

Commercial agent's fault committed prior to termination but discovered subsequently: such fault cannot deprive the commercial agent of his right to compensation (Ruling n° 675 - 21-17.423)

16/11/2022



Ruling No. 675

PARTIAL QUASHING

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 16 NOVEMBER 2022

Acopal, a limited liability company, with registered office at [Address 1], [Town/City 3], lodged appeal No. X

21-17.423 against the ruling delivered on 6 May 2021 by the *cour d'appel* (Court of Appeal) of Versailles, 12th Chamber, in the dispute between said party and Paniers Terdis, a simplified joint-stock company, having its registered office at [Address 5], [Town/City 2], respondent to the quashing.

In support of its appeal, the appellant relies on the three pleas of appeal attached to the present ruling.

The case file was sent to the prosecutor-general.

On the report of Ms Comte, judge referee, the observations of SCP Krivine et Viaud, lawyer of Acopal, SCP Waquet, Farge and Hazan, lawyer of Paniers Terdis, and the advisory opinion of Mr Douvreur, advocate-general, after discussions in the public hearing of 27 September 2022 in the presence of Mr Vigneau, President, Ms Comte, reporting judge referee, Ms Darbois, elder judge, Ms Poillot-Peruzzetto, Ms Champalaune, Ms Michel-Amsellem, Mr Bedouet, Mr Alt, judges, Mr Blanc, Ms Bessaud, Ms Bellino, Mr Regis, judge referees, Mr Douvreur, advocate-general, and Ms Labat, Chamber Registrar,

the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after deliberation thereof in accordance with the Law, has delivered this ruling.

Account of the dispute

Facts and Procedure

1. According to the ruling under appeal (Versailles, 6 May 2021) and the content of the case file, Acopal had been acting as a commercial agent of Terdis, which subsequently became Paniers Terdis, since 2008. On 3 May 2013, Acopal and Terdis entered into a contract known as the "contract for merchandising services", whereby Terdis entrusted Acopal with optimising the installation of its products on the shelves and, on 7 May 2013, a commercial agency contract. On 11 October 2013, a commercial agency contract and a "merchandising" contract were signed by and between Paniers Terdis and Acopal.
2. By letter received on 4 March 2016 by Acopal, Paniers Terdis terminated the commercial agency contract between them.
3. Acopal sued Paniers Terdis for payment of compensation for termination and compensation in lieu of notice and for disclosure of documents.

Pleas

Examination of the pleas

On the first plea

Statement of plea

4. Acopal objects to the ruling for dismissing its claims for compensation for termination and compensation in lieu of notice, whereas:

"(1) the activity carried out by the commercial agent for a competitor of his principal, known and tolerated by the latter, cannot constitute serious breach justifying the loss of compensatory compensation for termination and the absence of notice; whereas it is sufficient in this respect for the principal to have known of this situation before the conclusion of the commercial agency contract and for him to have tolerated it during the performance of the contract; whereas, in this case,

by considering the contrary, where Terdis had to have been aware of the activity carried out by Acopal for the competing company Georgelin since 11 October 2013, the date of entry-into-force of the agency contract that replaced the previous contract, and not previously, the *cour d'appel* (Court of Appeal) infringed Articles L. 134-3, L. 134-11, L. 134-12 and L. 134-13 of the Commercial Code;

(2) whereas the activity carried out by the commercial agent for a competitor of his principal, known and tolerated by the latter, cannot constitute serious breach justifying loss of the compensatory allowance for termination; whereas, in this case, by failing to examine if, as decided by the first instance court and as requested by Acopal, regardless of whether the commercial relationship between Terdis and Georgelin ceased on 22 October 2009, the commercial agency relationship between Acopal and Terdis had not begun as of 2008 (the written contract of 2013 only formalising these relations) and whether the principal had no knowledge at that time that Acopal was also working with the competing company Georgelin, such that it had tolerated this situation, which prohibited any serious breach on the part of the agent, the *cour d'appel* (Court of Appeal) failed to provide a legal basis for its decision in light of Articles L. 134-3, L. 134-11, L. 134-12 and L. 134-13 of the Commercial Code."

