



n° 1 - Décembre 2006



Lettre de Jurisprudence

A Selection of French Supreme Court Decisions

Commission des affaires Européennes et Internationales Commission des affaires Européennes et Internationales Commission des affaires Européennes



EDITORIAL

“La lettre de jurisprudence” normally doesn’t have an editorial. It’s simply meant to be a selection of French Supreme Court decisions by French lawyers for their fellow-lawyers all over the world. The idea came to me when speaking with non-French speaking lawyers who wanted to have an access to French jurisprudence but could not find any materials in any other language besides French.

It is not meant to be an authoritative academic publication but simply a short introduction to a few French cases chosen to give a diverse overview of the French legal scene.

Please let us know if you found it useful and tell us what subject areas would be of interest to you.

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Special thanks to the Honorable Judith C. Gibson for translating this issue

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The French National Council of the Bars (*Conseil National des Barreaux*) is the official representative body for the French Legal profession (*avocats*).

The National Council of the Bars is mainly in charge of promoting and defending the French Lawyers' interests, regulating the ethical and educational standards of the Lawyers, and influencing Law reform to achieve a better system of justice.

In the aim of promoting French lawyers and the Legal profession abroad the National Council of the Bars works closely with European and International organisations

Principles of judicial certainty applied by the Conseil d'Etat

Five large firms of auditors brought proceedings against decree No. 2005-14 12 of 16 November 2005 providing for a professional code of ethics for auditors.

Their challenge was based principally on four points:

- The decree was inconsistent with European Community law;
- It contained terms that were lacking in precision;
- It imposed excessive restrictions on the freedom on exercise of professional rights;
- It interfered to an unwarranted degree with legal rights in contracts which were already on foot.

The Conseil d'Etat rejected these submissions.

However, on the issue of when the code commenced to take effect, the Conseil d'Etat considered that the provisions in the code would not apply to contracts on foot as the code contained no transitional provisions dealing with the appointment of auditors in contracts already on foot.

The Conseil d'Etat, for the first time, relied upon the principle of judicial certainty to base its decision. It has therefore formally endorsed the principle of judicial certainty, although without declaring it to be a general principle of the law.

The Conseil d'Etat took this principle a step further by following legal principles developed from principles of legislative validity and recent legal reasoning concerning the role of the time factor when the setting aside of an administrative regulation can annul an administrative act.

CNB [2006] 1 - Conseil d'Etat, Assemblée de la Section contentieuse, 24 March 2006 , Sté KPMG et autres, décision n° 288460

Having regard to articles 1 and 2 of the Civil Code:

(...)

As to the manner in which the Code of Ethics should be applied to contracts currently in force:

New legislative or regulatory provisions cannot apply to contractual situations already in force at the date of enactment unless there are retrospectivity provisions provided. It follows from this that, subject to the general principles applicable to administrative contracts, only legislative provisions can, for reasons of public order, albeit implicitly, authorise the application of new provisions to such situations. Independent of this requirement, it is incumbent on the regulator to specify, for reasons of judicial certainty, the transitional provisions, if there are any, relevant for the implementation of a new regulation. It follows therefore that new regulations are particularly likely to have unfair implications for contracts already in force which have been validly entered into.

The provisions of the Finance Security Law of 1 August 2003 pertaining to the professional code of ethics and to the independence of auditors are, since the performance of work is guaranteed by the code of ethics, based on public order imperatives and are intended to apply to members of the profession who are regulated and organised and are not intended to apply to contracts to which they have already entered into contractual obligations. In any event, in default of there being any transitional provisions in the legislation under attack, the requirements and prohibitions arising from the code of conduct would, in the case of contracts entered into before its enactment, cause difficulties by reason of the character of the provisions being out of proportion to the objects of the code and were contrary to the principles of judicial security. It was appropriate therefore to annul the code insofar as it related to contracts on foot at the date of its enactment, in accordance with common legal principles, such date being the day after the publication in the French Gazette (17 November 2005).

(...)

DECISION :

Article 1: The decree of 16 November 2005 giving approval to a code of professional ethics is invalid insofar as it does not provide for transitional provisions relevant to contracts with government auditors already in force as at the date of commencement of the said regulation
(...)

**Force Majeure redefined by the Court of Cassation**

In French law, force majeure is a basis for exemption from liability. The classic statement of this, in article 1148 of the Civil Code, is that force majeure is characterised by three cumulative elements: the event must be external, unforeseen and impossible to prevent.

However, this concept is interpreted very differently by different Divisions (Chambers) of the Court of Cassation, leading to conflicting decisions which lead to the risk of judicial uncertainty.

