IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref:
ON APPEAL FROM
THE HIGH COURT OF JUSTICE Claim No: HQ15D05048
QUEEN'S BENCH DIVISION
BETWEEN:

DR ANDREW GUISE

Claimant/Respondent

- and-

RAJEEV SHAH

Defendant/Appellant

GROUNDS OF APPEAL

Ground 1: Truth

1. The Judge was wrong in law in his application of section 2(3) of the Defamation Act 2013. Had he applied section 2(3) correctly to the facts found by him, the only reasonable conclusion was that the section 2 defence should succeed.

1.1. Section 1 and section 2(3) each set a serious harm hurdle for a claimant to surmount. Section 1 is satisfied if the entire publication has caused serious harm to reputation. Section 2(3) is a higher hurdle because it requires the serious harm to have been caused by the unproved imputation(s) "having regard to" those that have been proved to be true.

1.2. Section 2(3) therefore requires the tribunal of fact to evaluate the effect on the claimant's reputation of the imputations that have been found to be true by reference to the matters on which it has relied to find that section 1 is satisfied. The Judge failed to do so.

1.3. In his finding on section 1[1] the Judge relied heavily on the alleged tendency of the website to deter companies in the pharmaceutical industry from doing business with the Claimant. This was drawn from the unchallenged evidence of David Laskow-Pooley, the Claimant's friend and mentor. As the Judge noted, Mr Laskow-Pooley's evidence was that "drug companies were risk

[1] Paragraphs 159 to 162 of the Judgment.

averse and the existence of the website alone was damaging". His evidence was that they will be "very careful to select a pair of hands that doesn't have even the slightest whiff or blemish". The Judge failed to ask himself by reference to Mr Laskow-Pooley's evidence what would have been the effect on the Claimant's reputation if the website had only conveyed the imputations that the Judge found to be true.

1.4. The only reasonable conclusion was that the imputations that the Judge found to be true – in summary, sending unwarranted bills for sums to which the Claimant had plainly no entitlement and when the Defendant reasonably objected to paying, seeking to damage him by widespread disclosure of his confidential information and publishing outrageously false statements about him - which reflected "very badly" on the Claimant and showed him to be "someone who cannot be trusted with confidential information", would have the same tendency to lead the "risk averse" drug companies (or any other reputable business) to shun him. Accordingly, any serious harm to reputation could not be consequential on any element of untruth in the website.

1.5. The Judge's finding on section 2(3) appears to be based on the "scam" imputation being the "most serious meaning".[2] The issue in relation to section 2(3) is not whether one or more of the unproved imputation(s) are the most serious. It is whether the gulf between the unproved imputations and the proved imputations is so wide as to cause serious harm to reputation. Had the Judge evaluated relative seriousness from this perspective he would have concluded that there was no such gulf. The proved and unproved imputations had a common sting of untrustworthiness as a business consultant.

1.6. Further, the evaluation is not to be made by reference to the moral culpability of the various imputations viewed in abstract. It is to be made by reference to the evidence relied on to support the section 1 finding and the significance of the imputations in the context of the publication complained of. The Judge ought to have taken into account that the word "scam" was isolated and

[2] Paragraphs 186 to 187.

unparticularised and the proved imputations and statements of honest opinion would have been of greater significance to the reasonable reader of the website than the unproved.

Ground 2: Harassment

2. The Judge made the errors of law set out below in his finding[3] that the publication of the website when combined with the 22 January 2015 visit amounted to a breach of section 1 of the Protection from Harassment Act 1997.

2.1. Having found (correctly) that the publication of the website "on its own would not have amounted to harassment", the Judge was wrong to find that when combined with the visit a course of conduct amounting to harassment had been established.

2.2. Further or alternatively, the Judge's finding that the Defendant knew that the course of conduct amounted to harassment was directed solely to the visit. The claim in harassment could not be established without the Judge finding that the Defendant knew or ought to have known that publication of the website amounted to harassment.

2.3. Further or alternatively, the publication of the website was not capable of amounting to conduct which could form part of a course of conduct amounting to harassment, having regard to all the circumstances, including its content and manner of publication and the Judge's findings as to the conduct of the Claimant.

2.4. Further or alternatively, having regard to all the circumstances, a finding that the publication of the website was conduct which formed part of a course of conduct amounting to harassment would be an interference with the Defendant's Article 10 rights which was not necessary, proportionate or corresponding to a pressing social need. Any rights of the Claimant in relation to the website were sufficiently protected by a claim in defamation, if warranted.

[3] Paragraphs 205 to 210.

2.5. Further or alternatively, the Judge's finding that this was not a "serious course of conduct" was incompatible with a finding that it was a course of conduct amounting to harassment.

2.6. Insofar as is necessary, the Defendant will rely on any success in relation to ground 1 in support of ground 2. However, ground 2 is not dependent on ground 1.

Ground 3: Honest opinion

3. The Judge appears to have found[4] that part of the honest opinion defence failed, although this does not appear to have been reflected in his overall findings on liability or damages. Insofar as is necessary, the Defendant will allege the Judge was wrong to do so. The relevant words were: "If you are considering doing business with this individual, I would urge extreme caution". The Judge held (correctly) that the words "If you are considering doing business with this individual, I would urge ….. caution" were honest opinion, but that as the Defendant's "pleaded case" merely referred to "caution", not "extreme caution", the defence failed in part. This was an error of law. The defence of honest opinion in section 3 of the 2013 Act is directed to "the statement", which is defined in section 15 as "words, pictures, visual images, gestures or any other method of signifying meaning". This is to be contrasted with section 2, which refers to "the imputation conveyed by the statement". The Judge should have applied the honest opinion test in section 3(4) to the words used by the Defendant in the website, not how they were pleaded in the Defence. Had he done so, it is plain from his previous findings on honest opinion, that he would have found that the entire sentence was honest opinion. Any other finding would be perverse. Further or alternatively, there is no material difference between "caution" and "extreme caution", particularly in the context of a defence which protects exaggerated and unreasonable opinions.

David Price QC
David Hirst
27 July 2017

[4] Paragraph 194.