Statement of reasons

Court's response

5. The ruling notes first that, on the one hand, the commercial agency contract, signed on 11 October 2013, states that the agent "cannot accept the representation of products that are likely to compete with those that are the subject of this contract" and that, on the other, Acopal acknowledges that it subsequently carried out commercial agency work also for Georgelin, a competitor of Paniers Terdis. The ruling further holds that Acopal did not provide evidence that, since the date of signature of the contract between itself and Paniers Terdis, the latter had been informed of this competing activity and had tolerated it, and that the principal's tolerance cannot be inferred from the past existence of commercial relations between Terdis and the competing company.
6. From these findings and assessments, the *cour d'appel* (Court of Appeal), which pointed out that the inclusion in the contract of the clause prohibiting any representation of a competing company called into question the tolerance Terdis had previously showed to Acopal vis-à-vis its relations as commercial agent for the benefit of Georgelin, was able to deduce, without the need for an inquiry—rendered ineffective by its findings—, that, in

continuing its relations with this competing company, Acopal had committed a serious breach.

7. The plea is therefore unfounded.

Pleas

On the second part of the second plea

Statement of plea

8. Acopal objects to the ruling for dismissing its claim for compensation for breach, whereas "the laws of a Member State transposing a European Union directive must be interpreted in the light of said directive, in particular when it has itself been interpreted by the Court of Justice of the European Union; whereas, in its ruling on Volvo Car Germany GmbH of 28 October 2010 (aff. C-203/09), the Court of Justice ruled that, "Article 18, subsection a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes an independent commercial agent from being deprived of his customer compensation when the principal establishes the existence of a breach by the commercial agent, which occurred after notice of the termination of the contract and before the expiry of the contract, which was such as to justify immediate termination of the contract at issue", after having stated, in the grounds of its decision, that "European legislature" sought to require the existence of a direct causal link between the breach attributable to the commercial agent and the principal's decision to terminate the contract in order to be able to deprive the commercial agent of the compensation provided for in article 17 of the directive" (§ 39), that "as an exception to the agent's right to compensation, article 18, subsection a) of the directive is to be interpreted strictly. Accordingly, said provision cannot be interpreted in a way that would be tantamount to adding a ground for revocation of compensation not given expressly therein" (§ 42) and that "where the principal becomes aware of the commercial agent's fault only after the termination of the contract, it is no longer possible to apply the mechanism provided for in article 18, subsection a) of the directive; consequently, the commercial agent cannot be deprived of his right to compensation under this provision when the principal establishes, after serving notice of the termination of the contract, that the agent committed a fault that was such as to justify immediate termination of the contract" (§ 43); whereas Articles L. 134-12 and L. 134-13 of the Commercial Code, which result from the transposition into national law of the abovementioned Directive, must therefore be interpreted as meaning that only serious breach committed before the termination of the contract and known to the principal may be considered as grounds for the termination that would exclude the commercial agent's right to compensation; whereas, in this case, by holding, on the contrary, that, in order to dismiss the claim for compensation for breach, it did not matter that the breach it characterised as serious, namely, Acopal's representation of a competitor of the principal without the latter allegedly having knowledge thereof, had been discovered only after the breach, when this circumstance excluded any direct causality between the disputed breach and the breach of contract, the *cour d'appel* (Court of Appeal) violated Articles L. 134-12 and L. 134-13 of the Commercial Code, in light of the Articles 17 and 18 of Directive 86/653/EEC of 18 December 1986 as interpreted by the Court of Justice of the European Union, together with Article 267 of the Treaty on the Functioning of the European Union."

