

1971

June 2

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NICOS CHR.
CHRISTO-
DOULIDES
v.
REPUBLIC
(REGISTRAR
OF PATENTS)

(HADJIANASTASSIOU, J.)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS CHR. CHRISTODOULIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

THE REGISTRAR OF PATENTS,

Respondent.

(Case No. 249/69).

*Patents—Application for a compulsory licence under a patent—
Held to have been rightly refused by the respondent Registrar—
Because no power or competence is expressly conferred on him
by our Patents Law, Cap. 266, to order the granting of such
compulsory licence—On the contrary, the combined effect of
sections 4, 5, 7, 8 and 9 of the said Law, Cap. 266, makes it
quite clear that the competence conferred on the Registrar is
dependent on the existence of rights and licences acquired and
granted in England under the (English) Patents Act, 1949, to a
patentee—General provisions of section 9 of our own Law,
Cap. 266 (supra) do not confer on the respondent Registrar
such powers which the Comptroller in England has under section
41 of the (English) Patent Act, 1949—Cf. Article 5A(1) and
(2) of the International Convention for the Protection of Industrial
Property (embodied in our Law No. 63 of 1965).*

Dismissing this recourse, the Court held that the respondent Registrar rightly refused to grant to the applicant the compulsory licence under a patent (*infra*) asked for, because there are no powers vested in him to grant such licence.

On December 2, 1968, the applicant's advocate wrote to Messrs. Hoffman—La Roche and Co. Ltd. which are the patentees of a patent in Cyprus No. 237, asking them to grant him a licence by agreement. It is to be noted that the said Patent No. 237 relates to a substance used as medicine and to a process for the manufacture of such substance. The patentees having declined to accede to the aforesaid request, the applicant on April 8, 1967, applied to the respondent Registrar of Patents, under the Patents Law, Cap. 266 and under sections 37–42 of the (United Kingdom) Patents Act (1949), for a

compulsory licence in Cyprus " for the making, using, exercising, importing and vending the patented invention as a medicine" etc., etc. under the Cyprus Patent No. 237 (*supra*), for the reasons set out in his said application (see the full text *post* in the judgment).

On May 26, 1969, the Registrar in reply wrote a letter to the applicant in which he had this to say :

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" I wish to inform you that your application cannot be accepted for the following reasons :

1. There is no provision in our Patents Law, Cap. 266, for the granting of compulsory licence in Cyprus.

2. The United Kingdom Patent Act was never extended to Cyprus *in toto* before Independence, and is therefore outside the provisions of Article 188 of the Constitution of the Republic.

3. Section 9 of our Patents Law, Cap. 266 does not make the whole U.K. Act applicable to Cyprus but only the limited provisions mentioned in sections 4 and 7 of Cap. 266 (*supra*).

4. It is clear from the wording of sections 4 and 7 as well as from the whole spirit of Cap. 266 that only rights registered in the United Kingdom may be resealed in Cyprus

5. Article 5A(2) of the International Convention for the Protection of Industrial Property (which is embodied in our Law No. 63 of 1965) gives a right to all member States to take legislative measures providing for the grant of compulsory licences, but there is no obligation on the respective countries to do so.

6.

7. In my opinion any compulsory licence that you may be entitled to should be obtained and registered in the United Kingdom".

On July 28, 1969, the applicant filed the present recourse whereby he is seeking to challenge the validity of the said decision of the Registrar on the ground that it is contrary to the provisions of the Patents Law, Cap. 266 . . . , or it was made or taken in excess or abuse of powers.

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It was argued by counsel for the applicant, *inter alia*, that the (English) Patent Act, 1949 including section 41 thereof is made applicable to Cyprus in the present case by virtue of section 9(1) of our Patents Law, Cap. 266.

After referring to, and quoting, the relevant statutory (and constitutional) provisions, the Court dismissed the recourse on the sole ground that the Registrar of Patents has no competence to grant compulsory licences as the one involved in this case.

