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COUR DE CASSATION

Public hearing of **12 February 2013**

Dismissal

Mr ESPEL, Presiding Judge

Decision No. 144 F-D

Appeal No. F 11-26.361

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

THE *COUR DE CASSATION*, COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER handed down the following decision:

Ruling on the appeal on points of law lodged by Vetrotech Saint-Gobain International AG, having its registered office at Bernstrasse 43, CH 3175, Flamatt (Switzerland),

against the decision rendered on 22 June 2011 by the *cour d'appel de Paris* (division 5, chamber 1), in its dispute with:

1°/ Interfer, *société anonyme*, having its registered office at mégazone de Moselle Est, parc d'activité, 57455 Seingbouse, formerly called Interfer sécurité,

2°/ Mr Bernard Lott, domiciled 18 rue Raymond Poincaré, 57208 Sarreguemines cedex, in his capacity as Interfer's legal representative,

3°/ Mr Paul Patry, domiciled 5 rue des Frères Lumières, 67087 Strasbourg cedex, in his capacity as Interfer's receiver,

respondents in the appeal;

In support of its appeal, the appellant states the two annulment arguments annexed to this decision;

In light of the information communicated to the Public Prosecutor;

THE COURT, at the public hearing of 15 January 2013, composed of: Mr Espel, Presiding Judge, Ms Mandel, Reporting Judge, Mr Petit, Senior Judge, Ms Arnoux, Court Clerk;

Based on the report by Ms Mandel, Judge, on the observations of SCP Hémerly and Thomas-Raquin, attorney-at-law representing Vetrotech Saint-Gobain International AG, of Mr Bertrand, attorney-at-law representing Interver and of Mr Lott and Mr Patry, in their capacities as Interver's representative and receiver, and after having deliberated in accordance with the law;

Whereas, according to the challenged decision (Paris, 22 June 2011), Vetrotech Saint-Gobain International (Vetrotech), holder of European patent No. 0 620 781 granted on 19 May 1999, designating France and entitled "Light-transparent heat-protection element", arguing that Interver sécurité was manufacturing and marketing in France the glass obtained by using a process reproducing the characteristics of claim 11 of that patent, had a bailiff carry out a *saisie-contrefaçon* and then brought proceedings against that company for the infringement of that claim;

On the first argument:

Whereas Vetrotech criticises the decision for dismissing its claim for infringement of the French designation of claim 11 of European patent No. 0 620 781, while, according to the argument:

1° by deducing from the decision of 16 February 2007 holding the saisie-contrefaçon report partially void that Vetrotech could not use the written note given to the bailiff during the saisie by Mr Schneider, Interver sécurité's administrative and financial director, in order to provide evidence of the composition of the mixture implemented by that company, while it precisely resulted from the grounds of the decision of 16 February 2007 that the note in dispute did not constitute, as held by the cour d'appel, one of the "statements induced by the twenty-four questions from the officiating bailiff who acted beyond his powers" the removal of which had been ordered, but, on the contrary, constituted one of the "seized items and documents" which had been ordered to be given back to Vetrotech, and which the latter should therefore have been able to use freely, the cour d'appel ignored the res judicata with regard to the decision of 16 February 2007, violating Article 1351 of the French Civil Code;

2° by issuing such decision, the cour d'appel, in any case, distorted the decision of 16 February 2007, violating Article 1134 of the French Civil Code;

