

Notified on the 29th January, 2008

Mercantile Court N°1 in Barcelona

Cause n° 644/2006-F

In Barcelona, on this 25th day of January, 2008.

I, Ms. EMILIA PUGA GONZÁLEZ, Acting Judge of Mercantile Court n. 1 of Barcelona, have examined the cause registered under n. 644/2006-F, upon application of the claimant ASOCIACION ESPAÑOLA DE FABRICANTES DE TUBOS Y ACCESORIOS PLASTICOS (ASETUB), represented by the solicitor Ana Moleres Muruzabal and by the lawyer Rufo Martinez de Paz, against LA FARGA LA CAMBRA SOCIEDAD ANONIMA UNIPERSONAL, represented by the solicitor Carlos Testor Ibars and by the lawyer Jose Miguel Blasco Hernando, according to the following

BACKGROUND FACTS

ONE.-The aforementioned Claimant filed a claim against the Defendant in which, upon establishing the facts and fundamental principles of law to be enforced, petitioned the Court to give judgement and 1. declare the contents of the advertisement published by the Defendant in *La Vanguardia* newspaper on 27th November, 2005, as described in fact 2 of the claim, as an act of unfair competition; 2. order the defendant to serve the sentence herein and to cease publication and/or release of the advertisement containing such information declared as unfair competition by this judgment. And all the above, obliging the Defendant to pay all the legal costs incurred.

TWO. - After admitting the claim for processing, by means of a judge decision made in this Court on 5/12/2006, the Defendant was summoned to Court to answer the Claim within the following twenty days.

In the referred time limit, the Defendant, La Farga Lacambra Sociedad Anónima Unipersonal, through his solicitor Mr. Testor Ibars, filed an answering brief stating his opposition to the Claimant's claims and asking for a judgment dismissing the Claim and obliging the Claimant to pay all the legal costs.

By means of an order issued by this Court on 21-2-2007, it was decided to summon the parties for a preliminary hearing to take place on 5-6-2006.

THREE. - On that date, the preliminary hearing took place and the parties, duly represented by their solicitors and lawyers, appeared before the Court.

FOUR. - During the preliminary hearing, the parties stated that no agreement had been reached on the claim and that there were no preliminary issues of law to be solved in this Hearing. Likewise, the parties confirmed their initial statements and having the parties detailed the points of their disagreement, the interlocutory stage of proceedings was opened.

The Claimant asked the Court to use as evidence the documents attached to the claim together with the claim itself and the expert's evidence which were admitted for proceedings according to the Court records of the Preliminary Hearing.

The Defendant asked the Court to use as evidence the documents and the expert's evidence which were admitted for proceedings according to the Court records of the Preliminary Hearing.

Finally, it was decided that the trial would take place on the 11th December, 2007.

FIVE. - The trial took place on such date examining the above evidences with the results below.

After that, the appearing parties brought their oral conclusions leaving the proceedings ready for judgement.

SIX. - In the completion of these proceedings, every legal prescription as well as all procedural safeguards have been fulfilled.

LEGAL GROUNDS

ONE. - The claimant files a claim against the defendant to determine the unfair competition of the latter by stating that the contents of the advertisement published in "La Vanguardia" newspaper on the 27th November, 2005 page 21, as follows: "[BROTOS DE LEGIONELA] LEGIONELLA OUTBREAKS. Plastic pipes are an optimal habitat for the development of the *legionella* bacteria in water. On the other hand, copper pipes destroy it, avoiding infection. THE SOLUTION, COPPER PIPES. Reports La Farga Lacambra, S.A.U., copper pipes manufacturer," are unacceptably beyond the legal limits for comparative advertising and can be considered as misleading advertising, incurring in unfair competition; therefore, the claimant asks that the contents of said advertisement be declared as unfair competition and the judge order the defendant to serve the sentence. The defendant objected the claim understanding that the published advertisement must not be deemed as unfair competition since it refers to a relevant, similar and provable fact, that is, the different properties of copper and plastic respect of the *legionella* bacteria; that copper and plastic pipes compared are used for the same purpose, in this particular case, to be used as piping; that this comparison has been made objectively and referred to an essential, pertinent, verifiable and representative property of copper and plastic; that the advertisement cannot be deemed as misleading regarding the persons who are directed to or affected by it; and, lastly, that the comparison with plastic cannot be considered as degrading since, regardless this comparison could discredit the plastic pipe in the market, the information presented is accurate, true and pertinent.

