

The Cour de Cassation - 11 December 2007, Appeal No 03-20747

THE COUR DE CASSATION, INDUSTRIAL CHAMBER, handed down the following decision:

On the first argument for the first ground of appeal:

The Court had regard to articles 1147 and 1315 of the Civil Code.

According to the confirmatory judgment under appeal, the New Caledonian Investment Bank (*Banque calédonienne d'investissement*) ("the Bank") consented to grant several loans in 1972, 1973 and 1975 to Mr and Mrs X, farmers, for their professional requirements, repayment of these loans being deferred in capital and interests. Following a series of arrears defaults, the Bank obtained a title against them and became the successful bidder for property belonging to them; Subsequently, Mr and Mrs X sought to hold the Bank responsible for having advanced them credit in excess of their capacity to repay.

In order to reject their claim, the judgment appealed from held, on its reasoning, that it was not for the Bank to prove that it had complied with its obligation to advise, but for Mr and Mrs X to prove to the contrary by, for example, producing documents demonstrating that their financial capacity at the time did not allow them to comply with their obligations and that among the documents there was no item attesting to the financial capacity of the farm.

By holding this view, without investigating whether Mr and Mrs X were uninformed borrowers and, should it be the case, whether, conformably with the duty to warn, to which it was bound with regard to them at the time the contracts were signed, the Bank could prove that it had fulfilled this obligation having regard to their financial capacity and the risk of indebtedness arising from the grant of the loans. The Court of Appeal, which had reversed the onus of proof, had deprived its judgment of legal validity.

FOR THESE REASONS and without there being any need to determine the issues in the other grounds of appeal, the court set aside the judgment and by implication rejected the other grounds of the judgment in which the court below had ordered Mr and Mrs X to pay damages for abuse of process as well as a civil fine.

SETS ASIDE AND ANNULS, apart from accepting the appeal of Mr and Mrs X, the judgment appealed from of 7 August 2003, between the parties, made by the Court of Appeal of Noumea and in consequence; remits, on this issue, the proceedings and the parties in the state they were in before the said appeal and, in the interests of justice, refers the matter to the Court of Appeal of Noumea with a differently composed bench;

Orders the *Banque calédonienne d'investissement* (Caledonian Investment Bank) to pay all costs.

In view of Article 700 of the *New Civil Procedure Code*, orders the *Banque calédonienne d'investissement* to pay Mr and Mrs X the total sum of 2,000 Euros;

Declares that, from this date, the Procurator General of the Cour de Cassation, the judgment will be forwarded to be transcribed in the margin or at the end of the judgment partially set aside;

Thus is the judgment of the Cour de Cassation Commercial, Financial and Economic Chamber, pronounced by the President in open court on 11 December 2007.

The Cour de Cassation - 20 December 2007, Appeal No 06-16543

THE FIRST CIVIL CHAMBER OF THE COUR DE CASSATION handed down the following judgment:

On 20 October 1989 the savings bank gave Mrs X a “bridging loan” for a total amount of 80,000 Francs for one year and also opened in her name a “cheque account” which always operated with an overdraft facility.

On the second limb of the sole ground of appeal:

The Court had regard to Article L311-3 of the *Consumer Code*.

To avoid the application of provisions of the *Consumer Code*, the judgment under appeal held that the loan and overdraft, which could only be explained by the creation of the commercial venture managed by Mrs X., the financing had been granted for the needs of a commercial activity and not for those of a consumer.

In so finding, while the professional use of a credit could only be for the specific purpose it was borrowed for, the Court of Appeal had erred by failing to apply the abovementioned provisions.

On the third and fourth limb of the sole ground of appeal:

The Court noted Article 1147 of the *Civil Code*.

In order to deny Mrs X her demand for the payment of damages for reparation of the loss suffered because of the granting of excessive credit and overdraft, the Court of Appeal held that the Banker, who was not obliged to answer for the risk of concerning the company managed by his client, had not committed any wrongdoing, the rapid increase of an overdraft on a demand account, added to the financing for of the setting up of a business, not being sufficient in themselves to describe the Banker’s wrong-doing.

In so holding, without specifying whether Mrs X was an uninformed borrower and if so, whether, conformably with the duty to warn to which it was bound, the savings bank justified asserted that it had met satisfied this obligation with regard to Mrs X’s financial capacity and the risks of indebtedness arising from the granting of the loan and overdraft, the subjects of the litigation, the Court of Appeal deprived its decision of legal basis.

FOR THESE REASONS, without having to determine the first limb of the ground of appeal:

SETS ASIDE AND ANNULS, in all respects, the judgment under appeal handed down between the parties by the Court of Appeal at Caen on 18 April 2006; and, in consequence, restores the proceedings and the parties to their positions prior to the said judgment and, in the interests of justice, refers them before the Court of Appeal at Caen with a different bench.

Orders the Savings and Provident Bank of Basse-Normandie to pay costs;

Having regard to article 700 of the *New Civil Procedure Code*, rejects the claim of Mrs X ;

Declares that, from this date, by the Procurator General of the Cour de Cassation, this judgment will be forwarded to be transcribed in the margin or at the end of the judgment set aside;

So ordered by the First Civil Chamber of the Cour de Cassation and read in open court by the President on 20 December 2007.