

Principle of loyalty in the administration of evidence: Engaging the services of paid third parties to establish facts of unfair competition is unfair

10/11/2021



Ruling of 10 November 2021, appeal no. 20-14.669

Dismissal

RULING OF THE COMMERCIAL CHAMBER OF 10 NOVEMBER 2021, APPEAL NO. 20-14.669

Having ruled that, in order to establish instances of unfair competition, the appellant had resorted to a scheme that consisted of engaging the services of third parties paid to stage a transaction in such manner as to cast doubt on the neutrality of their behaviour with regard to the respondent, a cour d'appel (Court of appeal) was able to deduce that the written testimonies and other documents produced had been obtained in an unfair manner and were therefore inadmissible

COUR DE CASSATION (COURT OF CASSATION)

Public hearing of 10 November 2021

Dismissal

Ms DARBOIS, Elder Judge acting as President

Ruling No. 759 F-B

Appeal No. G 20-14.669

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

IN THE NAME OF THE FRENCH PEOPLE

RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), COMMERCIAL CHAMBER, OF 10 NOVEMBER 2021

The Rassemblement des opticiens de France (ROF), formerly known as the Syndicat national des opticiens réunis, which acquired the rights of the Union des opticiens (UDO), whose registered office is at [Address 1], lodged appeal no. G 20-14.669 against the ruling handed down on 18 February 2020 by the *cour d'appel* (Court of Appeal) of Paris (Division 5, Chamber 1) in its dispute with IMD Optic, a limited liability company, whose registered office is at [Address 2], respondent in the quashing.

In support of its appeal, the appellant relies on the single plea for quashing appended to this ruling.

The case file has been sent to the Prosecutor-General.

On the report of Ms Bellino, Judge Referee, the observations of SCP Rousseau and Tapie, lawyer for the Rassemblement des opticiens de France; and SCP Waquet, Farge and Hazan, lawyer for IMD Optic; after arguments at the public hearing of 21 September 2021, where Ms Darbois, Elder Judge acting as President; Ms Bellino, Reporting Judge Referee; Ms Champalaune, Judge; and Ms Mamou, Chamber Registrar; were present,

the Commercial Chamber of the *Cour de cassation* (Court of cassation), composed of the above-mentioned President and Judges, after having deliberated in accordance with the law, has handed down the present ruling.

Facts and procedure

1. According to the ruling under appeal (Paris, 18 February 2020), the Union des opticiens (UDO), for which the Rassemblement des opticiens de France (ROF) acquired the rights, a professional association whose mission is to raise the ethical standards and defend the professional ethics of opticians and eyewear manufacturers, organised visits by mystery shoppers to various opticians' stores, including the one operated by IMD Optic, to check for any

fraudulent practices that involved falsifying invoices by increasing the price of lenses and correspondingly reducing the price of frames, with the purpose of obtaining a larger share of the price of the frames covered by customers' mutual insurance companies.

2. Relying on the testimonies of two such "shoppers", the UDO initiated proceedings against IMD Optic for acts of unfair competition and to claim damages for harming the collective interests of the profession.

Reviewing plea

On the first, second and third parts of the plea

Statement of plea

4. The ROF objects to the ruling declaring the two written testimonies inadmissible and dismissing all of its claims, whereas:

"1°/ The principle of lawfully obtained evidence prevents the admissibility of evidence gathered through a process that consists of causing an offence or a civil wrong to be committed. It does not, however, prohibit the administration of evidence of such an offence or wrong by means of a written testimony drawn up by a person who has witnessed it and objectively related the circumstances under which it was committed. The mere fact that the author of such written testimony has been paid for it does not in itself constitute the unfairness of this process, insofar as the author in question merely records the commission of an act without intervening to cause it to be committed, and is not specially paid for recording a specific act. In order to dismiss the two written testimonies drawn up respectively by Ms [B] and Ms [O], relating the fraud that employees of IMD Optic committed against mutual insurance companies by falsifying invoices, the *cour d'appel* (Court of Appeal) held that it was not disputed that these two "mystery shoppers" were paid by a company called Qualivox, and that IMD Optic also justified the existence of three separate cases in which the UDO (whose rights were acquired by the ROF) had also engaged the services of these two people, from which the court deduced "the existence of business relationships between the ROF and Qualivox, and these two mystery shoppers were coached to some degree, in such manner as to cast doubt on their complete neutrality in drafting the testimonies produced in the present case, since no evidence was provided as to how Qualivox remunerated the mystery shoppers and the ROF asserted, but did not establish, that many mystery shoppers had been sent to opticians' stores without any unfair behaviour having been observed on the part of the opticians." By ruling on such grounds, which were not sufficient to establish the unfairness of the process that UMO used to establish the existence of fraud committed by IMD Optic, the *cour d'appel* (Court of Appeal) infringed Article 9 of the Civil Procedure Code, read together with Article 6 of the European Convention on Human Rights.

