produce black and white documents for clarification when so required.

- (f) The "change of name to avoid misrepresentation statement" – (attributed to Shyan)

WBG had changed the name of a product from Indinine to Indinine3000 to avoid being liable for misrepresentation. This was despite me (Lim Jit Shyan) knowing that Indinine is a trademark belonging to WBG.

This group of statements will be collectively referred to as "the six main statements".

8 The second occasion was on 1 April 2006 when, according to WBG, the *same* six main statements were made again by Shyan and/or Ivan during a sales presentation to Bruce, a Ms Sharon Ong ("Sharon") and a Mr Tan Chye Soon ("Tan").

9 In addition, WBG alleged that on this occasion, the following other statements were made by Shyan and/or Ivan:

- (a) The "mixture statement" –

The products sold by WBG is [*sic*] "no longer Crypto" and that "it must be a mixture of something else".

- (b) The "change of name statement" –

The reason for WBG changing their product name from Indinine to Indinine3000 was because they no longer have the Crypto supply.

- (c) A statement essentially the same as the "no CS statement" at [7] above –

The products sold by WBG does not [*sic*] contain Chlorella Sorokiniana.

These three statements will be collectively referred to as "the three additional statements".

10 WBG pleaded that all the statements contain the following meanings and innuendoes:

- (a) The products sold by WBG do not contain CS at all.
- (b) WBG had misrepresented that its products contain CS.
- (c) WBG had misrepresented its products generally.
- (d) WBG was selling covertly obtained CS which was cultivated by Prof Wang.
- (e) WBG's products do not live up to the expectations as stated in the third party website, and that is why WBG does not have on its own website, assertions similar to those on the third party website.
- (f) WBG was and continues to be dishonest in the conduct of its business and business practice.
- (g) WBG was and is not transparent in its business dealings.

11 WBG further contended that all the statements amount to malicious falsehood. WBG argued that the references are false in that:

(a) WBG's products did and do at all times contain CS; and

(b) Shyan had not quit from WBG but was in fact terminated by WBG for failing to adhere to WBG's code of conduct in that he had deliberately poached downlines from others.

WBG further argued that the references were malicious in that Shyan and/or Ivan knew the falsity of the references but nevertheless made such references.

12 At this juncture, I set out the two occasions when the alleged defamatory statements were said to have been made. On the first occasion, on 30 March 2006, Doreen was invited to Meridian Life's premises by Shyan's wife (then his girlfriend), Jaslyn, to find out more about Meridian Life's product "Crypto+".

13 Bruce accompanied Doreen to this sales presentation. Bruce has been an active distributor of WBG since August 2002. He is currently at the fourth out of seven levels in the hierarchy of distributors, with a downline of approximately 3,000 members. In MLM terminology, one's downline refers to the entire downward chain of customers whose ultimate supply of products comes from that person. Doreen is also at the fourth level of the hierarchy but her involvement with WBG took a back seat after she had a child in late 2003.

14 At this first sales presentation, Bruce and Doreen were ushered into a presentation hall. They were seated around a table for a sales pitch by Shyan and Ivan. The alleged defamatory statements comprising the six main statements were made in the course of the sales pitch. Bruce and Doreen were then shown a video presentation which featured Prof Wang giving a talk to Meridian Life's distributors on "Crypto+".

15 Bruce was startled to discover that Prof Wang was now supplying Meridian Life's with the star ingredient, CM. Immediately after this sales presentation, Bruce's testimony was that he met with a Dr George Lim ("George") at WBG's premises. George is the founder of WBG. Bruce told George about the sales presentation he had attended and informed him that Prof Wang was supplying Meridian Life with CM.

16 In swift response, George engaged the services of a private investigation team, comprising Sharon and Tan. The plan concocted by George was for Bruce to bring Sharon and Tan to attend a sales presentation by Meridian Life. Sharon was to pose as a sister of Bruce's customer from WBG who had recovered from certain illnesses after taking WBG's products.

17 At this second sales presentation a mere two days later on 1 April 2006, the private investigation team, as one would expect, brought a pin-hole camera with them. Interestingly, no video or aural evidence from the camera was tendered in court. Sharon's testimony was that a customer service officer at the reception counter grew suspicious of her when she walked into Meridian Life's premises. According to Bruce, Ivan then questioned him why they had brought along a pin-hole camera but eventually nothing came of it.

18 Bruce, Sharon and Tan were shown Meridian Life's corporate video at a holding area. This was a different video from the earlier one shown to Bruce and Doreen. Bruce, Sharon and Tan were then brought to a table at the presentation hall for the sales pitch by Shyan and Ivan. Sharon's cover

story was that her sister was able to discontinue dialysis after taking WBG's algae products and she wanted to know more about the difference between the algae products of the two companies. The alleged defamatory statements of 1 April 2006 were made during the course of this sales pitch.

19 Counsel for both parties are agreed that if Shyan and Ivan are found liable, the first defendant will be held vicariously liable as well. I now proceed first to examine the lack of traversal in the defence, a point raised by counsel for WBG, Mr Peter Gabriel.

