

Tribunal federal



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4A\_14 5/2024

Judgment of 11 September 2024  
I . civil division

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Operation

Federal Judge Jametti, President,  
Federal Judges Hohl, Kiss,  
Federal Judges Rüedi, Kölz,  
Clerk Tanner.

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Responsibilities

C. \_\_\_\_\_  
represented by  
Dr Kilian Schärli and Dr Stefan Schröter, attorneys-at-law,  
Schiffbaustrasse 2, P.O. Box, 8031 Zurich,  
appellants,

**against**

1. A. \_\_\_\_\_,  
2. B. \_\_\_\_\_ gmbh,  
represented by  
Bernard Volken and Pascal Spycher, attorneys-at-law,  
Münstergasse 38, 3011 Bern,  
Respondent.

re  
Copyright; financial compensation,

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Against stand

Appeal against the ruling of the Commercial Court of the  
Canton of Aargau, 1st Chamber, of 31 January 2024  
(HOR.2019.16 / SB).

## **Facts of the case:**

### **A.**

**A.a** C.\_\_\_\_\_ (plaintiff, complainant) is a sculptor and steel sculptor. He is the owner of Swiss patent no. www relating to a "device for cooking food" (application date: 1 July 2008; date of grant: 15 January 2010), the European patents No. xxx B1 (with the same designation) and No. yyy B1 relating to a "device for cooking food" and the Swiss trade mark No. zzz "Feuerring" for goods and services of Nice Classification Nos. 6, 11 and 21 (date of filing: 4 October 2010; registration date: 16 March 2011).

A.\_\_\_\_\_ (Defendant 1, Respondent 1) is the sole shareholder and managing director of B.\_\_\_\_\_ gmbh (Defendant 2, Respondent 2).

Defendant 2 is a limited liability company founded on 21 June 2017 and entered in the commercial register on 26 June 2017. Its purpose is, on the one hand, the manufacture of and trade in its own decorative and functional elements made of steel, wood and ceramics as well as the distribution of exclusive designer furniture and accessories for indoor and outdoor use and, on the other hand, the planning and design of gardens and reception areas of companies.

The plaintiff manufactures so-called "Feuerringe". The original model is the "Feuerring D", from which the plaintiff has developed further variants. The "Feuerrings" are large steel bowls with different elevations and diameters and a 12 mm thick horizontal steel ring attached to the edge of the bowl, in the centre of which a wood fire can be lit and food can be cooked on the steel ring.

Defendant 1 designed the first so-called "grill ring" in 2014. He is the owner of the internet domains "www.grillring.ch" and "www.gartenfeuer.ch", through which "grill rings" of Defendant 2 are marketed by name. The domain "www.feuerundring.ch", also registered to Defendant 1, has been inactive since the beginning of March 2019.

**A.b** In a letter dated 12 June 2014, the plaintiff issued a warning to defendant 1 for infringement of his patent CH www and demanded a corresponding cease-and-desist declaration from him.

In a letter dated 25 June 2014, defendant 1 informed the plaintiff that it could not sign the pre-formulated cease-and-desist declaration, but would refrain from producing, selling or otherwise placing on the market products that infringed the plaintiff's patent CH www. He has removed all references to the fire shells "vesta" and "dimidius" from all electronic media and made them inaccessible to third parties; there are no print media.

By email dated 19 August 2016, the plaintiff sent defendant 1 another warning letter, this time for alleged infringement of the plaintiff's patents CH www, EP xxx and EP yyy as well as Swiss trademark no. zzz "Feuerring".

Further warnings were issued to defendants 1 and 2 on 12 January 2017 regarding infringement of Swiss patent no. www and European patent no. yyy.

In a statement dated 18 September 2017, Defendant 2 refused to issue a cease-and-desist declaration, arguing that it did not infringe the latter two patents of the Plaintiff because its products each lacked a feature essential to the invention.

In a letter dated 19 February 2019, the plaintiff issued a further warning to defendants 1 and 2, now for alleged infringement of his rights under patent, trademark and copyright law and for breach of fair competition.

