

Product Liability - Austria

Going for gold: court considers claims in relation to 24-carat cosmetics

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Facts

A cosmetics producer launched a product series entitled '24 K-rat Deluxe Formula', which consisted of a day and night cream and an eye and face serum. The series was advertised in catalogues and leaflets with the following claims:

"24 K-rat high carat care with multi-active NGS-age complex, consisting of finest gold- and silk particles! ... The gold particles reflect the light on the skin and give the skin a juvenile glimmer. The complexion appears brighter and the skin feels firmer, the face gains contour."

The products contained only a small quantity (0.05 parts per million) of colloidal gold.

A competitor argued that both the name of the product series and the defendant's claims were misleading. The competitor therefore sued for cease and desist, both of distribution of the series under the '24 K-rat Deluxe Formula' name and of the further use of the criticised claims. It argued that, according to the international nomenclature for cosmetic ingredients, the products contained no gold (color index 77480) or gold salts.

Applicable law

Under Sections 5(2) and (4) of the Food Safety and Consumer Protection Act (which is applicable to cosmetics by analogy according to Section 18 thereof), it is prohibited to market or advertise foods or cosmetics with misleading claims, in particular through claims that allege properties and effects of the foods or cosmetics that the products do not have. Furthermore, Sections 5(2) and (4) of the act implement Article 6(3) of the EU Cosmetics Directive (76/768/EEC) which provides that when labelling, putting up for sale or advertising cosmetic products, no text, name, trademark, picture or figurative or other sign can be used to imply that these products have characteristics which they do not have.

Decision

Both the first instance court and the court of appeal dismissed the claim. On appeal, the Supreme Court in part confirmed the claim and in part remitted the case to the court of first instance.

The Supreme Court held⁽¹⁾ that the average consumer would not expect visible gold particles in the product, since such particles are used for decorative purposes rather than in connection with skincare. A reasonable consumer would not expect a skincare product sold under the name '24 K-rat Deluxe Formula' to contain visible gold particles with a purity of 24 carats, but would expect only minor quantities of gold. Since the product contained gold in the form of colloidal gold, the product's name was not misleading.

However, with regard to the product's alleged properties, the defendant claimed certain efficiencies related to the inclusion of gold as an ingredient in its cosmetics series. These claims were disputed by the claimant.

The court held that the truth of the defendant's allegations in respect of the product's properties were relevant to the decision, since the average consumer would understand the defendant's claims to mean that the gold contained in the products

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would give consumers a youthful glow. These claims were also likely to cause consumers to make transactional decisions that they would otherwise not have made.

The burden of proof for such claims rested with the defendant. Therefore, in the absence of the establishment of any facts in relation to the efficiency of the defendant's products in the lower instance decisions, the Supreme Court had to remit the case.

Comment

The Supreme Court's decision upholds its rather liberal approach with regard to product names, provided that they are not obviously untrue. In a prior decision the Supreme Court held that the name 'Woodberry-fruit bar' was not misleading, as the product did contain woodberries (although in a very small quantity compared to other ingredients).

However, with regard to alleged properties, the Supreme Court maintains a strict approach and requires that the veracity of the claim be proven by the defendant.

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Endnotes

(1) 4 Ob 116/12f.

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