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Case No: 2651, 2652 and 2653 of 2007

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2008

Before : **Mr Justice Norris**

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Between :

THE SECRETARY OF STATE FOR BUSINESS ENTERPRISE AND REGULATORY REFORM	**Claimant**
- and -	
AMWAY (UK) LIMITED	**Defendant**

- -
- -

Mark Cunningham QC and Andrew Westwood (instructed by The Treasury Solicitor) for the Claimant
David Chivers QC and Philip Gillyon (instructed by Eversheds) for the Defendant

Hearing dates: 26-30 November 2007 & 3-7 December 2007

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Dated……Mr Justice Norris….....

Mr Justice Norris :

1. I shall not order Amway to be compulsorily wound up, but will dismiss the petition if Amway will give the voluntary undertakings handed up during the course of the hearing (with one addition).

2. The business now conducted by Amway (UK) Ltd ("Amway") has been conducted in this country for some thirty years. So far as the evidence discloses its basic business model has remained more or less the same throughout that period, though it was subject to significant revision in October 2007. The same basic business model is used in about 80 countries worldwide. Amway is involved in direct selling. It sells something over £10 million of products in the UK each year. It markets its own and third party products directly to consumers through a network of independent sellers known as Independent Business Owners ("IBOs"). The structure adopted for the direct selling network is what has come to be known as "multilevel marketing". Such a structure encourages existing IBOs to recruit additional sellers whose sales (and the further sales of those whom such additional sellers in turn recruit, level by level) benefit the original IBO through a bonus structure that I will need later to explain. The resulting business organisation might be expected to resemble a pyramid with (at the top) a very few people whose earnings are generated by the layers of recruiters underneath them and (at the base) a large number of direct sellers whose income is derived solely from what they manage to sell. For each IBO there will be above them a "sponsorship chain" (the person who recruited them, and who in turn recruited the IBO's recruiter, and so on) who will benefit from sales made by the IBO

and that IBO's downline: and below them a "downline" (those whom the IBO has recruited, and those who in turn have been recruited by the IBO's recruits and so on) whose sales will benefit the IBO.

3. The evidence of Mr Richard Berry, the director of The Direct Selling Association and current chairman of The Federation of European Direct Selling Associations is that for most of the last twenty years the majority of direct selling companies in the UK have operated on a single level structure, but that this had now changed and the majority now operate on a multilevel basis where the rewards of some are to a greater or lesser extent determined by the sales efforts of others.

4. One of the risks inherent in a multilevel marketing structure is that (because it offers participants both the opportunity to sell products and the opportunity to recruit others) it is capable of exploitation as a pyramid selling scheme. This is explained in the Department for Business Enterprise and Regulatory Reform web site in these terms:-

> "Trading schemes can be a legitimate opportunity for people to operate a business from home and are not illegal in the UK. Trading schemes become illegitimate and illegal if, while purporting to offer business opportunities, the sole purpose of the scheme is to make money by recruiting other participants, rather than trading in goods or services. This form of bogus scheme is sometimes referred to as "pyramid selling"…"

5. One of the by-products of a multilevel marketing scheme is that those towards the top of the pyramid (whose income is derived substantially from the sales efforts of several or perhaps many levels of IBOs below them) have the opportunity to create and promote motivational courses and literature directed at the lower tiers and aimed at encouraging them to recruit more members and

thus to extend further the base of the pyramid. Such material is known as Business Support Material (or "BSM"). The promotion of such BSM to the captive market represented by the lower levels of the pyramid provides the IBOs at the top with an additional and independent source of income to that derived from bonus payments arising from the sales generated by the lower levels of the organisation. Senior Amway IBOs promoted BSM through a number of vehicles, including Britt (UK) Ltd ("Britt") and Network 21 Support Systems Ltd ("Network 21"). Britt and Network 21 are independent entities which are not owned by Amway or by any of its shareholders or officers. Amway does not share in any of the risks or rewards of Britt and Network 21: nor does Amway require any of its IBOs to purchase the literature or services of either entity. It does, however, reserve the right to exercise a degree of control over what is circulated to its IBOs.

6. On 9 January 2006 the Secretary of State for Trade and Industry (in exercise of the power conferred by section 447 of the Companies Act 1985 as amended) authorised Mr Peter Bott (an official in the Department) and Luke Steadman, Mark Percy and Emily Adler (Chartered Accountants and all of CRA International (UK) Ltd) to carry out enquiries into Amway, Britt and Network 21. It appeared to the Secretary of State from their report that it was expedient in the public interest that each of Amway, Britt and Network 21 should be wound up. Accordingly on 11 April 2007 the Secretary of State presented a petition for the winding up of Amway. (Petitions were also presented against Britt and Network 21 but these have been the subject of arrangements made between the presentation of the petitions and the hearing

of the Amway petition and so are not before me). The grounds for presenting the petition were succinctly stated in paragraph 16 in these terms:

> "…It appears to the Secretary of State expedient in the public interest that Amway be wound up on the grounds that the business in which it is concerned is:
>
> 16.1 inherently objectionable; and/or
>
> 16.2 an unlawful lottery contrary to section 1 of the Lotteries and Amusements Act 1976; and/or
>
> 16.3 an unlawful trading scheme contrary to section 120 of Fair Trading Act 1973".

7. The grounds for inherent objectionability were expanded upon in paragraph 17 of the petition to identify the following points of objectionability:-

(a) that the business is promoted to prospective IBOs on the basis that participation carries with it the prospect of substantial financial rewards and/or easy money ("dream selling"):

(b) the reality is that the nature and rewards of the business are such that only a very small number of IBOs make any significant money, the substantial majority making either minimal or no financial return from their participation:

(c) because of the requirement that an IBO pay a joining and renewal fee and the likelihood that an IBO would purchase BSM there was a certainty that the Amway business would cause a loss to a large number of people (to the extent that out of an IBO population which exceeded 33,000 only

about 90 IBOs earned sufficient bonus to cover the costs of actively building their business).

8. As regards the case based upon an unlawful lottery it is the Secretary of State's case that the bonus payments made by Amway to IBOs are to a substantial extent dependent upon chance and are wholly unpredictable and thereby constitute an unlawful lottery. Their dependence upon chance is a result of the fact that bonus payments are influenced only to a very small degree by the IBO's own purchases from Amway (only about 16% of bonuses paid by Amway to IBOs directly relate to the IBO's own purchases) and to a very substantial extent by the product purchases of IBOs whom the recipient of the bonus has recruited (or whom such IBOs have themselves recruited). The recipients of the largest bonus payments had on average (a) earned only 3.5% of their bonus payment by themselves purchasing and selling Amway products: (b) personally recruited only 2% of those whose sales contributed to the bonus they received.

9. The case relating to an unlawful trading scheme is founded upon part XI of the Fair Trading Act 1973. It proceeds on the footing that the business conducted by Amway is "a trading scheme" and then focuses upon the payments which it is necessary to make to become and to remain an IBO. The Secretary of State seeks to prove that a prospective or current IBO is induced to make such payments by reason of the fact that the prospect is held out of receiving payments or other benefits in respect of the introduction of other persons (that is IBOs who are recruited and whose sales of Amway product may contribute to the bonus earned by the IBO who recruited them).

10. When the petition against Amway was presented the company sought to revise its business model and for that purpose to enter into a dialogue with the Department. The proper response to that approach must be informed by the following considerations:-

(a) The presentation of a public interest petition is not the commencement of ordinary adversarial litigation. Parliament has charged the Department with wide ranging responsibilities in relation to the affairs of companies including (under section 124A of the Insolvency Act 1986) their investigation and the formation of the view that it would be expedient in the public interest that companies should be wound up. Once that view is formed, the Secretary of State is empowered to present a petition.

(b) When the petition is presented Parliament has entrusted the court with the task of deciding whether, having regard to all the circumstances as disclosed by the totality of the evidence before the court, it is just and equitable for the company be wound up. In the conduct of that exercise the court will, of course, take note of the source of the submission that winding up is appropriate and of the expertise that has been brought to bear upon the decision to present a petition. But it remains for the court (not the Secretary of State) to decide whether (taking into account the interests of all parties, present members and creditors of the company, and present participants in the scheme) a winding up is just and equitable or whether some other relief is appropriate. This approach will be found set out in Re Walter L. Jacob & Co. Ltd [1989] BCLC 345 at 353B - 354C

per Nicholls LJ and in Re Senator Hanseatische [1996] 2 BCLC 562 at 606 *per* Millett LJ.

(c) The Secretary of State is not a licensor of approved business models or a business design consultant and is under no obligation to approve or to police a scheme of undertakings relating to the conduct of an individual company's business. The basis for this view is to be found in the decision of Brightman J in Re Bamford Publishers Ltd (cited and commented upon by the Vice Chancellor in Re Supporting Link Alliance Ltd [2004] 2 BCLC 486 at 503i - 505d).

11. In my judgment the Department's officials exhibited an appropriate degree of caution in entering into any form of negotiation with the Amway management. However, given that the compulsory winding up of an active and established company is a very serious step to be taken, what is necessary is that the Department is explicit and exact as to its concerns, so as to enable the company against whom the petition is presented (should it so choose) to prepare a revised business model which is (to quote a letter sent by the Treasury Solicitor in this case) "fully formulated, comprehensive, open and transparent, and capable of effective and ongoing implementation without the supervision of either the Secretary of State or the court" . I consider that to be an accurate statement of the standard that any revised business model must attain if it is to be worthy of consideration at the hearing of the petition as a significant matter to weigh in the balance.

12. Amway did prepare a revised business model and put it into effect in October 2007. One of the issues which falls for decision is what impact that implementation has upon the relief to be granted.

13. I turn first to a consideration of "inherent objectionability". Before that term takes on a life on its own it is useful to begin with a reminder that the only basis upon which the court can compulsorily wind up an active trading company under section 124A of the 1986 Act is "if the court thinks it just and equitable" for it to be so wound up. Whatever convenient labels may be used in argument, a finding and holding that it is "just and equitable" is the necessary foundation for the winding up order. The term "inherently objectionable" along with the adjective "pernicious" was the description given by Millet LJ in Re Senator Hanseatische (supra) to a "snowball" scheme called The Titan Business Club under which, upon payment of a fee of £2,500, an individual obtained the right to introduce others to the scheme. If he recruited another member then he earned commission of £450 (thereby recouping part of his outlay). The commission rate rose the more members he introduced: and if the people whom he recruited themselves in turn recruited others, then the commission rate rose again. In his membership application each member explicitly acknowledged that "my success depends on introducing new members". Millet LJ described the scheme in these terms:-

> "The scheme is merely a device for enabling the organisers and a relatively small number of early recruits to make potentially very large profits at the expense of the much larger number of those who are recruited later. Every new participant is in truth gambling on the scheme continuing long enough for him to recover his money and, he hopes, make a profit. But the scheme is not, of course, held out to him on this basis. Schemes of this kind are inherently objectionable and the court

> has consistently held that it is just and equitable to wind up the companies which operate them. They tend to be sold on a false and deceptive basis, sometimes explicit but usually implicit, that they are a certain source of profit for those who join and are capable of lasting indefinitely. A particular vice of such schemes is that they encourage similar dishonesty on the part of their members, who can recover their money only at the expense of new members whom they induce to enter the scheme…"

It will be apparent from that brief account that the Titan Business Club differs from the Amway business model. If Amway is to be wound up because its business is "inherently objectionable" it will therefore be necessary to identify the factors which made it just and equitable to wind up The Titan Business Club (or the other companies featuring in the decided cases) and to ascertain which, if any, of those factors applies in the case of Amway (bearing always in mind that it is the combination of factors which will, in any individual decided case, have been important, and that not all factors will have been of equal weight).