Defendant 1 subsequently ceased operating the domain "www.feuerundring.ch" and issued a cease-and-desist declaration regarding the future use of the name "Feuerundring" in a letter dated 4 March 2019. On the other hand, he disputed that the plaintiff was entitled to copyright protection in relation to the "Feuerring". He also reiterated his view that the products of defendant 2 did not infringe the plaintiff's rights under Swiss patent no. www and European patent no. yyy B1 due to the lack of inventive features.

**B.**

**B.a** On 15 March 2019, the plaintiff filed an action against the defendants with the Commercial Court of the Canton of Aargau. For infringement of his copyrights and violation of the Federal Act of 19 December 1986 against Unfair Competition (UWG; SR 241), he demanded (1) a ban on offering, selling or otherwise distributing the designated grills, (2) an order for their destruction, then (3) the provision of information and accounting and finally (4) payment of a sum to be quantified according to the result of the provision of information or to be determined by the court as financial compensation.

In a partial judgement dated 3 August 2021, the Commercial Court partially upheld, under threat of punishment, claims 1 (injunction), 2 (removal) and 3 (provision of information and accountability from 26 June 2014 to the date of the judgement), namely with regard to the grills with the model names "dimidius", "conicum" and "hemisfär". For the rest, it dismissed claims 1, 2 and 3.

Both parties appealed against this to the Federal Supreme Court. In its ruling of 17 June 2022, the Federal Supreme Court dismissed the appeals insofar as it upheld them (proceedings 4A\_472/2021, 4A\_482/2021 = BGE 148 III 305). With regard to the "dimidius", "conicum" and "hemistär" models, the Federal Supreme Court also affirmed a copyright infringement despite the narrow scope of protection of works of applied art. On the other hand, it denied that the plaintiff's claims could be based on the Unfair Competition Act.

**B.b** The Commercial Court subsequently reopened the proceedings. In a submission dated 9 March 2023, the plaintiff quantified his "claim for financial compensation" against the defendants (claim 4) at CHF 377,354. On 16 May 2023, he applied for additional interest of 5% on the amount claimed since 15 March 2019. The defendants requested that the claim be dismissed in its entirety.

In a ruling dated 31 January 2024, the Commercial Court ordered Defendant 2 to pay the Plaintiff CHF 50,581.80 and various amounts of interest. It otherwise dismissed the action.

The Commercial Court only affirmed a claim for enrichment pursuant to Art. 62 CO against Defendant 2, whereby it denied Defendant 1's passive legitimacy in this regard. It rejected the primarily asserted claim for the surrender of profits pursuant to Art. 423 para. 1 CO and

also a claim for damages pursuant to Art. 41 CO. When calculating the plaintiff's claim for enrichment, it assumed that the hypothetical licence fees due before 15 March 2018 were time-barred, which is why it only took into account the sales of the grills in question after 15 March 2018. Applying Art. 42 para. 2 CO by analogy, it assumed a licence fee of 10%. With 164 barbecue sales at an average of CHF 3,084.26, this resulted in the awarded amount of CHF 50,581.80.

### **C.**

In his appeal in civil matters, the appellant requests the Federal Supreme Court to set aside paragraph 1 of the Commercial Court's judgment of 31 January 2024 "insofar as the claim 4 specified in accordance with the quantification of the claim amount of 9 March 2023 was dismissed, and to order respondents 1 and 2 to pay the appellant CHF 377,354 as financial restitution plus interest at 5% since 15 March 2019. In the alternative, the case should be referred back to the Commercial Court for a new judgement in accordance with the recitals.

The respondents request that the appeal be dismissed insofar as it should be upheld. The Commercial Court has waived its right to a hearing and has decided to dismiss the appeal.

The parties have replicated and duplicated.

### **Considerations:**

#### **1.**

**1.1** Anyone whose copyright or related rights are infringed or jeopardised may request the court, among other things, to prohibit an imminent infringement or to remedy an existing infringement (Art. 62 para. 1 lit. a and b of the Federal Act of 9 October 1992 on Copyright and Related Rights [Copyright Act, CopA; SR 231.1]). Actions under the Code of Obligations for damages, for satisfaction and for the surrender of profits in accordance with the provisions on management without mandate (Art. 62 para. 2 CopA) remain reserved.

