MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-28 ta' Mejju, 2015

Citazzjoni Numru. 390/2014

Kram Trading

vs

Oleg Barkov ezercitanti l-kummerc taht

l-isem Barkov Distribution

Il-Qorti,

Rat ir-rikors guramentat tas-socjeta attrici tas-7 ta’ Mejju 2014 li jghid hekk:

1. Illi l-esponenti huwa partner fis-socjeta kummercjali Kram Trading liema socjeta timporta u tiffornixxi lil hwienet u lil-pubbliku in generali fis-suq Malti gamma ta’ prodotti taht il-marka

BRUNOX inkluz prodott bl-isem BRUNOX®expoxy li huwa deskritt bhala anti corrosion and primer system in one kif jidher mill-leaflet Dok. A u mit-Techinal Data Sheet Dok. B.

2. Illi skond it-technical data sheet Dok. B il-prodott BRUNOX epoxy huwa ukoll primer (paragrafu 1) u ghandu coverage ta' hmistax-il metru kwadru ($15m^2$) ghal kull litru ta' prodott (paragrafu 14).

3. IIli l-intimat li jimporta u jiffornixxi fis-suq lokali prodott simili bl-isem OWATROL OIL qieghed jirreklama dan il-prodott permezz ta' fliers u materjali ta' reklamar iehor kif jidher minn Dok. C u Dok. D fejn hemm paragun mal-prodott mibjugh mis-socjeta esponenti fis-sens li (a) BRUNOX Epoxy ma jistax jintuza bhala primer u (b) li l-coverage ta' OWATROL OIL huwa ta' $18m^2$ ghal kull litru u ghalhekk allegatament tliet drabiet izjed minn dak ta' BRUNOX - "triple more than BRUNOX".

4. Illi dan l-agir tal-intimat jikser il-limiti ta' konkorrenza in kwantu jikkonsisti fi reklamar komparattiv bi ksur intenzjonat u malizjuz tal-artikolu 32A Kap. 13 Ligijiet ta' Malta ghaliex huwa qarrieqi u jaghti informazzjoni zbaljata dwar il-prodott offert ghal bejgh mill-esponenti u r-rizultat normalment mistenni mill-uzu tieghu kif spjegat fl-artikolu 32B Kap. 13.

5. Illi l-intimat qieghed jistribuwixxi dan ir-reklamar komparattiv qarrieqi mal-hwienet fejn normalment jinbieghu dawn it-tip ta' prodotti fosthom is-sewgenti: WJA Distributors - Tarxien; Rovic Ironmongery - San Gwann; Ray's Ironmongery - Qormi; Electrowater Ironmongery - Qormi; PAVI DIY - Qormi; Top Tools - Fgura; - Miceli Ironmongery - Valletta.

6. Illi l-agir tal-intimat huwa ta' pregudizzju kbir ghan-negozju u presenza fis-suq tas-socjeta esponenti u ghalhekk hemm lok ghall-applikazzjoni ta' hlas ta' penali taht tal-artikolu 37 Kap. 13. Ghalhekk kella issir dina l-kawza.

Ghaldaqstant u prevja kull dikjarazzjoni opportuna, l-esponenti titlob bir-rispett kollu li dina l-Qorti ghar-ragunijiet fuq imsemmija :

(a) Tiddikjara li l-intimat qabez il-limiti ta' konkorrenza kif stabbilit mill-artikolu 32A et sequitur tal-Kodici tal-Kummerc, Kap. 13 Ligijiet ta' Malta.

(b) Tikkundanna lill intimati jhallas lis-socjeta esponenti somma bhala penali ta' dan il-ksur li ma tkunx anqas minn erba' mija u hamsa u sittin euro u sebgha u tmenin centezmu

(€465.87) u lanqas izjed minn erbat elef, sitt mija u tmienja u hamsin euro u hamsa u sebghin centezmu (€4,658.75),

(c) Tordna li jigu meqruda l-fliers u materjal iehor ta' reklamar qarrieqi mqassam mill-intimat a tenur tal-artikolu 37 Kap. 13.

Bl-ispejjez kontra l-intimat ingunti minn issa in subizzjoni u b'rizerva ghal kull azzjoni ohra spettanti lil-esponenti.

