

Professional penalties: the requirement of a fair trial does not imply the right of the defendant or his/her lawyer to have the last word before the closure of the proceedings

29/09/2021



Ruling of the Commercial Chamber of 19 September 2021, appeal no. 19-25.112

Bankruptcy law (Act of 26 July 2005)

please note that the ruling has been partially translated

The requirement of a fair trial under Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms does not imply the right of the person against whom a personal bankruptcy measure or a management ban are sought, or his or her lawyer, to speak last before the closure of the proceedings.

*It follows from Article L. 653-5, 6°, of the Commercial Code that the failure to keep accounts can only be sanctioned by a personal bankruptcy measure or a management ban if applicable texts require the keeping of accounts. Consequently, in order to pronounce a management ban against the manager of a forestry group - a type of civil company not subject to provisions applicable to merchants - a *cour d'appel* (Court of Appeal) must investigate whether the applicable provisions required the said group to keep accounts.*

Public hearing of 29 September 2021 Partial quashing Ms MOUILLARD, President

Ruling No. 680 FS+B

Appeal No. P 19-25.112

F R E N C H R E P U B L I C

IN THE NAME OF THE FRENCH PEOPLE

Mr [E] [X], residing at [Address 2], lodged appeal no. P 19-25.112 against the ruling delivered on 27 March 2018 by the *cour d'appel* (Court of Appeal) of Versailles (13th Chamber), in the dispute between him and Mr [H] [D], residing at [Address 1], acting as liquidator in the winding-up by decision of the court of *Groupement Forestier Développement Durable* (GFDD), respondent in the quashing.

In support of his appeal, the appellant invokes four pleas for quashing as appended to this ruling.

The file has been sent to the Prosecutor-General.

On the report of Ms Brahic-Lambrey, Judge Referee, the observations of SCP Zribi et Texier, lawyer for Mr [X], SCP Piwnica et Molinié, lawyer for Mr [D], ex officio, and the opinion of Ms Guinamant, Advocate-General Referee, after which the President asked the lawyers whether they wished to make further observations, following arguments at the public hearing held on 29 June 2021, during which were present Ms Mouillard, President, Ms Brahic-Lambrey Reporting Judge Referee, Mr Rémercy, Elder Judge, Ms Vallansan, Ms Graff-Daudret, Ms Vaissette, Ms Bélaval, Mr Riffaud, Ms Fevre, Judges, Mr Guerlot, Ms Barbot, Mr Blanc, Mr Boutié, Judge Referees, Ms Guinamant, Advocate-General Referee, and Ms Fornarelli, Chamber Registrar;

The Commercial Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the aforementioned President and Judges, having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Versailles, 27 March 2018) and the elements produced, the *Groupement forestier développement durable* (GFDD), managed by Mr [X], was placed in judicial reorganisation proceedings and then,

compulsory liquidation by decision of the court on 27 June and 19 December 2014. Mr [D], appointed as liquidator, requested that a personal bankruptcy or management ban be imposed on Mr [X].

Reviewing pleas

On the first plea

Statement of plea

3. Mr [X] takes issue with the court of appeal for ordering a management ban against him, when “the requirement of a fair trial implies that, in matters of personal bankruptcy measure or management ban, the person concerned or his/her lawyer must be heard at the hearing and be allowed to speak last, and that this must be mentioned in the decision. The *cour d'appel* (Court of Appeal) did not note that Mr [X] or his counsel had been invited to speak last. In so doing, the *cour d'appel* (Court of Appeal) infringed Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms.”

Court's response

4. The requirement of a fair trial under Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms does not imply the right of the person against whom a personal bankruptcy measure or a management ban are sought, or his or her lawyer, to have the last word before the closure of the proceedings. 5. The plea, which states the contrary, is therefore unfounded.

But on the second part of the third plea

Statement of plea

6. Mr [X] takes issue with the court of appeal for ordering a management ban against him, whereas “the obligation to keep regular accounts is imposed on any natural or legal person having a merchant status. He claims that forestry groups are civil companies governed by Articles 1832 to 1844-17 of the Civil Code, which are not required to keep accounts, that it follows from the contested decision that the company - of which Mr [X] was the manager - was a forestry group and that, the *cour d'appel* (Court of Appeal) infringed Articles L. 123-12, L. 653-5, 5° and L. 653-8 of the Commercial Code in imposing a five-year management ban on Mr [X], by holding that he had not produced any accounting documents such as a journal, ledger and inventory book, and that certain supporting documents were missing, though its own findings made clear that the group that had been wound up was a forestry group, which ruled out the possibility that Mr [X] was a merchant, a necessary condition for holding him liable for failure to keep regular accounts.”

Court's response

Plea admissibility 7. Mr [D], ex officio, submits that the plea is inadmissible as new and contrary to Mr [X]'s appeal.

8. However, since the plea does not call for consideration of any factual element that does not result from the ruling findings, it is purely legal. Since Mr [X], in his appeal submissions, simply contested the elements raised by Mr [D] without recognising that the forestry group was subject to accounting rules applicable to commercial companies, the plea is not contrary to the position that he maintained before the trial courts.

9. The plea is therefore admissible.

Merits of the plea

In view of Article L. 653-5, 6° of the Commercial Code:

10. It follows from this text that the failure to keep accounts can only be sanctioned by a personal bankruptcy measure or a management ban if applicable provisions require the keeping of accounts.

11. In order to impose a management ban on Mr [X], the ruling noted that natural and legal persons must keep accounts and that the GFDD had not produced a ledger, balance sheet or journal, but only a draft balance sheet.

12. In so determining, on erroneous grounds assuming the merchant status of GFDD, which is a civil company, and without investigating whether it was required to keep accounts by applicable texts, the *cour d'appel* (Court of Appeal) did not provide a legal basis to its decision.

Scope and consequences of the quashing

13. As the management ban was pronounced in consideration of several faults, the quashing on account of one of them entails, in application of the proportionality principle, the quashing of the ruling on this count.

ON THESE GROUNDS, the Court:

QUASHES AND SETS ASIDE, except insofar as it rejects the request to set aside the judgment against which the appeal was lodged, the ruling of 27 March 2018, between the parties, by the *cour d'appel* (Court of Appeal) of Versailles;

Returns the case and the parties, except on this point, to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Versailles, otherwise composed;

Orders Mr [D], as liquidator of the *Groupeement Forestier Développement Durable*, to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claims;

States that, at the request of the Prosecutor-General of the *Cour de cassation* (Court of cassation), this ruling shall be forwarded to be transcribed in the margin or following the partially quashed ruling;

Thus ordered and decided by the *Cour de cassation* (Court of cassation), Commercial Chamber, and pronounced by the President at its public hearing of the twenty-ninth of September, two thousand and twenty-one.

President : Ms Mouillard

Reporting Judge : Ms Brahic-Lambrey, Judge Referee

Advocate-General Referee : Ms Guinamant

Lawyer(s) : SCP Zribi et Texier, SCP Piwnica et Molinié

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International

Translated rulings