

(Privy Council Appeal No. 9 of 1982)

Edouard Le Scroog - - - - - Appellant

v.

The General Optical Council - - - - - Respondent

FROM:

**THE DISCIPLINARY COMMITTEE  
OF THE GENERAL OPTICAL COUNCIL**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 21ST JULY 1982

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON

LORD KEITH OF KINKEL

LORD BRIGHTMAN

[Delivered by LORD FRASER OF TULLYBELTON]

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This appeal is from a direction of the Disciplinary Committee of the General Optical Council made on 8th February 1982, to the effect that, by reason of findings made on that date, and upon 25th June 1980, of infamous conduct in a professional respect and of findings on the former date of publishing advertisements contrary to the General Optical Council Rules on Publicity, the name of the appellant should be erased from the register.

Their Lordships will refer later to the findings made on 25th June 1980 ("the 1980 findings"). They will consider first the findings made on 8th February 1982. On that date the Disciplinary Committee had before it a total of 6 charges against the appellant. They found four of these charges proved. Two (charges 1 and 2) were of infamous conduct, the conduct alleged being that the appellant had canvassed students at Hammersmith and West London College of Further Education and at King's College, London respectively. Two were breaches of the General Optical Council's Rules on Publicity 1981 by advertising in the University College Hospital magazine called "Too Much" (charge 4) and in the "Nursing Mirror" (charge 5). The Committee made no finding on the remaining two charges but ordered that they remain on the file. The effect of that order is that the charges were adjourned *sine die*.

The appellant's written Case included a complaint that he had not received proper notice of the hearing on 8th February 1982, but that complaint was expressly abandoned at the hearing before this Board and it need not be further considered.

It will be convenient to consider first the two charges of infamous conduct by canvassing. The facts on which the Committee reached their decision were as follows. The appellant had sent, or caused to be sent,

to an official of the students' union at each of the colleges already mentioned a letter. The letters were in identical terms. They bore the address of his firm "Softlens Practice", and contained *inter alia* the following paragraphs:—

"Dear Secretary, We are currently selling soft contact lenses from £55 a pair. As this is the lowest price to be found in England, it should be of interest to students (indeed, many of our clients have been students).

.....

Please feel free to convey this information to your students."

The letter was signed by a person named Paterson who, the appellant said, had been employed by him at the time the letters were sent in January and February 1981. The appellant admitted having caused the letters to be sent. He also admitted that if they were unsolicited they would constitute canvassing. His defence was that they had been sent in answer to requests from the students' unions concerned for information about his business, and particularly his prices for contact lenses. There was thus raised an issue of pure fact as to whether or not the letters had been sent in answer to requests. The Committee decided that issue against the appellant after hearing evidence from the persons who had been in charge of the correspondence at the students' unions concerned at the relevant time to the effect that, so far as they were aware, no request had been made to the appellant or his firm for information such as that contained in the letter. The witness from King's College, London, who had been the secretary of the students' union at the relevant time, said that when he received the letter he had posted it on the notice board. In addition to that evidence there is the fact that, in the opinion of their Lordships, the terms of the letters are more consistent with their having been unsolicited, than with their having been sent in answer to requests. The appellant gave evidence and said that the letters would have been sent in response to requests for information about the prices and services that he offered, but that he did not remember specifically instructing the letters to be sent, and he had "no idea" whether the requests had been written or oral. In the opinion of their Lordships the weight of the evidence was in favour of the view that the letters had been unsolicited and that they constituted canvassing.

The next question is whether the appellant's conduct in canvassing by sending these letters can properly be described as "infamous in a professional respect". The practice of canvassing had been expressly condemned by the General Optical Council in their Notice for Guidance (1977 edition) at paragraph 75. In the 1981 edition of the Notice for Guidance there is no specific reference to canvassing but there is a general reference in paragraph 78 to the need for maintaining the highest standards of behaviour. Having regard to these Notices and to the prohibition in the Rules on Publicity of advertising, except in accordance with the rules (to be referred to below) their Lordships have no doubt that canvassing may in certain circumstances amount to infamous conduct. In considering whether it did so in the present case there are two matters which are of particular importance. The first is that one of the 1980 findings had been on a charge of canvassing, and, before that finding was made, he had written to the General Optical Council a letter, dated 18th October 1979, in which he apologised for canvassing and said

"I am truly sorry for what has happened and I am prepared to give the Council my solemn assurance that the activity will not recur. I am also prepared to give my personal and solemn assurance that I shall not, in the future, canvass for clients or participate in selective discount schemes."