14. Amongst the many features of the authorities cited to me I have found the following to be of particular assistance in the present case:-

(a) operating a business that mathematically or self - evidently is bound to fail causing loss for the latest participants: Re Senator [1996] BCLC 345, Re Vanilla (unrep, 1998), Re Alpha Club [2002] 2 BCLC 612;

(b) operating a business which consists of nothing beyond the sale of participations in the business itself with the consequence that a relatively small

number of early recruits make potentially very large profits at the expense of a much larger number recruited later: Re Senator; Re Vanilla; Re Alpha Club ; Re Delfin [2000] 1 BCLC 71;

(c) misrepresenting the nature of the business of the company in a serious way: Re Walter Jacob (an apparent adviser in fact operating as a share vendor); Re Supporting Link Alliance [2004] 2 BCLC 486 (commercial company holding itself out as a charity fundraiser); Re UK-Euro Group [2007] 1BCLC 812 (principal activity of the company the raising of money not the development and sale of a product).

(d) seriously misrepresenting the product being marketed by the company: Re Walter Jacob (unmarketable shares); Re Vanilla (painting "far too rosy a picture"); Re Supporting Link Alliance ("local" guide produced nationally and randomly distributed); Re Equity & Provident [2002] 2 BCLC 78 (sale of an apparent mechanical warranty in reality no such thing);

(e) promoting a business on the basis that its participants will earn a reward greater than is commensurate with the effort: Re Senator

(f) By the nature of the business facilitating wrongdoing by others: Re Senator at p. 605 ("a particular vice of such schemes is that they encourage similar dishonesty on the part of their members").

15. No consideration of what is "just and equitable" would be complete without a recognition of the statutory context in which a multilevel company or trading scheme such as Amway operates. Part XI of the Fair Trading Act 1973 was passed to address the problems created by:-

> "Get rich quick schemes [operating] on the same basis as chain letters with each member recruiting further members. Members pay out large sums in the expectation of a high return…the forecasts are derived from…the principle of geometric progression leading to theoretical levels of recruitment reward which, in reality, are impossible to achieve…"

Section 119 enabled regulations to be made. Regulations were made in 1973 and in 1989 to deal with pyramid selling schemes. They forbade the making of statements that a participant would during any period receive a specified financial benefit unless the promoter had evidence that the indicated sums had actually been obtained during the same period as a result of participating in the scheme. In The Trading Schemes Regulations 1997 the requirement to substantiate financial benefits was removed; Parliament considered that sufficient protection would be afforded to prospective participants if advertisements and any resulting contract that they signed contained warnings in this form:-

> "It is illegal for a promoter or a participant in a trading scheme to persuade anyone to make a payment by promising benefits from getting others to join the scheme.
>
> "Do not be misled by claims that high earnings are easily achieved."

16. There are essentially two routes to becoming an Amway IBO. The first is by making an individual approach (particularly through the Amway website): the second is by being recruited by an existing Amway IBO. A candidate who uses the website will immediately be drawn to a page entitled "Your Own Business". The lure is a lifestyle statement:-

> "So often life is a trade off between making the money you need and having the flexibility and time to live your life to the full. There is an alternative that puts you in control, allowing you the flexibility to work when you want, giving you time for family and friends as well as the opportunity to earn the additional income you need."

The explicit proposition that is thereby put to a candidate thus concerns choice and control, and the implicit proposition is that you can exercise this choice and control whilst still making the money you need (or even additional income). This is developed later on the webpage in this way:-

> "You can run your business to be your main source of earnings or fit around other work to provide an additional income. Whatever you decide, Amway will offer you the training and personal support that's right for you. It's your decision – you choose."

17. The website then goes on to explain the Amway Sales and Marketing Plan in these terms:-

> "Amway offers three ways to earn income from your Amway business:
>
> - you earn income from the profit margin on selling Amway products

- you can earn bonuses based on the volume of product sales that you make

- …Amway pays a Performance Bonus based on the volume of sales made by people you have introduced to the business, without taking away from the bonuses paid directly to those other IBOs."

18. At the foot of that webpage there are two clarificatory statements:-

> "Amway does not pay people for simply recruiting others. The earnings opportunity is based on a healthy combination of primarily selling products and sponsoring prospective IBOs to start their own business.
>
> It is illegal for a promoter or participant in a trading scheme to persuade anyone to make a payment by promising benefits from getting other people to join a trading scheme. Do not be misled by claims that high earnings can be easily achieved."

19. Having thus laid out its proposition the Amway website then proceeds to sell that proposition to the prospective IBO. First it invites trust by describing Amway as "one of the world's leading direct selling companies" and explaining that

> "Amway has given millions of people worldwide the opportunity to turn their aspirations into reality. Since its founding in 1959 Amway has paid out bonuses of nearly 22 billion US dollars to date."

Second, it gives a prominent place to its Rules of Conduct and its Code of Ethics which declare the relationship between Amway and its IBOs and also deal with the relationship between IBOs themselves. Each IBO must agree to "present…the Amway business opportunity to…Prospects in a truthful and honest manner…and only [make] such claims as are sanctioned in official literature."

Third, having invited trust and set out an ethical framework the website then explains how Amway IBOs earn their income. It is made quite clear that there

are two separate sources. First, the "retail margin" on products sold to the IBO's customers. Second, bonuses based on the personal sales of the IBO and a commission based on the products and services that have been sold by "other IBOs that you directly or indirectly have introduced to the business, trained and helped building their own network (Sponsoring)." But the website is careful to explain that

> "the retail margin and the bonus and commission payments will only be made when products have actually been sold to the customer. There is no payment for introducing people to the business."

It will be necessary to explain the bonus structure at some greater length hereafter. For the present I draw attention to two other features of the website.

20. The website poses the question "Does Amway really give people more free time, or does it require a lot of time to succeed?" It answers that question in this way:-

> "Like any small business, it takes hard work to succeed in the Amway business, and that requires time and commitment, especially in the beginning. But the Amway business does offer flexibility for our Independent Business Owners in running their business. Unlike most conventional jobs, Amway IBOs can work at home, when they want, at their own pace, on their own schedule, according to goals they have set for themselves."

21. Finally, there is a section entitled "Training" which addresses the apprehension that an IBO with no previous merchandising or management experience may feel. The website asserts that "the unique thing about the Amway business opportunity" is the number of people who will offer assistance to the IBO "from the corporate support team to existing experienced business owners": and the page provides links to various training materials.

Adjacent to the links are two warnings. First, a warning "do not be misled by claims that high earnings can be easily achieved". Secondly a warning in these terms:-

> "Amway does not guarantee success in business. Use of these training tools can assist you, but cannot guarantee your success. You should always use good judgment in purchasing training materials. Your expenditure for training materials should be in reasonable proportion to your earnings."

22. Before leaving the website I must make three observations. First, I have selected the website as a convenient source of statements about the way Amway sells itself to prospective IBOs. There is also a volume of printed literature which I have considered and which contains statements to similar effect. For example, in the document entitled "Introducing Amway" the following statements occur:

> "In control: you can choose to work part-time to earn an extra income or work full-time to build a new career"
>
> "We offer every IBO the same opportunity. Success is based on the time motivation and effort that you put in"
>
> "Clients who like Amway products may also become interested in the Amway Business Opportunity and may wish to become IBO's. You can share the benefits of an Amway business with other people you meet and by registering new IBO's – who also use and sell Amway products – you can increase the pool of sales on which your bonuses are calculated."

"The Amway Sales and Marketing Plan is based on a balance between the direct selling of products and services to Clients and the recruitment of new IBOs to grow your business"

"The plan does not compensate anyone for simply recruiting others. A successful Amway business is built on a balance between selling products and sponsoring other people to do the same".

23. Second, it is, of course, impossible accurately to reproduce the effect of the entirety of the website or of the literature, and I am alert to the possibility that the very process of selection may have given undue prominence to some parts (for example, warnings).

24. Third, it will be apparent from the summary I have already given of the Amway business model and from the terms of the promotional literature that a fundamental part of the business model is that existing IBOs should recruit others. As to their behaviour in that regard existing IBOs are bound by the Code of Ethics (Principle 7 of which requires the IBO only to use "Amway authorised and produced literature concerning the Amway Sales and Marketing Plan"). Each IBO is also bound by Amway's Rules of Conduct which form part of the Terms and Conditions to which all IBOs agree to adhere when they register with Amway. Rule 24A says that no IBO may issue or cause to be issued any written information to a prospective IBO unless that invitation or information is published by Amway or approved in writing by Amway. Rule 26A says that during any presentation of the Sales and Marketing Plan:

(a) an IBO must not represent that an IBO can benefit solely by sponsoring others to be IBOs:

(b) must state that IBOs are under no obligation to sponsor others:

(c) must not claim that an IBO may achieve success with little or no expenditure of effort or time:

(d) must point out that income and sales bonuses can be achieved only on the basis of continuing sales of Amway products to end clients:

(e) must point out (as regards the sponsoring part of the Sales and Marketing Plan) that income from performance bonuses can be achieved by sponsoring activities only if the sponsor continues to make sales:

(f) may indicate specific income amounts or examples, provided that they can be totally supported by the workings of the Sales and Marketing Plan:

(g) may make representations about earnings or bonus from that IBO's business, provided that the amounts are based on personal experience and can be verified:

(h) may cite examples of success, provided that the IBO can show that such benefits were obtained as a result of building a successful Amway business:

(i) must state that the principal activity of an IBO is to sell or supply Amway products (and must not represent that the sale and supply of products is incidental or secondary to the Amway business).

25. Having set out the formal position, I turn to consider how this essential part of the Amway Sales and Marketing Plan works in practice. The evidence adduced by the Secretary of State does not contain specific examples of what was said by a particular IBO to a specific Prospect in order to recruit them (a point taken on behalf of Amway, but which to my mind equally demonstrates how difficult it must be for the Amway management itself to know what those whom it encourages to recruit Prospects actually say). What can be demonstrated is the material deployed at meetings and published on websites to encourage individual IBOs to persevere and which is available to them to assist in their recruitment of others. There is a very considerable volume of such material in evidence and it suffices to give a selection (although I am again alert to the potential distorting effect of that process). In conducting that exercise it will be convenient to note whether the statement comes from approved literature, or has been specifically drawn to the attention of the Amway management, or whether it has been produced in apparent breach of Principle 7 or Rules 24A and 26A to which I have referred.