Lack of traversal in defence

20 Mr Gabriel submitted that Shyan and Ivan had, in their defence, traversed some but not all of WBG's allegations. I have earlier set out these allegations in full ([7]–[9] above). A failure to traverse, he argued, amounts to an admission of the allegations of fact therein.

21 That must be right. Order 18 r 13 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("Rules of Court") reads:

Admissions and denials (O. 18, r. 13)

13. — (1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under Rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

It therefore becomes necessary to examine specifically what Shyan and Ivan had not traversed in their respective defences, although the exercise is somewhat tedious.

Shyan's Defence

22 In relation to the first sales presentation on 30 March 2006, Shyan denied making the six main statements, except for –

(a) the "third party website" statement (statement (b) at [7] above) as to which he raised the defence of fair comment; and

(b) the "circuitous route statement" (statement (d) at [7] above) as to which he raised both the defences of fair comment and justification.

He also denied the meanings and innuendoes of the statements as pleaded by WBG and further denied that the statements constitute malicious falsehood.

23 In relation to the second sales presentation on 1 April 2006, Shyan did not traverse any of WBG's allegations that the alleged defamatory statements (six main statements and three additional statements) were made by him. Neither did he traverse the meanings and innuendoes of the statements. Shyan's defence basically made no mention of the allegations against him concerning the second presentation.

Ivan's Defence

24 Out of the six main statements, Ivan is implicated only for statements (a) to (d) (at [7] above) on both occasions.

25 In relation to the first presentation on 30 March 2006, Ivan did not traverse any of the allegations that the four statements were made by him. Neither did he traverse the meanings and innuendoes of those statements. Ivan's defence made no mention whatsoever of the allegations against him concerning the first presentation.

26 In relation to the second sales presentation on 1 April 2006, there was some initial confusion because Ivan's defence was unclear as to whether it was traversing the three additional statements or the main statements. Counsel for the defendants, Mr Michael Loh, clarified that the defence was traversing the former. Accordingly, Ivan did not traverse any of the allegations that four of the main statements were made by him during the second presentation.

27 Returning to the three additional statements, Ivan raised the defence of justification for the "mixture statement" (statement (a) at [9] above), the defence of justification and/or fair comment for the "change of name" statement (statement (b) at [9] above) but denied making the "no CS statement" (statement (a) at [7] above and statement (c) at [9] above). Ivan also denied the meanings and innuendoes of the statements as pleaded by WBG and further denied that the statements constitute malicious falsehood.

28 When questioned about the general lack of traversal in the defence, Mr Loh argued that there was a general *seriatim* clause as well as a traversal by necessary implication in accordance with O 18 r 12(2) of the Rules of Court.

29 In respect of traversal by necessary implication, Mr Loh referred to Shyan and Ivan's reliance on the defence of Meridian Life, para 10 of which stated:

The 1st Defendants aver that at as [sic] April 2006, the Plaintiffs' products, by their own admission do not contain as an ingredient or at all "CM" and also that as from that date, Professor Wang Shun Te did not supply "CM" to the Plaintiffs. Any remark or comment in this regard by the 1st Defendants servants or agents is true and justified and is fair comment.

30 The defence of Shyan and Ivan (at para 1) made reference to the defence of Meridian Life in this fashion:

In so far as the matters therein are not specifically referred to in this Defence of the 2nd and 3rd Defendants, the 2nd and 3rd Defendants agree with and support the averments and position of the 1st Defendants and adopt the same as their own as the case may be and as applicable.

31 I cannot accept Mr Loh's argument in regard to the general *seriatim* clause or traversal by necessary implication. Publication is an essential element of the tort of defamation which must be

specifically addressed in the defence. I quote from GP Selvam, *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007 Ed) ("the White Book") at para 18/13/6:

Every allegation of fact must be specifically denied or specifically not admitted. ... So far as concerns the allegations which are the gist of the action, the denial should be as precise as possible, e.g. "The defendant never spoke or published the said words or any of them".

32 Jeffrey Pinsler, *Singapore Precedents of Pleadings* (Sweet & Maxwell Asia, 2006 Ed) ("Pinsler") at para 11.47 states:

If publication and reference (ie identification of the plaintiff in the alleged defamatory act) are in issue, that fact must be clearly pleaded in the defence. The defence should specifically deny those allegations contained in the statement of claim that relate to publication and reference.

Para 29-29 of Bullen & Leake & Jacob's *Precedent of Pleadings*, vol 1 (Sweet & Maxwell, 16th Ed, 2008) ("Bullen & Leake") is to the same effect.

33 The rationale behind requiring the defence to be specific in addressing the gist of the action is obvious. The main object behind O 18 r 13 of the Rules of Court is to narrow down the dispute –

... to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. ... This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. [The White Book at para 18/13/1]

That is precisely why the White Book, at para 18/13/6, recommends that the general *seriatim* clause ought not be adopted in dealing with essential allegations.