Rat ir-risposta tal-konvenut li tghid hekk:

1. Illi t-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt u dan fid-dawl tal-fatt li l-agir tal-intimat ma jiksirx id-disposizzjonijiet tal-artikolu 32A u 32B tal-Kap. 13 tal-Ligijiet ta' Malta. L-informazzjoni komparativa maghmulha mill-intimat, bejn il-prodotti 'Owatrol Oil' (distribwit mill-intimat) u 'Brunox' (distribwit mir-rikorrent), jissodisfa l-kundizzjonijiet kollha tal-artikolu 32A tal-Kap. 13 ta' Ligijiet ta' Malta stante li l-informazzjoni provduta hija informazzjoni korretta bbazata fuq paragun oggettiv tal-karatteristici tal-prodotti mertu ta' din il-kawza.

2. Illi kif ser jigi pprovat fil-mori tal-kawza l-informazzjoni uzata mill-intimat dwar il-prodott 'Brunox' huwa korrett u veritier. Ir-rikorrent huwa sbaljat fid-dikjarazzjoni tieghu li l-intimat iddikjara li 'Brunox' m'huwiex 'primer'. L-intimat iddikjara li 'Brunox' ma jissostitwix 'primer' tradizzjonali, liema fatt johrog minn diversi opinjonijiet ta' esperti dwar il-prodotti mertu ta' din il-kawza. Apparti minn hekk huwa minnu li 'Owatrol Oil' ikopri (coverage) tlett darbiet aktar minn 'Brunox' stante illi l-prodott 'Owatrol Oil' ikopri tmintax (18)-il metru kwadru, filwaqt 'Brunox' ikopri hmistax (15)-il metru kwadru. Pero kif jindika Dok. A anness mar-rikors guramentat "Brunox is applied in 2 - 3 coats to the remaining porous rust with a brush, roller, spray gun or in several coats from the handy CFC free Brunox spray can." Fil-konfront ta' 'Owatrol Oil' hemm bzonn biss ta' passata wahda u ghalhekk il-kumment 'triple more than Brunox' huwa validu.

3. Illi di piu t-talbiet huma vessatorji u infondati u huma immirati sabiex jinfluwixxi xi pressjoni fuq l-esponenti sabiex ma jbieghx u jew jiddistribwixxi xi prodotti minn tieghu.

Bl-ispejjez.

Rat l-atti u n-noti ta’ sottomissjonijiet prezentati;

Rat li l-kawza thalliet ghas-sentenza.

Ikkunsidrat

Provi

Mark Grech xehed li hu partner ma' missieru Anthony Grech fis-socjeta rikorrenti Kram Trading li topera fil-qasam ta' ironmongery u fost il-prodotti li ghandhom hemm prodott tad-ditta Brunox li hu epoxy rust converter u li ilu jitqassam fis-suq Malti ghal dawn l-ahhar 12-il sena. Dan il-prodott jintuza mal-hadid gdid kif ukoll mal-hadid imsaddad bhala primer.

Il-prodott Owatrol Oil jintuza wkoll bhala primer. Xi xhur ilu s-salesman taghhom, Edward Attard, kien qallu li ra flyers tal-Owatrol Oil f'diversi hwienet taz-zebgha u li kien qed isir paragun mal-prodott taghhom Brunox, kemm dwar coverage kif ukoll dwar l-uzu tieghu bhala primer u dawn il-paraguni kienu qarrieqa. Ftit granet wara, anke missieru sar jaf bihom. Huma kienu jafu b'dana l-prodott qabel, imma l-paragun ghamilhom hafna hsara.

Dwar dana l-flyer (ara Dok. C) fir-rigward tal-coverage jallega li Owatrol Oil huwa ta' 18 metri kwadri/L ghal kull litru u dana huwa 'triple more than Brunox'. Fil- fatt il-coverage ta' Brunox epoxy huwa ta' 15 metri kwadri ghal kull litru (ara Dok. B - Technical data sheet Clause 14). Skont Clause 7.1 dan il-prodott jista' jizdied b'8% acetone u ghalhekk jista' jizdied il-coverage. Skont l-istess Caluse 7.1 u 7.2 u 14 huwa dejjem ahjar li jinghataw zewg passati tal-prodott. Il-coverage ta' Owatrol Oil (ara Technical Data Sheet taht Coverage Dok. MG2) huwa ta' 18 metri kwadri ghal kull litru izda dana jista' jvarja skond il-materjal. Illi wara l-ewwel applikazzjoni ta' Owatrol Oil wiehed irid ukoll jaghmel passata ohra skond il-kundizzjoni tal-hadid u dana billi Owatrol Oil jithallat ma' primer (Application). Dan hu konfermat fuq il-flyer (Dok. C) fl-ahhar bullet point fejn ighid "Apply a second coat with 25% Owatrol Oil and 75% oil based paint. Fuq il-flyer (Dok. D) ghal rizultati ahjar u mill-ahjar ghandhom isiru izjed passati, anke tlieta. Ghalhekk 'triple more than Brunox' huwa zbaljat u

mhux sostanzjat kemm mit-Technical Data Sheet tal-Owatrol Oil kif ukoll mill-flyer stess Dok. D.