TWO.- The matter to be solved herein is focused on whether the said public communication entails a misleading action as per article 7 of the Competition Law [*Ley de la Defensa de la Competencia*] of 10th January, Law 3/91, which considers as unfair the release of the incorrect or false information which may lead the persons who are directed to or affected by it to an error "about the nature, way of manufacturing or distribution, features, ability for use, quality and quantity of the products and, in general, about the advantages actually offered"; in summary, this law considers misleading advertising as unfair.

If misleading advertising must be understood as per Council Directive 84/450 of 10th September then, any advertisement that, in any way, leads or can lead the persons who are directed to or affected by it to an error or is able to damage a competitor must be considered as such.

In this case, the unfairness exists in the error caused, or that can be caused, to the consumer by false or inaccurate information on certain aspects of the service provided, and this Directive tries to protect the consumer at the moment of making a decision in the market, particularly, in order that this decision is free and conscious, as suitable to who must be the arbitrator in a transparent system of fair competition.

On the other hand, article 9 of the Competition Law states that “making or releasing statements about the activity, services, premises or market relationships of a third party which discredit it in the market, are considered as unfair, unless they are accurate, true and pertinent.”

THREE.- Both expert witnesses who acted in the trial, the one acting for the claimant, Mr. Jordi Codina, and the one for the defendant, Mr. Fernando Espiell, coincide at least that, indeed, copper tubes do not destroy the *legionella* bacteria, but they inhibit it or prevent it to develop, at least with legally set maintenance.

According to Mr. Espiell, the *legionella* development within copper pipes would start after 500 days and would act after 800 days, under the worst conditions (in presence of water, high temperature and other bacteria) while within plastic pipes this development activity would happen in 10 days. Mr. Codina stated during the trial that, both plastic and copper pipes, once installed according to the applicable law, must carry a maintenance activity which prevents the development of any bacteria. Thus, according to the above and applying the legal grounds above, regarding the public which the advertisement published by the defendant is directed to, specialists or not, if we read that copper tubes destroy the *legionella* bacteria, what we really understand is that the *legionella* bacteria is destroyed and not that it is inhibited or that is prevented to develop within a period of time and within certain conditions; this information has not been proved since what has been made clear is that copper tubes do not destroy the *legionella* bacteria. **Likewise, the said advertisement conveys that, if plastic pipes are installed as water piping, the *legionella* bacteria will necessarily appear, regardless maintenance is made or not, which is also not proved. Therefore, the judge finds for the claimant understanding that the information in the advertisement above is misleading and is degrading for the plastic pipes manufacturers, and its release is an act of unfair competition.**

FOUR. - Regarding the legal costs, according to article 394 of the Act for Civil Trials [*Ley de Enjuiciamiento Civil*], the costs for the present trial shall be paid by the defendant.

Thus, once legal grounds and all the general and pertinent information are examined,

I DECIDE THAT,

allowing the claim filed by the ASOCIACIÓN ESPAÑOLA DE FABRICANTES DE TUBOS Y ACCESORIOS DE PLÁSTICO (ASETUB), represented by the solicitor Ms. Molerés Muruzubal, against the company LA FARGA LACAMBRA, SOCIEDAD ANÓNIMA UNIPERSONAL, I RULE that the contents of the comparative advertisement inserted in “La Vanguardia” newspaper by the defendant on the 27th November, 2005, page 21, is an act of unfair competition and I order the defendant to serve this sentence and to cease publication of said advertisement.

Shall the parties be noticed of this sentence herein and be informed that they can appeal against it before this Court within a period of five days from the notification according to article 457 of the Act for Civil Trials [*Ley de Enjuiciamiento Civil*].

Done and ordered in this Court this 25th day of January, 2008.

PUBLICATION. - The Judge in substitution of the one who gave this judgment has read the above sentence and has caused it to be published.