The requirements for claims for damages in intellectual property law are identical to the liability requirements in the law of obligations, to which the corresponding laws, in this case Art. 62 para. 2 of the Swiss Code of Obligations, refer.

Accordingly, the liability requirements of the respective standards are decisive (BGE 132 III 379 E. 3.1).

**1.2** The appellant bases his claims for financial compensation on Art. 423 para. 1 CO (business impropriety) and Art. 41 CO (tort), and secondarily on Art. 62 CO (compensation). His appeal is directed against the rejection of the claim for the transfer of profits pursuant to Art. 423 CO (see recital 2) and the claim for damages pursuant to Art. 41 CO (see recital 3). With regard to the claim for compensation pursuant to Art. 62 CO awarded by the lower court, he criticises the assessment (see recital 4).

## **2.**

**2.1** If the management was not undertaken with the interests of the principal in mind, the principal is nevertheless entitled to appropriate the benefits arising from the management of his business in accordance with Art. 423 para. 1 CO. Art. 423 CO regulates the so-called non-genuine management without a mandate (also known as "business impropriety"). In contrast to genuine management without mandate, the managing director does not act on behalf of a third party, but for his own account and in his own interest. In doing so, he takes actions that interfere with the legal position of another (BGE 129 III 422 E. 4; 86 II 18 E. 4; judgement 4A\_88/2019 of 12 November 2019 E. 3.1.1). The main cases of application are interventions in the absolute rights of others, such as intellectual property rights.

The claim for the transfer of benefits is subject to three conditions: Unlawful interference with the rights of another, the intention of the principal to conduct the transaction exclusively or primarily in his own interest and, finally, bad faith on the part of the principal. The principal acts in bad faith if he knows or must know that he is encroaching on another person's legal position without legal grounds (BGE 129 III 422 E. 4; 126 III 69 E. 2a; judgements 4A 450/2019 of 18 May 2020 E. 5.1.1; 4A\_88/2019 of 12 November 2019 E. 3.1.1; 4A\_474/2012 of 8 February 2013 E. 8.1). Anyone who follows an incorrect but justifiable opinion in circumstances that are difficult to assess can claim good faith (BGE 94 II 297 E. 5h; judgement 4A\_474/2012 of 8 February 2013 E. 8.1 with references).

The burden of proof of bad faith lies with the principal (judgement 4A\_474/2012 of 8 February 2013 E. 8.1 with references; MATTHIAS LEEMANN, Schadenersatz-, Gewinnherausgabe- und Bereicherungsklagen, in: Schweizer IP-Handbuch, 2nd ed. 2021, § 53 p. 1651 et seq, margin no. 14.2 p. 1673).

**2.2** When assessing the bad faith of the principal in copyright law, particular attention must be paid to the fact that copyrights do not emerge from a register and are difficult to research. In this respect, they differ from trademark rights (Art. 37 et seq. of the Federal Act of 28 August 1992 on the Protection of Trademarks and Indications of Source [SR 232.11], patent rights (Art. 60 of the Federal Act of 25 June 1954 on Patents for Inventions [SR 232.14]), design rights (Art. 24 et seq. of the Federal Act of 5 October 2001 on the Protection of Designs [SR 232.12]) or rights to three-dimensional structures of semiconductor products (Art. 13 et seq. of the Federal Act of 9 October 1992 on the Protection of Topographies of Semiconductor Products [SR 231.2]). Whether a work is protected by copyright and how far the scope of protection extends can be questionable and often forms the core of a subsequent dispute. The granting of copyright to a work also depends on judgements, so it can be difficult to predict how the courts will decide. For this reason, a warning letter based on the assertion of the alleged copyright holder does not automatically destroy good faith.