Dwar l-uzu tal-Brunox epoxy bhala primer l-intimat qed jallega illi "Brunox Epoxy does not replace the traditional primer" u li "Owatrol Oil can be used as a primer" (ara Flyer D). Fit-Technical Data Sheet ta' Brunox (Dok. B) Clause 1, hemm car illi huwa "Patented anti-corrosion and primer system in one. The world's first rust stop and primer in one with epoxy resin" waqt li Clause 2 "simultaneously a primer". Fil-Clause 9 ighid li wara l-applikazzjoni tal-Brunox epoxy "the application of a primer is omitted". Fl-ahhar paragrafu tal-Flyer D hemm "Brunox should always be used on rust. Do not put it on bare metal as anti-corrosion, which can cause problems (wrinkling) in conjunction with other layers". Dan mhu minnu xejn. Fil-fatt fil-Clause 6 (Dok. B) insibu li l-process li jrid isir qabel ma jigi applikat il-Brunox epoxy u dana jinkludi t-tnehhija kemm jista’ jkun tas-sadid. Jista’ jintuza fuq hadid li ghadu mhux imsaddad u insibu l-kliem 'derusted steel must be free of dust and grease'. Dan ifisser li Brunox epoxy jista’ jintuza kemm fuq hadid imsaddad kif ukoll fuq hadid mhux imsaddad. Minn naha l-ohra skond id-Dok. AG2 Owatrol Oil jista’ jintuza biss meta hemm sadid prezenti (ara heading 'Surface Preparation') "Do not remove firm rust" u "Do not clean metal back to a bright finish".

Anthony Grech esebixxa Dok. AG2 ritratt li ha tal-flyer f'hanut l-Imsida. Id-Dok. C u D huma photocopy tal-flyer li kien hemm il-Pavi. Dawn il-flyers qed jaghmlulhom hsara billi l-paragun mal-prodott taghhom hu zbaljat kemm dwar coverage kif ukoll dwar l-uzu tieghu.

Edward Attard, salesman ma' Kram Trading, xehed li xi ftit xhur ilu beda jara flyers li fihom kien hemm miktub li Owatrol Oil ghandu coverage ta' 18 metri kwadri ghal kull litru u li hu "triple more than Brunox". Fuq wara tal-flyer fl-ahhar paragrafu hemm paragun mal-prodott Brunox. Ikkonferma li Dok. C u D huma l-flyers li ra. Hu semma’ d-diversi hwienet fejn ra dan il-flyer u esebixxa d-Dok. EA1 kopja ta' flyer li ra Hal- Tarxien. Bill kien jaf li dak li kien hemm fil-flyer kien zbaljat kellem lil Mark Grech id-direttur.

Oleg Barkov xehed li huwa jimporta l-prodott Owatrol Oil. Hu kompla jixhed hekk: This product has a number of functions, mainly being a rust converter, primer for oil-paint, wood sealer and a paint additive to make the paint rust-inhibiting and have a

better cohesion. When he decided to import this product, he made a study of its features and how it compares to other products on the market so he could compete with other distributors. One .of the main products on the market was Brunox. One of the most important features of any anti-rust product is the level of coverage it provides because of (i) the amount of substance needed from the product to provide protection on the material which is being used and (ii) the cost effectiveness of such coverage.