34 Further, the particular statement in Meridian Life's defence relied upon by counsel ([29] above) was itself a general one and did not specifically deny publication of the six main statements or the three additional statements. Order 18 r 13 of the Rules of Court embodies the requirements of procedural justice to ensure that issues are clearly crystallised. I have carefully scrutinised the defence in this case but can see no way to hold that all the allegations as to publication had been traversed. The further argument run by Mr Loh that WBG had appeared to conflate or equate CM with CS in its pleadings does not in any way absolve the defendants of their duty to respond with precision in their defence and to fully protect their position even if WBG's Statement of Claim was ambiguous. In any event, there were allegations made by WBG which did not involve CM or CS (eg, the "third party website statement" (statement (b) at [7] above)) which were not traversed fully.

35 The consequence of the lack of traversal is that the allegations as to publication are deemed admitted; the defendants will not be able to adduce evidence on the issue because it is no longer in dispute: the White Book at para 18/13/1 citing *Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen*.

36 Accordingly, the allegations which are deemed admitted by Shyan and Ivan are summarised as follows.

37 In relation to the first presentation, Shyan is deemed to have admitted to making:

(a) the "third party website statement" (statement (b) at [7] above); and

(b) the "circuitous route statement" (statement (d) at [7] above).

38 Ivan is deemed to have admitted to making:

- (a) the "no CS statement" (statement (a) at [7] above);
- (b) the "third party website statement" (statement (b) at [7] above);
- (c) the "misrepresentation statement" (statement (c) at [7] above); and
- (d) the "circuitous route statement" (statement (d) at [7] above).

39 In relation to the second presentation, Shyan is deemed to have admitted to making:

- (a) the "no CS statement" (statement (a) at [7] above and statement (c) at [9] above);
- (b) the "third party website statement" (statement (b) at [7] above);
- (c) the "misrepresentation statement" (statement (c) at [7] above);
- (d) the "circuitous route statement" (statement (d) at [7] above);
- (e) the "lack of transparency statement" (statement (e) at [7] above);
- (f) the "change of name to avoid misrepresentation" statement (statement (f) at [7] above);
- (g) the "mixture statement" (statement (a) at [9] above); and
- (h) the "change of name statement" (statement (b) at [9] above).

40 Ivan is deemed to have admitted to making:

- (a) the "third party website statement" (statement (b) at [7] above);
- (b) the "misrepresentation statement" (statement (c) at [7] above);
- (c) the "circuitous route statement" (statement (d) at [7] above);
- (d) the "mixture statement" (statement (a) at [9] above); and
- (e) the "change of name statement" (statement (b) at [9] above).

41 In this light, the plaintiff won half the battle even before the trial commenced. However, I still have to determine whether the statements (at [7] and [9] above) bear the defamatory meanings or innuendoes alleged. Secondly, for those statements the publication of which was denied, I will have to examine whether the plaintiff's allegations in relation thereto have been made out.

Whether the statements bear the defamatory meanings and innuendoes

42 A commonly used test whether a statement contains a defamatory meaning or innuendo is that applied by Lord Atkin in *Sim v Stretch* [1936] 52 TLR 669 at 671:

Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

see *Workers' Party v Tay Boon Too* [1972-1974] SLR 621 at 628; Clerk & Lindsell on *Torts* (Sweet & Maxwell, 19th Ed, 2006) ("Clerk & Lindsell") at para 23-28. Where the statements are targeted at a business, it is also pertinent to note that "words which tend to interfere with a person's business are not as such defamatory, unless they tend to injure his reputation": see Gatley on *Libel and Slander* (Sweet & Maxwell, 10th Ed, 2004) ("Gatley") at para 2.9. Applying this test, I accept that all the alleged statements pleaded by WBG (at [7] and [9] above) are defamatory, except for: (i) the "change of name to avoid misrepresentation statement" (statement (f) at [7] above); (ii) the "mixture statement" (statement (a) at [9] above); and (iii) the "change of name statement" (statement (b) at [9] above).

43 Regardless of whether they were true or false, I do not see how those three statements bear any of the meanings and innuendoes pleaded (at [10] above). The general sting of all the alleged defamatory statements pleaded by WBG is that WBG's products did not contain CS and that WBG engaged in unsavoury business practices. "The change of name to avoid misrepresentation statement" (statement (f) at [7] above) is at worst neutral and could perhaps even be said to present WBG in a good light since WBG did the responsible thing of changing the name of its product to *avoid* misleading the public. It did not accuse WBG of *actively* misrepresenting its products or infringing the trademark of others. To an ordinary person, a statement that a seller has to change the name of his products when a key ingredient has been changed would not be remarkable. Neither does it impute the absence or presence of any ingredient.

44 In relation to "the mixture statement" (statement (a) at [9] above) and "the change of name statement" (statement (b) at [9] above), I disagree that the reference to the absence of "Crypto" in those statements meant that WBG's products did not contain CS or that WBG engaged in unsavoury business practices. It is common ground between Bruce, Ivan and Shyan that the term "Crypto" was used to refer to CM when they conducted sales presentations. (That perhaps explains why Meridian Life named its product "Crypto+" to ride on the good name of "Crypto".) Before WBG lost its license with Prof Wang, it had aggressively touted "Crypto" (or CM) as a unique substance in itself. Hence, any statement that WBG's products did not contain "Crypto" would only impute that WBG's products did not contain CM. The parties are agreed that defamation would not lie for any statement that WBG's products no longer contain "Crypto".

