

Update: Comparative Advertising - Malicious Falsehood

Ajinomoto Sweeteners Europe SAS -v- ASDA Stores Limited [2010] EWCA Civ 609

Review

1. At first instance (Ajinomoto Sweeteners Europe SAS -v- Asda Stores Limited [2009] EWHC 1717 (QB)), Tugendhat J had confirmed that the single meaning rule (applicable to the law of libel) applied to malicious falsehood. If a statement had two meanings, both reasonably possible, but in one meaning the statement was false and in the other it was not, then the court should adopt the meaning in which the statement was not alleged to be false.
2. The Claimant appealed, and the first issue for the Court of Appeal to decide was whether the Judge at first instance was right about the relevance of the single meaning rule to malicious falsehood. Lord Justice Sedley did not mince his words, perhaps conscious of the need (at least on this occasion) to avoid ambiguity:

“..the [single meaning rule] itself is anomalous, frequently otiose and, where not otiose, unjust.”

3. It was the unanimous decision of the Court of Appeal that the single meaning rule does not apply to malicious falsehood claims. In terms, therefore, if advertisements making direct or indirect comparisons with competitors or their products contain statements which are capable of being interpreted as damaging by a reasonable consumer then that meaning will be relevant for the purposes of a malicious damage claim, no matter how many other (innocent and

reasonable) interpretations of the statement there may be. If malice can be proved in relation to the damaging meaning then a claim can be made out.

Conclusion

4. The decision of the Court of Appeal will assist in clarifying an issue that can frequently arise in cases involving comparative advertising. Whilst the greater clarity is to be welcomed, it is now of paramount importance that any statements made in comparative advertisements (or in any other advertisements for that matter) should continue to be the subject of rigorous analysis. The aim should be to include only those statements that are defensible as being factually accurate and not misleading. The risks for the advertiser arising from any latent or patent ambiguities have now been brought into sharp focus and any such ambiguities, however clever and sophisticated, could give rise to substantial claims.

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