

Mary Lesley Bebbington

Appellant

v.

The General Optical Council

Respondent

FROM

THE DISCIPLINARY COMMITTEE OF THE  
GENERAL OPTICAL COUNCIL

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REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL OF THE 23RD APRIL 1985,  
DELIVERED THE 22ND MAY 1985

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*Present at the Hearing:*

LORD KEITH OF KINKEL

LORD BRIDGE OF HARWICH

LORD BRIGHTMAN

*[Delivered by Lord Keith of Kinkel]*

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This is an appeal under section 14 of the Opticians Act 1958 against a determination dated 18th September 1984 of the Disciplinary Committee of the General Optical Council constituted under section 10 of that Act. By that determination the Committee found the appellant guilty upon a charge of infamous conduct in a professional respect and also upon a further charge of breach of the Council's rules on publicity, and directed that her name be erased from the register of ophthalmic opticians.

The charges in question were in these terms:-

"1. ... that on a date or dates between the 3rd February 1984 and the 6th June, 1984, your conduct was infamous in a professional respect in that you permitted M.L. Bebbington Limited to carry out its practice of ophthalmic opticians from the first floor of premises at 20 Bond Street, Bristol, when you knew or should have known that one of the principal means of access of the said premises was through the ground floor premises of Specsavers Limited, otherwise known as or trading as Specsavers International, which company (a) by its illuminated fascia sign, visible to the public highway known as Bond

Street aforesaid advertised that savings were obtainable on the purchase of spectacle frames and (b) by a large inscription on the shop window reading

'come in and see our spring collection a sight for sore eyes. Frames from £7.50 -£20'

invited members of the public enter their premises, and that the Disciplinary Committee may, if they think fit, direct that your name be erased from the register of ophthalmic opticians contrary to section 11(1)(b) of the Opticians Act 1958.

2. ... that on a date or dates between the 3rd February 1984 and the 6th June, 1984, you did permit the display of an illuminated fascia at the premises of your practice or business which said fascia was visible from the public highway known as Bond Street, Bristol and being part of a larger sign which also advertised the business of 'Specsavers' contrary to the General Optical Council's Rules on Publicity 1981 made under section 25(1)(a) of the Opticians Act 1958 and in particular in breach of rules 3, 4 and 12 of the said rules on publicity in that the said fascia sign did not fall within any of the exceptions provided for by rules 5-12 inclusive and 16 and that the contravention is such as to render you unfit to have your name on the register of ophthalmic opticians and that the Disciplinary Committee may, if they think fit, direct that your name be erased from the said register contrary to section 11(3) of the Opticians Act 1958."

Similar charges were preferred against the appellant's husband, Mr. D.J.D. Perkins, but at the commencement of the hearing before the Committee the charges against him were withdrawn and struck out. A charge in similar terms to charge 2 against the appellant was preferred against M.L. Bebbington Ltd., a company controlled by the appellant, and this was dealt with by the Committee at the same time as the charges against the appellant. In the result, the Committee found the charge against the company proved, but postponed judgment for six months.

There has never been any material dispute about the primary facts of the case. The company controlled by the appellant took a twenty-year lease of the first and second floors of the premises at 20 Bond Street, Bristol, and commenced business there as ophthalmic opticians in January 1984. A company called Specsavers Ltd, which carried on the trade of selling spectacle frames to members of the opticians' profession and other optical equipment to members of the public, were already installed as lessees under a

lease of their own on the ground floor of the same premises. There is not, and never has been, any connection between the appellant or her company and Specsavers by way of directors or shareholders in common or otherwise, except that an in-house trustee company belonging to a well-known firm of Bristol solicitors acted as secretary both of the appellant's company and of Specsavers. Access to the first and second floor premises of the appellant's company was available to the public only through the ground floor premises of Specsavers.