26. A substantial document produced by Britt is entitled "Your future your choice". It promotes "the opportunity to own a business that has unlimited potential", explaining that it is "an opportunity that can provide different levels of benefits, depending on your choice". It poses a question:-

> "What do you want from life? When we were at school and before we started work, we all had dreams of what we would have when we were grown up…how many people have achieved their earlier dreams? For most people their expectations have had to shrink to match their income. What would your dreams be if nobody were going to say to you "Be realistic!"…"

It then provides an answer to that question in these terms:-

> "This is an opportunity that can enable you to achieve your dreams. It's not like winning the lottery, it requires work. But you don't have to do it on your own – you will have help to enable you to achieve whatever level of success you want to reach."

It then explains the Amway Sales and Marketing Plan by reference to "an example for illustrative purposes only". This assumes that each hypothetical IBO in the example achieves a relatively modest level of sales, and focuses upon the compounding effect of each IBO recruiting others. It demonstrates that the Prospect would make an annual income of £760 from combined retail margin and performance bonus based on his or her own assumed sales. But if the Prospect recruited six others, each of whom recruited four others, each of whom recruited two others then the annual income of the Prospect rises to £17,349. It is then demonstrated that by encouraging others in the down line to recruit additional IBOs the Prospect's income can increase to £58,821 and that "once you have developed these additional IBOs you will also qualify for further bonuses…your income could exceed £66,000 per annum". The example concludes with a small box containing the statutory warning. This document was reviewed by Amway management.

27. Trevor and Jackie Lowe are successful Amway IBOs (amonst the original six recruited by Amway directly). They recruit others using Network 21. The Network 21 website quotes Trevor Lowe as saying:-

> "By diligently working my business and leveraging the Network 21 development system I was able to build the business I desire and produce a lifestyle my family and I had only ever dreamed of."

He is described as having "a thriving international business", as being able regularly to visit his children who live in Cape Town and Hong Kong, as enjoying sailing on his yacht, and as hoping to breed a classic winning racehorse. Jackie Lowe explains in her IBO Profile the life changing decision she made to become an Amway IBO and "to have a lifestyle she could never have dreamed of", able to enjoy watching and supporting her two children "following their dreams in show jumping and ballet", while she enjoys "riding beautiful horses, scuba diving in exotic locations, flying and sailing." The site explains that because IBOs are self employed the decision how much time it will occupy is one for the individual IBO but that:-

> "even a few hours a week can produce impressive results. Our secret weapon is "duplication"…"

This is a direct reference to the compounding effect of the Amway bonus structure whereby the sales of an individual IBO contribute to the bonus earned by everyone up the sponsorship line. The evidence indicates that this website (or one with identical content) was subjected to the Amway review process.

28. Another IBO organisation promoting the Amway business opportunity was International Business Systems ("IBS"). It ran a website which prominently featured testimonials. In considering this evidence I have been careful to distinguish between testimonials that may fairly be read as relating to the business itself (ie the Amway business opportunity) and those which may be referring to the training and support package (ie the BSM produced by IBS). One testimonial is from Chris and Sharon Farrier. It testifies to a belief that "if you were prepared to dedicate some time and commitment to this,

achieving anything was possible" and explains that within one year Sharon Farrier was making more money than in her full time job, allowing her to purchase her first home. It goes on to say:-

> "For the last twelve years our business has given us the equivalent of good executive size income with part time commitment."

Another testimonial is from Dr Anup Biswas which, after referring to his appointment as "a consultant" (which I read as being a hospital consultant), explains that under the guidance of his up line sponsors "there have been many intangible benefits while my income continues to climb to replace my full professional salary".

There are many others with the same tenor, speaking of life changing decisions and the ability to eliminate all debt. The IBS website was reviewed by Amway in February 2003; Amway's internal documents demonstrate that the Amway management had concerns that the "business opportunity" referred to in the site was not explicitly identified as the Amway Sales and Marketing Plan, and that there were inappropriate references as to income. Notwithstanding those concerns Amway did not invoke Principle 7 or either of the Rules in relation to the IBOs who promoted the IBS site, and it remained fully operational in an unaltered form at the time of the investigation into Amway's business. IBS also produced a booklet called "How it works" which is full of statements that are completely contrary to the guidance contained in Amway's European BSM Training Manual. A few examples suffice. The Manual says that statements about "financial independence" are indirect income representations and "cannot be used": the Booklet states that one of

the things the Amway business will enable you to do is "becoming financially independent". The Manual says that the Amway business plan should not be promoted as generating a "residual" income: the Booklet tells the prospect that "you can develop a large homeshopping and e-commerce business that creates a residual income that comes in month after month whether you are able to be there or not". The Manual says that describing the business opportunity as leading to "security" is a misrepresentation: the Booklet is crammed with such statements.

29. The Amway business opportunity was also presented at open meetings, with the assistance of literature or power point presentations. Naturally they vary in content, but there are some constant themes. I will select the presentation by Winbiz.21. It is headed "Prospecting Script", and suggests various questions to "encourage conversation and find out what their dream is". It then draws a distinction between "earned income" which is described as "selling time/working for money" and "residual income", the characteristic of which is that "money works for them". Into this second category is put "[the] independent business owner with a business system". It suggests that the objective is to "build organisations of people to do the same, developing a residual income from self use and building organisations of self users" which involves "no selling of products", "minimum investment" and "massive potential residual income". It is not clear from the evidence whether Amway reviewed or approved this particular script. But it is clear that Amway did review and approve a similar Winbiz.21 script which contained the following statements:-

> "Take a few moments to consider your present lifestyle. Are you totally content with the quality time you have with your family? Is your present income giving you some of the luxuries you think you deserve?"
>
> "With the right business structure you can share in the profits of millions of pounds already being spent. A profit growth that will only accelerate in the years ahead. Depending on one's reason or one's desire, this system can be developed to create anything from a small secondary income to a bracket which would rate in the top two per cent of money earners today. This top bracket is now being achieved by people in the same time as it takes to study for a university degree."
>
> "You can continue as you are or you can take your first step to secure your financial future."

These statements were authorised by Amway for release on 21 September 2005. For convenience I at this point note that by that date the Amway management had available to it the results of a survey which showed that the average annual income of their Platinum level IBOs (a senior level with an established down line) was £11,910.

30. On 27 March 2006 two of the investigators in fact attended an open meeting organised by Network 21. The presenter told the meeting that someone dedicated to the Amway business could reach the senior platinum level in about six to twelve months earning £20,000, that after two or three years an active IBO could expect to make £45,000 per year, and that someone who reached the most senior level could expect to make £120,000, and that "the money we get for this is fantastic for what we do" (which must be a reference to the "secret weapon" of "duplication"). Mr Steadman gave evidence (which I accept) of similar statements at other meetings.

31. The evidence establishes that such statements are likely to have had significant influence on Prospects in persuading them to become IBOs. Amway

distributes questionnaires to a sample of its new IBOs. Surveys conducted in July 2005 and October 2005 produced responses from people who had been IBOs for between three and six months. Each respondent was asked to write on a scale from 1 to 5 (where the value 1 meant "of no importance" and 5 meant "extremely important") the importance of various factors in deciding to become an IBO. "Long term income potential" scored 4.7, "to improve my lifestyle" scored 4.5, and "to fulfil my personal dream" and "to supplement my current income" each scored 4.3. (These results are in line with another Amway survey conducted over the period 2003-2005 which established that 85% of respondents regarded "earn[ing] an additional income" as very important, and 79% so regarded "improv[ing] lifestyle"). However the written responses indicate that amongst the population of IBOs of three to six months standing are those for whom there were non-financial considerations. For example one respondent answered, "I am a new person because of this business opportunity" and another "I have chronic fatigue syndrome. This business allows me to work at my own pace and I am happier and healthier because of this". It is not possible to ascertain to what extent these views are representative: but their existence must be acknowledged. Likewise there are amongst this population of IBOs some who are concerned by the balance between selling and recruitment. For example one respondent answered:-

> "We started the business to sell products because we believed in them. Yet no interest is shown by Amway and its up lines to selling them to the public. All Amway is interested in is selling tickets to IBOs who are not making any money…"

Another responded:-

> "We joined to sell products and we have been told recently we focus too much on selling the products. My mother has made a huge profit from selling Avon and only attends annual meetings for Christmas and special presentations and it costs her hardly anything. So our suggestion to Amway is sell your products to the general public and make money from them and not to your IBOs who joined to supplement their income."

32. It has been necessary to deal in detail with the way in which Prospects are invited to become and do become IBOs because it lies at the heart of the Secretary of State's case on inherent objectionability. I turn to record my findings of fact as what happens when a Prospect becomes an IBO, dealing shortly with matters of less significance, but again having to deal at some length with those matters on which the Secretary of State particularly relies.

33. When an IBO signs up he or she receives a Business Starter Pack from Amway at a cost of £28 (and there is an annual renewal fee of £18). The pack contains all necessary brochures, order forms, receipt pads, price lists and product information sheets. In addition it contains some material designed to assist in the operation of the IBO's business. (An Amway survey indicates that over 2/3^{rds} of newly recruited IBOs also purchase tickets for training/motivational meetings and over half purchase Amway brochures) .

34. It is the unchallenged evidence of Malcolm Humphry, the Director of Finance for Amway that the £28 fee is not a charge for the right to register as an IBO, but is a charge to cover the costs of the literature and other material in the Business Starter Pack. It is simply paid into Amway's general business account and is not directly used to fund performance bonuses. Other direct selling companies also charge initial fees (ranging from £15 for Avon representatives to £120 for Virgin Vie representatives), some of which

35. To obtain the Business Starter Pack the IBO will have signed the documents contained in the registration pack. These would have included the Rules to which I have already referred. The Pack also contained certain Policies and some Terms and Conditions. Amongst the Policies was "IBO website policy" which made clear that any site generated by an IBO for use in support of and the development of his Amway business must receive the formal written approval of Amway before it is put in the internet. The Policy also provides that "zero tolerance will be applied" to the making of income representations or sales plan depictions unless they have been expressly authorised in writing by Amway. The Terms and Conditions contain (in clause 8) provision for termination. The IBO can at any time and for any reason and without penalty withdraw within fifteen working days of acceptance of his registration by Amway. In that event, Amway is bound to refund any monies paid for the Amway registration pack, refund the purchase price for any products

36. The registered IBO also became eligible to derive income from the "retail margin", from the "performance bonus" and to sponsor his or her own IBOs (with the prospect of deriving a commission from their sales).