The Cour de Cassation (the French Judicial Supreme Court as opposed to the Conseil d'Etat which is the French Administrative Supreme Court) in two decisions of 14 April 2006 has endeavoured to harmonise and unify the definitions of force majeure concerning both tortious and contractual liability.

The first proceedings concerned tortious liability arose from a fatal accident taking place in an RER railway station belonging to the RATP. The second proceedings concerned contractual responsibility for failure to execute a contract because one of the parties contracted a fatal disease. The Supreme Court determined that the deceased's suicide in the first case and the fatal illness in the second case both contained characteristics of force majeure. The unavoidability and unforeseen nature of the development in each case was sufficient to establish force majeure. However, the third criterion, that the act should also be external, seems to be no longer a requirement

CNB [2006] 2 - Cour de Cassation, Assemblée Plénière, 14 April 2006 , *pourvoi n° 02-11168*

The Court:

According to the decision of the Court of Appeal (Douai , 12 November 2001) Mr X ordered machinery from Mr Y which was specially designed for his professional activities. Because of Mr Y's health problems, the parties agreed upon a new date for delivery, which date was not complied with. Medical examinations Mr Y underwent revealed he had cancer, from which he died several months later without the machine having been delivered. Mr X then sought to assign to the members of the Y family, who were the heirs of the deceased, the obligation to conclude the contract and to pay damage and interest.

On the first ground of appeal:

Mr X appealed from the rejection of his claim for damages and interest on the following bases:

- *The illness from which M. Michel Y suffered was of an unforeseen character. The question was whether this gave rise to a claim of force majeure. On 7 January 1998 , the date M. Michel Y made to his co-contractor an offer which was accepted, namely to fix the date for delivery of the order at the end of February 1998. M. Michel Y knew he had suffered for several months from a right wrist infection resulting in a temporary but total incapacity to work and had undergone a number of medical examinations. The Court of Appeal had not applied the appropriate legal principles to the findings of fact and consequently Article 1148 of the Civil Code had been violated;*
- *An event cannot amount to force majeure for the person in default unless he has taken all necessary steps to prevent the event occurring to avoid the supervening event. Rather than the malady suffered by M. Michel Y having the character of force majeure, it was in fact the case that far from informing his co-contractor that he would not be able to deliver the machine that had been ordered for a period of some months, which would have permitted M. Philippe X to take steps necessary to mitigate the loss caused by the failure of delivery on the due date, M. Michel Y had on 7 January 1998 made to his co-contractor a proposition, which was accepted, to fix the date of delivery to the end of February 1998, although this was a date he could not comply with, given the right wrist infection which was causing a temporary but total inability to work, this being an illness he knew he had been suffering from for several months. The Court of Appeal did not apply the correct legal principles to the findings of fact and in consequence Article 1148 of the Civil Code was violated;*

However, although loss had not been occasioned by force majeure or a fortuitous act, the seller had been prevented from fulfilling his obligations and thus the seller had been prevented from complying with his obligations because of his illness. This unforeseen event, occurring after the contract was entered into and inevitably prevented the contract from being carried out, constituted force majeure. It was clear that only Michel Y was capable of adapting the machinery and that he was prevented from doing this, first by his temporary partial illness

and then by his fatal illness. The physical incapacity resulting from the infection and the fatal illness were supervening events occurring after the contract had been entered into had all the hallmarks of being unforeseen and the chronology of events concerning the rapid decline of his state of health showed it was impossible to prevent. The Court of Appeal was right to hold that such circumstances amounted to the necessary elements for force majeure.

It followed from this reasoning that none of these grounds for appeal were made out.

Second argument: [no issue of law of interest]

For these reasons, the Court of Appeal rejected the appeal.

CNB [2006] 3 - Cour de Cassation, Assemblée Plénière, 14 April 2006 , *pourvoi n° 04-18902*

The Court: on the sole ground of appeal:

According to the judgment appealed from (Paris , 29 June 2004), the body of Corinne X was found between the platform and railway tracks of a station used by the RATP. There was an open finding of involuntary manslaughter, by the head of the Homicide squad, which revealed that the incident, which occurred after the departure of a train wagon, had happened unobserved and that no witnesses had come forward. Mr X, the husband of the victim, both in his own capacity and as representative for their two minor children, brought proceedings seeking that the RATP be ordered to pay compensation for the loss caused by this accident.

Mr X appealed from the rejection of this claim by the Court of Appeal on the basis that according to article 1384 paragraph 1 of the Civil Code, the fault of the victim does not totally exonerate the occupier in a case of force majeure. While the fall of the victim could not be explained other than by her own voluntary action and the likelihood of her having caused the accident was corroborated by the apparent distress of the victim, the Court of Appeal had flagrantly violated the provisions of this article of the Code.