This applies in particular to works of applied art (Art. 2 para. 2 lit. f CopA), as the presumed individuality of the work is more difficult to fulfil here, since the purpose of use determines the normal form and, in case of doubt, a purely handcrafted performance must be recognised (BGE 148 III 305 E. 5.1 and 5.3; 143 III 373 E. 2.1). Then the less pronounced the individual character conferred on the work by exploiting the scope of design, the lower the scope of protection for an object of utility (judgement 4A\_472/2021 and 4A\_482/2021 of 17 June 2022 E. 7.3; not published in: BGE 148 III 305). If the purpose of use, the previously known shapes or the technicality of the object of use leave no room for an individual creation, the product is purely a handcrafted product that is not entitled to copyright protection (see assessment of judgements 4A\_472/2021 and 4A\_482/2021 of 17 June 2022 by BRIGITTE BIELE, Feuerring - Ein Holzfeuergrill als Werk der angewandten Kunst, iusNet IP, October 2022). What is required is an assessment of the overall impression in comparison to other models of the

same class of goods, taking into account the preconditions of the item in question.

This raises tricky questions that cannot be answered without further ado and are difficult to assess. Therefore, high demands are placed on the proof of knowledge of the existence and scope of protection of the third party's legal right in copyright law (BARBARA K. MÜLLER, in: Urheberrechtsgesetz, 2nd ed. 2012, N. 18 to Art. 62 URG). For the same reason, the degree of diligence required to clarify the legal situation must not be overstretched in copyright law (LEEMANN, Et.ä.O., § 53 para. 4.12 p. 1662).

**2.3** The lower court denied the bad faith of the complainants. The complainant had first asserted claims under unfair competition and copyright law in the letter dated 19 February 2019. In the previous warning correspondence since 12 June 2014, he had focused on the infringement of his patents, which is why he had consulted a patent attorney and had unilaterally focused on patent law, i.e. the technical claims of its grill, without even mentioning the copyright. The respondents could therefore not have been considered to be acting in bad faith from the outset until the warning letter of 19 February 2019. Contrary to the complainant, it is also not the case that anyone who infringes patents must also ask themselves whether they are also infringing copyrights. Patents and copyrights have a completely different object of protection and a patent infringement by no means implies an infringement of copyright. There is no reason why the respondents knew or should have known of the complainant's (alleged) copyright before 19 February 2019.

The respondents' bad faith could therefore only be considered since the warning letter of 19 February 2019, as this at least informed them that the complainant was now also claiming copyrights. With regard to the infringement of a copyright, however, a warning letter cannot destroy good faith. As long as the infringer of the copyright has a defensible legal position, bad faith is ruled out. In the present case, the legal situation was unclear at the time. Although a copyright infringement had been affirmed in the first part of the proceedings, this did not apply to all of the grills of the respondents that were objected to by the complainant. The present constellation was clearly a borderline case. The view of the respondents, the complainant was not entitled to copyright was a justifiable legal opinion (at the time).



**2.4** These considerations must be endorsed throughout. The arguments put forward by the appellant against them do not prevail:

**2.4.1** Thus, he unsuccessfully insists on the warning letters *prior to* the one of 19 February 2019. Until then, the complainant focused on the infringement of his patents and did not even mention the copyright. The lower court ruled correctly when, under these circumstances, it ruled out from the outset that the respondents were aware or should have been aware of the complainant's alleged copyright (cf. Art. 3 para. 2 ZGB e *contrario*).

The respondents were therefore not obliged to make any clarifications. The complainant is mistaken if he believes that the respondents should have sought expert advice and obtained an expert opinion. They could only be considered to have acted in good faith if this had ruled out the infringement of copyright. As they had not submitted such an expert opinion to the court, they had not proved that they had acted diligently. Contrary to the complainant's opinion, there is no requirement to always obtain an expert opinion on all conceivable aspects from a competent person as soon as the infringement of intellectual property rights is in question. The judgment of the Federal Patent Court O2022\_002 of 12 February 2024 referred to by the appellant differs significantly from the facts of the present case and cannot be applied to the infringement of copyrights anyway. In addition, the lower court correctly explained that the appellant focused its warnings on the infringement of its patents. The respondents therefore only had to make enquiries in this respect. However, due to the different objects of protection of patent and copyright law, they were not obliged to also obtain clarifications, let alone an expert opinion, on the possible infringement of copyrights, since the appellant himself had not even mentioned such, but had merely referred to his patents unilaterally.