Specsavers had affixed to the wall of the building above their premises, which had display windows to the street, a large fascia board bearing a logo in the form of a stylized pair of spectacles and the legend "SPEC SAVERS SHOWROOM ON GROUND FLOOR SAVE ON SPECS". The appellant's company affixed to the same wall, above and resting on top of Specsavers' fascia board a somewhat smaller fascia board of its own bearing the words "M.L. BEBBINGTON OPHTHALMIC OPTICIAN 1st and 2nd FLOORS". The effect was such that there did not appear to be any clear differentiation between the two fascia boards. There were inscribed on the inside of Specsavers' shop window in such a way as to be readable from outside the words "Come in and see our spring collection a sight for sore eyes. Frames from £7.50 - £20". It appears that a receptionist stationed in Specsavers' premises made a practice of assisting members of the public with the selection of spectacle frames and then directing them up to the appellant's company's premises for the purpose of obtaining a prescription for lenses. The appellant's company did purchase a certain quantity of spectacle frames from Specsavers, but this amounted to only about 8% by value of the total quantity of spectacle frames purchased by the appellant's company over a five month period.

In February 1984 the appellant and her company received from the Council notice of a complaint relating to their advertising activities and in June 1984 were informed that the matter was to be referred to the Disciplinary Committee. By letter dated 15th August 1984 they were notified by the Council that an inquiry was to be held before the Disciplinary Committee on 18th September 1984 into charges of professional misconduct and breach of the rules on publicity. By letter dated 28th August 1984 the appellant's solicitors sought an adjournment of the proceedings, but this was refused and they took place on the date fixed, with the result which their Lordships have described.

In the course of the hearing before the Committee counsel for the appellant produced a letter dated 15th September 1984 signed by a Mr. R. King as

managing director of Specsavers. By this letter Mr. King expressed himself as having no doubt that the board of directors of Specsavers would act on his recommendation that the fascia board or window displays at their premises should be altered in accordance with any directions the Disciplinary Committee might give, provided that the costs of doing this were indemnified by the appellant or her company.

In the course of the hearing of the appeal, photographs were produced showing that the allegedly offending inscriptions have now been removed from Specsavers' windows and that their fascia board has been altered so as now to read "SPEC SAVERS SPECS TO BE SEEN IN SHOWROOM ON GROUND FLOOR". The Board were informed that this had been done at the expense of the appellant's company. Further, the latter company's fascia board has been more clearly differentiated from that of Specsavers by a prominent black line drawn between them. Counsel for the respondent Council accepted that in the state of facts which at present exists there were no grounds for complaint against the appellant or her company on the advertising score, particularly having regard to The General Optical Council (Rules on Publicity) Order of Council 1985, which came into force, superseding the 1981 rules, on 11th March 1985.

The relevant provisions of the Opticians Act 1958 are as follows:-

- "11. (1) If any registered optician -
- (a) ...
  - (b) is judged by the Disciplinary Committee to have been guilty of infamous conduct in any professional respect,
- the Committee may, if they think fit, direct that his name shall be erased from the register.
- (2) ...
  - (3) If it appears to the Disciplinary Committee that a registered optician or an enrolled body corporate has contravened or failed to comply with any rules made under section twenty-five of this Act and that the contravention or failure is such as to render the optician unfit to have his name on the register or the body corporate unfit to have its name on the list, the Disciplinary Committee may, if they think fit, direct that the name of the optician or body corporate shall be erased from the register or list.

25. (1) Subject to the provisions of the next following sub-section, the General Optical Council may make rules prohibiting or regulating -

- (a) the use by registered opticians and enrolled bodies corporate of any means of giving publicity, whether by advertisements or not, to their practice or business of ophthalmic or dispensing opticians; ..."

The General Optical Council (Rules on Publicity) Order of Council 1981 provided by Rules 3 and 4:-

"3. A registered optician or an enrolled body corporate shall not, in relation to his or its practice or business, use any means of giving publicity, whether by advertisements or not, except in accordance with these rules.