Statement of reasons

Court's response

In view of Articles L. 134-12, paragraph 1, and L. 134-13 of the Commercial Code, transposing Articles 17, §3 and 18 of Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents of 18 December 1986:

9. Under the first of these texts, in the event of termination of his relationship with the principal, the commercial agent is entitled to a compensation in respect of the damage suffered. According to the second, the compensation provided for in Article L. 134-12 is not due, in particular when the termination of the contract is caused by serious breach of the commercial agent.
10. The Commercial, Financial and Economic Chamber has held that the cases of serious breach committed by the commercial agent during the performance of the contract, including those discovered by his principal after termination of the contractual relationship, are such as to deprive the commercial agent of his right to compensation (Com., 1 June 2010, appeal No. 09-14.115; Com., 24 November 2015, Appeal No. 14-17.747; Com., 19 June 2019, Appeal No. 18-11.727).
11. However, the Court of Justice of the European Union (CJEU), by ruling of 28 October 2010 (Volvo Car Germany GmbH, aff. C-203/09, points 38, 42 and 43), recalled that, "under the terms of Article 18, subsection a) of the directive, the compensation referred to therein is not due when the principal has terminated the contract" on the grounds of "breach attributable to the commercial agent which would justify, under national legislation, immediate termination of the contract", that "as an exception to the agent's right to compensation, Article 18, subsection a) of the directive is to be interpreted strictly. Accordingly, this provision cannot be interpreted as meaning that it adds a ground for revocation of compensation not expressly given in this provision" and considers that "where the principal becomes aware of the commercial agent's breach only after the end of the contract, it is no longer possible to apply the mechanism provided for in Article 18, subsection a) of the directive. Consequently, the commercial agent cannot be deprived of his right to compensation under this provision when the principal, after having notified him of the termination of the contract in advance, establishes the existence of a breach by said agent that was such as to justify immediate termination of the contract."
12. The CJEU also stated, in a ruling of 19 April 2018 (CMR. v. Demeurs terre et tradition SARL, C-645/16, paragraph 35), that "any interpretation of Article 17 of this directive that could prove to be to the detriment of the commercial agent was excluded."
13. In view of the interpretation that must be given to Articles L. 134-12 and L. 134-13 of the Commercial Code, it appears necessary to modify the case-law of this chamber and henceforth hold that a commercial agent who has committed a serious breach prior to the termination of the contract, of which no mention was made in the notice of termination and which was discovered thereafter by the principal, such that it did not cause the termination, cannot be deprived of his right to compensation.
14. In dismissing Acopal's claim for compensation for breach of contract, the ruling held that it did not matter that, discovered after the termination, a breach of the obligation of loyalty was not mentioned in the notice of termination if said breach, which was liable to constitute serious breach, was committed prior to the termination.
15. In so ruling, the cour d'appel (Court of Appeal) violated the above-mentioned texts.

Pleas

And on the first part of the third plea

Statement of plea

16. Acopal objects to the ruling for dismissing its request for disclosure of documents and its request for payment of royalties[GJ1] , whereas "the relationship between the commercial agent and the principal is governed by an obligation of loyalty and a reciprocal duty of information; whereas the commercial agent has the right to require his principal to provide him with all the information, in particular an extract from the accounting documents necessary to verify the amount of commissions due to him; whereas, in this case, by dismissing Acopal's request for disclosure of documents and its request for payment of royalties, on the grounds that it did not justify its activity with the customers concerned for the period prior to 30 June 2016, when it was up to Paniers Terdis to provide beforehand the accounting documents necessary to verify the commissions due, the *cour d'appel* (Court of Appeal) infringed Articles L. 134-4, L. 134-7 and R. 134-3 of the Commercial Code."