This would not change if, as the appellant claims, his assertion, but in any case cannot base it entirely on the findings in the judgment under appeal - 'excessive use of the work' would be present. As explained, the respondents did not have to consider the possibility of a copyright infringement in view of the one-sided focus on the patent infringement and were therefore allowed to dispense with clarifications in this regard.

**2.4.2** Contrary to the complainant's opinion, however, the warning letter of 19 February 2019 was not able to destroy the good faith of the respondents. Firstly, it is not possible to speak of a "copyright-specific warning", as the complainant puts it. In this letter, he again referred to his patent and trade mark rights and only additionally and for the first time also to copyright and unfair competition. He therefore did not specifically send the defendants a warning letter for alleged infringement of his copyrights. The contested judgement does not contain any findings according to which he would have specified or substantiated his alleged copyright. The complainant does not raise any objections to the facts of the case that would allow the findings of the lower court to be supplemented in this regard. The infringement of copyrights, which was invoked in addition to other rights but not further substantiated, since this aspect had never even been mentioned before, did not have to prompt the respondents to carry out specific clarifications on copyright, especially since such an infringement was not obvious.

**2.4.3** On the contrary, the lower court correctly recognised that the legal opinion of the respondents, according to which the appellant was not entitled to copyright protection with regard to the "Feuerring", was (at that time) entirely justifiable, since there were in any case considerable doubts in this respect or a borderline case existed. The complainant is not able to overturn this judgement by essentially insisting on the position he took at first instance, which was rightly rejected.

When encroaching on a copyright, it may not only be questionable whether an act is to be regarded as an infringement. Rather, in the absence of a register entry, it may already be questionable and uncertain whether a work enjoys copyright protection at all. Although the judgement in this regard is based on legal criteria, it is also based on an evaluation that is difficult to assess. This applies in particular to works of applied art (see E. 2.2 above). As the Federal Supreme Court emphasised in particular in the present case when assessing the copyright protection of the grill at issue, the hurdle of the individuality of the work is high and a narrow scope of protection must be assumed (judgement 4A\_472/2021 and 4A\_482/2021 of 17 June 2022 E. 5.3, 6.3.2 and 7.3, partly not published in: BGE 148 III 305). The fact that the grill at issue was ultimately recognised as a copyright-protected work was on a knife-edge. *Nota bene*, the decisive factor was *not* the reduction or minimalist design of the grill that the complainant had focused on, but other aspects cited by the Federal Supreme Court; the scope of protection was also drawn more narrowly than postulated by the complainant (judgement 4A\_472/2021 and 4A\_482/2021 of 17 June 2022 E. 6.1.2 and 7, not published in: BGE 148 III 305). This shows that even the assessment of the complainant was not entirely correct. In other words, different views

are justifiable with regard to the copyright protection of the "Feuerring"; opinions also differ among experts (see only the criticism of BGE 148 III 305, for example by MisGHA SENN, Die Zweckänderung bei einer Grundform als Individualitätskriterium? sic! 2023, p. 211 et seq.; REGOR WILD, review of the dissertation by Eliane Haas: Die Verwendung von Bearbeitungen urheberrechtlich geschützter Werke, sic! 2023, p. 323 et seq., 323; VOLKEN/STAMPFLI, Führt die Rechtsprechung zum Urheberrecht zu einer Aushöhlung des Designrechts?, SJZ 2023, p. 1020 et seq., 1025).

Under these circumstances, it was difficult to assess whether the plaintiff's grill was protected by copyright and to what extent.

The existence and scope of protection of the copyright to the grill in dispute were therefore by no means certain, especially since the complainant only recently invoked the copyright in the warning letter of 19 February 2019, among other things, although he did not substantiate this in more detail. The respondents therefore had no reason to clarify the copyright. This is not affected by the fact that the topic of copyright is discussed to a "considerable extent" in legal circles, as the complainant argues. Even after the warning letter of 19 February 2019 without any clarification of copyright law in good faith that their actions did not constitute an infringement of copyright in the complainant's grill. Their legal opinion that they did not infringe the complainant's copyright was justifiable at the time.