2°/ Instructing a person to go to a company in order to ascertain the methods of invoicing a product for the purpose of ensuring that they comply with the applicable legislation does not constitute a staged transaction intended to induce the commission of an offence or a civil wrong. In the present case, in support of its claims against IMD Optic, the ROF submitted two written testimonies, drawn up respectively by Ms [B] and Ms [O], in which the latter stated that IMD Optic's employee had falsified the invoice for the purchase of their glasses, by increasing the price of the lenses, which were better reimbursed by mutual insurance companies, and by reducing the price of the frames accordingly, as they appeared on the estimate that had initially been presented to them. In order to dismiss these written testimonies as having been drafted in ignorance of the principle of lawfully obtained evidence, the *cour d'appel* (Court of Appeal) held that the content of the written testimonies, which showed that the mystery shoppers had "immediately drawn the opticians' attention to the amounts to be reimbursed by their mutual insurance company for lenses and frames (EUR. 70 for frames and a maximum of EUR. 140 per lens), does not support the respondent's argument that the opticians were induced to commit fraud, as the reimbursement of the products by the mutual insurance company could only be perceived by the opticians as a determining factor in the sale". By ruling on such grounds, which were not sufficient to establish that the customers in question had induced the fraud committed by the employees of IMD Optic, the *cour*

d'appel (Court of Appeal) once again infringed Article 9 of the Civil Procedure Code, read together with Article 6 of the European Convention on Human Rights.

3°/ A form of proof is legally admissible as long as it is the only way for the person who used it to prove a fact and that the infringement of the rights of third parties is proportionate to the interests involved. In this case, the ROF argued that the "mystery visits" method was the only way to prove potential fraud against mutual insurance companies that certain opticians might commit, and that its purpose was to establish the commission of illegal acts that undermined the interests and reputation of the profession, and constituted acts of unfair competition. By merely holding, in order to set aside the two written testimonies submitted during the trade union's arguments, that they had been drawn up in ignorance of the principle of lawfully obtained evidence, without investigating, as it was requested to do, whether the practice of "mystery visits" in the context of which the written testimonies in question were drawn up, did not constitute the only means for the trade union to provide evidence of possible fraud against the mutual insurance companies through the falsification of invoices, and if the production of these written testimonies was not proportionate with regard to the opposing interests involved, in that it tended to relate the proof of acts likely to damage the collective interests of the profession of opticians, and constituting facts of unfair competition, the *cour d'appel* (Court of Appeal) did not provide legal grounds to its decision with regard to Article 9 of the Civil Procedure Code and Article 6 of the European Convention on Human Rights."

Court's response

5. After noting that the two "mystery shoppers" who drew up the written testimonies were paid by Qualivox and that they had also drawn up the written testimonies based on which the ROF had initiated proceedings against three other opticians at the beginning of 2017, the ruling held that this resulted in the existence of business relationships between the ROF and Qualivox, and these two "mystery shoppers" were coached to such extent as to cast doubt on their complete neutrality in drawing up the written testimonies produced, since no evidence was provided as to how they were paid by Qualivox. Lastly, the ruling held that the very content of the written testimonies shows that the "mystery shoppers" immediately drew the opticians' attention to the amounts to be reimbursed by their mutual insurance company for lenses and frames, which does not make it possible to dismiss IMD Optic's argument that the opticians were incited to commit fraud, as the reimbursement of products by the mutual insurance company could only be perceived by the opticians as a determining factor in the sale.
6. From these observations and assessments, from which it follows that the trade union had resorted to a stratagem that consisted of engaging the services of paid third parties to stage a transaction of such nature as to cast doubt on the neutrality of their behaviour with regard to IMD Optic, the *cour d'appel* (Court of Appeal), which was not required to carry out the research invoked by the third part of the plea, which was not requested of it, was able to deduce that the written testimonies, as well as the estimates and invoices that accompanied them, had been obtained in an unfair manner and were therefore inadmissible.
7. As a result, the pleas must be dismissed..