45 I also observe that WBG did not place any weight on the three statements identified above (at [42]) during the course of the proceedings and focused their case on statements (a) to (e) at [7] above. In any event, I am satisfied that only statements (a) to (e) (at [7] above) and statement (c) (at [9] above) contain the defamatory meanings or innuendoes pleaded by WBG.

Outstanding issues on publication and defences

46 For Shyan, the outstanding issues concerning the six main statements allegedly made during the first sales presentation of 30 March 2006, are:

- (a) Whether he made the "no CS statement" (statement (a) at [7] above);
- (b) Whether the defence of fair comment is made out for the "third party website statement" (statement (b) at [7] above);
- (c) Whether he made the "misrepresentation statement" (statement (c) at [7] above);

(d) Whether the defences of justification and fair comment are made out for the "circuitous route statement" (statement (d) at [7] above); and

(e) Whether he made the "lack of transparency statement" (statement (e) at [7] above).

47 For Ivan, the outstanding issue is whether he made the "no CS statement" (statement (c) at [9] above) during the second sales presentation on 1 April 2006.

First sales presentation of 30 March 2006

Whether Shyan made statements (a), (c) and (e) at [7] above

48 It will have been noted at [37] above that Shyan is deemed to have admitted to making statements (a), (c) and (e) (at [7] above), *inter alia*, during the second sales presentation on 1 April 2006. For that reason, whether he made those statements during the *first* sales presentation is not of critical importance except to determine the number of occasions the utterances were made. Furthermore, the audience to which the defamatory statements were made during the first sales presentation was also a small group. Nonetheless, I shall examine this issue for completeness.

49 WBG's case for the first sales presentation rests primarily on the testimony of Bruce and Doreen. I found Doreen to be an unhelpful witness on the stand. She was unable to recall many of the events that had occurred during that presentation. Under cross-examination, she revealed that she did not pay much attention to the sales presentation; she was carrying on another conversation and catching up with her friend, Jaslyn, and other old friends who were present at that presentation. She admitted that she left her husband Bruce to speak with Shyan and Ivan. She further admitted that in her own affidavit of evidence-in-chief she had agreed with what her husband had said in his affidavit of evidence-in-chief because whatever her husband said "*must*" be true. When asked in re-examination to clarify what she herself remembered Shyan and Ivan to have actually said, all she could say (at Notes of Evidence, p 104) was that Shyan and Ivan had said "WBG no longer using [*sic*] Cryptomonodales". Her oral evidence made it amply clear that it would be unsafe to rely on her affidavit of evidence-in-chief.

50 This leaves Bruce as WBG's key witness for the first presentation. After reviewing Bruce's testimony, I am satisfied that the allegations that Shyan had made statements (a) and (c) (at [7] above) are unsubstantiated assertions. The only allegation that is made out is the "lack of transparency statement" (statement (e) at [7] above).

51 I am satisfied from the evidence that during a typical one-hour long sales presentation by Meridian Life where the customer's attention span was limited, the focus would be on extolling the virtues of one's own product extensively and not on putting down the competitor. I accept that it is not common for Ivan and Shyan to venture into the competitor's product range or the precise scientific ingredients involved. Bruce himself acknowledged (at Notes of Evidence, pp 97–98) that the focus of the first sales presentation was on actively extolling the virtues of Meridian Life's "Crypto+" and not on disparaging competing products.

52 Bruce also gave evidence that immediately after the first sales presentation he went back to George and related to George that Shyan and Ivan had said that WBG's products did not contain CM any more. That was all he told George. If, as Bruce alleged, not one but six defamatory statements had been made during that sales presentation, one would have expected Bruce to have mentioned at least some of those statements to George.

53 That Bruce's recollection of the first presentation was unreliable is further shown by his inconsistent evidence whether it was Shyan or Ivan who had made statements (a), (c) and (d) (at [7] above) during the first sales presentation. During cross-examination, Bruce stated (at Notes of Evidence, p 60) that it was Ivan who had made the statements, but he later sought to resile. Bruce's initial answer – that it was Ivan who made the alleged defamatory statements – is consistent with Shyan and Ivan's testimony that Ivan was the main presenter during the first presentation. A further reason for doubt was that Bruce's recollection of the six main statements alleged to have been uttered during the first sales presentation was word for word the same as those uttered during the second sales presentation.

54 After considering the evidence carefully, the only statement out of the three statements in issue (statements (a), (c) and (e) at [7] above), which I am satisfied Shyan made, is the "lack of transparency" statement (statement (e) at [7] above). That statement, in its entirety, reads:

I had quit from WBG because I had to be true to my conscience, and that I had joined WBG because WBG was very transparent in its business dealings and would produce black and white documents for clarification when so required.

