

COUR DE CASSATION

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ASSEMBLÉE PLÉNIÈRE

Public hearing of 17 February 2012

Dismissal

Mr LAMANDA, First Presiding Judge

Appeal No. A 10-24.282

Decision No. 604 P+B+R+I

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

The *COUR DE CASSATION*, sitting in *ASSEMBLÉE PLÉNIÈRE*¹, has handed down the following decision:

Ruling on the appeal on a point of law lodged by Mr Réginald Wehrkamp-Richter, domiciled at Le Moulin, chemin du Breuil, 63960 Veyre-Monton,

against the decision handed down on 8 June 2010 by the *Cour d'Appel* of Grenoble (1st civil chamber), in the dispute with:

1°/ Mr Louis Paul Guitay, domiciled at l'Err de Crans, 5 rue du Prado, 3963 Crans Montana (Switzerland),

2°/ LPG Systems, a *société anonyme*, whose registered office is located at Technoparc de la Plaine, NP 35, 30 rue du Docteur Abel, 26902 Valence cedex,

defendants in the appeal;

On 4 October 2011, the commercial, financial and economic chamber decided to refer the case to the *assemblée plénière*;

¹ Translator's note: the *Cour de Cassation* sits as a full court

The claimant puts forward out, before the *assemblée plénière*, the annulment argument annexed to this decision;

This single argument was set out in a brief filed with the Clerk's office of the *Cour de Cassation* by SPC Delaporte, Briard & Trichet, attorneys-at-law representing Mr Wehrkamp-Richter;

A defence brief was filed with the Clerk's office of the *Cour de Cassation* by SCP Boré & Salve de Bruneton, attorneys-at-law representing Mr Guitay and LPG Systems;

The report drafted by Mr André, Judge, and the opinion drafted by Mr Le Mesle, First Advocate General, were made available to the parties;

Whereupon, the *COUR DE CASSATION*, sitting in *assemblée plénière*, at the public hearing of 3 February 2012, before: Mr Lamanda, First Presiding Judge, Ms Favre, Messrs Lacabarats, Louvel, Charruault, Loriferne, Terrier, Presiding Judges, Mr André, Reporting Judge, Messrs Blondet, Le Corroller, Pluyette, Bailly, Bizot, Petit, Ms Bellamy, Ms Geerssen, Ms Mandel, Messrs Maunand, Girardet, Judges, Mr Le Mesle, First Advocate General, Ms Tardi, Chief Clerk;

Based on the report by Mr André, Judge, assisted by Mr Régis, Assistant Judge in the Documentation, Research and Reporting Department, on the observations of SCP Delaporte, Briard & Trichet, of SCP Boré & Salve de Bruneton, on the opinion of Mr Le Mesle, First Advocate General, to whom, among the parties invited to do so, SCP Delaporte, Briard & Trichet replied, and after having deliberated in accordance with the law;

On the single argument:

Whereas, according to the challenged decision (Grenoble, 8 June 2010), Mr Wehrkamp-Richter was ordered by an irrevocable decision of 10 September 2001 to pay various sums for the infringement of claims 1, 3, 4 and 5 of the patent registered under No. 87-03865 and filed by Mr Guitay who had granted the exclusive right to exploit it to LPG Systems; these claims having been revoked by an irrevocable decision of 21 February 2002, Mr Wehrkamp-Richter served a summons upon Mr Guitay and LPG Systems claiming the restitution of those sums;

Whereas Mr Wehrkamp-Richter objects to the decision for dismissing his claim, while, according to the argument, *the decision to revoke a patent, which has both a retroactive and absolute effect, deprives the decision previously handed down on the infringement of the revoked patent of any legal basis, even against a third party in the revocation proceedings; therefore, it makes the sums paid in pursuance of such a decision on the infringement undue, even if the latter is irrevocably res judicata, and creates entitlement to the repayment of the sums paid; by dismissing*

Mr Wehrkamp-Richter's claim for the restitution of the overall sum of €6,000 paid in pursuance of the judgment of the Tribunal de Grande Instance of Limoges dated 13 March 1997, which held him liable for the infringement of claims 1, 3, 4 and 5 of patent No. 87-03865, and affirmed by the ruling of the Cour d'Appel of Limoges dated 10 September 2001, after having, however, noted that the Tribunal de Grande Instance of Lyon had revoked the aforementioned claims in a judgment of 15 June 2000, and that the Cour d'Appel of Lyon had affirmed this revocation in a ruling of 21 February 2002, the Cour d'Appel, which did not draw the legal consequences from its own findings, violated Articles 1235 and 1376 of the French Civil Code, as well as Article L. 613-27 of the French Intellectual Property Code;

However, noting that Mr Wehrkamp-Richter had been held liable for infringement by an irrevocable decision, the *Cour d'Appel* rightly came to the conclusion that the retroactive and absolute revocation of the patent to the extent of the claims' revocation ordered in a subsequent decision could not justify the restitution of the sums paid in pursuance of the decision on the infringement; that this argument is unfounded;

ON THESE GROUNDS:

DISMISSES the appeal;

Orders Mr Wehrkamp-Richter to pay the costs;

Having regard to Article 700 of the French Code of Civil Procedure orders him to pay to Mr Guitay and LPG Systems the overall sum of €2,500; dismisses Mr Wehrkamp-Richter's claim;

As drafted and decided by the *Cour de Cassation*, sitting in *assemblée plénière*, and pronounced by the First Presiding Judge at this public hearing on the seventeenth of February two thousand and twelve.