37. The "retail margin" will vary depending on whether the manufacturer is Amway or a third party. The amount actually earned will depend on whether the IBO can sell the product at full list price. There is some evidence to suggest that Amway goods were overpriced (and indeed Amway made very substantial across-the-board cuts after the commencement of the investigation, reducing its homecare products range by 48% and its personal care products by 29%). But this case has not been about product pricing, and I make no findings. But for the purposes of this judgement I have not assumed that the "retail margin" will be 30% on sales, but rather adopted the approach that it will in reality be less significant as a source of income than it appears on paper to be. I have also taken into account that in truth only about 9% of registered IBO's are actively involved in retailing, accounting for some 40% of

purchases (figures derived from averaging material provided in reports by KPMG in 2001 and 2004). 60% of Amway's sales are therefore to the remaining 91% of IBOs for the purposes of self-consumption, and such self-consumers seem to spend on average about £1000 pa .

38. I turn to the bonus structure: the structure is complex and it is unnecessary to burden this judgment with its minutiae. An IBO is not required to make a minimum quantity of purchases or to maintain a specified inventory. But every item that is purchased by an IBO (whether for sale, thereby earning the retail margin, or for self consumption) carries with it a points value ("PV") that varies depending upon whether the product is an Amway own label product or is produced by a third party. The bonus is earned by reference to the PV on purchases from Amway. There are potentially two elements. First, there is the IBO's "personal volume" (that is, the monthly purchases of that individual IBO). Second, there is the "down line volume" which is the aggregate of the personal volumes of everyone in that IBO's down line(s). An IBO's personal volume and down line volume are together known as "the group volume". Bonuses are earned by reference to the achievement of particular thresholds, assessed on a monthly basis (with no carry forward from month to month) e.g. if an IBO purchases products with a cumulative PV of 200 then a commission of 3% is payable. Thus, to take a very simple example, assume A recruits three new IBOs (A1, A2 and A3) and in a month each of them orders product from Amway with a PV of 100. A1, A2 and A3 will earn no bonus. If A1 has sold the entirety of the product purchased to customers then A1 will have earned the "retail margin" on those sales (whatever that is). If A2 has self-consumed the entirety then no "retail margin"

will have been earned, but A2 will have effectively acquired the goods at "wholesale" price, (though it has been no part of the case to compare that "wholesale" price with the retail price of comparable products available from a supermarket). However, A will add his personal volume of 100 PV to the "downline" volume of 300 PV from A1, A2 and A3 to produce a group PV of 400, thereby earning a 3% commission on his personal PV.

39. The bonus structure is such that there is a succession of thresholds (each 3% higher than the last) from 3% to 21%: but the thresholds are not evenly spaced being at 200 PV, 600PV, 1200 PV, 2400 PV, 4,000 PV, 7,000 PV and 10,000 PV. These thresholds mean that a refinement can be introduced to the bonus system (called "the differential bonus"). It is best illustrated by a modification to the very simple example I have given. Assume the same structure, but assume that in the given month A has purchased Amway product with a PV of 200, A1 and A3 have again purchased product with a PV of 100 but A2 has now purchased product with a PV of 200. A1 and A3 will earn no bonus (being below the 200 PV threshold). A2 will earn a 3% bonus on personal volume (being at the 200 PV threshold). A will earn a 6% bonus on personal volume because A's group volume (200 + 100 + 200+100) is at the 6% threshold. A2 has no down line so there is no question of a "differential bonus". A's downline consists of A1, A2 and A3: and there is the possibility that he can earn a "differential bonus". A has earned 6% commission and A1 and A3 0%: the difference is 6%, so the "differential bonus" is 6% and A earns a 6% commission on A1 and A3's sales. Looking next at A2, A has earned 6% commission on his 200 PV, and A2 has earned 3% on his 200 PV. So A gets a "differential bonus" of 3% on A2's product purchases. So in this

example A1, A2 and A3's sales have (a) supported A earning a commission rate on his personal volume in excess of that which would have been earned by reference to the personal volume alone: and (b) have enabled A to earn bonuses on something other than his personal volume (ie A1, A2 and A3's down line sales). In neither case has the fact that A has earned these enhanced commissions *reduced* the commission that would otherwise have been payable to A, A2 and A3. What has happened is that Amway has decided to pay a 6% commission on group sales of that size, but not to allocate it equally between all members of the group.

40. It is necessary to note one further refinement to the bonus system and then to comment on a separate reward system. In the example I have used A's points threshold was above the threshold of each of A1 A2 and A3. Assume now that A2 himself recruits two new IBOs (A2A and A2B) each of whom makes purchases in a month with a PV of 200. A's group sales are now worth 1,000 PV (200(A) + 100(A1) +200(A2) + 200(A2A) + 200(A2B)+100(A3)). This earns him a 6% bonus (the band between 600 PV and 1200 PV) on his personal volume. It continues to earn him a 6% differential bonus on A1 and A3's sales. But A2 now has a "downline" with a PV of 600 for his "group", which puts A2 in the 6% commission band. There is thus now no differential between A and A2, so no "differential bonus" is paid to A in respect to A2's group purchases. To restore the differential (and so to earn commission on the purchases made by A2's down line) A must increase his group PV to above the next threshold (1200 PV) by earning an extra 200PV. He can do this by increasing his own personal volume by 100% (increasing it from 200 PV to 400 PV). Or he can encourage A1 and A3 to make a greater contribution to

the group either by increasing their personal volume, or by encouraging them in turn to recruit an IBO each of whom equals A1's modest sales effort of 100 PV. Or A can go and recruit A4 and start a new down line. In principle it would appear that A's persuasive powers were better directed to making one more recruit than to making one more sale. A detailed worked example in the evidence of Mr Steadman (first affidavit paragraph 2.5.26 (c)) demonstrates that it is to the advantage of an IBO to produce his group volume through more rather than fewer sponsored or recruited IBOs thereby maximising the difference between his own group volume and the group volumes of each of the IBOs sponsored by him. Mr Chivers QC put it this way in submission: within the bonus structure there is an incentive to create breadth as well as depth because an IBO always needs to stay ahead of each person in the level below, otherwise they will be squeezed out by the "differential bonus" mechanism. There is thus a constant drive to recruit throughout the system.

41. The maximum performance bonus payable to an IBO under this scheme is 21% of group volume. Once that ceiling is reached there can be no increase in commission rates (though, of course, the group sales on which that commission is paid can continue to grow). But the bonus scheme has an inbuilt limit on that because once the group sales of any individual down line (for instance A2's down line in my example) reached 10,000 PV, so that A2 becomes entitled to 21% commission and the differential bonus as between A and A2 disappears, then A2's group sales cease to count towards the calculation of A's bonus, and A2's down line is effectively "spun off". A then becomes eligible for higher awards (Silver, Gold, Platinum, Sapphire, Emerald and Diamond). It is unnecessary to give a detailed exposition. It suffices to

note that at these levels award holders will be involved in minimal direct sales activity and will be being rewarded to a substantial extent by what is called in the BSM "residual income", will be focussing on the recruitment of further "downlines" to replace those "spun-off", and will tend to be significantly involved in the production of BSM (which can be sold to IBOs in their down line) with a view to increasing that residual income.

42. Having set out the structure I turn to my findings of fact as to what, in truth, this structure produces for individual IBOs. The case for the Secretary of State is that the reality of the Amway business is that the nature and rewards of becoming an IBO and participating in that business are such that only a very small number of IBOs make any significant money from their participation. In fact, the substantial majority of IBOs make no money and indeed by reason of their payment of the registration fee and the annual renewal fees, lose money from their participation. In its Points of Defence Amway does not assert that this is not so, nor does it run any positive case. It merely puts the Secretary of State to proof. The Secretary of State proves the case by statistical analysis. For the period from 2001 to 2006 (a) 95% of all bonus income was earned by just 6% of the IBOs; and (b) 75% of all bonus income was earned by less than 1.5% of IBOs. In 2005–2006 there were 39,316 IBOs who shared a bonus pot of £3.427 million. But of this total, 27,906 IBOs (71%) earned no bonus at all, and 101 IBOs (0.25%) shared £1.954 million between them. That leaves a group of 11,309 IBOs to share a bonus pot of £1.473 million. Within that category there was a group of 7,492 IBOs (earning 3% commission) who between them shared £101,400. This gave them an average annual bonus income of just over £13.50, a sum less

than the annual renewal fee of £18.00. (I do not, of course, overlook the "retail margin" earned on product purchased from Amway and not self consumed: but the 3% commission is earned when the monthly points value is 200 PV, so the total retail margin, allowing for self consumption, and even assuming full-price sales, will be low). If one were to represent this bonus distribution on a graph with a central vertical axis containing the commission bands (with 0% at the base and 21% at the top) and the horizontal axis calibrating the number of people in the class, then the bar graph would resemble not a pyramid but a candle stick, with a large solid base of IBOs who earned nothing or virtually nothing and a thin column of IBOs arising out of it who earned 6 to 21% commission. A feature of that graph would be that the group at the top of the candle would be those who had been IBOs longest. So Trevor and Jackie Lowe earned a total bonus of £141,000 (having been IBOs since 1979). Of that bonus only £1,788 related to commission on their personal volume (which suggests that they had personally purchased about £8500 worth of product in a year for on-sale to their own customers). £30,000 was attributable to the differential bonus earned on sales made by their down line, and the rest was attributable to the higher awards scheme to which I have referred. The Stranneys earned a total bonus of £59,142. They too had joined in 1979. The bonus payable on their personal purchases was £1,963. The differential bonus earned on sales by their down line was £15,660. The balance was made up of the higher awards to which I have referred. The Melvilles earned a total bonus of £32,058. They joined in 1980. The bonus earned on their personal volume was £788. The differential bonus earned on sales by their down line was £20,078. The balance was made up of the higher

awards. On the other hand at the base of the candle stick are almost all the recent joiners together with a very considerable number of people who have been IBOs for years, but not made a financial success out of their business.

43. The picture can be presented in a variety of ways: but it is consistent. Between 2001 and 2006 the proportion of IBOs not earning any bonus income varied between 69% and 78%. In year 2004/5 only 74 out of 25,342 IBOs earned over £10,000 by way of bonus. In that year only 4,076 IBOs earned enough bonus to cover the annual renewal fee: 21,266 did not even cover their most basic running cost from bonus payments (though there may be retail margin). If very modest business expenses are factored in (say £100 on petrol or the purchase of BSM) the picture is even starker with only 1,820 IBOs making sufficient from bonus payments to cover those expenses and 23,521 IBOs failing to do so. In the period from 2000 to 2005 Chris and Sharon Farrier's bonus income ranged from £21,495 to £7,971 and averaged £12,850. Over the same period the income of Dr Anup Biswas ranged from £137 to £433 and averaged £306. These are the people whose testimonials said respectively that they were earning "the equivalent of good executive size income", or was deriving an income that "continue[d] to climb to replace my full professional salary".