In his affidavit of evidence-in-chief, Shyan stated (at para 40):

As for my statement that I quit arising from my conscience, it was my view of how I wanted to do my business. The fact that they had hidden from me that CM was actually the tradename of CS during my time with them shows how the Plaintiffs did their business.

He accepted during cross-examination that that paragraph was an implicit admission that he had indeed made the lack of transparency statement.

55 I turn next to examine the defences pleaded by Shyan: (i) fair comment for the "third party website statement" (statement (b) at [7] above); and (ii) justification and fair comment for the "circuitous route statement" (statement (d) at [7] above).

Fair comment for the "third party website statement"

56 The "third party website statement" in its entirety reads:

If WBG was doing true business practices, WBG would not refer to a third party website for their products.

During cross-examination, Shyan admitted that he had shown Bruce a third party website during the presentation. There was some disagreement over whether that website was <<http://www.indinine.biz>> or <<http://www.tigerstone.biz>>. Interestingly, the print-outs from the website <<http://www.tigerstone.biz>> as late as October 2006 displayed WBG's Hunza range of products and the corresponding WBG sales brochures on the same. WBG had already lost the license to distribute Prof Wang's products and to use the trade name CM since July 2005.

57 Be that as it may, one of the elements of fair comment is that the comment must be based on fact: *Overseas-Chinese Banking Corp Ltd v Wright Norman* [1994] 3 SLR 760; *Chen Cheng v Central Christian Church* [1999] 1 SLR 94. Mr Loh argued that WBG knew full well that its trademarks were being used on those websites. Whilst there may well be strong suspicion of a connection between WBG and those websites, the evidence presented before me did not bear out the allegation that WBG *itself* had been referring to any of those websites. The print-outs from WBG's website and brochures

at the material time did not contain the links to third party websites. MLM distributors are free to set up their own websites advertising their products and these websites are not necessarily endorsed or supervised by the parent company. Accordingly, that part of the statement alluding to WBG referring to a third party website was not based on fact. Fair comment therefore fails.

Justification and fair comment for the "circuitous route statement"

58 The "circuitous route statement" in its entirety reads:

WBG had obtained Chlorella Sorokiniana from a Professor Wang Shun Te by way of a circuitous route from the United States of America.

The defence of justification fails since the statement was untrue; WBG had ceased obtaining CS from Prof Wang but from another Taiwanese manufacturer, Far East Bio-Tec Co Ltd ("Febico"). The defence of fair comment also fails as the impugned statement was one of fact and not comment.

Second sales presentation of 1 April 2006

59 The context of the second sales presentation was strikingly different from the first. Whilst the first presentation might be described as a typical MLM sales presentation, the second presentation involved a covert sting operation set up by WBG to entrap Meridian Life. Sharon testified that she was employed by WBG for the specific task of recording remarks, if any, made by Meridian Life's employees that WBG's Indinine Formula and Vitality Plus did not contain CS. A thorough review of all the evidence before me shows that the second sales presentation was deliberately designed to ensnare Meridian Life where Ivan and Shyan were subject to relentless questioning by Sharon. Her job as *agent provocateur* was to precipitate the making of defamatory remarks by persistently asking Shyan and Ivan suggestive questions.

60 Interestingly, the first time Sharon heard of the term Cryptomonadales was during the second sales presentation itself. This meant that WBG's instructions to her were specifically targeted at capturing statements about the lack of CS in WBG's products. WBG knew full well what they needed to pin Meridian Life down.

61 It will be recalled that Sharon's colleague, Tan, had brought along a pin-hole camera to Meridian Life's premises. When asked why no such recording was produced in court, all Sharon could say was that the recording was "somewhat terminated" by her colleague. Quite naturally, there was some doubt whether it had indeed been "terminated" and whether it contained relevant evidence. However, given the lack of traversal by Shyan and Ivan, the failure to produce the recording was not of critical importance.

Whether Ivan made the "no CS statement"

62 I am not satisfied that Ivan made the "no CS statement" (statement (c) at [9] above). With regard to the second presentation, I found Sharon's affidavit of evidence-in-chief to be a more detailed and balanced account than Bruce's. In Sharon's affidavit of evidence-in-chief, she said she had *understood* from Ivan that WBG's products did not have CS. However, that is materially different from whether Ivan had *made* such a statement. Under cross-examination she explained:

Q: You add in there, your comments: "So we understood from him that Indinine had no CS."

My question to you is, at that juncture, when Ivan indicate [sic] that rightfully they did not,

did you ask him, "So are you saying they don't have CS?"

A: I did not bring up the term *Chlorella Sorokiniana*.

Q: At that time?

A: At that moment.

...

Q: Then how can you understand from him that Indinine had no CS?