Statement of reasons

Court's response

Having examined Articles L. 134-6, L. 134-7 and R. 134-3 of the Commercial Code:

17. Under the second of these texts, for any commercial transaction concluded after termination of the agency contract, the commercial agent is entitled to his commission either when the transaction is mainly due to his activity during the agency contract and has been concluded within a reasonable deadline from the termination of the contract or when, under the conditions provided for in the first of these texts, the order was received by the principal or the commercial agent from the third party before termination of the agency contract. According to the third, the commercial agent is entitled to require his principal to provide him with all the information, in particular an extract from the accounting documents necessary to verify the amount of commissions due to him.
18. In dismissing the request for disclosure of accounting documents, the ruling maintains that Acopal does not provide any evidence to justify a particular activity on its part in the departments in question and with the customers concerned before the date of termination of the contract that generated transactions concluded mainly through its activity, within a reasonable period after said date.
19. In so ruling, the *cour d'appel* (Court of Appeal) violated the aforementioned texts, even though Acopal was entitled to require its principal to provide all the accounting documents necessary to verify the amount of commissions that might be due to it.[GJ2]

Operative part of the ruling

ON THESE GROUNDS, and without having to rule on the other pleas, the Court:

QUASHES AND SETS ASIDE, but only insofar as it dismisses Acopal's claims for compensation for breach, disclosure of documents and for the right to the payment of royalties, and insofar as it rules on costs and the application of Article 700 of the Code of Civil Procedure, the ruling delivered on 6 May 2021 between the parties by the *cour d'appel* (Court of Appeal) of Versailles;

Refers, except on said points, the case and the parties back to the status existing prior to the said ruling and sends them back to the *cour d'appel* (Court of Appeal) of Versailles, otherwise composed;

Orders Paniers Terdis to pay the costs;

In accordance with Article 700 of the Code of Civil Procedure, dismisses the application made by Paniers Terdis and orders it to pay Acopal the sum of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of Cassation), this ruling shall be forwarded for transcription in the margin or at the bottom of the partially quashed ruling;

Thus ordered and adjudged by the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation), and pronounced by the President in a public hearing on the sixteenth day of the month of November of the year two thousand and twenty-two.

Pleas attached

PLEAS ATTACHED to this ruling

Pleas submitted by SCP Krivine and Viaud, Supreme Court Lawyer, for Acopal.

FIRST PLEA FOR QUASHING

Acopal objects to the ruling under appeal FOR HAVING dismissed its claim for compensation for termination and its claim for compensation in lieu of notice;

1. "WHEREAS the activity carried out by the commercial agent for a competitor of his principal, known and tolerated by the latter, cannot constitute serious breach justifying the loss of compensatory compensation for termination and the absence of notice; whereas it is sufficient in this respect for the principal to have known of this situation before the conclusion of the commercial agency contract and for him to have tolerated it during the performance of the contract; whereas, in this case,

by considering the contrary, where Terdis had to have been aware of the activity carried out by Acopal for the competing company Georgelin since 11 October 2013, the date of entry-into-force of the agency contract that replaced the previous contract, and not previously, the *cour d'appel* (Court of Appeal) infringed Articles L. 134-3, L. 134-11, L. 134-12 and L. 134-13 of the Commercial Code;

2. WHEREAS, subsidiarily, the activity carried out by the commercial agent for a competitor of his principal, known and tolerated by the latter, cannot constitute serious breach justifying loss of the compensatory allowance for termination; whereas, in this case, by failing to examine if, as decided by the first instance court (ruling under appeal, p. 6-7) and as requested by Acopal (submissions of appeal, p. 18-21), regardless of whether the commercial relationship between Terdis and Georgelin ceased on 22 October 2009, the commercial agency

relationship between Acopal and Terdis had not begun as of 2008 (the written contract of 2013 only formalising these relations) and whether the principal had no knowledge at that time that Acopal was also working with the competing company Georgelin, such that it had tolerated this situation, which prohibited any serious breach on the part of the agent, the *cour d'appel* (Court of Appeal) failed to provide a legal basis for its decision in light of Articles L. 134-3, L. 134-11, L. 134-12 and L. 134-13 of the Commercial Code.