While the fault of the victim does not totally exonerate the occupier except when the characteristics of force majeure were present, this requirement would be met when this fault had, in relation to the accident, an unforeseen and unavoidable character. Since the fall of Corinne X could not be explained other than being as a result of the voluntary act of the victim, it was not foreseeable in the sense that the RATP could not have learned of her intention to throw herself under the railway wagon. There was no breach of the safety regulations imposed for the security of the area and the RATP had taken all reasonable measures to make it impossible for persons wanting to cause damage to expose themselves to risk. The Court of Appeal was therefore right to hold that the fault of the victim exonerated the RATP from any responsibility.

The argument having not been made out, the appeal was accordingly rejected.



The banker's obligation to warn

With this decision, the Cour de cassation has put an end to differing interpretations of the law.

Since 1994 the First Civil Chamber of the Supreme Court has placed an effective burden on bankers to advise; the lender must direct the attention of the borrower to the risk of excessive borrowing.

The Commercial Chamber has always rejected this approach. It was only prepared to regard the lender as responsible if the following two elements existed :

- the bank must have known that the borrower's position was beyond help;
- the borrower must have been genuinely unaware of this peril.

This divergence has now been put to an end by judgments of 21 February, 3 May and 20 June 2005 which define an obligation to warn for a banker which is less demanding than the obligation to give advice. The two courts only impose this obligation when the borrower is not a professional.

Thus in future a banker must warn the non-professional lender of the risks of excessive borrowing having regard to his/her ability to repay, the appreciation of which must be taken into account when considering the expected revenue from the loan.

CNB [2006] 4 - Cour de Cassation, 1 ère Chambre civile, 21 February 2006 ,*Pourvoi n°02-19066*

The Court: - On the sole grounds of appeal, considering the first argument :

Having regard to article 1147 of the Civil Code;

Credit Lyonnais agreed on 20 July 1993 to loan to Mr and Mrs Y the sum of 300,000 francs to finance work on their principal place of residence. On 25 May 1994, it loaned a further 190,000 francs for the purchase of an apartment for tenancy revenue. Following monthly payments not being made Credit Lyonnais claimed from Mr and Mrs Y the amount outstanding. The borrowers claimed the lender had failed to discharge its obligation to advise.

The findings of fact in the decision appealed from were that to accommodate the requests of Credit Lyonnais, the sums due had been paid for several years. Mr Y, who had been made redundant in February 1993 due to the economic downturn, had little chance of obtaining employment because of his age. If the rate of indebtedness as a result of the loans was at the outer limits of acceptability, Mr and Mrs Y were nevertheless property owners with, in addition to their principal place of residence, realty worth 1,000,00 francs and an investment portfolio worth, in March 1994, 425,682 francs (according to the appellants) or twice this amount according to the bank. The second loan was in fact for an investment property. Even if the bank had treated the loan as elevating the risk to the limit of what was reasonable, it had not been sufficiently demonstrated that the bank was at fault.

In reaching this determination, by not inquiring whether Mr and Mrs Y could be considered as borrowers on notice and that if they were not, whether the bank had warned them about the importance of the risk and thereby discharged its obligation to warn, the Court of Appeal had not applied the appropriate legal principles in its decision.

For these reasons, the decision was set aside and referred for rehearing before the Court of Appeal of Paris ...

CNB [2006] 5 - Cour de Cassation, Chambre commerciale, 3 May 2006, Pourvoi n° 02-11211

The Court: According to the fact in the decision under appeal, in December 1994 and June 1996 the Commercial Indian Ocean Bank (BFCOI) agreed to give Mrs X two home loans for which her husband was guarantor. The loan repayments ceased in April 1998. BFCOI claimed default under the terms of the loan and informed Mrs X of this event by post on 12 January 1999.

On being pursued for payment, Mr and Mrs X had principally submitted that the bank had failed in its duty to give advice by giving Mrs X credit without having regard to her income (...).

On the first claim :

Mr and Mrs X complained that the judgment they appealed from absolved the bank of all liability when in fact:

- 1. A bank fails in its duty to advise and becomes liable to a lender if the bank has not put the latter on guard as to the dangers of debt which results in calls to repay loans. They could demonstrate to the court that it was as the result of the loan that BFCOI made two loans for which the total monthly repayments were 12 643,18 francs plus 10,589,08 francs (ie 23 232,26 francs) at a time when the borrower had no occupation and no disposable income save a social service pension for two children of 3 500 francs a month. In failing to have any regard for these matters, although frequently raised in discussion, drawn from the fact that the borrower only had 3 500 francs a month for the two children and nothing else, but nevertheless the borrowings went up to total of 23 232, 26 francs a month, the Court of Appeal had no legal justification for its decision regarding article 1382 of the Civil Code, which had been violated.*
- 2. The fact that the husband of the borrower had been in senior management in the lending bank was irrelevant to the strict obligation of the lender to inform the borrower and to put her on her guard as to the dangers of debt resulting from the loans being called in, in that to absolve the bank from any responsibility on the basis that the husband of the borrower was a professional well versed in credit matters and with the competence to understand contractual obligations with regard to the household's financial capacity, the Court of Appeal was considering a motive that was entirely unrelated to the obligations of the lender to the borrower and could not justify its decision having regard to article 1382 of the Civil Code, which had been violated.*