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

Orders the Rassemblement des opticiens de France to pay costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses the claim made by the Rassemblement des opticiens de France and orders it to pay to IMD Optic the sum of EUR. 3,000;

Thus decided and ruled by the *Cour de cassation* (Court of cassation), Commercial Chamber, and pronounced by the president at the public hearing of the tenth of November, two thousand twenty one.

PLEA APPENDED to this ruling

Plea submitted by SCP Rousseau and Tapie, Supreme Court Lawyer, for the Rassemblement des opticiens de France.

The ruling under appeal is criticised for having declared the two written testimonies presented by the Rassemblement des Opticiens de France (which acquired the rights of the Union des Opticiens) inadmissible, for having dismissed all of its claims, for having declared that the further or other claims by the Rassemblement des Opticiens de France (which acquired the rights of the Union des Opticiens) were baseless, for having dismissed them and for having ordered it to pay irrecoverable costs;

On the grounds that "On the claims of the ROF trade union: In order to argue that the mystery shoppers' written testimonies it produced during arguments were not obtained unfairly and are therefore admissible, and to request that the judgment be overturned on this point, the ROF trade union argues that the practice of mystery shopping is legal, an extremely common business practice and now provided for by law (Article 104 of the Act of 17 March 2014, known as the Hamon Law, now Article L. 512-7 of the Consumer Protection Code created by Order No. 2016-301 of 14 March 2016). It maintained that in the present case, the written testimonies produced complied with the legal and case law requirements insofar as it had informed opticians in the city of [Locality 3] and its close suburbs by letter in November 2015 that mystery shoppers were going to be sent to opticians' stores to check compliance with best practices, that IMD Optic was indeed a recipient of such a letter and was also informed of these mystery visits by statements in trade publications, that in any event, no unfair process of such a nature as to induce opticians to commit a wrong was implemented, that the recruitment and remuneration of the mystery shoppers by a third-party company does not detract from the reality and soundness of their written testimonies, and that their remuneration has no bearing on the identification of wrongdoing. It maintains that in any event, the estimates and invoices provided are sufficient on their own to demonstrate the existence of wrongdoing. IMD Optic requests that the judgment be upheld on the grounds stated therein. It recalls that the use of mystery shoppers is governed by conditions that the UDO did not meet, as it had never received prior information regarding the visit of mystery shoppers nor was it informed by trade publications, and that it had been induced to commit a wrong by the two mystery shoppers, who were paid by one Qualivox with which the UDO had an established business relationship. It is not disputed that the two mystery shoppers who drew up the written testimonies submitted during arguments by the ROF trade union in support of its claims, Ms [O] and Ms [B], were paid by one Qualivox. IMD Optic also provides evidence of the existence of three separate cases in which UDO (ROF) initiated proceedings against opticians at the beginning of 2017 on the basis of written testimonies drawn up by the same two mystery shoppers (Exhibits 116 to 118). This resulted in the existence of business relationships between the ROF and Qualivox and these two mystery shoppers were coached to some degree, in such manner as to cast doubt on their complete neutrality in drafting the testimonies produced in the present case, since no evidence was provided as to how Qualivox remunerated the mystery shoppers and the ROF asserted, but did not establish, that many mystery shoppers had been sent to opticians' stores without any unfair behaviour having been observed on the part of the opticians. In addition, the ROF claims that IMD Optic received a circular sent in November 2015 to opticians in [Locality 3] and the immediate suburbs to warn them of visits from mystery shoppers, the same content having been reproduced in trade publications. But, as the lower court judges noted, the list it provides of the recipients of the circular dated 17 November 2015 mentions a company called First Optical registered at the respondent's address - [Address 2] - which does not correspond to either the corporate name or trade name (Nation Optic) of IMD Optic, in such a way that it cannot be established that the latter actually received the letter. Nor is it established that it was aware of the "Say NO to FRAUD" press releases of 19 November 2015 and 20 February 2017. Lastly, the very content of the written testimonies, which showed that the mystery shoppers immediately drew the opticians' attention to the amounts to be reimbursed by their mutual insurance company for lenses and frames (EUR. 70 for frames and a maximum of EUR. 140 per lens), does not support the respondent's argument that the opticians were induced to commit fraud, as the reimbursement of the products by the mutual insurance company could only be perceived by the opticians as a determining factor in the sale. Consequently, it cannot be held that the written testimonies of both mystery shoppers sent to IMD Optic, as well as the

estimates and invoices that accompany them, were obtained in conditions that comply with the principle of fairness in the administration of evidence. On these grounds, the referred judgment shall be upheld, except to specify that all claims submitted by the ROF will be dismissed”.

