

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA -3 OCT 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

SAMUEL SEWARD TODDINGS (Defendant)

Appellant 14226

AND

EDMUND GRAHAM GIBBONS (Plaintiff)

Respondent.

Case for the Respondent.

RECORD.

10 1. This is an Appeal brought by leave of the Supreme Court of Bermuda from an Order of the said Supreme Court (C. Brooke-Francis C.J.) made on 27th October, 1947, ordering a new trial of an action brought by the Respondent against the Appellant for damages for libel and heard before the Chief Justice of the said Supreme Court and a Special Jury on 6th, 7th and 8th October, 1947, when the said Special Jury by their verdict found that the words complained of by the Respondent and published by the Appellant did not amount to a defamatory statement and did not convey a reflection on the Respondent calculated to disparage or injure him in his business, and awarded the Respondent no damages. The said
20 Order for a new trial was made upon the grounds that the verdict of the Jury was against the weight of the evidence.

p. 37.

pp. 35 & 36.

2. The Respondent, who was Plaintiff in the action and is hereinafter referred to as "the Plaintiff," at all material times carried on business at ten retail establishments in Bermuda, and, in particular, carried on business in the trade name of Gibbons Co. as a retailer *inter alia* of men's footwear at Queen Street, Hamilton, Bermuda. The Appellant, the Defendant in the action, who is hereinafter referred to as "the Defendant," was at all material times the proprietor and publisher of a daily afternoon newspaper known as the "Bermuda Mid-Ocean News" which has a
30 circulation of about 5,000 and is read by 12,000 readers daily throughout the said Colony.

pp. 2 & 6.

p. 18.

p. 22.

3. On 20th January, 1947, the Defendant printed and published in the said newspaper an Editorial in the following terms :—

pp. 44 & 45.

"The Golden Rule in Business

Being strongly opposed to misleading advertising, not only because it is unethical but because we believe it is detrimental

to the interests of this Colony both as regards local and especially tourist trade, we quote an advertisement of Gibbons Company which appeared in last Friday's issue of the Royal Gazette :

‘ Slowly

It's a slow tedious business getting English goods . . . but we've just received a handsome assortment of new English Shoes. The finest of craftsmanship and leather goes into these quality shoes we've all wanted. Brown, Grain, Brogues and Oxfords . . .

from 28/6

10

Gibbons Co.

Queen Street, Hamilton ’

There is undoubtedly a brisk demand here for English shoes of quality, and it comes not only from local people but from the tourists whose numbers we are striving so hard and spending so much to increase. You can imagine our disgust, therefore, when we were reliably informed that the ‘ handsome assortment of new English shoes ’ offered in this advertisement was confined to some remnants only. Likewise, you can imagine the disappointment of would-be purchasers who responded to the advertised announcement. 20
Fortunately, both H. A. & E. Smith and Trimingham's were able to supply what Gibbons Co. merely pretended to have in stock.

A notorious cynic once said that there were no ethics in retail business. This may have seemed witty at the time, but it is not true. In the United States, for example, nearly all of the larger departmental stores are members of independent organisations (notably the Retail Research Association and the National Retail Drygoods Association) whose office it is to draw up and enforce a code of ethics. Needless to say, they fulfil many other functions, but this in our estimation is one of the most important. 30
Incidentally, persistent failure or refusal to comply with the codes means dismissal from the association.

We can give you a few examples of the Retail Research Association code from our own experience, although we are unable to say whether or not the codes have been altered since the war. Advertising managers or directors, for instance, are required to enforce the code rule against overstatements in advertising. This applies to qualities, values, quantities and assortments.

Another interesting code rule applies to ‘ Sales.’ If a store advertises marked down or bargain prices, not less than 20 per cent. of the goods must have been formerly and regularly sold at the maximum original price listed. In other words, which may put it more clearly, if goods are advertised as regularly \$10 to \$15 values marked down to \$6.50, at least 20 per cent. of the entire lot must have been valued and sold at the top price \$15. 40

As to why the better stores join these associations and obey their rulings, the answer is that they have found it good business

to be truthful and to maintain high standards. The store owners pay for the upkeep of the associations, and find it profitable to make use of their services and adhere to their rules. Anyone who has had experience with departmental store merchandise managers, buyers and over-enthusiastic advertising personnel can readily understand why a little 'policing' is necessary.

