

**Cour de Cassation 4 December 2007, Appeal Case No 06-88025**

THE COUR DE CASSATION (CRIMINAL DIVISION) has handed down the following decision. This is an appeal from a decision concerning X Thierry, SOCIÉTÉ CATINOT, civil parties, against a decision of the Court of Appeal of Montpellier (Criminal Jurisdiction) dated 10 October 2006, which dismissed their demands after acquittal of Claude Y of violation of legal professional privilege. Joining the appeals on account of the connection Having regard to the submissions produced by the applicant and defendant. On the first ground of cassation, based on violation of Article 111-2, 111-3, 226-13 and 226-31 of the Penal Code, of Article 66-5 of the Law of 31 July 1971 in the wording given to it in Article 34 of Law No 2004-130 of 11 February 2004, and violation of Articles 591 and 593 of the Criminal Procedure Code, as lacking in grounds ;

"in that the judgment appealed from, released Claude Y from the consequences of legal proceedings. based on the violation of legal professional privilege, and rejected the demands of the civil parties;

“on the ground that "the reality of the facts was not discussed; It is asserted that Claude Y used the letter addressed to him on 16 May 2003 by his colleague X, at the time of the proceedings before the first instance tribunal of Montpellier, the said letter having been: - referred to in service records dated 29 October 2004, - produced during the hearing of 2 November 2004 and used during pleadings at this last Court hearing. The Court held consequently that the letter of 16 May 2003 had been created before the Law of 11 February 2004 and prior to the setting up of the new harmonised internal regulation of the Bar of Montpellier, at a time when, in the absence of any particular requirement, lawyers did not have the habit of affixing the word "official" to letters to which they intended to confer this character. Consequently, the provisions of the new law of 11 February 2004 could not be applied to these letters, other than by making this law retrospective and , consequently, this would prevent the production of almost all letters between lawyers that had previously been considered as suitable to be communicated.

Moreover, this would go against the will be contrary to the intention of the legislator in 2004, who had precisely intended to reconsider Article 66-5 of the Law of 30 September 1971, already reworked several times, which held the confidentiality of correspondence between lawyers as an absolute. It was, therefore necessary to investigate whether the letter of 16 May 2003 fell outside the litigious framework, and whether its purpose was, as the defendant maintained, to certify and put into effect an agreement between the parties and could therefore be considered to be "official". The letter of 16 May 2003 had been written by Mr X, in reply to a previous letter of 13 May, in which Mr Y asked him if he would consider the payment of a sum of 32,500 Euros as being in full satisfaction with regard to the part of the judgment of 18 March 2003 and the provisional enforcement interim execution. In the litigation letter, Mr X wrote that he "had never had any doubt concerning the transcription error, which modified the judgment", adding: "I had certainly read the sum of 65,000 Euros and not 75,000 Euros; consequently, the executory principal will amount to 32,500 Euros". This letter clearly had, as its intention, to materialise an agreement between the parties as to the sum owing by the losing party, on behalf of the party seeking to enforce the judgment which had been affected by a manifest material error. From these facts, the letter lost its confidential character because it was intended to officially recognise the agreement entered into between by the parties on the interpretation to give to a judgment which contained a transcription error. It could well be

analysed as an official document the content of which could be submitted to the consideration of the tribunal. It will also be seen that this letter was not within the scope of a transactional research. Incidentally, the receipt sent by the defendant to his colleague, for the sum claimed by the latter, had been accepted by the SCEA Catinot and returned signed to the office of the defendant. The interpretation of the judgment, on the basis of 32,500 Euros being due for provisional execution, was thus guaranteed. Finally, it will need to be emphasised that only the letter of 13 May 2003, constituting the agreement, had been produced within the framework of the civil proceedings, the other exchanges of correspondence between lawyers not having been produced until the present criminal proceedings. As the letter of 13 May 2003 could be communicated, no violation of legal professional privilege could from then on be evoked against Claude Y, who will accordingly be acquitted”:

“While, firstly, Article 66-5 of the Law of 31 December 1971, insofar as it stemmed from the Law No 2004-130 of 11 February 2004, is applicable, conformably with the reasoning of the First Civil Chamber of the Cour de Cassation, to the correspondences exchanged prior to the commencement of Law No 2004-130 of 11 February 2004, since they have not been the subject, on this date, of a litigation concerning their communication, which had been definitively resolved.

In determining to reject the argument, when the correspondence had been produced in Court, whatever its date, after the enactment of Law No 2004-130 of 11 February 2004, so that it could not have been *a fortiori* the object, at that date, of litigation concerning its communication which had definitively been resolved, the judges in the court below had contravened the sections of the law referred to above.

" Secondly, although, the existence of a custom would in no way defeat the application of legal rules governing legal professional privilege and, consequently, penal rules laws dealing with its violation); in relying on the existence of a custom, in order to waive compliance, the judges below had once again acted in breach of the provisions referred to above."

The Court had regard to Articles 226-13 and 226-31 of the Penal Code, Article 66-5 of the Law of 31 July 1971, as amended by the Law of 11 February 2004.

As a result of Article 66-5, as amended by the Law of 31 July 1971, letters between lawyers, except those which carry the word "official", are protected by legal professional privilege.

Consequently the judgment appealed from and the pleadings stated that Thierry X, a lawyer, and the Catinot Company had sued Claude Y, also a lawyer, for violation of legal professional privilege, on the basis that he had produced, on 24 September 2004, in civil proceedings, a letter which the former had addressed to him on 16 May 2003 and which did not carry the word "official" and accordingly, the Criminal Court had convicted the defendant.

To set aside the judgment appealed by the defendant and to discharge him, the appeal judgment set out that the Law of 11 February 2004 did not apply to letters sent before the date of its enactment and that the letter the subject of these proceedings, which was an official record of an agreement between the parties, did not have a confidential nature.

However, in so finding, whereas when the production of the letter had occurred following the enactment of the aforementioned Law, the Court of Appeal had not given a proper legal basis for its decision.

Accordingly, it followed that the judgment should be set aside.

For these reasons, and without there being any need for considering the other grounds of appeal before the Court:

ALLOWS THE APPEAL, on all grounds, from the judgment of the Court of Appeal of Montpellier dated 10 October 2006, so that the case could be heard again, in accordance with the law.

REMITTS the proceedings and the parties before the Court of Appeal in Aix-en-Provence, chosen by special deliberation in closed session.

HOLDS that Article 618-1 of the *Criminal Procedure Code* does not apply to Thierry X and to Catinot Company.

ORDER that the judgment, transcript and seals of the Court of Appeal of Montpellier and any orders made in the judgment are annulled.

So ordered by the Cour de Cassation (Criminal Chamber) in Open Court, on the day, month and year set out above.

Were present at the proceedings and at the deliberations: Judges: M. Cotte, President, Mme Anzani, Counsellor-Rapporteur, Mr Joly, Mrs Palisse, Mrs Guirimond, Mr Beauvais, Guérin, Straehli, Advisers to the Chamber Lawyers of the Court, Mrs Ménotti, Assistant Judge Junior Lawyer.

Solicitor General: Mr Mouton

Bailiff: Mr Souchon

The judgment was accordingly signed by the President, the Rapporteur a Researcher and the Bailiff.