Held, (1). I have reached the conclusion that the Registrar has not misdirected himself on the legal question for the following reasons :

- (a) Because no power is expressly conferred on the Registrar in Cyprus to order the granting of a compulsory licence, and in my view the provisions of section 9 of our Patents Law, Cap. 266, do not confer on him such powers which the Comptroller in England has under section 41 of the Patents Act, 1949 ;
- (b) On the contrary, it seems to me that the combined effect of sections 4, 5, 7, 8 and 9 of our Law (see *post* in the judgment), made it quite clear that the competence conferred on the Registrar is dependent on the existence of rights and licences already acquired and granted in England under the Patents Act, 1949 to a patentee.

(2) In the result, the application is dismissed. No order as to costs.

Application dismissed.

No order as to costs.

Cases referred to ;

Schou's Patents [1924] 1 Ch. 574 ;

F. Hoffmann—La Roche v. Intercontinental, etc., etc. [1965] 2 All E.R. 15 ;

Hoffmann—La Roche and Co. A.G.'s Patent (1969) R.P.C. 504;

Beecham Group v. Bristol-Myers Co. and Another (1967) 1 C.L.R. 263 ;

Ansor Corporation v. The Republic of Cyprus (1969) 3 C.L.R. 325, at pp. 333–334 ;

Andronicou and Co. Ltd. v. CYTA (1969) 3 C.L.R. 1, at pp. 10–12 ;

Edwards and Co. v. Picard [1909] 2 K.B. 903 C.A. ;

In re Cathros Application [1934] 51 R.P.C. 75.

Recourse.

Recourse against the decision of the respondent refusing to grant to applicant a compulsory Licence under Cyprus Patent No. 237.

A. *Dikigoropoulos*, for the applicant.

S. *Georghiades*, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

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The following judgment* was delivered by :

HADJIANASTASSIOU, J. : On December 2, 1968, the applicant's advocates wrote to Hoffman-La Roche and Co. Ltd., which are the patentees of a patent in Cyprus, No. 237, asking them to grant him a licence by agreement. This letter is in these terms :—

“ We have been asked by our aforesaid client to apply to you for permission to import, sell and in any way deal with the produce known as Novel Benzodiazepine 4-Oxides, otherwise as Chlordiazepoxide, complete specifications of which are described in your Cyprus patent No. 237. This application is made to you under s. 9 of the Cyprus Patent Law, Cap. 226, and under the relevant provisions of the United Kingdom Patent Act, 1949. Our client is prepared to discuss the question of terms to be imposed by you for the granting of such a licence, as well as to pay a reasonable percentage on the value of the produce to be imported and sold by him by way of royalties.” (See *exhibit 2*).

On January 13, 1969, the advocates of the patentees in replying to the applicant's application, said that their clients were unable to comply with his request.

On April 8, 1969, the applicant applied to the Registrar under the Patents Law, Cap. 266 and under sections 37-42 of the United Kingdom Patents Act (1949) for a compulsory licence in Cyprus, “ for the making, using, exercising, importing and vending the patented invention as a medicine and/or for the purposes of the production of a medicine, upon such terms as may be determined by you, for the following reasons ” :—

“1. The patented invention relates to a substance used as medicine and to a process for the manufacture of such substance.

* For final judgment on appeal see (1972) 7 J.S.C. 786 to be reported in due course in (1972) 3 C.L.R.

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2. The patented invention is not being worked within the Republic of Cyprus.
3. The demand for the patented articles is met by the importation of patented goods from abroad and such demand is not met on reasonable terms.
4. There has been an abuse of the monopoly rights created by the Patent.
5. The patentee has refused to grant to me a licence upon any and/or any reasonable terms.
6. Trade in the Republic of Cyprus is being prejudiced.
7. It is in the public interest that a licence should be granted to me.
8. The monopoly rights created by the said Patent are contrary to Article 25 of the Constitution and such unconstitutionality can only be cured by the grant of a compulsory licence."

I should have added that patents are choses in action and, subject to certain statutory provisions, the rules of law applicable to the ownership and devolution of personal property, generally apply. See *Edwards & Co. v. Picard* [1909] 2 K.B. 903 C.A. ; also section 54 (5) of the Patents Act, 1949.