10 It is for the benefit of the people who dwell in Bermuda or who visit our shores that we have cited the foregoing example of advertising overstatement. If we are to retain our good name, we must maintain high standards of business practice. There is no more excuse for overstatement than there is for over-pricing. The Golden Rule should be as much a part of our business lives as of our private lives. Paraphrasing the Trade Development Board's publicized requests, we venture to say 'Let's have More Of It!'. "

20 4. On 27th January, 1947, the Plaintiff commenced proceedings in the Supreme Court of Bermuda claiming damages for libel contained in the said article. By his Statement of Claim delivered on 25th February, 1947, the Plaintiff alleged that the said Editorial was defamatory of him and further alleged by way of innuendo that the said words meant that the Plaintiff, with whom the establishment known as Gibbons Co. as well as other establishments owned by the Plaintiff were identified in the knowledge of the public, had been guilty of unethical conduct; had intentionally misled the public by statements which were not true; had acted in a way which was detrimental to the interest of Bermuda as a whole, and had been guilty of dishonest conduct by the publication of an advertisement which had no relation to fact, and had merely pretended to have in stock what his competitors Messrs. H. A. & E. Smith and Messrs. Trimingham Bros. Ltd. were in fact able to supply. p. 1. pp. 2 to 4.

30 5. By his amended Defence delivered on 3rd October, 1947, the Defendant pleaded—

- (A) that the whole of the words complained of amounted to fair comment on a matter of public interest;
- (B) justification;
- (C) the rolled-up plea;
- (D) that the words were not defamatory in themselves; and
- (E) that they were not written or published of the Plaintiff.

The innuendo was denied.

p. 8.

40 6. The said action came on for trial before the Chief Justice of the Supreme Court of Bermuda and a Special Jury on 6th, 7th and 8th October, 1947. After evidence directed to the issues raised upon the pleadings had been called on behalf of the Plaintiff and the Defendant, and the Chief Justice had summed up to the Jury, questions were left to the Jury by the Chief Justice in the following form:— pp. 6 to 26. pp. 26 to 34.

"1. Do the words complained of amount to a defamatory statement? Yes or No. pp. 34 & 35.

2. Are the words complained of :

- (A) Statements of fact or
(B) Partly one or partly the other.

Read the Editorial carefully and you will be able to answer that.

3. In so far as you find that the words are statements of fact are such statements of fact true ? Yes or No.

4. In so far as you find that the words are comment, does such comment add any sting to the libel ? Yes or No.

5. (A) If you find that such comment does add sting to the libel is such comment correct—that is to say true ?

(B) Does such comment exceed the limits of fair comment ?

6. Are the words complained of published of the Plaintiff ?

7. Are the words complained of published of the Plaintiff in the way of his business ?

8. Do the words complained of convey a reflection on the Plaintiff calculated to disparage or injure him in that business ?

9. Damages.

NOTE.—You need not consider Question 5 (B)—the question of fair comment if you find statements of fact are true and a comment does not add sting to the libel or is correct—there is your justification and that is the best I can do to combine the two defences.’

7. The answers given by the Jury to the said Questions as recorded by the learned Chief Justice in his note were as follows :—

pp. 35 & 36.

“ Q.1. Do the words complained of amount to a defamatory statement ? Reply ‘ No.’

Q.2. Are the words complained of—

- (A) statements of fact ; or
(B) expressions of comment ; or
(C) partly one or partly the other ?

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The Question 2 was answered irregularly, and I called upon the Foreman to answer it intelligently.

The Foreman then inserted—

‘ Part of paragraph (C) partly comment and partly facts.’

Q.3. In so far as you find that the words are statements of fact, are such statements of fact true ?

Q.4. In so far as you find that the words are comment, does such comment add any ‘ sting ’ to the libel ?

Q.3 and Q.4 not having been answered, I asked Mr. Foreman if he were not able to answer those questions—

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Reply ‘ No.’

I observe that the matter was of importance—Mr. Foreman says he fully understood the questions.