And on the grounds, supposedly adopted, "SARL I.M.D Optic requests that the two written testimonies provided by the Union des opticiens be excluded from the proceedings, as it did not abide by the principle of fairness in the administration of evidence. One of the two written testimonies will be declared inadmissible on the grounds that a copy of Ms [B]'s identity document was not produced as required under Art. 202 of the Civil Procedure Code which states in its last paragraph: "The written testimony shall be written, dated and signed by the author, who must append the original or a photocopy of any official document proving his or her identity and bearing his or her signature." To justify its fairness, the Union des opticiens claims on the one hand that it had informed SARL I.M.D. Optic in advance of the visit of the so-called "mystery shoppers" and, on the other hand, that it had not entrapped I.M.D. Optic with the intention of inciting the opticians to commit fraud. While the Union des opticiens did send a circular announcing the visits of "mystery shoppers", the circular sent to the respondent was sent to First Optical located at [Address 2], even though the respondent's company name and trade name are respectively I.M.D. Optic and Nation Optic. SARL I.M.D. Optic, however, disputes having received this circular. The Union des opticiens did not send this circular by registered post with acknowledgement of receipt but by simple post and is unable to justify that SARL I.M.D. Optic did receive it. On this point the Union des opticiens asserts that in any case SARL I.M.D. Optic was informed of these visits through press releases sent to trade publications.

Although the Union des opticiens presented two press releases, it did not justify in any way in which professional publications these press releases were published, or even whether SARL I.M.D. Optic would be the recipient of these publications. Consequently, this argument by the Union des opticiens to justify its fairness cannot be accepted. SARL I.M.D. Optic claims that it was under pressure from the customer that it was compelled to modify the invoice in relation to the original estimate previously drawn up, which the Union des opticiens formally contests, stating that the "mystery shopper" was paid by a third party, in this case Qualivox, and not by itself, and that its remuneration in no way depends on whether or not there has been fraud. However, the court cannot legitimately rely exclusively on a written testimony drawn up by a third party not duly authorised for this purpose. The court has no proof that the said "mystery shopper" remained passive and refrained from inducing fraud and consequently excludes the fraudulent inducement of the event to be proven; The principle of fairness in the administration of evidence has not been demonstrated by the Union des opticiens; The two written testimonies provided by the Union des opticiens will therefore be declared inadmissible; The court will dismiss all of the Union des opticiens' claims;

Whereas 1°) while the principle of lawfully obtained evidence prevents the admissibility of evidence gathered through a process that consists of causing an offence or a civil wrong to be committed, it does not, however, prohibit the administration of evidence of such an offence or wrong by means of a written testimony drawn up by a person who has witnessed it and objectively related the circumstances under which it was committed. The mere fact that the author of such written testimony has been paid for it does not in itself constitute the unfairness of this process, insofar as the author in question merely records the commission of an act without intervening to cause it to be committed, and is not specially paid for recording a specific act. In order to dismiss the two written testimonies drawn up respectively by Ms [B] and Ms [O], relating the fraud that employees of IMD Optic committed against mutual insurance companies by falsifying invoices, the *cour d'appel* (Court of Appeal) held that it was not disputed that these two "mystery shoppers" were paid by a company called Qualivox, and that IMD Optic also justified the existence of three separate cases in which the Union des Opticiens (whose rights were acquired by the Rassemblement des Opticiens de France) had also engaged the services of these two people. From this the Court deduced "the existence of business relationships between the ROF and Qualivox, and that these two mystery shoppers were coached to some degree, in such manner as to cast doubt on their complete neutrality in drafting the testimonies produced in the present case, since no evidence was provided as to how Qualivox remunerated the mystery shoppers and the ROF asserted, but did not establish, that many mystery shoppers had been

sent to opticians' stores without any unfair behaviour having been observed on the part of the opticians. By ruling on such grounds, which were not sufficient to establish the unfairness of the process that Union des Opticiens used to establish the existence of fraud committed by IMD Optic, the *cour d'appel* (Court of Appeal) infringed Article 9 of the Civil Procedure Code, read together with Article 6 of the European Convention on Human Rights.