**2.5** The lower court correctly denied the bad faith of the appellants and therefore rightly rejected a claim for disgorgement of profits under Art. 423 CO.

**2.6** Given this result, there is no need to comment on the complainant's allegation that the lower court applied Art. 55 para. 3 ZGB i.V.m. The court found that the complaint was contrary to federal law in that it did not comment on the personal liability of Respondent 1 under Art. 423 para. 1 CO, although the conditions for his personal liability would be fulfilled. In the absence of an award of a claim under Art. 423 CO, this complaint is in vain.

### **3.**

The complainant then asserts a claim for damages under Art. 41 CO. Such a claim also requires proof of damage, unlawfulness, fault and a natural and adequate causal connection between the damaging act and the damage in immaterial property law (BGE 132 111 379 E. 3.1; LEEMANN, St.St.O., § 53 para. 2.1 p. 1658).

The lower court denied fault. In doing so, it referred to the statements on the lack of bad faith on the part of the respondents. There were no apparent reasons to judge fault differently from bad faith.

The complainant is wrong to object to this. In the case of the infringement of intellectual property rights, fault depends on whether the infringer knew or should have known of the existence of the pre-existing property right and its scope of protection. This is consistent with the requirement of bad faith for the claim for the surrender of profits under Art. 423 CO (LEEMANN, Et.et.O., § 53 para. 4.2 p. 1660 and para. 14.2 p. 1672 f.). Since the lower court denied the bad faith of the respondents in accordance with federal law (cf. E. 2.4 and 2.5 above), it also logically rejected fault. The contrary view of the complainant has already not been substantiated under the heading of "bad faith" and is therefore also not able to prevail in the present context with regard to culpability.

It is therefore unnecessary to examine the further requirements. The complainant is already not entitled to compensation under Art. 41 CO due to a lack of fault on the part of the respondent.

#### **4.**

**4.1** The claim of the person whose absolute rights have been infringed to the surrender of the profit realised is only based on an assumption of the transaction in the case of bad faith (Art. 423 CO), while the person acting in good faith is entitled to the profit resulting from the transaction. The claim for restitution is not linked to the claim for restitution of the profit realised from the infringement of rights according to the rules of unjust enrichment (Art. 62 CO). In contrast to Art. 423 CO, Art. 62 CO does not link the claim for restitution to the fault of the enriched party (BGE 129 III 646 E. 4.4; 129 III 422 E. 4).

The enrichment that the debtor has obtained at the expense of another ("aux dépens d'autrui") pursuant to Art. 62 para. 1 CO is to be compensated; a direct transfer of assets between the enrichment creditor and the enrichment debtor is not a prerequisite and, in contrast to the claim for damages, no loss of assets on the part of the enrichment creditor is required (BGE 129 II 1422 E. 4; 129 III 646 E. 4.2; judgement 4C.290/2005 of 12 April 2006 E. 3.1. 3.1).

In contrast to business customisation (Art. 423 CO), the right of restitution (Art. 62 CO) does not permit the absorption of profits (BGE 133 III 153 E. 2.4). In the case of infringements of intellectual property rights, the claim for compensation under Art. 62 para. 1 CO is based on compensation for value in the sense of compensation for use, i.e. a reasonable licence fee. Reasonableness is primarily based on the usual licence fee for such use. If

such a fee cannot be determined, the question must be asked as to what reasonable contracting parties would have agreed in the knowledge of the circumstances (hypothetical licence fee). If necessary, the customary or hypothetical licence fee must be estimated by the court in analogous application of Art. 42 para. 2 CO (on the whole LEEMANN, zt.ä.O., § 53 para. 27.3 p. 1681).