Q.5. If you find that such comment adds a 'sting' to the libel—

(A) is such comment correct, that is to say true ?

(B) does such comment exceed the limits of fair comment ?

No answer to (A) or (B).

Q.6. Are the words complained of published of the Plaintiff ?

Reply ' No. '

Q.7. Are the words complained of published of the Plaintiff in the way of his business ?

10 Reply ' Yes. '

Q.8. Do the words complained of convey a reflection on the Plaintiff calculated to disparage or injure him in that business ?

Reply ' No. '

Note by Judge : The word ' disparage ' means—

To lower in estimation ; to treat slightly ; to undervalue ; to vilify.

Q.9. Damages ?

Reply ' Nil. '

20 *Note by the Judge :* You need not consider Question 5 (B), that is the question of ' fair comment ' if you find that—

(1) the statements of fact are true and

(2) the comment : (A) does not add any sting to the libel, or (B) is correct. '

8. Upon the answers to the said questions, and, in particular, to the first Question, the Chief Justice on 8th October, 1947, gave Judgment for the Defendant with costs, but gave leave to the Plaintiff to apply for a new trial. p. 36.

30 9. On 11th October, 1947, the Plaintiff gave notice of Motion for a new trial upon the ground that the whole verdict of the Jury was against the weight of the evidence adduced at the said trial. Upon the hearing of such Motion on 27th October, 1947, the learned Chief Justice held that the answer to the first Question given by the Jury, namely—that the words complained of did not amount to a defamatory statement, and was an answer such as reasonable men on the evidence before them ought not, and could not, have arrived at. He accordingly ordered that there should be a new trial of the said action and that the costs of the previous trial and of the said Motion should abide the result of the new trial. It is against this Order that the present appeal is brought by the Defendant. p. 37.

40 10. It is submitted that the Jury having, by their answer to Question 7, found that the words complained of were published of the Plaintiff in the way of his business, it is clear beyond argument that such words, in their natural and ordinary meaning and without need to place upon them any innuendo, constitute a plain and obvious defamation incapable of any innocent explanation, and that accordingly the finding of the Jury in their Answers to Questions 1 and 8, that the words complained

of did not amount to a defamatory statement and did not convey a reflection on the Plaintiff calculated to disparage or injure him in his business, were perverse and unreasonable and such as no reasonable men could reach.

11. While it is conceded that Questions 4 and 5 left to the Jury may not have raised as clearly as they might have done the issues arising on the defence of fair comment, it is submitted that their answers taken as a whole to the Questions put to them, and, in particular—

(A) the contradiction between their answer to Question 6 that the words complained of were *not* published of the Plaintiff, and their answer to Question 7 that the words complained of *were* 10 published of the Plaintiff in the way of his business; and

(B) their inability or refusal to answer Questions 3, 4 and 5; show that the Jury were either unwilling to understand or incapable of understanding the issues raised in the action.

12. The Plaintiff accordingly humbly submits that the said Order of the Supreme Court of Bermuda is correct and that this Appeal should be dismissed for the following among other

REASONS.

- (1) BECAUSE the words complained of constituted a plain and obvious libel upon the Plaintiff in the way of his 20 business, which was incapable of any innocent explanation.
- (2) BECAUSE the answers of the Jury to Questions 1 and 7, namely—that the words complained of did not amount to a defamatory statement and did not convey any reflection upon the Plaintiff calculated to disparage or injure him in his business, were perverse and unreasonable and such as no reasonable men could reach.
- (3) BECAUSE the answers of the Jury to the other Questions 30 and, in particular, their mutually contradictory answers to Questions 6 and 7 and their refusal or inability to answer Questions 3, 4 and 5 show that the Jury were either unwilling to understand or incapable of understanding the issues raised in the action.
- (4) BECAUSE of the reasons given in the Judgment of the Chief Justice upon the hearing of the Motion for a new trial.
- (5) BECAUSE the Order of the Chief Justice upon the hearing of the Motion for a new trial was right and 40 ought to be upheld.

KENNETH DIPLOCK.

No. 1 of 1948.

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AND

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Respondent.

Case for the Respondent

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