The canvassing referred to in charges Nos. 1 and 2 was therefore in breach of that solemn assurance and the Committee were entitled to regard it as specially deserving of reprobation for that reason. Secondly the terms of the letter sent to the two students' unions were open to serious objection. When the appellant was asked about the statement quoted above, to the effect that his price was "the lowest price to be found in England", he replied that he did not know if that was correct. In cross-examination he said, "It may be true, it may also be close to the truth, but it is not a downright and blatant lie". Such carelessness as to the truth of the statement might properly have been taken into account by the Committee. Later in the letter there is a statement to the effect that information concerning prices "would obviously be of benefit to the public who are open to exploitation by some of England's more expensive practices simply through their ignorance". That statement implied, as the appellant admitted in cross-examination, that there were opticians who were exploiting the public by reason of the public's ignorance. Such implied criticism of other members is a further objectionable feature of the letter.

Counsel for the appellant submitted that the Disciplinary Committee were not entitled to have regard to the contents of the letters because the charge was simply that he had been guilty of infamous conduct "in that [he] canvassed students . . . by means of a letter" without any indication that the terms of the letter were to be relied on. Their Lordships reject that submission. In their view the whole circumstances of the canvassing have to be taken into account including the terms of the letters themselves. For these reasons their Lordships consider that the Committee was well entitled to hold that the appellant's conduct in sending the letters had been infamous in a professional respect.

Finally, on the question of infamous conduct, counsel for the appellant submitted that the advice on the law given by the Legal Assessor to the Committee after it had retired to consider its findings was erroneous or at least misleading. The note made by the Legal Assessor of the advice which he had given is before their Lordships. The note is brief but it refers to judgments given in the courts, and the reference must have been intended, and understood, to have been to cases from which counsel on both sides had quoted passages in the judgments when addressing the Committee. These cases were *Rex v. The General Medical Council* [1930] 1 K.B. 562 and *Allinson v. General Council of Medical Education and Registration* [1894] 1 Q.B. 750 in which the judges explained that infamous conduct by a professional man means serious misconduct, or conduct which is disgraceful or dishonourable. Even without such instruction from reported cases, it must be obvious to any educated person that "infamous" is a word implying strong reprobation, and their Lordships have no doubt that the members of the Committee were well aware of that fact. In these circumstances the advice given by the Legal Assessor is, in the opinion of their Lordships, not open to criticism on the ground either of insufficiency or inaccuracy.

The result is that, in the opinion of their Lordships, the Committee's findings on the charges of infamous conduct are not shown to have been in any respect erroneous.

Turning now to the charges relating to advertising in the magazine "Too Much" and in the "Nursing Mirror", these are brought under the General Optical Council's Rules on Publicity 1981. The advertisements are alleged to have been in breach of rules 3 and 4, and not to have been within any of the exceptions provided by later rules. Rule 3 prohibits any means of giving publicity, whether by advertisements or not, except in accordance with the rules. Rule 4, so far as applicable here, provides as follows:—

"All means of giving publicity to a practice or business, used by registered opticians . . . shall be of a dignified and restrained

character and free from any reference to the efficiency of, or the facilities given by, other registered opticians . . .”.