Brunox does not indicate the coverage it provides on its cans whereas Owatrol does. The coverage of Owatrol is triple more than Brunox. According to Brunox technical data coverage amounts to 15 sq/m for one coating (Point 14 Dok. B). However according to Dok. A Brunox spray is applied in 2-3 coats or in several coats, meaning that the product has to be applied more than once. Thus contrasts with Owatrol. In Dok. OB1 under title 'Coverage' there is indicated 18 sq/m which is more than Brunox. In Dok. C under title "Surfaces with old paint/very rusty surfaces", when the product Owatrol is applied on the rusty material it only has to be applied once. Then when the material is painted, 25% of the paint coating should be Owatrol Oil. Based on these factors it was legitimate to conclude that Owatrol is triple that of Brunox, and he is being conservative as it is possible that Brunox has to be applied several times. On the basis of this information he prepared a brochure for the use of shop owners not end customers. In it he put a banner with a comparative statement between Owatrol and Brunox based on his findings derived from Brunox literature. That Owatrol is a better product is confirmed by the German Institute of Corrosion which places Owatrol in the third place, Coca Cola in fourth position and Brunox in the ninth position (Dok. OB2). These calculations are also confirmed by a representative of Owatrol Thomas Rathbone (email dated 14/10/2014 Dok. OB3 and OB4).

A detailed write-up of the advantages and different uses of Owatrol Oil is found in Dok. D, whereas documents OB5 and OB6 are extracts from two different websites selling Brunox. These state that "Brunux Epoxy does not replace primer in the traditional sense. Brunox should always be used on rust. Do not keep it to bare metal as the (alleged) anti-rust one that can cause problems (eg. wrinkles) in conjunction with other layers." This means that Brunox cannot be solely used as a preparatory material for the prevention of absorption of subsequent layers of paint as Owatrol Oil. The latter can be used solely as a primer.

Konsiderazzjonijiet ta' dritt

Illi l-azzjoni attrici odjerna hija bazata fuq l-artikoli 32A u 32B tal-Kodici tal-Kummerc dwar reklamar komparattiv. Dawn l-artikoli dahhlu fil-ligi taghna d-Direttiva tal-EC 97/55 dwar comparative advertising.

Illi skont l-artikolu 32A.(1) kummercjanti m'ghandhomx jaghmlu reklamar kompararttv. Is-subartikolu (4) imbaghad jiddefinixxi "reklamar komparativ" bhala 'kull reklamar li esplicitament jew b'deduzzjoni jiddentifika kompetitur jew oggetti jew servizzi offruti minn kompetitur.

Illi reklamar komparattiv huwa pero permess meta l-kundizzjonijiet li gejjin jigu sodisfatti:

(a) ma jkunx qarrieqa skont it-tifsira tal-artikolu 32B jew skont it-tifsira tal-artikoli 51C u 51D tal-Att dwar l-Affarijiet tal-Konsumatur; (51C azzjonijiet qarrieqa u 51D ommissjonijiet qarrieqa);

(b) ikun jipparaguna oggetti jew servizzi li jissodisfaw l-istess htigiet jew li huma mahsuba ghall-istess ghan;

(c) ikun jipparaguna oggettivament xi wahda jew iktar mill-karatteristici materjali, rilevanti, verifikabbli u rapprezentattivi ta' dawk l-oggetti u s-servizzi, liema karatteristici jistghu jinkludu l-prezz;

(d) ma jkunx inaqqas mill-kreditu jew imaqdar it-trademarks, l-ismijiet kummercjali, jew il-marki distintivi ohra, l-oggetti, is-servizzi, l-attivitajiet, jew ic-cirkostanzi ta' xi kompetitur;

(e) ghal prodotti b'titolu ta' origini, f’kull kaz ikun jirreferi ghal prodotti bl-istess titolu;

(f) ma jiehux vantagg mhux gust mir-reputazzjoni ta' xi trademark, isem kummercjali jew marki distintivi ohra ta' xi kompetitur jew tat-titolu ta' origini ta' prodotti konkorrenti;

(g) ma jkunx jipprezenta oggetti jew servizzi bhala imitazzjonijiet jew repliki ta' merkanzija jew servizzi li ghandhom trademark jew isem kummercjali protett;

(h) ma jkunx johloq konfuzjoni bejn kummercjanti, bejn dak li jirreklama u xi kompetitur jew bejn it-trade marks, l-ismijiet kummercjali jew xi marki distintivi ohra, oggetti jew servizzi ta' dak li jirreklama u dawk ta' xi kompetitur.