On May 26, 1969, the Registrar, having dealt with the application of the applicant for the granting of a compulsory licence to him, in his letter (*exhibit 1*) had this to say :—

"I wish to inform you that your application cannot be accepted for the following reasons :—

- “1. There is no provision in our Patents Law, Cap. 266, for the granting of compulsory licences in Cyprus.
2. The United Kingdom Patent Act was never extended to Cyprus, *in toto*, before independence, and is, therefore, outside the provisions of Article 188 of the Constitution of the Republic.
3. Section 9 of our Patents Law does not make the whole U.K. Act applicable to Cyprus but only the limited provisions mentioned in sections 4 and 7 of Cap. 266.
4. It is clear from the wording of sections 4 and 7 as well as from the whole spirit of Cap. 266 that only rights registered in the United Kingdom may be resealed in Cyprus and protected. In some

respects rights registered in the U.K. are automatically extended here without even re-registration or re-sealing.

5. Article 5A (2) of the International Convention for the Protection of Industrial Property (which is embodied in Law 63/1965) gives a right to all member states to take legislative measures providing for the grant of compulsory licences, but there is no obligation on the respective countries to do so.
6. Article 25 of the Constitution of the Republic is irrelevant in your case because our Patents Law, Cap. 266 does not in any way restrict the right of your client to carry out his profession of chemist and importer of drugs.
7. In my opinion any compulsory licence that your client may be entitled to should be obtained and registered in the United Kingdom."

On July 28, 1969, the applicant, feeling aggrieved because of the refusal of the Registrar, filed the present recourse seeking the following relief :—

" A declaration that the act or decision of the respondent not to grant, and/or his omission to grant, to applicant a Compulsory Licence under Cyprus Patent No. 237, communicated to applicant through his advocate by a letter dated the 26th May, 1969 (copy of which is attached hereto and marked ' A ') is *null* and *void* and of no effect whatsoever as being contrary to the provisions of the Patents Law (Cap. 266) and/or of the Constitution and as having been made or taken in excess and/or in abuse of the powers vested in him."

The opposition was filed on September 5, 1969, and was based on almost the same reasons given by the Registrar in his letter of May 16, 1969.

The facts appear in the affidavit of the applicant dated April 8, 1969, and are as follows :—

1. I am an importer of drugs and a registered Chemist having been practising my latter profession in Nicosia for the last 24 years.
2. Most of the prescriptions executed in my capacity as a Chemist relate to psychotropic drugs of the group to which the patented invention under Cyprus Patent No. 237, belongs.

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3. Both as a Chemist dispensing psychotropic drugs and as an importer I am a person interested in the patented invention.
4. The patented invention being capable of being commercially worked in the Republic of Cyprus is not being commercially worked therein.
5. The commercial working of the invention in the Republic of Cyprus is being prevented or hindered by the importation of the patented article.
6.
7. By reason of the refusal of the patentee to grant a licence on reasonable terms :—
 - (a) The establishment or development of commercial or industrial activities in the Republic is unfairly prejudiced,
 - (b) the Patentee acquires a monopoly contrary to the provisions of Article 25 of the Constitution,
 - (c) the Patentee is encouraged to continue in the abuse of his monopoly rights thus acquired in detriment to the public interest, in that the prices charged by him for his patented article are much higher than the prices at which such article could be offered by me either by importation or local manufacture.”

I consider it constructive to deal first with the provisions of section 4 which are in these terms :—

“ Any person being the grantee of a patent (which expression shall include a patent of addition) in the United Kingdom or any person deriving his right from such grantee by assignment, transmission or other operation of law may apply within three years from the date of the sealing of the patent to have such patent registered in the Republic. Where any partial assignment or transmission has been made, all proper parties shall be joined in the application for registration.”

Regarding the privileges and rights conferred by registration, section 7 provides :—

“ Such certificate of registration shall confer on the applicant privileges and rights subject to all conditions established by the law of the Republic as though the patent had been granted in the United Kingdom with an extension to the Republic.”

The duration of privileges are laid down in section 8, which is as follows :—

“Privileges and rights so conferred shall date from the date of the patent in the United Kingdom and shall continue in force only so long as the patent remains in force in the United Kingdom :

Provided that no action for infringement shall be entertained in respect of any manufacture, use or sale of the invention prior to the date of issue of the certificate of registration in the Republic.”