44. Fairness requires two matters to be noted, however. First, whilst this is the overall picture presented by the statistics there are individual cases which demonstrate that the norm is not the invariable rule. Looking at the snap shot in the year 2004/2005 an IBO called Hardy earned total bonus payments of £34,275 (ranking 16th overall) but had only been an active IBO for six years.

An IBO called Singh had bonus payments of just under £29,000 but had been an IBO for only three years. An IBO called Kurian earned bonus payments of £25,400, but had only been an IBO for just over five years. An IBO called Areje earned just under £19,000 with very substantial direct selling in under two and a half years. Likewise an IBO called Grant earned bonus of over £15,000 with very substantial direct selling in just over two years. But Singh and Areje were two in over 30,000 who had joined in that period.

45. Second, graphically as these figures were presented by the Secretary of State, this case is not about whether the Court approves of the way Amway chooses to divide up amongst its sales force the commission it is prepared to pay on sales of its products.

46. Amway could not fail to be aware both of the pattern of bonus distributions under the system it devised or of the general level of payments to IBOs: and it was also aware of the consequences. Thus in an Overview conducted in 2003 it was noted:-

> "New [applicants] are signed up and then tend to be neglected. IBOs are more concerned with recruiting down lines, rather than encouraging and managing their new customers, thereby maintaining a longer term benefit."

At a meeting of Diamond Award holders in September 2005 to consider fresh promotional material the minutes record:-

> "…various concerns with the income opportunity, demonstrates very low in the first year. A hard working IBO should be working 30 hours per week. This has the potential to motivate and the potential to destroy. Feedback is that the number of hours should be taken out and the overall package should be attractive. £21K is not a very exciting story. Look at the overall potential ie Emerald, Diamond etc. The public want more free time, not more money. People buy the dream. They

are attracted to the alternative lifestyle. Vast majority of people haven't achieved."

47. The evidence of Mr Berry, the director of the Direct Selling Association establishes that in general 52.2% of direct sellers have been in the business for less than two years. This indicates a very high turn over rate. Mr Berry explains that maintaining the motivation to persevere is the biggest hurdle a direct seller will face. In consequence the turn over rate is often close to 100% (which Mr Berry says is similar to many low paid retailing posts in shops, pubs and similar establishments). Such turn over is facilitated by the ease of joining and leaving, coupled with the modest investment at risk. Amway's experience reflects this. In 2001-2 5,690 people joined but 10,149 left. In 2002-3 6,525 IBOs joined and 8,000 left. In 2003-4 the situation was in balance, but since then there have been more joiners than leavers, the position in 2005-6 being that 12,561 people joined and 8,756 left. It is worth underlining that a 100% turnover rate does not mean that everyone who joined in that year left: it simply means that the number of joiners in any given year is matched by the number of people *throughout the system* who leave in that year. The important point to draw from this in the present context is that, on the footing that Amway is in business to sell products to customers (which is what it asserts) then it has to maintain a body of people to buy its products and (hopefully) sell them on: and what it has effectively done is to outsource this recruitment to its IBOs. The existing IBOs effectively act as gang masters, the gang master being rewarded under a system which rewards him or her more highly for the assembly of a gang (the "downline" with the aggregation of the group volume to produce ever higher commission rates) than for the direct selling of product.

48. On the facts as I have so far found them I would have considered it just and equitable to wind Amway up. I would have done so on a narrow ground which it is necessary to identify.

49. I begin by clearing some undergrowth. It has not been any part of the Secretary of State's case that multi level marketing schemes in general are inherently objectionable. It is true that by their very nature they run certain risks, and if those risks eventuate then grounds may exist for petitioning the Court on the just and equitable ground: compare Secure and Provide plc [1992] BCC 405 at 406 b-c where Hoffman J referred to the scope for fraud and misrepresentation inherent in any pyramid selling structures. But the existence of risk is not itself enough: the same might be said of almost any business model, since none can be absolutely free of risk to the general public.

50. Nor has this case been (as it might have been) about the volume of BSM produced by Amway or by the organisations (like Britt and Network 21) formed by its senior IBOs and profitably peddled to a captive audience of non-achieving IBOs. Mr Cunningham QC did not open the case in that way and it is not the case which Mr Chivers QC has had to meet at trial.

51. Nor can it be said with any degree of seriousness that Amway is a form of "snowball" scheme, by its very nature and the principles of mathematics destined to oblivion to the financial loss of its ultimate participants. It has survived as a business model for some thirty years. It has survived for some months notwithstanding a moratorium on recruitment of IBOs during the present litigation. It survives by selling its product to IBOs – for self consumption or for on sale to the public. The unchallenged evidence of Mr

Humphrey is that for an IBO to sponsor some-one who does not make sales is of no use to Amway (though on the evidence as a whole I would modify that statement to read "someone who does not make purchases for self-consumption or retail sale is of no use"). It is true that the market for toothpaste and washing up liquid, for carpet cleaner and face cream is in a sense finite: but that makes Amway no more destined to oblivion than any high street retailer of those products. Of its anticipated income of £13m in 2007 90% is derived from product sales, and the balance from handling charges, third party commissions, and fees payable by IBOs. There is no evidence that the absolute key to its survival is the collection of the modest initial and annual renewal fees, the sale of product catalogues and BSM, so that in reality it exists for and because of the sale of participations themselves. (On the contrary, the fact is that the income collected from initial fees only covers the costs of the materials provided in return). That is not the way the case has been run.

52. It is true that Amway faces serious and sustained financial difficulties. From October 2000 to December 2005 it has consistently made losses ranging from £1.48 million per annum to £4.31 million pounds for a slightly longer financial period (and averaging some £2.9 million). Amway is dependent upon the support of Amway (Europe) Ltd (which in turn derives most of its income not from a commercially successful European operation but from dividends payable on its shareholding in Amway Korea). But this simply makes Amway unprofitable unless it makes product sales, not bound for an inevitable end.

53. What this case has been about is the disparity between the dream that is sold to and the reality of the opportunity that is gained by an IBO: and the key issue is whether the manner in which that comes about poses such a risk to the public that, even having regard to the private interests of the shareholders, employees, existing IBOs and customers of Amway, the company should be compulsorily wound up.

54. I would have answered that question in the affirmative having considered the following matters:-

(a) The Secretary of State has not adduced any direct evidence to prove that any individual IBO was actually misled as to the opportunity afforded by the Amway Sales and Marketing Plan. Indeed, the unchallenged evidence of Sue Cox was that over a fourteen year period at Amway not a single IBO had ever complained to the Business Conduct Department that he or she had been enticed to become an Amway IBO on the basis of "easy money" or the prospect of substantial financial rewards based on little or no effort. She also said (and I accept) that there were only two written complaints which concerned the presentation of the Amway business opportunity in the five year period from January 2001 to December 2005. But that proves only that there were very few formal complaints.

(b) On the other hand the statistical evidence strikes me as compelling. In weighing that evidence one must not, of course, be blinded by the statistics. They present a picture of the position as it is, but do not themselves provide an explanation of what has brought that situation about. As Mr Chivers QC says, the fact that the vast bulk of IBOs make

virtually no money *may* have been brought about because the vast bulk of them choose to put in virtually no effort. It may well be, as he submits, that they are entirely rational beings who make the deliberate choice to become IBOs but not actually seek to derive an income, content simply to self-consume. But I find that speculation deeply unsatisfying. In terms of what is possible it is equally possible that many IBOs are seduced by a dream, find the reality of the Amway business opportunity very different, for reasons of self-esteem will not admit failure, and end up simply as purchasers of Amway products for self-consumption. In terms not of what is possible, but of what is probable, it seems to me highly improbable that such large numbers of people signed up to the Amway business opportunity in order not to make any money (or even to lose it) – especially when the survey responses indicate that long term income potential, improvement of lifestyle, fulfilment of personal dreams and supplementing of current income are regarded as very important to joiners. I think the probability is that the reality turned to be different from the expectation.

(c) I would accept the submission of Mr Chivers QC that it would not be accurate to describe the Amway business opportunity as "illusory" in the sense that no opportunity actually existed. In my survey of the evidence I have recorded some instances of those who did have some success. But they are the equivalent of one in many thousands. If the reality of an opportunity is fairly presented, members of the public are free to try and free to fail: and the mere fact that some do fail would not compel the conclusion that the opportunity was not being fairly presented. But if

almost all do not achieve then I think the inference is fairly raised that the disparity between expectation and experience arises from a failure to make a fair presentation of the actual (as opposed to the theoretical or exceptional) chance of success.

(d) More caution is needed in addressing Mr Chivers QC's submission that wherever an IBO appears in the structure that IBO has exactly the same real prospect of success as those above him and below him, and that every new recruit has the same opportunity and prospect as every other IBO. I do not think that that is justified by the evidence and I do not think that it is a necessary consequence of the structure of the business. Like chain letters and pyramid schemes generally the opportunity for each new level of recruits is diminished by that already exploited (or disaffected) by the level above. Moreover, the whole system is designed to encourage those in the level above to recruit competitors for the level below.

(e) The evidence suggests to me that large numbers would not have joined Amway to achieve the actual outcome; and that whilst the opportunity they acquired was not totally illusory, it may well have been oversold, because IBOs are sold a dream which in reality they have no genuine prospect of attaining.

(f) In my judgement the material produced by Amway itself cannot be categorised as containing misrepresentations of that type of such seriousness as to justify winding up. Amway is openly selling a proposition to prospective IBOs, not providing careers advice. In inviting people to make a modest financial but a significant personal commitment

it has a legal duty not to misstate the facts on which the decision to commit will be made. By a fine margin it has complied with that duty. In making that assessment I leave out of account the undoubted fact that for the first six months there is a relatively painless exit route for an IBO. A company cannot justify misstating what it offers by saying that when the truth is discovered it is easy to leave. It is the statements or representations themselves that must be judged. Each of the statements made in the Amway website and literature on which the Secretary of State places reliance is literally correct (even if it might tend to convey an impression that what was being offered was a real prospect of an alternative career or of an additional income). Even if some might read the literally true statements as implying rather more than they actually state about the prospects of success Amway's material contains repeated statutory warnings that high earnings are not easily achieved and clear and repeated statements that earnings depend on the investment of time and effort. These are the statements which Parliament (having considered the position) thought in enacting the Fair Trading Act 1973 and approving the Trading Schemes Regulations 1997 were sufficient to convey an adequate warning to those considering such material. Provided that there is no actual misrepresentation, it is not for the judiciary at the invitation of the executive to say that Parliament has got it wrong. If clearer and more stringent warnings are required then better Regulations must be passed. (On this issue reference may be made to the observations of Neuberger J in Re Delfin [2000] 1 BCLC 71 at p.97b).

(g) But I consider that on any fair reading of the promotional material produced by the IBO organisations or spoken to at meetings it is clear that substantial actual misrepresentations were made to prospective IBOs (such as could not be redeemed by any statutory warning, even if one was present) - misrepresentations about what had actually been achieved, was currently being achieved and what could realistically be achieved by new joiners.