4. All means of giving publicity to a practice or business, used by registered opticians or enrolled bodies corporate, shall not be misleading but 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 or enrolled bodies corporate."

The classical exposition of the meaning of the word "infamous" in a disciplinary provision such as section 11 of the 1958 Act is contained in the judgment of Lord Jenkins in *Felix v. General Dental Council* [1960] A.C. 704, where, in the context of section 25 of the Dentists Act 1957 which referred to "infamous or disgraceful conduct in a professional respect" he said at page 720:-

"... it appears to their Lordships that these two adjectives nevertheless remain as terms denoting conduct deserving of the strongest reprobation, and indeed so heinous as to merit, when proved, the extreme professional penalty of striking-off."

This exposition has been followed and applied in many subsequent cases.

The reason why conduct involving a breach of rules forbidding or restricting the use of advertising by members of a profession may be regarded as infamous or disgraceful was explained by Devlin J. in *Hughes v. Architects' Registration Council of the United Kingdom* [1957] 2 Q.B. 550, 561:-

"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."

This passage was expressly approved by Lord Fraser of Tullybelton in *Le Scroog v. General Optical Council* [1982] 1 W.L.R. 1238, 1243.

The principles upon which this Board acts in reviewing a determination of guilt by a professional disciplinary body are common to all the enactments giving a right of appeal against the decisions of such bodies. They are well set out in the judgment of Lord Jenkins in *Felix v. General Dental Council* (*supra*) page 716, 717:

" As to the scope of the appellate jurisdiction conferred on their Lordships by section 29 of the Dentists Act, 1957, Mr. Widgery Q.C. [for the General Dental Council as respondents in the appeal] accepted a submission made by Mr. Norman Richards Q.C. [for the appellant] to the effect that such an appeal is an appeal by way of rehearing, to which the same principles apply as are applicable to an appeal to the Court of Appeal against the decision of a judge of the High Court sitting as a judge of fact at first instance, and accordingly their Lordships find it unnecessary to refer to the authorities cited by Mr. Norman Richards in support of this proposition. In this connection their Lordships were properly reminded of the principle that an appellate court should not lightly differ from the finding of a trial judge on a question of fact and that 'it would be difficult for it to do so where the finding turned solely on the credibility of a witness': see *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; and note the distinction drawn by that case between the finding of a specific fact (which *prima facie* is a matter for the judge of first instance) and the drawing of inferences from the facts specifically found which, subject to the weight properly due to the opinion of the trial judge, is a matter on which the appellate court may properly regard itself as free to form its own view.

Thus in the present case a finding by the Disciplinary Committee that the appellant claimed fees for work which had not been done, and as to the circumstances in which he did so, would be a

finding of specific facts which the appellate tribunal should prima facie accept: whereas a finding that on the specific facts so found the appellant was in relation to the matter in question guilty of infamous or disgraceful conduct in a professional respect would be in the nature of an inference from the specific facts found, and as such more readily open to review.

Their Lordships would add that the question whether in relation to a given matter a dentist has been guilty of infamous or disgraceful conduct is in their opinion a question of mixed fact and law, the question of law being whether on the facts proved or admitted the dentist has been guilty of infamous or disgraceful conduct within the meaning of section 25 of the Act of 1957.

In applying the above principles to the present case, their Lordships are put in some difficulty by the circumstance that beyond finding the facts alleged in each paragraph of the charge proved the Disciplinary Committee gave no reasons for its determination. Their Lordships are thus left without any express guidance as to the view of the facts upon which the Disciplinary Committee proceeded."

In the present case their Lordships have felt similar difficulty in following the process of reasoning whereby the Committee arrived at their findings of guilt against the appellant on both charges. The Committee must have drawn from the primary facts (which were not in dispute) certain inferences leading to the view that in relation to the matters charged the appellant harboured in her mind some dishonest or dishonourable intention. It would have been of much assistance if the Committee had stated explicitly the nature of these inferences and the grounds which they perceived for drawing them.