L-artikolu 32B(2) jaghti din id-definizzjoni ta’ reklam:

> Reklam huwa qarrieqi jekk inkluza l-prezentazzjoni tieghu, iqarraq jew probabbilment iqarraq bil-persuni li lejhom ikun indirizzat jew li ghandhom jasal, u jekk minhabba fin-natura qarrieqa tieghu, hu probabbilment jaffettwa l-imgieba ekonomika taghhom jew huwa wiehed li ghal dawk ir-ragunijiet jaghmel hsara jew probabbilment jaghmel hsara lil xi kompetitur tal-persuna li dan ir-reklam ghandu ghan li jippromwovi l-interessi taghha.
>
> (3) Sabiex jigi stabbilit jekk reklamar huwiex qarrieqi, ghandhom jitqiesu l-karatteristici tieghu kollha, u b'mod partikolari kull informazzjoni li jista' jkun fih dwar -
>
> (a) il-karatteristici ta' oggetti jew servizzi, inkluza d-disponibbilta taghhom, in-natura, l-ezekuzzjoni, il-kompozizzjoni, il-metodu u d-data tal-manifattura jew provvista, kemm ikunu adatti ghall-iskop, l-uzu, il-kwantita, l-ispecifikazzjoni, l-origini geografika jew kummercjali jew ir-rizultati normalment mistennija mill-uzu taghhom, jew ir-rizultati u l-karatteristici materjali tat-testijiet jew kontrolli mwettqa fuq l-oggetti jew is-servizzi;
>
> (b) il-prezz jew il-mod li bihom l-prezz jigi kkalkolat, u l-kondizzjonijiet li bihom l-oggetti jigu forniti jew is-servizzi jkunu moghtija;
>
> (c) in-natura, l-attributi u d-drittijiet ta' min jaghmel ir-reklam, bhall-identita u l-attiv tieghu, il-kwalifiki u l-pussess ta' drittijiet ta' proprjeta industrijali, kummercjali jew intellettwali jew kwalunkwe premijiet u distinzjonijiet miksuba minnu.

Illi meta kien se jigi introdott fil-ligi Ingliza l-kuncett tal-comparative advertising, fil-dibatiti parlamentari, Lord Strathclyde kien ikkumenta li:

> The government have been persuaded that there is no harm in comparative advertising ... provided that it makes fair use of a registered trademark for the purpose of informing the public. As foreshadowed in the White Paper, the Bill seeks to chart a middle course, allowing comparative advertising but providing safeguards for the owner of a registered trademark.

Il-ligi Maltija imxiet bl-istess hsieb, u accettat li comparative advertising huwa permess, basta li l-kondizzjonijiet imsemmija fil-ligi, senjatament fl-artikoli 32A u 32B tal-Kap. 13 jigu sodisfatti, fosthom partikolarment li r-reklamar ma jkunx qarrieqi; li ma jnaqqas mill-kreditu jew imaqdar il-markju; ma jiehux vantagg mhux gust mir-reputazzjoni tal-markju; ma johloqx konfuzjoni bejn il-kummercjanti u li ma jkunx misleading b'mod li jaghti informazzjoni falsa.

Illi l-oneru tal-prova qieghed fuq sid il-markju li jikkontendi li kien hemm reklamar qarrieqi. It-test huwa wiehed oggettiv u bazat fuq dak li jifhem a reasonable reader, cioe l-persuni li lejhom ikun indirizzat jew li ghandu jasal ir-reklamar (artikolu 32B(2)).

Kontestazzjoni

Fil-kaz in ezami, skont is-socjeta rikorrenti, il-flyers tal-Owatrol Oil jaghmlu paragun mal-prodott taghha Brunox, kemm dwar coverage kif ukoll dwar l-uzu tieghu bhala primer u dana qed johloq konfuzzjoni fis-suq u qed jikkawzalhom hsara.

Fil-flyer Dok. C, is-socjeta rikorrenti qed toggezzjona ghal parti fejn hemm imnizzel:

> Owatrol-Oil 4-in-1 / direct to rust 1) Rust-converter 2) Primer for oil-paint 3) Wood-sealer 4) Paint additive to make paint rust-inhibiting + better adhesion.
>
> For both: old (rusty) + new metal
>
> Coverage: 18 m^2/L (triple more than Brunox)

Fid-dokument D, qed toggezzjona fejn hemm:

> Compare to Brunox: Brunox epoxy does not replace the traditional primer. Owatrol-Oil can be used as a primer. Brunox should always be used on rust. Do not put it on bare metal as an anti-corrosion, which can cause problems (wrinkling) in conjunction with other layers. Owatrol-Oil can be used on both, new and old, rusty metal. Also, you can't use Brunox as paint-additive.