(h) The question is to what extent should the consequences of the making of these statements be visited upon Amway. Mr Chivers QC invites me to note that none of the materials is alleged to have been created or promulgated by Amway or under the control of Amway or pursuant to instructions from Amway. He draws to my attention the Terms and Conditions which bind individual existing IBOs, the Code of Ethics to which I have referred, and the policy on presentations embodied in the literature which Amway sends to its IBOs. But these formulaic statements can be of no avail if their content is not actually applied: they are purely cosmetic. The evidence shows that these Terms and Codes and Policies are not effective. Amway itself does not apply them (as evidenced by its approval of the some of the statements). When Amway disapproves, it does not enforce that disapproval. So much is admitted in Amway's evidence. Susan Cox was employed in the Business Conduct Department at Amway's head office. Her evidence is that the Business Conduct Department did not always have the capacity promptly to review new and revised BSM at the rate at which it was submitted, with the result that such material could remain in the review process for up to two years.

During that review period it appears from the evidence that the material is in circulation. Mr Mark Beiderwieden (a Director of Amway, and a senior Vice President and Managing Director (Europe) of the Amway Group) frankly acknowledges that "there may have been issues in relation to the implementation and enforcement of the [European BSM Policy]". Mr Denham (the new General Manager of Amway) acknowledged that the system for enforcement of the Terms and Conditions was "an ineffective process in many respects". In my judgment Amway bears direct responsibility for the statements which it approved or which it failed to subject to a proper review process to ensure actual compliance with the position formally stated on paper.

(j) Mr Chivers QC submitted that this was a failing in management rather than a demonstration that the business was inherently objectionable. I do not agree with the distinction being drawn. This is to give the description "inherently objectionable" a life of its own, and to deconstruct the concept. In my judgement it is open to the Court to wind up a company on the "just and equitable" ground if it is managing its business in a way that does not accord with generally accepted minimum standards of commercial behaviour and so is against the public interest. The BSM material made serious misrepresentations in relation to a key part of Amway's business.

(k) But there is a body of BSM material provided to and presentations made to IBOs and prospective IBOs about which Amway says it did not know. Miss Cox puts it in this way:-

> "Amway is not the police. There are over 30,000 registered IBOs in the UK. We cannot be expected to attend every meeting, seminar or talk; to listen in to every conversation between IBOs; or to anticipate when BSM is about to be produced, updated or amended. Business Conduct can only act on the information supplied to it…"

Mr Chivers QC submits that this cannot be weighed in the scale.

(l) He submits that the Secretary of State cannot maintain a case that Amway ought to have had knowledge of the promotion of its business to prospective IBOs and failed to take adequate steps to supervise that presentation where no proper particularisation of the allegation has been given and the Secretary of State has elected not to put the allegation to any of Amway's witnesses. I do not agree. To my mind the point is not whether Amway is vicariously liable for statements made by independent IBOs, or whether such statements are constructively Amway's statements. Recruitment of new IBOs by existing IBOs is a key part of Amway's business model and of the business opportunity that is presented to each IBO, backed by the incentives in the bonus structure which is so designed as to encourage IBOs to generate further down lines. It seems to me that in asking myself whether it is just and equitable that Amway should be wound up for misstatements or misrepresentations made in the course of that recruitment process, as a matter of justice and equity Amway cannot reap the benefit of such misstatements or misrepresentations without accepting the proper consequences flowing from the means by which that benefit was obtained. It permitted itself to be surrounded with a penumbra of impropriety, and took the advantages to its business thereby gained. To be weighed in the scale is not only its own wrongdoing, but wrongdoing

by those whom it encouraged to undertake recruitment in a way that it knew could not be adequately supervised or regulated, and for which it provided no training. Running a business in such a way that it encourages wrongdoing by others is a determining factor in the balance. The damage to creditors through winding up is a price that has to be paid to secure the ending of the risk to the public. The damage to participants weighs lightly, since those who would suffer most from the winding up are those whose improper conduct created the ground for winding up.

(m) This also is the answer to a further submission of Mr Chivers QC that to justify winding up on the just and equitable ground the wrongdoing must be by "the directing mind" of the company and not a mere management malfunction, a proposition for which he accepted there was no clear authority but which he submitted was hinted at in Equity & Provident (supra at p. 102). I do not agree that there is any such principle. If the business model entails a risk of impropriety, the impropriety occurs and the company thereby secures an advantage, it matters not whether the impropriety itself occurs by the will of any "directing mind". To suggest as much is to elevate the convenient label of "*inherent* objectionability" into a form of legal test that section 124A itself does not contain.

55. I have paused to make provisional holdings on part only of the evidence because of an issue that arose between Mr Cunningham QC and Mr Chivers QC on the law. I resume my findings of fact.

56. As I indicated at the start of this judgment, in October 2007 Amway revised its business model. Its sales had been falling since the early 2000s: partly

because the economy was strong (meaning that people were less likely to be motivated by a need for extra income), partly because of the growth of internet shopping, and partly because sales were affected by unfavourable media attention and "IBO leaders who did not work closely with the company" (to quote the evidence of Mr Humphrey). Amway was beginning to react to this: but I am in no doubt that the real spur to action was the commencement of the Secretary of State's investigation. As a result (to quote Amway's evidence) :-

> "Amway has now addressed BSM issues robustly and effectively and, at the same time, has introduced a new business model which is retail and customer focused and which has the full support not only of Amway Group's senior management but also its employees in the UK and, most importantly, a considerable number of people who want to be able to be an Amway Business Owner."

This evidence was not challenged by the Secretary of State (though it was the subject of comment). The revisions are set out in detail in the evidence filed which was fully formulated, comprehensive, open and transparent. Amway submit and its evidence asserts that it is capable of effective and ongoing implementation without the supervision of either the Secretary of State or the court: but it offers undertakings to the court in any event.

57. In summary, the changes effected are as follows:-

(a) Amway has recruited a senior management team with direct UK experience, and in particular a general manager who has identified a need to assert central control and to dilute the influence on the organisation as a whole of the senior IBOs:

(b) Amway has re-designated existing IBOs as "Amway Business Owners" (ABOs) and devised a tiered qualification system as "retail consultant",

"certified retail consultant" and "business consultant". The retail consultant is the basic level, with a defined role to find customers for Amway products. The retail margin has been abolished (to discourage people remaining as retail consultants but simply self consuming). The bonus system has been revised to provide (in effect) a 25% commission on all sales once a sales target has been achieved. The retail consultant has a pure sales function and cannot sponsor anyone to become an ABO. A retail consultant may (but is not obliged to) become a certified retail consultant provided they have an established customer base. Qualification consists in the completion of an online certification test set by Amway and aimed at ensuring a full understanding of the Amway business model. This is followed by mandatory personal training. A certified retail consultant must maintain his or her own customer base (five customers with a through put of £200 per month) but is authorised to recruit other ABOs. A certified retail consultant will earn a marketing plan bonus income (the details of which are not material, but are very similar to the existing scheme). A certified retail consultant on reaching an income of £7,000 over a twelve month period (only a modest part of which, of course, need be derived from direct sales, and the bulk of which is likely to be derived from the marketing plan bonus income ie the down line) may become a business consultant. A business consultant must maintain a customer base but takes on an enhanced leadership role in motivating, training and supporting those in his "downline" (for example, in relation to the introduction of new products).

(c) All BSM deployed by certified retail consultants and business consultants will be rigorously controlled by Amway, and it will be impermissible for any profit to be derived from its production or dissemination. Thus the scope and incentive for third parties to misrepresent the business opportunity will be significantly reduced (and, incidentally, ABOs will not be pressured into buying BSM in excess of their reasonable needs).

(d) All new ABOs will be required to undertake an orientation programme operated by Amway. This will significantly reduce the risk that they are joining on the basis of any misrepresentation or misunderstanding as to how the business works, or have not been given the requisite warnings. Whatever has been said face to face, or at a meeting, or in any material that has been produced by recruiters but is not known to Amway will necessarily be assessed by the new ABO against accurate material produced by Amway.

(e) Amway will publish earnings information prior to allowing the recruitment of new ABOs. Amway has some experience of this having been the subject of a Commission Order of the United States Federal Trade Commission in 1979 requiring it to make such disclosures in that jurisdiction. Amway's evidence in fact resisted the idea of unilateral income disclosure (ie that Amway should do something that other direct sellers were not compelled to do): and the unconditional offer of income disclosure was in fact only made at trial. Its form was set out in a draft undertaking.

(f) Finally, under the new business model both the "registration fee" and the "renewal fee" cease to be chargeable.

58. The Secretary of State did not subject the new business model to a detailed critique: nor was any suggested deficiency in it put to any Amway witnesses (none of whom was cross examined). Mr Cunningham QC simply submitted that it was not very different from the old model and that I could not trust the Amway management. I reject the first submission: in my judgement the new model makes radical changes, bringing into greater prominence the retail nature of the business, eliminating the attraction of recruiting self-consumers, asserting proper control over what is said, providing a mechanism for correcting any misstatements and not requiring any initial financial commitment. I do not consider the second submission open: I had been invited to accept the Amway written evidence at face value, and I have not seen any of the intended senior management give evidence and certainly cannot form an adverse view of them.

59. The question arises what impact the change in the business model has upon the decision that falls to be made whether it is just and equitable to make a winding up order. Mr Cunningham QC submitted that guidance was to be found in Re Walter Jacob & Co Ltd (*supra*). He and Mr Chivers QC agreed that the following passages were material:-

> "In considering whether or not to make a winding up order…the court has regard to all the circumstances of the case as established by the material before the court at the hearing" (p351i).
>
> "A petition having been duly presented…the next stage is when the petition comes before the court. At this second stage the court is concerned with the whole of the evidence before it, and

> the submissions made thereon by the parties. The court is not concerned with what was the material before the Secretary of State at the earlier stage when he formed his opinion…the court's task…is to carry out the balancing exercise…having regard to all the circumstances as disclosed by the totality of the evidence before the court" (pp352i-353c).
>
> "[This court must exercise its own discretion] in the light of the circumstances as they now are.." (357h).
>
> "…It would offend ordinary notions of what is just and equitable that, by ceasing to trade on becoming aware that the net is closing around it, a company which has misconducted itself on the securities market can thereby enable itself to remain in being despite its previous history. The wishes of those who control such a company, that it should remain extant for other purposes will, normally, carry little weight in the balancing exercise. On the other hand, by winding up such a company, the court will be expressing, in a meaningful way, its disapproval of such conduct. Moreover, in addition to being a fitting outcome for the company itself, such a course has the further benefit of spelling out to others that the court will not hesitate to wind up companies whose standards of dealing with the investing public are unacceptable" (360f-h).