**4.2** The lower court affirmed that the complainant was entitled to a claim against defendant 2 for unjust enrichment pursuant to Art. 62 para. 1 CO. It determined the amount of the hypothetical licence fee to be paid at its discretion by analogous application of Art. 42 para. 2 CO. In doing so, it used the net proceeds of the barbecue sales complained of, averaging CHF 3,084.26, and assumed a licence fee for luxury products of 10% of these net proceeds. With 164 barbecue sales, this resulted in the awarded amount of CHF 50,581.80. Such a discretionary estimate is based - apart from the exceptional consideration of abstract experience rates - on a judgement of the facts. It is therefore part of the determination of the facts and can therefore only be reviewed by the Federal Supreme Court for arbitrariness (BGE 144 III 155 E. 2.2.1; 143 III 297 E. 8.2.5.2; BGE 131 III 360 E. 5.1). A certain degree of schematisation is also permissible in the estimation (judgement 4A\_49/2016 of 9 June 2016 E. 5.2).

**4.3** The appellant criticises the assessment of the hypothetical licence fee as being too low. The lower court wrongly used the net sales prices actually realised by Respondent 2 instead of what reasonable contracting parties would have agreed. To determine what could reasonably have been agreed, he uses licence agreements or agreements that he had concluded with third parties, in some cases on a comparative basis. Based on this, he postulates that a "minimum licence fee of CHF 500" should be assumed for each sale.

**4.4** The lower court did not consider this information from the complainant to be meaningful. They could not be set in relation to the respective "net sales prices" of the barbecues in question because the complainant had not quantified the latter. In any case, the agreements concluded as part of a settlement were not suitable for determining a hypothetical licence fee. The appellant is unable to invalidate these correct considerations of the lower court by essentially merely repeating the position he had already taken before the instance. Even when applying Art. 42 para. 2 CO, it was incumbent on the appellant, who is obliged to provide evidence, to present all circumstances that allow or facilitate the estimation of the hypothetical licence fee (cf. BGE 122 III 219 E. 3a). Since the comparisons with third parties cited by him did not form a suitable basis for estimation, it is not objectionable that the lower court relied on the specific information provided

by Respondent 2 on the barbecue sales made by her. The percentage fee of 10% per sale applied was rather generous in favour of the complainant and is therefore not criticised by the latter. The appeal against the assessment of the hypothetical licence fee thus proves to be unfounded.

**4.5** The appellant does not object to the fact that the lower court rejected respondent 1's passive legitimacy with regard to the right to claim under Art. 62 CO on the grounds that he personally did not derive any advantages. It is therefore unnecessary to comment further on this.

**4.6** Accordingly, the contested judgement also withstands review by the Federal Supreme Court insofar as it awards the complainant an enrichment claim of CHF 50,581.80 plus interest against respondent 2 and dismisses the remainder of the claim.

## **5.**

The appellant comments on the costs and compensation consequences of the proceedings before the court of first instance. However, he does not contest these independently of the outcome of the Federal Supreme Court proceedings.

However, he concludes in para. 64 of the notice of appeal that the respondents should be obliged to "pay the appellant compensation for the pre-instance proceedings". If this is to be seen as an independent application, it could not be accepted. The appealing party must quantify the amount of the cantonal party compensation (BGE 143 III 111 E. 1.2). This was not the case here.

## **6.**

The appeal must be dismissed. In accordance with the outcome of the proceedings, the appellant is liable for costs and compensation (Art. 66 para. 1 and Art. 68 para. 2 BGG).

**Accordingly, the Federal Supreme Court recognises:**

**1.**

The appeal is dismissed.

**2.**

The court costs of CHF 7,000 are imposed on the appellant.

**3.**

The appellant must compensate the respondents for the federal court proceedings with a total of CHF 8,000.

**4.**

The parties and the Commercial Court of the Canton of Aargau, 1st Chamber, will be notified of this judgement in writing.

Lausanne, 11 September 2024

On behalf of the First Civil Division of the  
Swiss Federal Supreme Court

The President:



Jametti

The Clerk:



Tanner

3p3JSlZlÜ3dS  
:Xp30110X3  
VERSAND

19 SEP. 2024

