Legal privilege during saisie-contrefaçon in Belgium – a follow-up

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This is a follow-up to Jan-Diederik Lindemans' post of 18 December 2019 discussing the guidelines on legal privilege during *saisie-contrefaçon* adopted by the Brussels Bar Association ('BBA') on 21 October 2019. In a judgment of 26 March 2020, the Ghent Business Court confirmed the BBA's position on this issue.

In the 26 March 2020 judgment, the Ghent Business Court (Belgium) weighs in on the scope of attorneys' legal privilege, in a dispute opposing a law firm and a court-appointed expert.

A law firm provided legal advice to a client in the context of an expected IP dispute with a competitor. Upon request from said competitor, the President of the Ghent Business Court appointed an expert to carry out a *saisie-contrefaçon* (including both descriptive and actual seizure) on the premises of the law firm's client.

The court-appointed expert seized, amongst others, copies of e-mail correspondence between the law firm and its client as well as a statement of costs and fees describing the nature of the services provided by the law firm. The expert rejected all requests by the law firm's attorneys to return the privileged documents and filed the expert-report with the court, withholding the privileged documents and mentioning that these were available to the court upon request.

The law firm brought suit against the expert before the Ghent Business Court, requesting a permanent injunction as well as damages.

The expert first opposed the court's competence both on a territorial and on a material level, but the court rejected those arguments and declared itself competent to hear the case.

As to the issue of legal privilege, which is at the heart of the dispute, the court started by referring to the applicable principles.

First, the court highlighted that legal privilege, which in Belgium is based on art. 6 (right to a fair trial) and art. 8 (right to privacy) of the ECHR on the one hand, and art. 458 of the Belgian Criminal Code on the other hand, is a fundamental part of the rights of defence. Indeed clients can only properly prepare a defence if they feel comfortable telling their attorney everything, which in turn is only possible if the client knows that no one else will access the information entrusted to the attorney. Furthermore, the court recalled that legal privilege is both a right and a duty. The purpose-bound character of legal privilege will hence determine its scope of protection: as attorney-client correspondence is critical for the preparation of a defence, such correspondence is covered by legal privilege, even vis-à-vis court agents. Finally, exceptions to legal privilege may be justified by higher standing values like a state of emergency or the rights of defence of the person subject to legal privilege (e.g. an attorney).

Turning to the case at hand, the court insisted that its assessment ought to take the specifics of the case into account.

Since legal privilege covers all information and documents drawn up in order to seek and provide legal advice, all seized e-mail correspondence in the case at hand falls within such scope. In addition, because the statement of costs and fees also discloses information on the nature of the service provided by the law firm, such document is privileged too. The court also confirmed that invoking legal privilege in these circumstances did not divert it from its social purpose, i.e. the safeguard of the client's rights of defence – the law firm's client would indeed have been deterred from seeking legal advice had they known that the attorneys' advice might fall in the hands of third parties. This goes to the heart of the rights of defence.

Furthermore, the court dismissed other arguments brought by the expert. Although only attorneys may be held criminally liable for violations of legal privilege, third parties must also comply with legal privilege, regardless of the quality in which they act or their duty of professional secrecy. In addition, that the privileged documents were found at the client's premises did not constitute a waiver of privilege by the client.

Last but not least, the court attached no relevance to the fact that the privileged documents were part of documents seized in the context of a *saisie-contrefaçon*: values of general interest such as the protection of intellectual property may not take precedence over legal privilege as otherwise attorneys would not be able to assist their clients properly. Rules on evidence will thus not take precedence over legal privilege.

The court thus came to the conclusion that the expert infringed the law firm's legal privilege by examining both its correspondence with the seized client and the statement of costs and fees, making copies of and refusing to return such documents and by holding copies available for the court. The court ordered the expert to file the sealed copies of the privileged documents with the court's secretary and awarded the law firm damages.

The Ghent Business Court thus confirmed that legal privilege is a key component of the fundamental rights of defence, thereby raising it above many other legal principles and making it the cornerstone of the legal profession.

Although the above case does not specifically relate to patent law, it is nevertheless highly relevant for all Belgian patent litigators as the principles applicable to the enforcement of legal privilege will also apply to patent disputes where descriptive seizure measures are often challenged the most vigorously.

Disclaimer: the author of this post is now an associate with the law firm that sued the expert but was practicing at a different law firm at the time of the proceedings.