

Samuel Seward Toddings - - - - - Appellant

v.

Edmund Graham Gibbons - - - - - Respondent

FROM

THE SUPREME COURT OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1948

Present at the Hearing :

LORD SIMONDS

LORD OAKSEY

LORD MACDERMOTT

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[Delivered by LORD MACDERMOTT]

This is an appeal from an order of the Supreme Court of Bermuda (C. Brooke Francis, C.J.) made on the 27th October, 1947, for a new trial of an action for damages for libel brought by the respondent against the appellant.

The respondent is the proprietor of a number of shops and stores in Bermuda and elsewhere. At one of these establishments known as "Gibbons Company" and situate in Queen Street in the City of Hamilton, he carried on business as a retailer of footwear and other goods. The appellant was at all material times the proprietor and publisher of a daily newspaper circulating in Bermuda called the "Mid-Ocean News". The words complained of by the respondent in his action appeared in the issue of this newspaper of the 20th January, 1947. They took the form of an editorial which is fully set out in the Statement of Claim. It reads thus:—

"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

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. 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. 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.

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.

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!'

In his Defence the appellant pleaded, *inter alia*, justification, fair comment and that the words complained of were not defamatory. At the trial before the Chief Justice and a special jury both sides called oral evidence and various questions directed to the several issues in the case were left to the jury. Of these questions only the first need now be mentioned. It and the answer to it were as follows:

" Q. Do the words complained of amount to a defamatory statement?
A. No."

On this finding the learned Chief Justice gave judgment for the appellant with costs; but subsequently, on a motion brought by the respondent, he ordered a new trial upon the ground that reasonable men could not, on the evidence, have arrived at this answer. It is from this decision that the appellant now appeals.

When, as in the present case, the words complained of in a suit for defamation are capable of a defamatory meaning the issue of libel or no libel is one peculiarly within the province of the jury. That does

not mean, however, that their verdict is sacrosanct and unassailable whatever the circumstances. It is, of course, well settled that such a verdict must not be disturbed lightly or merely because the reviewing tribunal would itself have arrived at a different conclusion; but a finding which reasonable men could not reach on the material available for their consideration has no special immunity. Here, in the words of Lord Herschell, L.C., in *Australian Newspaper Company Ltd. v. Bennett*, (1894) A.C. 284 at 287, "The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men."

Applying this test to the facts of the present case their Lordships are satisfied that the jury's answer to the first question cannot stand. In their natural meaning the words of the editorial charge the advertiser they attack with unethical conduct in that he had intentionally misled the public by an untrue statement. No reasonable man could regard this meaning as otherwise than defamatory in the absence of some further fact or circumstance tending to modify it or to afford ground for saying that it would not be regarded as derogatory by those to whom the words were published. But the evidence contains nothing which could have this neutralising effect. It indeed points the other way, for the appellant himself admitted in the course of cross-examination that unethical meant dishonest and that if its facts were not correct the editorial was extremely damaging. It was, however, urged on his behalf that it could not be assumed that in Bermuda the terms of this editorial would injure the reputation of a trader, and that the finding of the jury showed that such an assumption would be mistaken. While it is, no doubt, true that public opinion on the same subject may vary from place to place, there is, in their Lordships' view, no foundation for this contention in the present instance. The verdict cannot be regarded as conclusive on such a matter as, if it were, it would be unassailable and beyond review; and apart from the verdict, there is nothing from beginning to end of the case to warrant the suggestion underlying the argument. On the contrary, the evidence of the appellant to which reference has already been made, the terms of the editorial itself and, not least, the opinion of the learned Chief Justice which, as was pointed out by Lord Esher, M.R., in *Webster v. Friedeberg*, 17 Q.B.D. 736, "is a matter to be taken into serious consideration", all go to show that the standards of commercial morality prevailing in Bermuda are not such as to condone conduct of the sort described in the words complained of or to rob those words of their sting.

For these reasons their Lordships consider that the order appealed from was right and should be affirmed and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.

In the Privy Council

SAMUEL SEWARD TODDINGS

2.

EDMUND GRAHAM GIBBONS

DELIVERED BY LORD MACDERMOTT