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Section 5 reads :—

“An application for registration of a patent under this Law shall be made to the Registrar in the prescribed manner and shall be accompanied by the prescribed fee, two certified copies of the specification or specifications (including drawings, if any) of the United Kingdom patent and a certificate of the Comptroller General of the United Kingdom Patent Office giving full particulars of the grant of the patent on such specification or specifications.”

Regarding section 41 of the Patents Act (1949) which deals with inventions relating to food or medicine, it reads as follows :—

“Where a patent is in force in respect of—

- (a) a substance capable of being used as food or medicine or in the production of food or medicine ; or
- (b) a process for producing such a substance as aforesaid ; or
- (c) any invention capable of being used as or as part of a surgical or curative device,

the comptroller shall, on application made to him by any person interested, order the grant to the applicant of a licence under the patent on such terms as he thinks fit, unless it appears to him that there are good reasons for refusing the application.

(2) In settling the terms of licences under this section the comptroller shall endeavour to secure that food, medicines, and surgical and curative devices shall be available to the public at the lowest prices consistent with the patentees' deriving a reasonable advantage from their patent rights.

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(3) A licence granted under this section shall entitle the licensee to make, use, exercise and vend the invention as a food or medicine, or for the purposes of the production of food or medicine or as part of a surgical or curative device, but for no other purposes."

It is to be noted that the provisions of this section extend to substances capable of being used in the production of food or medicine, and have been selected by the legislature in England for special treatment which may deny to the patentee the sole right enjoyed by patentees in all other fields to make, use, exercise and vend his invention. The purpose, as I understand it, is to encourage competition in order to ensure, as far as possible, that these essential commodities shall be available to the public at reasonable prices.

Section 43 lays down the procedure to be followed by any person interested in an application under sections 37-42. The interest, of course, must be set out in a statement accompanying the application. In *re Cathros Application* [1934] 51 R.P.C., 75, it was held that a desire to manufacture the patented invention was sufficient.

With regard to the construction of the words "any person interested" see *Re Schou's Patents* [1924] 1 Ch. 574; *F. Hoffmann-La Roche v. Inter Continental etc.* [1965] 2 All E.R. 15; also *Hoffmann-La Roche & Co. A.G.'s Patent*, (1969) R.P.C. 504.

Reverting now to the position in Cyprus, section 29 (1) (3) of the Courts of Justice Law (1960), deals with the law to be applied and is in these terms:—

"(e) The Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland which were applicable to Cyprus immediately before Independence Day, save in so far as other provision has been or shall be made by any law made or becoming applicable under the Constitution and in so far as they are not inconsistent with, or contrary to, the Constitution."

The Patents Act (1949) is made applicable to Cyprus by virtue of Law 40/57, now Cap. 266, s. 9 (1), which confers jurisdiction on our Supreme Court to deal with claims under the Patents Law.

When Cyprus became a Republic, it acceded to the International Convention for the Protection of Industrial

Property, and the first Protocol which were approved under Article 169.2 of the Constitution. That law (in a schedule to which the text of the Convention is set out) was published under No. 63/65 in the Official *Gazette* of the Republic, dated November 4, 1965, and the convention has, under paragraph 3 of Article 169 of the Constitution, superior force to any municipal law.

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Article 5 (A)(1) and (2) reads :

“ (1) The importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail revocation of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the granting of compulsory licences to prevent abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.”

Having reviewed the position both with regard to the powers of the Registrar in Cyprus and of the Comptroller in England regarding his statutory duties to grant an applicant a licence under the patent, I shall now proceed to deal with the submissions of both counsel.

Counsel on behalf of the applicant argued the present case mainly on two grounds :—

(a) that the Patent Act (1949) including s. 41 is made applicable to Cyprus in the present case by virtue of Law 40/57, now Cap. 266 s. 9 (1). He relies on two cases, *i.e. Beecham Group v. Bristol-Myers Company and Another* (1967) 1 C.L.R. 263 and also *Ansor Corporation v. The Republic of Cyprus* (1969) 3 C.L.R. 325 at pp. 333-334.

(b) that the refusal of the Registrar to grant to the applicant an order for a compulsory licence is contrary to Article 25, because it creates a monopoly in favour of the patentee. He relies on *Andronicou & Co. Ltd. v. CYTA* (1969) 3 C.L.R. 1, at pp. 10-12.