It was contended on behalf of the appellant that the advertisements were not in breach of these rules, and in particular of rule 4, because they were of a dignified and restrained character as required by that rule. The contention raised a question of taste in which there may be room for differences of opinion, but it is a matter of objective fact that the advertisements complained of were prominent, in the case of the “Nursing Mirror” advertisement, the most prominent on the page, and in large type. But they were not the most prominent or in the largest type of any advertisements in the respective periodicals. It appears to their Lordships that the solution of this question depends upon the view that is taken of the optician’s profession. If, as the appellant maintained, it is to be regarded mainly as a trade or business of selling spectacles and contact lenses, then an “eye catching” advertisement is perfectly proper in accordance with ordinary commercial practice. If, as the General Optical Council maintains, it is to be regarded primarily as a profession, comparable to the medical profession, then advertisements by opticians should be designed merely to impart information, and not to attract attention. The reason is that, if prominent advertisements are allowed, then advertisers will tend to compete, as commercial advertisers do, to have the most attractive and the most effective advertisement. Counsel for the appellant submitted that opticians were not solely concerned with rendering a service, such as testing eyesight, but that they also sell goods and in that respect their profession differs from the medical profession and from most other professions. Consequently he said it was in the public interest for the appellant to increase the turnover of his business thereby reducing his overheads and enabling him to reduce his charges to the public. That is a possible view, although their Lordships note in passing that an increased turnover, if it led to improved profits, would also benefit the appellant. But the answer to the contention is that Parliament has entrusted the Disciplinary Committee of the Optical Council with the duty of setting the standards appropriate to the profession, and in their Lordships’ opinion that Committee is the proper tribunal to decide this issue. The appellant, having joined the profession, is bound to observe the rules which apply to its members. Their Lordships cannot improve upon the explanation given in relation to the architects’ profession by Devlin J. (as he then was) in *Hughes v. Architects Registration Council* [1957] 2 Q.B. 550, at pages 561–562, as follows:—

“If a man joins a profession in which the use of trade weapons is barred, and then proceeds to employ them, he is taking an unfair advantage over his fellows. They restrain themselves, believing, rightly or wrongly, that such restraint is essential to the good health of the profession as a whole; he gets the benefit of their restraint and fills his purse at their expense. He is defaulting on the obligation, by which explicitly or impliedly he undertook to be bound when they made him of their company. Such conduct could be thought disgraceful not merely by those of the profession but by outsiders who were not themselves bound by the same standards.”

In the opinion of their Lordships the Committee is not shown to have fallen into error in applying the standard which they considered appropriate for professional persons, and not a purely commercial standard, in judging whether the advertisements were dignified and restrained, and in finding that the advertisements were in breach of the rules.

It was accepted by the General Optical Council that the “Nursing Mirror” was a periodical in which publication of advertisements by

members of the profession was permitted under rule 5 of the Rules of Publicity. Rule 5 is in the following terms: —

“ A registered optician or an enrolled body corporate may publish advertisements or other matter relating to his or its practice or business in periodicals circulating wholly or mainly among registered opticians, registered medical practitioners, pharmaceutical chemists, members of professions ancillary to medicine, manufacturers of or dealers in optical appliances, or employees of registered opticians or enrolled bodies corporate, . . . ”

It was argued on behalf of the appellant that the magazine “ Too Much ” was also a periodical falling within that rule. Having regard to the view already expressed that both advertisements contravened the rules, in respect that they were not dignified and restrained, nothing turns upon this further point but, as it was argued, it is right that their Lordships should express an opinion upon it. In their opinion “ Too Much ” does not fall within the class of periodicals referred to in rule 5. There was evidence from the former editor of that periodical that 600 copies of the particular issue published in June 1981 were printed, that the number of (clinical) students at University College Hospital at that time was about 130, and that the policy of the publishers was to sell the periodical also to doctors, nurses and other professional persons in order to increase its income. Counsel for the appellant submitted that it had not been shown that the circulation of the magazine was not mainly among members of professions ancillary to medicine. Their Lordships do not accept that submission. The evidence as to the actual circulation of the particular issue was quite inconclusive, but the former editor said that the periodical was written by students for students, and the most cursory examination of its contents bears that out. Having regard to the evidence of the editor, and to the nature of the contents of the periodical, their Lordships consider that the proper conclusion is that it circulated mainly among students. Students do not in the opinion of their Lordships constitute a profession. The periodical is therefore not within rule 5 and publication of an advertisement in it would not have been permitted even if the advertisement itself had been dignified and restrained.

For these reasons their Lordships are of opinion that there is no reason for interfering with the finding of the Disciplinary Committee on the four charges which it heard on 8th February 1982. They were in addition to the 1980 charges which had already been found proved. In terms of the Opticians Act 1958 Section 11(1)(b) and (3) the only penalty which the Disciplinary Committee could impose was to order that the appellant's name be erased from the Register. That is the order that they made and in their Lordships' opinion it is not open to criticism. They will humbly advise Her Majesty that the appeal should be dismissed.

The appellant must pay the respondent's costs of the appeal.

In the Privy Council

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EDOUARD LE SCROOG

v.

THE GENERAL OPTICAL COUNCIL

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DELIVERED BY

LORD FRASER OF TULLYBELTON