Minn naha l-ohra l-intimat isostni li huwa ghamel studju komparattiv tal-kwalita tal-prodott tieghu komparat ma' dak li kien hemm fis-suq u semma' lil Brunox partikolarment dwar kemm ikun hemm bzonn li jintuza mill-prodott biex ikollok l-ahjar rizultat u kemm bzonn tonfoq flus. Hu ezebixxa d-dokumenti OB5 u OB6 li huma siltiet minn websites differenti li jbieghu l-prodott Brunox u li jikkonfermaw dak li hu qed isostni fil-flyers. Inoltre l-fatt li Owatrol huwa prodott ahjar minn Brunox gie konfermat, skond l-intimat, mill-German Institute of Corrosion, li jpoggi lil Owatrol fit-tielet post, lill-Coca Cola fir-raba post u lill-

Brunox fid-disgha post (Dok. OB2 a fol. 46). Il-kalkolazzjonijiet dwar il-coverage saru minn rapprezentant ta' Owatrol, Thomas Rathbone (ara email datat 14/10/2014 Dok. OB3 and OB4 a fol. 48-49).

Is-socjeta rikorrenti tikkontendi li l-flyer (Dok. C) jallega li Owatrol Oil huwa ta' 18 metri kwadri/L ghal kull litru u huwa 'triple more than Brunox', meta dan huwa zbaljat u mhux sostanzjat kemm mit-Technical Data Sheet tal-Owatrol Oil kif ukoll mill-flyer (Dok. D). Il-coverage ta' Brunox epoxy huwa ta' 15 metri kwadri ghal kull litru (Dok. B) u l-prodott jista' jizdied b'8% acetone, ghalhekk hemm aktar coverage. Minn naha l-ohra, l-coverage ta' Owatrol Oil, skond Dok. MG2, huwa ta' 18 metri kwadri ghal kull litru u wiehed irid jaghti aktar passati skont il-kundizzjoni tal-hadid billi Owatrol Oil jithallat ma' primer. Ghalhekk ma jistax ikun li Owatrol-Oil hu triple more. In kwantu ghall-uzu tal-Brunox, l-intimat qed jallega illi “Brunox Epoxy does not replace the traditional primer" mentri "Owatrol Oil can be used as a primer”, meta fil-fatt Brunox hwwa "Patented anti-corrosion and primer system in one". Fil-Flyer Dok. D hemm imnizzel li "Brunox should always be used on rust u mhux on bare metal, meta dan mhux minnu ghax Brunox Epoxy jista’ jintuza kemm fuq hadid imsaddad kif ukoll fuq sadid mhux imsaddad, mentri skont id-Dok. AG2, Owatrol Oil jista' jintuza biss meta hemm sadid prezenti.

L-intimat ma jaqbilx ghax ighid li skond il-Brunox technical data, il-coverage huwa ta' 15 sq/m ghal passata wahda (Punt 14 Dok. B) izda skond id-Dok. A, Brunox irid jinghata aktar minn passata wahda. Dan jikkuntrasta ma' Owatrol (Dok. OB1) fejn il-'Coverage' hu ta' 18 sq/m li hu aktar minn Brunox. Skond id-Dok. C meta jigi uzat l-Owatrol fuq materjal imsaddat dan jigi applikat ghal darba biss. L-intimat isemmi li Brunox ma jistax jintuza bhala primer mentri Owatrol jintuza hekk.

Illi fil-kaz in ezami l-intimat ghamel studju komparattiv, qabel irreklama l-prodott minnu impurtat biex jipparaguna oggett jew servizz li jissodisfa l-istess htigiet jew li huwa mahsub ghall-istess ghan. Fil-fatt iz-zewg prodotti in kwistjoni ghandhom x’jaqsmu ma' rust stop + primer.

Il-flyer dwar il-prodott u l-materjal ta' reklamar imhejji mill-intimat jipparaguna oggettivament wahda jew iktar mill-karatteristici materjali, rilevanti, verifikabbli u rapprezentattivi ta' dan l-oggett u s-servizz, liema karatteristici jirrigwardaw anke l-prezz. L-intimat isemmi, fost affarijiet ohra, il-coverage, l-uzu, il-karatteristiki teknici tal-prodott in kwistjoni u l-effett li ghandhom fuq il-prezz skond l-ammont tal-prodott li jintuza. Dan huwa ikkonfermah permezz ta' kalkolazzjonijiet li saru mid-ditti ta' barra u surveys li saru minn istituti barranin, liema informazzjoni gew prezentati fl-atti ta' dawn il-proceduri. Dana huwa konformi ma' dak li jipprovdi l-artikolu 32B(c).