3° the scope of the protection conferred by a European patent is determined by the content of the claim; while the latter can be interpreted using the description or the drawings, it cannot be extended; in the present case, claim 11 of European patent No. 0 620 781, which does not depend on the product claims preceding it, covers a process for producing a light-transparent heat-protection element using a hydrous alkali silicate, characterised in that “the alkali silicate is combined with a hardener which contains or liberates silicon dioxide, and a pourable compound is formed, this compound is placed into a mould cavity between two carrier elements or applied to a carrier element, the compound is then hardened to a solid polysilicate layer while maintaining the water content and in the hardened polysilicate the molar ratio of silicon dioxide to alkali metal oxides is set to a ratio which is greater than 4 :1”; the claim in no way indicates that this process should only enable the manufacturing of a product strictly corresponding to claim 1, with a protection layer necessarily having a water content comprised between 44 and 60 wt.%; by holding that claim 11 of European patent No. 0 620 781 only relates to “a product defined exactly like the product the subject-matter of claim 1”, with a pourable compound which should necessarily have a water content comprised between 44 and 60 wt.%, the cour d'appel added to claim 11 a characteristic it does not have, thereby limiting the content of this claim, violating Article 69 of the European Patent Convention of 5 October 1973 and Article L. 613-2 of the French Intellectual Property Code;

4° the infringement of a patent is objectively assessed by determining whether the process at issue includes the essential characteristics of the asserted claim; by holding, in an inoperative manner, that the skilled person would not contemplate checking if the pourable compound could be obtained with a water content below 44 %, without seeking to determine, as it was invited to by Vetrotech in its appeal pleading, whether it did not precisely emerge from the saisie-contrefaçon reports that the gel used by Interver sécurité was actually pourable, the cour d'appel deprived its decision of a legal basis having regard to Articles L. 613-3 and L. 615-1 of the French Intellectual Property Code;

5° pursuant to Article L. 615-5-1 of the French Intellectual Property Code, where the subject-matter of the patent is a process for the manufacture of a product, the court may order the defendant to prove that the process used to manufacture an identical product is different from the patented process; by pointing out, to refuse to apply this provision, that the requirement of an identical

product was not met, insofar as Interfer sécurité's seized products did not infringe claim 1 of European patent No. 0 620 781, as the process covered by claim 11 of this patent did not specifically refer to the manufacture of a product strictly corresponding to the one defined in claim 1, the cour d'appel again ignored the scope of claim 11 of the patent, violating Article 69 of the European Patent Convention of 5 October 1973 and Article L. 613-2 of the French Intellectual Property Code;

However, whereas, firstly, only the grounds of a legal decision have *res judicata*; the decision of 16 February 2007 did not hold that Mr Schneider's written note constituted one of the seized items and documents that had to be given to Vetrotech but, reversing the order of the Judge in charge of the case preparation dated 12 July 2006, held the *saisie-contrefaçon* report partially void, ordered the removal of the statements induced by the twenty-four questions asked by the bailiff who acted beyond his powers and ordered that the seized items and documents be given back to Vetrotech;

Whereas, secondly, the *cour d'appel* did not distort the decision of 16 February 2007 by holding that Mr Schneider's note, relating to the composition of the mixture used by Interfer, constituted a statement given by the latter in response to one of the twenty-four questions asked by the bailiff;

Whereas, thirdly, assessing the scope of claim 11 of patent No. 0 620 781 having regard to the applicable texts, the decision notes, on its own grounds and on adopted grounds, that this claim does not specify how the characteristic of pourability is obtained, it should be referred to the description of the patent to understand the meaning thereof; the decision further points out that this description mentions that, thanks to the high water content, the compound is very fluid and can be poured, even in the interstice of laminated safety glass where the distance between the panes of glass is small and, in order for the mixture comprising alkali silicate and hardener thus introduced to form a protection layer with a high resistance to fire, its water content must be comprised between 44% and 60%; finally, the decision notes that the water content of the gel implemented by Interfer is set at 39.8%; considering these observations and assessment, from which it emerges that the product implementing the process at issue is not identical to the product obtained using the patented process in that it does not reach the lower limit of the water content of 44%, the *cour d'appel*, which did not limit the scope of claim 11 and which did not have to perform the research referred to in the fourth branch, legally justified its decision;

It follows therefrom that the remainder of the argument, whose first branch is not grounded in fact, is not founded;

On the second argument:

Whereas Vetrotech criticises the decision for having ordered it to pay Interfer sécurité a certain sum as damages for abuse of process, while, according to the argument:

1° in its decisions to hold Vetrotech liable for abuse of process, the cour d'appel, having considered in particular that the maintenance of the infringement proceedings was abusive, the quashing to be ordered concerning the first argument will therefore lead to the quashing of the grounds criticised by the second argument, pursuant to Article 625 of the French Civil Procedure Code;

2° exercising a legal remedy becomes a fault only in the case of an abuse; the sole fact that a saisie-contrefaçon turns out to be unjustified or appears to contain an irregularity leading to its total or partial nullity does not impose strict liability on the party that had it performed; by noting that the tribunal had “[drawn] the right conclusions from the decision of this Court and held the saisie-contrefaçon partially void for having been used as a pretext to carry out illicit investigations” by ordering Vetrotech to pay compensation for the commercial damage allegedly suffered by Interfer sécurité as a result of the saisie-contrefaçon operations, without establishing that the saisie-contrefaçon procedure initiated by Vetrotech was abusive, the cour d'appel violated Article 1382 of the French Civil Code;

3° the claimant is only liable for its own abuses having regard to the saisie-contrefaçon operations; by holding that the bailiff acted beyond his powers by asking twenty-four questions to the seized party and, consequently, that the saisie-contrefaçon was similar to a search, which had led the Judge in charge of the case preparation and then the cour d'appel to set aside from the discussion the answers to those questions, without establishing that Vetrotech could be held liable for an abuse with regard to the performance of the saisie-contrefaçon operations, the cour d'appel violated Article 1382 of the French Civil Code;

4° the purpose of the saisie-contrefaçon is to enable the holder of a patent to gather information on a product or process alleged of infringement; by noting that the saisie-contrefaçon had enabled Vetrotech to unduly obtain information on Interfer's manufacturing processes while the saisie-contrefaçon had been held valid for the most part and that, consequently, it had been ordered that all the seized

items and documents be given back to Vetrotech, the cour d'appel, which again made its decision on the basis of grounds that are not suitable to establish that Vetrotech's exercise of its right to have a saisie-contrefaçon performed constituted an abuse, violated Article 1382 of the French Civil Code;

5° bringing a court action is a right and only incurs the civil liability of the person bringing the action in the case of a fault likely to become an abuse of standing to sue, a fault which shall be determined by the judges ruling on the merits of the case; the incorrect appreciation of its rights by a party does not constitute a fault per se; in the present case, the cour d'appel held that Vetrotech committed an abuse of its standing to sue by continuing the infringement proceedings while its own analyses showed that Interfer sécurité's glass did not have the water content mentioned in claim 1 of its patent; by relying on this sole basis, while Vetrotech did not assert the infringement of claim 1 of its patent but that of claim 11 and that the latter claim in no way referred to the water content mentioned in claim 1, the cour d'appel pronounced its decision on the basis of grounds that are not suitable to establish that the maintenance of its action for the infringement of claim 11 of its patent constituted an abuse and thereby violated Article 1382 of the French Civil Code;

However, whereas, in the first place, the dismissal of the first argument renders the first branch without object;

And whereas, secondly, the decision, concerning the order to pay compensation, is neither based on the sole irregularity of the *saisie-contrefaçon*, nor on the mere fact that Vetrotech made an incorrect appreciation of its rights but points out, on its own grounds and on adopted grounds, that this company unduly obtained information on the manufacturing processes of a direct competitor on the occasion of the questions asked by the bailiff who acted beyond his powers; the *cour d'appel*, which thus considered that there existed a fault committed by Vetrotech, legally justified its decision;

It follows therefrom that the remainder of the argument, whose second and fifth branches are not grounded in fact, is not founded;

ON THESE GROUNDS:

REJECTS the appeal on points of law

Orders Vetrotech Saint-Gobain international AG to pay the costs;

Considering Article 700 of the French Civil Procedure Code, rejects its request and orders it to pay to Interver sécurité the sum of 2,500 euros;

As drafted and decided by the *Cour de cassation*, commercial, financial and economic chamber, and pronounced by the Presiding Judge at this public hearing on the twelfth of February two thousand and thirteen.