The first charge against the appellant was in substance that she permitted her company to carry on practice on the upper floors of the Bond Street premises when she knew that the access thereto was through the ground floor premises of Specsavers, which invited members of the public to enter these premises by means of advertising displays which would have been objectionable if used by an ophthalmic optician. Taken literally, this implies that the appellant was guilty of infamous conduct in a professional respect by arranging for her company to start business on the upper floors when Specsavers was installed on the ground floor with its offensive display, or alternatively, if that display was not on

show when the company started business, in not closing down the business when the display first went on show. Counsel for the respondents disclaimed any suggestion that it was wrong for the company to operate from the floors above Specsavers' premises, having its sole means of access through the latter. What he did maintain was that the appellant harboured an unworthy intention of taking advantage of Specsavers' display for the financial benefit of her company. Such an intention would have to be proved beyond reasonable doubt in order for the appellant to be found guilty of infamous conduct.

In their Lordships' opinion there is no evidence whatever approaching anything near proof beyond reasonable doubt of such intention. The time scale of the whole events between the company starting up business in Bond Street and the disciplinary hearing was extremely short. The appellant had no responsibility for Specsavers' advertising displays and no means of controlling their content and nature. While the proceedings were pending she took steps to attempt to persuade Specsavers to alter objectionable features of their displays, and at the hearing she undertook to pay the cost of such alterations. This action appears to their Lordships to be indicative of good faith on her part. In the face of the appellant's offer, it seems to their Lordships that any reasonable Disciplinary Committee would have adjourned the proceedings in order to see whether the position could be regularised by removal of the undesirable features of Specsavers' display. But essentially their Lordships consider that the determination of the Committee on this charge was clearly wrong and unjustifiable because the Committee did not have before them any evidence to warrant the inference that the appellant had the intention of taking improper and unworthy advantage of Specsavers' advertising display. Their Lordships have already commented on the Committee's failure to give any reasons for their decision, but have little doubt that any reasons which the Committee might have attempted to formulate would have exposed their complete inadequacy as justification for the Committee's finding of conduct so heinous as to merit the extreme sanction of striking off.

As regards the second charge, this is so worded as to convey the meaning that the appellant's own fascia board, which bore only the words "M.L. Bebbington Ophthalmic Optician 1st and 2nd Floors", was in contravention of rule 4 of the 1981 Rules. This proposition is, of course, quite untenable, but presumably what is truly meant is that the combination of the Bebbington fascia with the Specsavers' fascia amounted to a contravention of the rule. Here again, a finding of guilt involving unfitness to be on the register of ophthalmic



opticians could only be properly arrived at upon the basis of evidence that the juxtaposition of the Bebbington fascia with Specsavers' fascia was effected with the intention of obtaining improper financial advantage from the advertising message of the latter. Their Lordships consider the evidence of the whole circumstances to be quite inadequate to enable any inference of such an intention to be drawn, and have no hesitation in holding that the finding of unfitness on the part of the appellant to be on the register was entirely unjustified.

Their Lordships cannot leave the case without animadverting upon what they regard as an unfortunate aspect of the disciplinary proceedings. As is well known, the position as regards the future of the profession's rules governing publicity was at the time of these proceedings in a state of flux. The responsible Minister had made proposals involving *inter alia* a considerable relaxation of the then existing rules which, indeed, has since come about. The proposals had been strongly resisted by more conservative members of the profession. At a meeting of the General Optical Council on 28th June 1984 a number of these went on record in support of such opposition. As it happened, five such members were included in the ten who comprised the Disciplinary Committee convened for the purpose of the present proceedings. Such a constitution of the committee was not well calculated to give an impression of fairness.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be allowed, and the determination of the Disciplinary Committee set aside. The respondent Council must pay the appellant's costs before the Board.