A: *This affidavit is done in retrospect, yes? It was after that we learned that *Cryptomonadales* is actually *Chlorella Sorokiniana*, is the commercial name of *Chlorella Sorokiniana*, and it was later explained to us that they are the same.*

[Notes of Evidence, pp 141–142] [emphasis added]

Q: *... in other words your insertion of this line "so we understood from him that Indinine had no CS", is actually a statement that you added in on hindsight?*

A: *Since it is used interchangeably, *Cryptomonadales* and *Chlorella Sorokiniana*.*

Q: *No that's not my question, let me rephrase that. At that point in time, did you understand it to be like that?*

A: *I understand from him that it does not contain *Cryptomonadales*, not CS.*

Q: *At that point in time?*

A: *Yes, Your Honour.*

[Notes of Evidence, pp 143–144] [emphasis added]

63 When asked how she drew the inference that WBG's products did not have CS, Sharon said:

A: However, I asked him, he is the one who implied that their product is not real, he is real [sic] for a while.

Q: Pause for a while. Like I said, the implication is only formed by you, you yourself said he never came right out to say it?

A: Yes, Your Honour.

...

Q: You have specifically been said [sic], find out if they will say that *Chlorella Sorokiniana* does not exist in WBG's products; is that correct?

A: Yes, Your Honour.

Q: So if you find yourself in a situation where they don't come right out to say it you are only left

with the best case scenario which is you imply?

A: Yes, Your Honour.

...

Q: ... In short, would you agree with me, Ivan was very uncomfortable to talk about WBG's products?

A: At that moment of time, yes, Your Honour.

...

Q: Okay, in other words, he was emphasising their products were pure Cryptomonadales?

A: Yes, Your Honour.

Q: And they are not commenting that their products up there which may not have Cryptomonadales but one thing they are certain it cannot be 100 per cent?

A: Yes.

Q: So the importance for Ivan was to convince you that there may be Cryptomonadales out there in other products, whatever it is, but mine is 100 per cent, you are guaranteed?

A: Yes, Your Honour.

Q: And that was his focus?

A: Yes, Your Honour.

[Notes of Evidence, pp 148–151]

Q: ... The point is they never excluded the possibility that perhaps, like what you said, the plaintiff's product may have, could have, indeed may have Chlorella Sorokiniana?

A: Yes, Your Honour.

Q: They never came right out and told you, "no, I'm certain they don't?"

A: Yes, Your Honour.

[Notes of Evidence, pp 161–162]

Sharon's answers in cross-examination, as excerpted above, did not lend any credence to her allegation that Ivan had uttered a categorical statement that WBG's products did not contain CS.

64 Further, Ivan himself stood up to cross-examination. He testified that Sharon kept asking him whether WBG's products were "fake" and his reply was that WBG's products no longer had "Crypto" but Meridian Life's product did. He stressed that his emphasis was always on "Crypto". This is consistent with Sharon's affidavit of evidence-in-chief where she said that Ivan had tried not to talk about WBG. After considering the evidence regarding the second sales presentation carefully, I am

not persuaded, on a balance of probabilities, that Ivan made the “no CS statement” (statement (c) at [9] above).

Summary on defamation

65 Before we proceed to the issue of malicious falsehood, it may be useful to summarise my findings on defamation. In this connection, WBG does not have to prove special damage in order to successfully establish an action in slander. Section 5 of the Defamation Act (Cap 75, 1985 Rev Ed) (“the Act”) provides that:

5. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

The word “calculated” in s 5 is used in s 6 of the same Act and has been interpreted to mean “likely to produce the result”: *DHKW Marketing v Nature's Farm Pte Ltd* [1999] 2 SLR 400; see also Gatley at para 4.16 and Clerk & Lindsell at para 24-16, citing *IBM v Web-sphere Ltd* [2004] FSR 39 to similar effect. Since this is an action for slander in respect of words that are likely to disparage WBG in its trade or business, it is unnecessary to prove special damage in establishing liability.

66 Accordingly, having established the requisite elements of slander in the foregoing discussion, I find Shyan liable in defamation for making the following statements during the first sales presentation of 30 March 2006:

- (a) the “third party website statement” (statement (b) at [7] above);
- (b) the “circuitous route statement” (statement (d) at [7] above); and
- (c) the “lack of transparency statement” (statement (e) at [7] above).

For that same sales presentation, owing to a lack of traversal, I find Ivan liable in defamation for making:

- (a) the “no CS statement” (statement (a) at [7] above);
- (b) the “third party website statement” (statement (b) at [7] above);
- (c) the “misrepresentation statement” (statement (c) at [7] above); and
- (d) the “circuitous route statement” (statement (d) at [7] above).

67 In relation to the second sales presentation of 1 April 2006, due to a lack of traversal, I find Shyan liable in defamation for making:

- (a) the “no CS statement” (statement (a) at [7] and statement (c) at [9] above);
- (b) the “third party website statement” (statement (b) at [7] above);
- (c) the “misrepresentation statement” (statement (c) at [7] above);
- (d) the “circuitous route statement” (statement (d) at [7] above); and

(e) the "lack of transparency statement" (statement (e) at [7] above).

In relation to that same sales presentation, owing to a lack of traversal, Ivan is liable in defamation for making:

- (a) the "third party website statement" (statement (b) at [7] above);
- (b) the "misrepresentation statement" (statement (c) at [7] above); and
- (c) the "circuitous route statement" (statement (d) at [7] above).