SECOND PLEA FOR QUASHING

(subsidiary to the first)

Acopal objects to the ruling under appeal FOR HAVING dismissed its claim for compensation for termination;

1. WHEREAS under the terms of Article L. 134-12 of the Commercial Code, the commercial agent is entitled to compensation for damage suffered in the event of termination of his relationship with the principal; whereas if, by exception, this compensation is not due, according to Article L. 134-13, 1 of the same code, when the termination of contract has been caused by serious breach of the commercial agent, it must necessarily have been known to the principal before it took its decision to terminate the contract, without which said breach cannot be considered as having caused the termination. whereas, in this case, by holding, on the contrary, that, in order to dismiss the claim for compensation for breach, it did not matter that the breach it characterised as serious, namely, Acopal's representation of a competitor of the principal without the latter allegedly having knowledge thereof, had been discovered only after the breach, when this circumstance excluded that the termination of contract could have been caused by said breach, the *cour d'appel* (Court of Appeal) infringed Articles L.

134-12 and L. 134-13 of the Commercial Code;

2. WHEREAS the laws of a Member State transposing a European Union directive must be interpreted in the light of said directive, in particular when it has itself been interpreted by the Court of Justice of the European Union; whereas, in its ruling on *Volvo Car Germany GmbH* of 28 October 2010 (aff. C-203/09), the Court of Justice ruled that, "Article 18, subsection a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents precludes an independent commercial agent from being deprived of his customer compensation when the principal establishes the existence of a breach by the commercial agent, which occurred after notice of the termination of the contract and before the expiry of the contract, which was such as to justify immediate termination of the contract at issue", after having stated, in the grounds of its decision, that "European legislature" sought to require the existence of a direct causal link between the breach attributable to the commercial agent and the principal's decision to terminate the contract in order to be able to deprive the commercial agent of the compensation provided for in article 17 of the directive" (§ 39), that "as an exception to the agent's right to compensation, article 18, subsection a) of the directive is to be interpreted strictly, where said provision cannot be interpreted in a way that would be tantamount to adding a ground for revocation of compensation not given expressly therein" (§ 42) and that "where the principal becomes aware of the commercial agent's fault only after the termination of the contract, it is no longer possible to apply the mechanism provided for in article 18, subsection a) of the directive; consequently, the commercial agent cannot be deprived of his right to compensation under this provision when the principal establishes, after serving notice of the termination of the contract, that the agent committed a fault that was such as to justify immediate termination of the contract" (§ 43); whereas Articles L. 134-12 and L. 134-13 of the Commercial Code, which result

from the transposition into national law of the abovementioned Directive, must therefore be interpreted as meaning that only serious breach committed before the termination of the contract and known to the principal may be considered as grounds for the termination that would exclude the commercial agent's right to compensation; whereas, in this case, by holding, on the contrary, that, in order to dismiss the claim for compensation for breach, it did not matter that the breach it characterised as serious, namely, Acopal's representation of a competitor of the principal without the latter allegedly having knowledge thereof, had been discovered only after the breach, when this circumstance excluded any direct causality between the disputed breach and the breach of contract, the cour d'appel (Court of Appeal) violated Articles L. 134-12 and L. 134-13 of the Commercial Code, in light of the Articles 17 and 18 of Directive 86/653/EEC of 18 December 1986 as interpreted by the Court of Justice of the European Union, together with Article 267 of the Treaty on the Functioning of the European Union.

THIRD PLEA FOR QUASHING

Acopal objects to the ruling under appeal FOR HAVING dismissed its claim for disclosure of documents and its request for the payment of royalties;

President : Mr Vigneau

Advocate-general : Mr Douvreur

Judge referee : Ms Comte

Lawyer(s) : SCP Krivine et Viaud – SCP Waquet, Farge and Hazan

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Institution judiciaire

Translated rulings