THE SINGLE ANNULMENT ARGUMENT

The challenged decision is criticised for having dismissed, by affirming the contested judgment, Mr Wehrkamp-Richter's claim for ordering, jointly and severally, Mr Guitay and LPG Systems to pay back, with statutory interest, the sum of €6,000 corresponding to the amounts paid in pursuance of the decision holding him liable for the infringement of claims 1, 3, 4 and 5 of patent No. 87-03865, which were later revoked;

On the grounds that "it must be pointed out that the existence of infringement by Mr Wehrkamp-Richter and Mr Andrieux of the massage head with a lower form which is the subject-matter of Mr Guitay's patent No. 87-03865 (infringement of claims 1 to 5), was recognised in a judgment of the Tribunal de Grande Instance of Limoges on 13 March 1997 affirmed by a decision of the Cour d'Appel of Limoges on 10 September 2001 and that in the meantime, the Tribunal de Grande Instance of Lyon, in a judgment of 15 June 2000, held claims 1 to 5 of the patent registered under No. 87-03865 invalid, this revocation being affirmed in a decision of 21 February 2002; Mr Wehrkamp-Richter contends that he paid the overall sum of €6,000 in pursuance of the judgment of the Tribunal de Grande Instance of Limoges and of the decision of the Cour d'Appel of Limoges; the extent of the revocation decision is defined by Article L. 613-27 of the French Intellectual Property Code pursuant to which "a decision to revoke a patent shall have absolute effect, subject to opposition from third parties..."; it results thereof that as soon as the revocation decision is res judicata, the patent is definitively revoked with respect to all parties; however, the party which was held liable for infringement by a decision which is res judicata cannot escape liability by retroactively adducing the revocation decision obtained subsequently by another party, nor can it obtain the restitution of the damages which it paid; the appellant adduces recent case law according to which "since the revocation of a patent results in its revocation on the date of filing the patent application, a Cour d'Appel can rightly consider that the proceedings for damages is deprived of any legal basis"; however, in this instance, the compensation had not been the subject of a final decision, it was not even decided, the question of the infringement alone having been definitively settled; since the compensation has been definitively paid, the argument concerning the deprivation of legal basis is not applicable and the referred judgment must be affirmed in that it dismissed Mr Wehrkamp-Richter's claim for the repayment of the sums paid, owing to res judicata" (contested judgment, page 8, last § to p. 9, antepenultimate §);

And on the potentially adopted grounds of the first-instance Judges that "under Article L. 613-27, 1st subparagraph, of the French Intellectual Property Code, "a decision to revoke a patent shall have absolute effect, subject to opposition from third parties"; this rule, from which result the revocation of the patent and the

end of the acts of exploitation carried out on this patent for lack of purpose, definitively and with respect to all parties, cannot, however, challenge the effects of the decisions on third parties' liability for infringement which are res judicata (see in particular: Cour d'Appel of Paris-4th chamber, 29 September 1995 and Cour de Cassation, commercial chamber, 27 January 1998; Cour de Cassation, commercial chamber, 28 January 2003); in this instance, Mr Wehrkamp-Richter was irrevocably held liable for infringement by the decision of the Cour d'Appel of Limoges on 10 September 2001; the subsequent revocation of claims 1 to 7 of Mr Guitay's patent, by the 21 February 2002 decision of the Cour d'Appel of Lyon cannot challenge the effects of res judicata" (contested judgment, p. 6, § 3 to 6);

The decision to revoke a patent, which has both retroactive and absolute effect, deprives the decision previously handed down on the infringement of the revoked patent of any legal basis, even against a third party in the revocation proceedings; therefore, it makes the sums paid in pursuance of such a decision on the infringement undue, even if the latter is irrevocably res judicata, and creates entitlement to the repayment of the sums paid; by dismissing Mr Wehrkamp-Richter's claim for the restitution of the overall sum of €6,000 paid in pursuance of the judgment of the Tribunal de Grande Instance of Limoges dated 13 March 1997, which held him liable for the infringement of claims 1, 3, 4 and 5 of patent No. 87-03865, and affirmed by the ruling of the Cour d'Appel of Limoges dated 10 September 2001, after having, however, noted that the Tribunal de Grande Instance of Lyon had revoked the aforementioned claims in a judgment of 15 June 2000, and that the Cour d'Appel of Lyon had affirmed this revocation in a ruling of 21 February 2002, the Cour d'Appel, which did not draw the legal consequences from its own findings, violated Articles 1235 and 1376 of the French Civil Code, as well as Article L. 613-27 of the French Intellectual Property Code.