As agreed (see [19]), the first defendant is vicariously liable for the defamation by Shyan and Ivan respectively.

Malicious falsehood

68 Under the common law, a claim in malicious falsehood succeeds upon proof: (i) that the defendant published to third parties words which are false; (ii) that they refer to the claimant or his property or his business; (iii) that they were published maliciously; and (iv) that special damage has followed as a direct and natural result of their publication: see *Gatley* at para 20.1 and *Clerk & Lindsell* at para 24-09. Section 6(1)(b) of the Act, if satisfied, relieves WBG from having to prove special damage. It reads:

6.— (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage —

...

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

Falsity of the statements

69 Having reviewed the evidence, I find that all the statements at [7] and [9] above are false, save for the "lack of transparency statement" (statement (e) at [7] above) and the "mixture statement" (statement (a) at [9] above). I should perhaps elaborate on this finding of falsity with regard to the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above).

70 Those two statements were statements concerning WBG's renaming of its Hunza range of products around the time when WBG lost its license with Prof Wang, *eg*, Indinine was renamed to Indinine3000 in December 2004. During cross-examination of Mr Andrew Ngai, the marketing director of WBG, Mr Loh tried to pin the reason for the renaming to the fact that WBG had lost the right to use the word "CM" on its packaging and wanted to avoid being liable for misrepresentation. However, Mr Ngai flatly denied that and explained that the renaming was to inform the consumer that the new products contain improved formulations and that the renaming was part of a process of product upgrading and development that was already ongoing before WBG lost its license with Prof Wang. I accept Mr Ngai's answer and I find that the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above) are false.

71 I now turn to discuss the statements which I find to be true or, to be more precise, which the plaintiff has failed to satisfy me to be false. With regard to the "mixture statement" (statement (a) at [9] above), as stated at [6] above, WBG's new products do indeed contain a mixture of CS and other ingredients. As for the "lack of transparency statement" (statement (e) at [7] above), it will be recalled that WBG never once revealed to its distributors or customers that CM was actually a trade name for CS. Bruce, who is actively involved in WBG, testified that he only discovered this fact for himself while surfing the Internet. WBG jealously guarded the actual scientific ingredient, CS, from the public domain and, through extensive marketing, perpetuated the myth that CM was an ingredient unique to them. WBG trained all their distributors, including Bruce, Ivan and Shyan, to believe that CM was the fruit of intensive research by Prof Wang and that Prof Wang was the only manufacturer of CM. Mr Loh further submitted that the sales brochures of WBG had misleadingly marketed CM as being different and separate from Chlorella, when in fact CM is a sub-species within the Chlorella family (see [4] above). It is clear to me that the lack of transparency is evident from the way WBG actively mystified the identity of its star ingredient.

Malice

72 Whilst I do not think that Ivan and Shyan acted with the "dominant intent" of injuring WBG, malice may be made out if there was a reckless disregard of the true facts: *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR 772 ("*Maidstone*"), citing *Horrocks v Lowe* [1975] AC 135; see also Gately at para 20.7, citing *Spring v Guardian Assurance plc* [1993] 2 All ER 273 and *Kaye v Robertson* [1991] FSR 62 at 67. Yong CJ in *Maidstone* also went on to state (at 789):

A defendant is not reckless, for the purposes of proving malice, if he did so believing it was true, even if he was careless, impulsive or irrational in coming to that belief. The law does not require him to be logical. In order for him to be held to be reckless, he must be shown to have not cared or considered if the statement was true.

Although the affidavits of evidence-in-chief of Shyan and Ivan suggested that they had honestly believed that WBG's products no longer contained CS, the evidence they gave on the stand about their frame of mind at the material time was that they did not know how WBG had obtained its supply of CS after it lost its license with Prof Wang. If so, it cannot be said that they believed in the truth of the statements uttered, which concerns the *absence* of CS in WBG's products. The evidence before me showed no attempt by Shyan and Ivan to consider, substantiate or validate the truth of the statements before they were uttered. I therefore find that the utterances were made in reckless disregard as to whether they were true.

Summary on malicious falsehood

73 Except for the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above), I am satisfied that special damage need not be proved by WBG since s 6(1)(b) of the Act is satisfied, *viz*, the remaining statements were likely to produce pecuniary damage to WBG in respect of its business carried on at the time of publication.

74 As I alluded to at [43] above, the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above) are at worst neutral statements and I cannot see how they were likely to produce pecuniary damage to WBG. Therefore in order to succeed in malicious falsehood with respect to those two statements, WBG has to prove special damage at common law.

75 Accordingly, I now have to establish whether the special damage as pleaded by WBG has been proven for the sole purpose of determining whether liability in malicious falsehood is made out in respect of the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above).

76 In this connection, WBG claimed \$12m in special damage and adduced evidence of its accounts through the affidavit of evidence-in-chief of its finance manager, Ms Julie Goh.