Counsel on behalf of the respondent, on the contrary, argued

(a) that s. 41 of the Patent Act (1949) is not applicable to Cyprus under the provisions of s. 9 (1) of the Patents Law, Cap. 266 ;

(b) that under our law there is no express power given to the Registrar to grant a compulsory licence to an applicant in Cyprus, and that the only remedy of this applicant is to apply to the Comptroller in England under s. 41 of the Patents Act, 1949, for an order for a compulsory licence, and then if he succeeds, to apply to have it registered in Cyprus.

I find it convenient to state that the word “patent” as used in our law, denotes a grant from the Crown of a monopoly in respect of an invention. The patent is granted in a form authorised by rules made under statutory power, and is sealed with the seal of the Patent Office. In the Patents Act, 1949, invention means any manner of new manufacture, the subject of letters patent and grant of privilege within the Statute of Monopolies and any new method or process of testing applicable to the improvement or control of manufacture, and include an alleged invention. The term “manner of manufacture” includes both process and product of manufacture. The effect of this definition is that the objection of “not an invention within the meaning of The Act” raises two questions. First whether what is claimed, or, in the case of a method of testing, that which the method of testing is said to improve or control, is a “manufacture”; and secondly, whether the manufacture, or method of testing, is new and inventive or alleged to be so. The second question may be divided into two parts. First, consideration of those cases in which the law allows the allegation that the manufacture, or method of testing, claimed is new and inventive to be rejected; and secondly, of those cases in which what is alleged to be new and inventive is not the manufacture or method or, as it is sometimes put, the novelty does not appertain to the manufacture. See *Halsbury's Laws of England*, 3rd Edn., Vol. 29 of the Patents and Inventions at p. 22, paragraph 50, under the heading “Statutory Meaning of Invention”.

In our country, because of the high cost and lack of highly technical specialized personnel, we have not as yet managed to establish a research centre in order to carry out the necessary enquiry to decide whether a patent can be registered, and in the absence of such centre, we are bound to continue relying on the technical experiences of the United Kingdom. Be that as it may, and until we decide to take legislative measures under the provisions of Law 63/65, providing for the granting of compulsory licences in order to prevent abuses which might result from the exercise of the exclusive rights conferred by the

patent, I take the view that the Registrar in Cyprus has no power under this existing law to order the granting of a compulsory licence to an applicant. However, even before the passing of Law 63/65, the industrial property in the Republic was protected by various laws, based mainly on the corresponding English Acts. With regard to patents, as I have already shown, any patent granted in the United Kingdom may be registered in Cyprus under our Patents Law, and any privileges acquired in respect of such patent are protected in Cyprus, so long as they last in England:—I would, therefore, disagree with counsel for the applicant that if the Court accepted paragraphs 2 and 3 of the grounds of law raised by the respondent in their opposition, that the patentees' rights would not be protected in Cyprus under our own law. (See paragraphs 2 & 3 of the opposition).

Regarding the first contention of counsel for the applicant, I have reached the view that the Registrar has not misdirected himself on the legal question for the following reasons :—

(a) Because no power is expressly conferred on the Registrar in Cyprus to order the granting of a compulsory licence, and in my view, therefore, the general provisions of s. 9 of our own law do not confer on him such powers which the Comptroller in England has under s. 41 of the Patents Act, 1949 ;

(b) that on the contrary, it seems to me that the combined effect of the sections of our law to which I have referred earlier, make it quite clear that the competence conferred on the Registrar is dependent on the existence of rights and licences acquired and granted under the Patents Act, 1949, to a patentee.

For the reasons I have endeavoured to explain, I have reached the view that the application should be dismissed, because the decision of the Registrar is not contrary to any of the provisions of this Constitution, or of any law, nor is it made in excess or in abuse of powers vested in such organ. Having reached the view that the Registrar has no competence in this matter, I would like to add that it is no disrespect to counsel for the applicant that I have not found it necessary to deal with the other point raised in this argument.

Application is, therefore, dismissed, but in view of the fact that this is the first application of this nature which came before this Court, I do not propose making an order for costs against the applicant.

Application dismissed. No order as to costs.