Whereas 2°) instructing a person to go to a company in order to ascertain the methods of invoicing a product for the purpose of ensuring that they comply with the applicable legislation does not constitute a staged transaction intended to induce the commission of an offence or a civil wrong. In the present case, in support of its claims against IMD Optic, the Rassemblement des Opticiens de France submitted two written testimonies, drawn up respectively by Ms [B] and Ms [O], in which the latter stated that IMD Optic's employee had falsified the invoice for the purchase of their glasses, by increasing the price of the lenses, which were better reimbursed by mutual insurance companies, and by reducing the price of the frames accordingly, as they appeared on the estimate that had initially been presented to them. In order to dismiss these written testimonies as having been drafted in ignorance of the principle of lawfully obtained evidence, the *Cour d'appel* (Court of Appeal) held that the content of the written testimonies, which showed that the mystery shoppers had "immediately drawn the opticians' attention to the amounts to be reimbursed by their mutual insurance company for lenses and frames (EUR. 70 for frames and a maximum of EUR. 140 per lens), does not support the respondent's argument that the opticians were induced to commit fraud, as the reimbursement of the products by the mutual insurance company could only be perceived by the opticians as a determining factor in the sale". By ruling on such grounds, which were not sufficient to establish that the customers in question had induced the fraud committed by the employees of IMD Optic, the *cour d'appel* (Court of Appeal) once again infringed Article 9 of the Civil Procedure Code, read together with Article 6 of the European Convention on Human Rights.

Whereas 3°) a form of proof is legally admissible as long as it is the only way for the person who used it to prove a fact and that the infringement of the rights of third parties is proportionate to the interests involved. In this case, the Rassemblement des Opticiens de France argued that the "mystery visits" method was the only way to prove potential fraud against mutual insurance companies that certain opticians might commit, and that its purpose was to establish the commission of illegal acts that undermined the interests and reputation of the profession, and constituted acts of unfair competition. The *cour d'appel* (Court of Appeal), held that, in order to set aside the two written testimonies submitted during the trade union's arguments, they had been drawn up in ignorance of the principle of lawfully obtained evidence. It did not investigate, as it was requested to do, whether the practice of "mystery visits" in the context of which the written testimonies in question were drawn up, did not constitute the only means for the trade union to provide evidence of possible fraud against the mutual insurance companies through the falsification of invoices. It also did not investigate if the production of these written testimonies was not proportionate with regard to the opposing interests involved, in that it tended to relate the proof of acts likely to damage the collective interests of the profession of opticians, and constituting facts of unfair competition. As such, the *cour d'appel* (Court of Appeal) did not provide legal grounds to its decision under Article 9 of the Civil Procedure Code and Article 6 of the European Convention on Human Rights;

Whereas 4°) the *cour d'appel* (Court of Appeal) must respond to the new pleas put forward in support of an application to reverse the lower court's decision, and examine the new documents produced before it in support of these pleas. By upholding the judgment of the Paris Commercial Court of 10 April 2018, insofar as it had declared the written testimony drawn up by Ms [X] [B] inadmissible, on the grounds (judgment, p. 3, 6th §) that a copy of Ms [B]'s identity document was not produced, in accordance with the requirements of Article 202 of the Civil Procedure Code, without examining Ms [X] [B]'s identity document duly submitted during arguments in the appeal proceedings by the Rassemblement des Opticiens de France (Exhibit No. 9 bis; its appeal submissions, p. 7), the *cour d'appel* (Court of Appeal) infringed Article 455 of the Civil Procedure Code.

Whereas 5°), in any event and in the alternative, the Rassemblement des Opticiens de France submitted during arguments (Exhibit No. 9 bis; its appeal submissions, p. 7) the identity document of Ms [B]. By stating, on the grounds adopted by the judges of the lower court, that the written testimony drawn up by Ms [B] was inadmissible insofar as her identity document was not produced as required by Article 202 of the Civil Procedure Code, the *cour d'appel* (Court of Appeal) altered the nature of the submissions and the document communication form of the Rassemblement des Opticiens de France, thus infringing Article 4 of the Civil Procedure Code.

Judge acting as President : Ms Darbois
Reporting Judge : Ms Bellino, , Judge Referee
Judge : Ms Champalaune
Lawyer(s) : SCP Rousseau et Tapie – SCP Waquet, Farge et Hazan

[READ THE FRENCH VERSION>](#)