77 The evidence Julie Goh provided was nothing more than the total value of sales to networkers for 2005 and for 2006. The difference between the total value of sales for the two years represented the loss in gross revenue for 2006, which was about \$2m. She then multiplied that figure by four to obtain the projected amount of damages of \$8m that would be suffered over four years on the basis it would take that period of time to rebuild lost confidence in the WBG brand. It was immediately apparent that whilst WBG sought \$12m in damages, the evidence it produced could only support a claim for \$8m at best.

78 Whilst it was not pleaded as such, the method of calculation adopted by WBG can be considered as a claim for \$2m for actual loss of profits suffered in 2006 and \$6m for general loss of custom due to the acts of the defendants. That computation effectively attributed WBG's loss of gross revenue for 2006 entirely to the defendants, but the accounts included products and courses that were completely unrelated to the Hunza product range.

79 Even if the earlier \$2m reduction in gross revenue was in relation to the Hunza product range, it was only a reduction in turnover. No attempt was made to show what the loss of profit was. (For the sake of completeness, even if WBG had hitherto been loss-making, it would still be necessary to show to what extent the defendant's conduct had exacerbated WBG's losses.) Besides, I am not persuaded from the circumstances of this case that "such loss was caused in fact by the defendants' wrong, in the sense that but for the defendants' act the loss would not have occurred": Gatley at para 5.6; see also Clerk & Lindsell at para 23-237.

80 A critical factor I considered in assessing whether any such loss was *caused* by the defendants was that it could not be shown that Shyan and Ivan had repeated the defamatory statements beyond the confines of the two presentations of 30 March and 1 April 2006. There was no evidence at all that Shyan and Ivan had circulated those statements. Certainly the offending statements were not carried in the media or circulated in brochures. Whilst it is not inconceivable that there might have been other presentations, it is significant that WBG failed to produce any evidence of such.

81 Further, Julie Goh conceded on cross-examination that any loss of custom might well be attributable to WBG's inability to market their products as successfully as before without the star ingredient CM which they had so assiduously promoted in the past. Moreover, Meridian Life's new claim to fame as a result of their acquisition of that same ingredient would have added to WBG's woes. Julie Goh also admitted on the stand that it was probable that networkers bought less because they did not like the new products, eg, Indinine3000, released in December 2004. In other words, WBG could have lost business due to legitimate competition by Meridian Life or other competitors.

82 In view of the unreliability of the evidence tendered, I see no ground to find that the special damage as pleaded by WBG has been proven. The upshot of the foregoing discussion is that liability in malicious falsehood in respect of the "change of name to avoid misrepresentation statement" (statement (f) at [7] above) and the "change of name statement" (statement (b) at [9] above) is not made out.

83 I now summarise my findings on malicious falsehood. In relation to the first sales presentation, I find Shyan liable in malicious falsehood for making the "third party website statement" (statement (b) at [7] above) and the "circuitous route statement" (statement (d) at [7] above). In relation to the same sales presentation, I find Ivan liable in malicious falsehood for making:

- (a) the "no CS statement" (statement (a) at [7] above);
- (b) the "third party website statement" (statement (b) at [7] above);
- (c) the "misrepresentation statement" (statement (c) at [7] above); and
- (d) the "circuitous route statement" (statement (d) at [7] above).

84 For the second sales presentation, I find Shyan liable in malicious falsehood for making:

- (a) the "no CS statement" (statement (a) at [7] and statement (c) at [9] above);
- (b) the "third party website statement" (statement (b) at [7] above);
- (c) the "misrepresentation statement" (statement (c) at [7] above); and
- (d) the "circuitous route statement" (statement (d) at [7] above).

85 With regard to the same sales presentation, I find Ivan liable in malicious falsehood for making:

- (a) the "third party website statement" (statement (b) at [7] above);
- (b) the "misrepresentation statement" (statement (c) at [7] above); and
- (c) the "circuitous route statement" (statement (d) at [7] above).

As agreed, the first defendant is vicariously liable for the malicious falsehood uttered by Shyan and Ivan respectively.

Conclusion

86 At the commencement of the trial, I informed counsel that if I was satisfied that substantial damages ought to be awarded, I would bifurcate the issue of liability from that of quantum and order damages to be assessed. In this regard, Gatley states at para 20.13:

Where the words fall within the statute [*ie*, s 3(1) of the UK Defamation Act 1952 which is in *pari materia* with s 6(1) of our Act] the claimant may recover damages representing the loss which he is likely to suffer as the direct and natural consequence of the falsehood.

In view of my finding that WBG has successfully invoked s 6(1)(b) of the Act for certain statements constituting malicious falsehood (see [72] above), the existence of pecuniary loss must be inferred [see *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 40-016] and I am unable to award purely nominal damages. WBG is also entitled to general damages for its successful action in defamation in light of my findings at [66] to [67] above.

87 For the foregoing reasons, I give judgment for the plaintiff.

88 In view of the course the trial has taken and, in particular, the concluded testimony of Julie Goh and my familiarity with the matter, I shall undertake the assessment of damages on a date to be fixed by the Registrar. Costs are reserved until after assessment.

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