Illi s-socjeta rikorrenti qed tibbaza t-talba taghha fuq it-technical data reklamata mill-intimat li hija tikkontendi li mhumiex vera, mentri l-intimat ddefenda l-posizzjoni tieghu billi rrefera ghall-istess techical data pprezentata mill-istess socjeta rikorrenti u jghid li dawn jaghtuh ragun meta jsostni li Owatrol Oil huwa 'triple more than Brunox’. L-intimat jissottometti wkoll li r-reklamar maghmul minnu jsib sostenn minn kalkolazzjonijiet u studji li saru barra minn Malta qabel ma huwa ddecieda li jirreklama l-prodott tieghu b'dak il-mod.

Fil-fehma tal-Qorti l-intimat ma qalghax minn zniedu r-reklamar li l-prodott Owatrol-Oil huwa tlett darbiet aktar minn Brunox imma spjega kif gie ghal dik il-konkluzjoni. Hu jghid illi skont il-kalkoli li ghamel u li gew konfermati minn barra, il-prodott tieghu jehtieglu passata wahda mentri Brunox jehtieglu anke tlett passati allura-l-prodott tieghu huwa triple more than Brunox. Ighid ukoll li l-prodott tieghu jista' jintuza fuq kull hadid mentri dak ta' Brunox fuq hadid imsaddad biss. Is-socjeta rikorrenti ma taqbilx, imma l-intimat ipproduca informazzjoni anke minn websites li jbieghu l-prodott tas-socjeta rikorrenti li, skont hu, jikkonfermaw dak li afferma fil-flyers. Fil-fehma tal-Qorti minn dawn il-provi ma jistax jinghad li l-intimat ghamel xi false claim fir-rigward tal-prodott tieghu jew tal-prodott tas-socjeta rikorrenti billi dak li afferma huwa kollu dokumentat b'kalkoli.

Illi l-Qorti trid tezamina wkoll jekk dan ir-reklamar kienx iqarraq jew probabbilment iqarraq bil-persuni li lejhom ikun indirizzat jew li jasal ghandhom. Kif jikteb **Paul Torremans** fil-ktieb Intellectual Property Law (5th Ed. Fol 491-421): "An objective test is taken in deciding whether there is dishonest practise by reference to the reasonable reader of the advertisement ... The general public is taken to know the ways of advertisers and to expect hyperbole (**Vodafone Group plc vs Orange Personal Communication Services Ltd**

(1997)).They will judge the advertisement as a whole. As a result, dishonesty will only be found when there is a significant misleading by the advertisement" (**British Communications plc vs AT & T Communications (UK) Ltd** (1996); **Barclays Bank plc vs RBS Advanta** (1996)).

Illi fil-kaz ta' comparative advertising "the burden of proof lies with the claimant whose registered mark has been taken for comparison" (Torremans). Illi s-socjeta rikorrenti kellha almenu iggib xi tip ta' prova li r-reklamar in kwistjoni kien b'xi mod qed iqarraq jew qarraq lill-persuni li lejhom kienu indirizzat dawn il-flyers jew xi tip ta' response jew feedback minghand il-hwienet tal-merca fejn gew distribwiti dawn il-flyers jew minn xi klijenti li xtraw dak il-prodott. Minn dana ma hemm xejn.

Fil-fehma tal-Qorti, is-socjeta rikorrenti, li fuqha kien l-oneru tal-prova dwar il-hsara li qed issirilha, ma irnexxiliex tipprova li r-reklamar mill-intimat kien qarrieqi jew li holoq konfuzzjoni fis-suq.

Fid-dawl ta' dan kollu l-Qorti ghalhekk hija tal-fehma li f'dan il-kaz ir-reklamar li sar mill-intimat ma jnaqqasx mill-kreditu jew imaqdar it-trademark, l-isem kummercjali, jew il-marki distintivi ohra, l-oggetti, is-servizzi u l-attivitajiet, tas-socjeta rikorrenti u konsegwentement dan ir-reklamar mhux qarrieqi u ghalhekk permessibbli.

Decide

Ghal dawn il-motivi l-Qorti tiddeciedi billi tichad it-talbiet tas-socjeta rikorrenti bl-ispejjez kontra taghha.

< Sentenza Finali >

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