60. Mr Cunningham QC accepted that I must have regard to the totality of the evidence, but he said that the fact that a company had reformed once the net had started to close in, and the present wishes of the management that the company should survive, were each to be accorded little weight: so that even if I were to form the view that the business of the company in its present form was not inherently objectionable I should nonetheless still wind it up, because (a) at one time it had been objectionable and it should not avoid the negative consequences of that simply by reforming; and (b) that to do so would be a deterrent. Mr Chivers QC submitted that the task was to decide whether it was just and equitable to wind up Amway *at the date of the hearing*, and that I should not consider whether I would have wound up Amway at an earlier date under different circumstances, and then

decide whether matters have changed enough for me to make a different decision now.

61. Re Walter Jacob and Co Ltd is an authority binding upon me and it clearly establishes the proper approach of the court: see Re Supporting Link Alliance Ltd [2004] 2 BCLC 486 at 501h. In my judgment I must reach a decision on the totality of the evidence as presented at the hearing (irrespective of what might have been the position at the time the petition was presented). The fundamental question is whether it is just and equitable to wind up Amway. It is not helpful to substitute some other concept such as "inherent objectionability." One aspect of the public interest that would be promoted by making a winding up order is to bring to an end a company which in the conduct of its business failed to maintain at least the generally accepted minimum standards of commercial behaviour. One such standard is to avoid inviting the public to participate in trading schemes on a false and deceptive basis. A fundamental part of the Amway business is to recruit people to buy its products (either for the purpose of self consumption or for the purpose of on-sale). Insofar as Amway undertook that recruitment itself it did (on a fine balance) comply with the law. But it was a key part of its business model (as illustrated by the nature of the opportunity which it offered and the nature of the rewards which it paid) that its existing IBOs should perform that function. Insofar as it had in place machinery to control what was said by such IBOs to members of the public Amway failed to prevent false and deceptive descriptions being given of what its business opportunity offered: and insofar as it recognised that it could not control everything that was said, it failed properly to address the manifest risk that

IBOs had been induced by false and deceptive statements to participate in its trading scheme. Amway understood that this was the burden of the petition presented by the Secretary of State. In its media "blog" for the 24th May 2007 it stated:-

> "The heart of the DTI's position, as we understand it, is that the business opportunity is promoted by incorporated and unincorporated organisations in a manner that does not reflect the financial rewards people are likely to earn when they participate in the Amway business….Amway's fault, according to the petition, lies in our failure to take sufficient action to prevent these abuses from occurring….."

The "blog" asserted Amway's intention to address the problems that might exist in the UK "so that no government ever sees the need to step in again". It has now taken steps to do so by asserting control (so far as it can) over what may be said, and by seeking to correct (through an induction programme) any false and deceptive statements that may have been made. I place significant weight on the undertaking offered at trial to make proper income disclosure. These proposals are of course put forward by a management team that has failed properly to supervise the business in the past and instituted the present reforms largely under the spur of the petition. But its present management team has not been challenged upon any perceived deficiencies in the system or upon any inadequacies in the team itself. I do not consider that the fact that the reforms have only really taken place in response to the petition (though the problems that occasioned the petition were being considered by the management before the investigation) makes it an affront to justice to recognise them for what they are. There remains a degree of risk to the public that Amway will not conduct its

business in a proper way: but it is not possible to eliminate all risk from commercial activity, and it may be possible to moderate the risk. To wind up an active lawfully trading company that now recognises and seeks to abide by the appropriate standards of commercial probity (and has endeavoured to engage with the Department to address any concerns of the regulator) is a serious matter: it has serious consequences for creditors (when Amway is seeking to trade out of its present insolvency) and for the significant number of present scheme participants who derive a main or additional income (albeit that this is a small proportion of the total IBOs). On the evidence there are people (over 7000) who wish to continue to participate in the Amway business, and the business model itself is that now adopted by the majority of direct selling organisations. On balance I do not consider that the need to punish Amway for its past wrongs or the need to deter other multilevel companies from inducing the public to become purchasers and retailers of its products by misstatements requires that the serious consequences I have identified be visited on Amway: and as a result of the undertakings now offered (including that offered at trial) I consider a winding up order to be disproportionate. The Secretary of State's investigation and the presentation of this petition are a sufficient salutary lesson to Amway and a clear warning to its peers that if the risks inherent in the multi-level model are not rigorously controlled then serious and expensive consequences follow.

62. The question now arises how I should dispose of the petition (assuming the "lottery" and "fair trading" grounds are also not made out). The nature of the discretion was clearly described in Re Secure & Provide plc (*supra*) Re Supporting Link Alliance *(supra)* and Re Bell Davies Trading Ltd [2005] 1 BCLC 516. The Court has a discretion whether or not to make a winding up order. The Court may simply dismiss the petition if satisfied that past wrongs have been remedied and the management can be trusted not to permit their recurrence (even if unconstrained by any undertakings). But the Court has power to accept undertakings as to future conduct, and a discretion as to whether to make the giving of undertakings a condition of dismissing the petition. The power will not be exercised (and undertakings will be refused) if those offering them cannot be trusted. The power to accept undertakings is likely to be exercised if that course is acceptable to the Secretary of State. If the Court considers that undertakings may be acceptable, it should nonetheless be slow to accept them if the Secretary of State is not willing to dispose of the petition in that way: but whilst the course may be unusual, the Court undoubtedly has power to do so if there are countervailing factors which outweigh the Secretary of State's opposition. In the instant case I could simply dismiss the petition: but undertakings are offered and I see no need to spurn them even if the Secretary of State shows no enthusiasm for their acceptance. The full form of the undertakings offered is set out in a document headed "Proposed Voluntary Undertakings' handed up during the course of the trial. In summary the undertakings are as follows: -

(a) to maintain the present prohibition on the production sale or promotion of BSM that is not authorised and distributed by Amway;

(b) not to introduce a registration fee or a renewal fee;

(c) not to recruit new ABOs until it has published earnings data in accordance with a stated income disclosure policy (which requires annual disclosure for 12 month periods of the average earnings and the highest and lowest earnings of each category of ABO together with the minimum income levels for qualification for higher rewards and the number of persons qualified at each level).

If undertakings of this sort are to be given I would also require an undertaking to maintain an induction programme for new ABOs of the type summarised in paragraph 57(d) above. I will dismiss the petition if these undertakings are given.

63. The Secretary of State's complaint that the Amway business opportunity constitutes an unlawful lottery can be dealt with more shortly. The Lotteries and Amusements Act 1976 provides in its first section that "all lotteries which do not constitute gaming are unlawful" (subject to immaterial exceptions). There is no statutory or other legal definition of "a lottery", so the task in hand is one of recognition (rather than the application of a

definition): indeed several of the cases are decided on the short ground that "this scheme has "lottery" written all over it". The key distinguishing feature of a lottery is that it constitutes the distribution of prizes by lot or chance (ie involving no element of skill), the chance itself being obtained by payment by or contribution from those who participate: see Imperial Tobacco Ltd v Attorney General [1981] AC 718 at 736G and 747B. But it is not necessary that the payment itself be attributable to (or allocated to) the acquisition of the chance: thus the participant can purchase a product which carries with it a chance of a prize at the same price he would normally have paid for that commodity without the chance, and yet participate in a lottery: Imperial Tobacco (Supra). Nor is it necessary to prove that the money paid by the participant has been used to provide the prizes Imperial Tobacco (Supra). Moreover, the term "prize" itself is a wide one, extending the rewards or commissions which are dependent upon chance: see Halsbury's Laws of England fourth edition 2002 reissue volume 4 (1) paragraph 174. There is one case which suggests that not all of the distributable fund need be distributed simply and solely by chance (and that part may be distributable by reference to the exercise of skill) provided that "a substantial part" is distributed simply and solely by chance: see Boucher v Rowsell [1947] 1 All ER 870. By contrast, if the whole of the distributable fund is distributed according to a single rule, then the clear conclusion of the cases is that if the winning of "the prize" depends to any extent (more than de minimis) upon the exercise of skill then there is no lottery (Re Senator at p 585-6 following Hall v Cox [1899] 1 QB 198 and Moore v Elphick [1945] 2 All ER 155). Finally, whilst these factors have been identified as relevant

in particular cases it is clear that an over analytical approach should not be adopted, but rather one of commonsense: see Re Senator [1996] 2 BCLC 582 at 599g. The core concept is a distribution of money by chance, and nothing but chance ie by doing that which is the equivalent to drawing lots.

64. In the light of those principles I hold that the revised Amway business model does not amount to a lottery for the following reasons:-

(a) A lottery is dependent upon the making of a payment in order to obtain the chance: under the revised scheme no payment is required for any initial business starter pack, nor is any annual renewal fee payable.

(b) Taking a commonsense view and avoiding an over analytical approach the Amway marketing plan involves not the distribution of money by the equivalent of drawing lots but the allocation of a bonus to those who must themselves have effected sales of product.

65. That second ground requires explanation in the light of some of the cases.

66. The vice that is identified in the snowball scheme/lottery cases is that the participant pays to obtain a reward, and the reward received by an individual participant derives from those over whom he had no control. Thus in Re Senator (*supra* at p.602) Saville LJ described the participants in this way:-

> "They pay their money for one reason only, namely to gain the chance, and it is only a chance, of reaping rewards from those who in turn pay and join for the same reason. One source at least of the potential rewards comes from those over whom the participant has no control, and to my mind it follows as a matter of ordinary language and commonsense that in this respect at least the participant is taking part in a scheme properly described as the distribution of prizes or rewards

> entirely by chance. In other words, looked at as a whole, this scheme too has the word lottery written all over it."

But it is important to recognise that that observation was made in the context of a money circulation scheme which had no commercial purpose. This is clear from page 598 of the report where Saville LJ describes the scheme in these terms:-

> "The scheme therefore provides the organisers and their self employed consultants with half the amounts paid by members, and the latter with the chance of recouping their outlay and making money when and if other members join. The scheme has no other commercial purpose."

On that factual foundation calling the scheme "a lottery" was a direct application (as the judgment itself makes clear) of the decision in DPP v Phillips [1935] 1 KB 391. In that case a company bought a quantity of note cases for the equivalent of 7.5 pence each. These note cases were then sold to the public in a package which included some order forms for further note cases. If a purchaser of a note case procured at least four members of the public to place orders, then on the fourth and each subsequent order he was paid a commission of 50 pence. If persons so placing orders (and themselves receiving a package containing a note case and further order forms) then themselves effected sales, then the original purchaser received a 50 pence commission on each of the first three such further sales. Lord Hewitt CJ held:-

> "In my opinion this was not a commercial transaction. The object of the seller and the object of the buyer were not concerned with note cases. They were concerned with the chance which the buyer might procure of obtaining a large sum of money by the operation of persons over whom he had no more control than he has over "the countless laughter of the sea"…If this transaction had been, or could reasonably be regarded as, a commercial transaction, it may be that other

> considerations might apply; but wherever one looks in this undoubtedly ingenious scheme one finds it impossible to discover anything of a really commercial nature."

Unlike the promoters of the Titan Business Club or the vendor of the note cases, under the revised scheme Amway earns nothing for affording its retail consultants the opportunity to become certified retail consultants (who are permitted to recruit Amway business owners and to create a down line). Amway's only means of making money is to sell the products which it manufactures or purchases from suppliers and sells to and through its retail consultants. It rewards them by providing a scheme of bonus payments. No retail consultant or certified retail consultant can earn any bonus unless they themselves have made sales to the minimum customer base which they must at all times maintain.

67. Consistently with the requirement that one must not apply an over analytical approach but must view the business in a commonsense way, the reality of operation must reflect that formal structure. It is the unchallenged evidence of Amway that its product prices are now bench marked. If Amway had been selling over priced goods and/or had not required a minimum customer base, then there might have been a strong argument that there was no underlying commercial basis for the business structure, that no Amway business owner was in reality acquiring the opportunity to establish a selling business, and that each was in reality simply acquiring the opportunity to induce others to join the scheme so as to create an income generating down line. That was in my judgment the fault that lay at the heart of the businesses in Re Vanilla Services BV (13 February 1998, unreported, Rattee J). This involved a so called "gold accumulation programme" whereby participants for a not insignificant down

payment acquired the right to acquire gold coins (a) for a price considerably in excess of that for which they were sold on the open market: or (b) as a reward for procuring fourteen "attachments" (ie fourteen new members of the gold accumulation programme). In form a participant was acquiring a product: but in substance he was acquiring the chance to make a profit by way of so called commissions which depended on the selling success of others in his down line over whom he had no control. It was a snowball scheme dressed in the guise of a commercial transaction. In my judgment the same is true of Re Delfin International (SA) Ltd [2000] 1 BCLC 71. Without explaining the scheme in detail, I would record that Neuberger J found as a fact that whatever the theoretical position under the structure of the business model, in reality participants purchased the product (a knowledge system) at a price of £850 (it had a wholesale price of £85) and the right to distribute it as a closely connected package (the rights of distribution affording access to an income which to a substantial extent was made up by money earned by those whom he might recruit). Once it had been found that as a matter of commercial reality persons were attracted to becoming participants by the prospect of persuading others in turn to become participants and making money by those others encouraging yet further people to become participants, the conclusion that the scheme was a lottery was compelled.

68. In my judgment it is not compelled by the new Amway model spoken to in evidence which the Secretary of State did not challenge. Multilevel marketing schemes are capable of being lotteries if the reality is that the business opportunity being sold is an opportunity to recruit and not an opportunity to sell product. If a scheme is in truth a lottery the fact that the lottery is

conducted for the purpose of securing some commercial advantage to a business will not prevent it from being "a lottery". In the Imperial Tobacco case, the scheme was run for marketing purposes and actually increased the sales of the relevant brands by 39%. But although it had a commercial purpose the scheme was (and remained) a lottery. If a scheme for rewarding employees constituted a lottery, it would remain a lottery even though it had a commercial objective. But the fundamental questions are: What is "the scheme"? And is "the scheme" (approached in a commonsense way) one for the distribution of payments as if by lot? In my judgment the new Amway scheme is not. "The scheme" is the entire rewards structure for Amway business owners. This gears rewards to sales. For the retail consultant it is that person's sales alone that determine the reward. For a certified retail consultant who has established a down line (who will be fewer in number than ordinary retail consultants) the reward is a function of rebate on personal sales plus a bonus on group sales calculated by reference to the total sales in the down line and personal sales (the "differential bonus"). A certified retail consultant can qualify as a business consultant once an annual income of £7,000 has been achieved. The business consultant will be expected to support his down line by providing help, advice, guidance and motivation and arranging product training sessions. There is the unchallenged evidence of Mr Morley (formerly Amway's sales manager) that in his experience most IBOs at the Platinum level did a lot of work in the field on a one to one basis with their down lines and supported their distributors very well. The Secretary of State did not seek to cross examine the Amway management and to suggest that support and motivation would be a matter of form and not of reality. If an

OBO with a downline supported and motivated that downline and benefited in part from sales made by that downline it cannot be said that the reward received was dependent on pure chance. If it became a matter of form not substance of course the rewards would cease to look like performance related income and would come to look like income earned by chance.

69. There is element of chance in all human achievement: but where a success or failure can be materially influenced by knowledge or skill then the outcome is not correctly described as a matter of pure chance. In "snowball" schemes the selection of recruits is not treated as the exercise of skill, so the rewards come purely by chance. But the Amway scheme requires sales of product to be made: if no sales are made there are no rewards. Amway is a commercial operation dependent upon sales of product. In my judgment there is no necessity to criminalise such arrangements anymore than there is to criminalise those who grant profit related leases or pay premiums to become a "sleeping partner" or participate in any other commercial arrangement where the reward received is substantially influenced by something other than the direct exercise of skill by the recipient. I do not think that I should strain to find something to be a lottery (and thereby to criminalise every one of the 30,000 Amway participants each of whom probably "has in his possession for the purpose of …distribution…any such matter…relating to the lottery as is calculated to act as an inducement to persons to participate in that lottery…or uses any premises…for purposes connected with the promotion…of the lottery" and thereby commit offences within Section 2 of the Lotteries and Amusements Act 1976). Mr Chivers QC submitted (and I accept) that it is a principle of legal policy that a person should not be penalised except under

R v Bristol Magistrates Court ex parte E [1998] 3 All ER 798 at 804. To me the current Amway reward scheme does not have "lottery" written all over it.

70. I finally turn to the Secretary of State's claim that Amway ought to be wound up on the just and equitable ground because it is conducting an unlawful trading scheme. It is common ground that the Amway business opportunity constitutes a "trading scheme" for the purposes of Part XI of the Fair Trading Act 1973. As I have earlier noted, this part of the Act was aimed at:-

> "Get rich quick schemes [operating] on the same basis as chain letters with each member recruiting further members….."

The Secretary of State says that the Amway business opportunity is just such a scheme (even though its members do not pay out large sums to Amway).

71. It is submitted that Part XI of the 1973 Act applies to Amway because the prospect is held out to participants of receiving payments or other benefits "in respect of" the introduction of other persons who become participants in the Amway trading scheme. (Amway's acceptance that it constitutes a trading scheme has an entirely different foundation: it acknowledges that it is a trading scheme because it holds out to participants the prospect of receiving payments in respect of the supply of goods or services by participants to others and acquisition of goods or services by any person). But if on either basis it is a trading scheme then the offences set out in Section 120 of the 1973 Act may be committed. The relevant offence is contained in Section 120 (3). This provides (so far as material):-

> "If any person who…has applied…to become a participant in…a trading scheme (a) makes any payment to…the promoter…and (b) is induced to make that payment by reason that the prospect is held out to him of receiving payments or other benefits in respect of the introduction of other persons who become participants in the trading scheme, any person to whom…that payment is made shall be guilty of an offence."

72. An essential precondition is, therefore, that a prospective IBO must make a payment to Amway. That used to be the case under the original Amway business model but is no longer the case under the new model. At the date of the hearing of the petition there is therefore no question of an offence being committed under Section 120. The Secretary of State says it is none the less just and equitable to wind up Amway because such an offence had (on the balance of probabilities) been committed in the past. (No argument was addressed as to whether this was the appropriate standard).

73. The payment to which reference is made is the £28 that was payable by the newly registered IBO to obtain the business starter pack. Clearly he is "induced" to make that payment: he is asked to do so, and does so on the basis that he will receive something in return. The question is whether that inducement includes "the prospect…of receiving payments or other benefits in respect of the introduction of other…participants." Mr Chivers QC submits (and I accept) that Amway has never made payments for the introduction of other participants and has never held out the prospect that such payments would be made. Its website and literature declare in sundry places that the Amway plan "does not compensate anyone for simply recruiting others." Mr Cunningham QC submits that (according to its terms) the offence does not require the prospect being held out of payment "for" the introduction of other

persons but such payments "in respect of" the introduction of other persons, and that a payment can be made "in respect of" the introduction even if it is not "for" the introduction. He says that if you hold out the prospect of a payment "as the result of" the introduction of another participant (even if some other conditions have also to be fulfilled) then the offence is committed.

74. This led to a debate as to whether Neuberger J had given Section 120(3) a "narrow" interpretation ("for") or a "wide" interpretation ("as a result of") in Re Delfin (supra). I prefer to start with the words of the Section itself and to give the expression "in respect of" in section 120 the same meaning that it bears in section 118 of the 1973 Act, and if a paraphrase is needed then to treat the expression as being equivalent to "relating to." If in reality a payment is made substantially "in respect of" or "relating to" the introduction of a participant, then the section bites: but if the payment is made "in respect of" or "relating to" something else (e.g the volume of products sold) then the section does not bite even if one element in the computation may be whether the recipient had recruited the person helping to create the sales volume.

75. This reading is supported by a close analysis of Delfin (supra). Counsel for the Company had submitted

> "that both as a matter of fact on the evidence and in the light of the marketing and other material published by the two companies for potential purchasers of [Delfin's] products and for potential associates, a half yearly payments of £55 are made in the expectation of receiving payments in respect of the introduction of other persons who become purchasers of [Delfin's] products…."

If Mr Cunningham QC is right on his construction of section 120, that was a concession by Counsel that an offence had been committed and the judgement should have ended there. Mr Chivers QC submits (correctly) that it was precisely because Delfin's Counsel had pointed out the payment would only be made if there was *both* an introduction *and* the introduced person became a purchaser of Delfin's products that the argument had to continue. As I read his judgement Neuberger J. accepted that if the reality was that the inducement to become a participant arose out of the income that would eventually be generated *when associates sold the product* to new customer then no offence would be committed (p.83d). But that was only the way the scheme "ostensibly" worked. If one looked at the reality of the Delfin business as a whole "the dichotomy between purchasing the product and becoming an associate is more apparent than real" (p.83g).

76. On that reading I would hold that the Secretary of State has failed to prove on the balance of probabilities that even under the old model Amway was in breach. There is no direct evidence of any such inducement. The survey evidence of new participants cannot be fairly read as establishing any such inducement. As a matter not only of form but also of reality Amway held out the prospect of payments being made, not in respect of introductions, but in respect of sales made by participants who were introduced (and even then the actual payment was calculated by reference to the IBO's own sales). As its web site correctly said:-

> " Amway does not pay people for simply recruiting others…it is illegal for a promoter….in the trading scheme to persuade anyone to make a payment by promising benefits from getting other people to join trading scheme".

77. I therefore hold that Amway was not in breach of the 1973 Act. It follows that it would not be just and equitable to wind Amway up on this basis.

78. For these reasons I have reached the conclusion expressed in the opening paragraph of this judgement.

Mr Justice Norris…….8 May 2008