However the judgment under appeal noted that the loan moneys had been taken out by Mrs X to finance repair and extension work for a villa that belonged to her and in this transaction she had been assisted by her husband, who was present when the documents were signed and carried out his duties as a senior adviser in the lending body, and who had for this reason every ability to understand the import of contractual obligations having regard to the financial capacity of the household. Given the knowledge that he had, the interest he had in ensuring his wife obtained all necessary information to understand the obligations she was entering into to improve their joint property, the Court of Appeal determined, without determining the other grounds, that the bank, which therefore had no duty to warn, had committed no error.

This ground of appeal was not made out.

Other grounds / [no issue of law of interest]

CNB [2006] 6 - Cour de Cassation, Chambre commerciale, 3 May 2006, Pourvoi n°04-15517

The Court:

The facts according to the judgment under appeal were as follows. During 1993 Credit Lyonnais, for the purpose of financing the purchase of two co-property title apartments in a building in Bordeaux, agreed to make several loans to Mr and Mrs X which they on turn hoped to repay, having been assured of this by the seller, from tenant revenue. These revenues proved to be insufficient. The husband, who had no unemployment insurance protection, then lost his job. Mr and Mrs X, facing the impossibility of meeting their financial obligations, had to have a mortgagee sale of their principal place of residence as Credit Lyonnais had used this as collateral for another loan entered into in 1994. The court held the bank had failed in its duty to advise of the risky nature of the kind of investment they had chosen and of the risk if they could not achieve the kind of fiscal return they were counting on getting. Mr and Mrs X claimed Credit Lyonnais should be liable. The Court of Appeal accepted their arguments and ordered the bank to reimburse Mr and Mrs X for the losses they suffered, notably the losses following the forced sale of their home.

On the first argument (first limb):

Having regard to article 1147 of the Civil Code;

The judgment appealed from had accepted the claim from Mr and Mrs X and held that Credit Lyonnais failed in its duty to advise and failed to draw to the attention of the borrowers the illusory nature of rental returns claimed by the vendor, having regard to the charges and outgoings inherent in an apartment building and to the difficulties of finding permanent tenants, which the bank could hardly have been unaware of, and also the impossibility that they would enjoy any financial advantages;

Setting up these schemes was an unrealisable dream as from the date of their being entered into. In June and October 1993 the borrowings in contention had been excessive having regard to the borrowing capacity of Mr and Mrs X, taking into account the revenues produced by the investment. What can be deduced is that the credit establishment had failed in its duty to warn and the Court of Appeal had failed to apply the appropriate legal reasoning.

As to the fourth argument put before the court: [no legal issue of interest]

For these reasons the judgment was set aside and the proceedings referred to the Court of Appeal of Toulouse .

CNB [2006] 7 - Cour de Cassation, Chambre commerciale, 20 June 2006, Pourvoi n°04-14114

The Court :

The judgment under appeal was sent back after annulment (Commercial Financial & Economic Chamber, 27 March 2001 , appeal no. 98 - 22.618). Mr X, an unemployed truck driver, and his wife, a housekeeper, obtained credit from the Union Bancaire du Nord (UBN) for the purpose of financing the purchase and renovation of a hotel. BDI Society intervened in the litigation on behalf of the financing party. The loan of 474 999 francs was agreed to in October 1991. There was no personal contribution to the loan, and four months later nothing had been paid. The vendor's business profits had diminished consistently over the previous three years, principally by reason of his health problems, going from 246 000 in 1988 to 164 000 francs in 1990, the last year for which information had been available, while the annual charges for reimbursement of the loan, valued at 100 746 francs, when added to other charges, went up to 123,000 francs in 1990. Several months after these events Mr and Mrs X invoked the obligation of the bank and of the broker for failure to advise.

On the sole ground of appeal, first argument:

Having regard to article 1147 of the Civil Code:

When looking at the responsibility of the bank to warn layman investors, the judgment under appeal considered the feasibility of the project by comparing the figures available from the vendor with the annual charges for the loan and then determined that the loan of 100 746 francs was not excessive.

In arriving at this conclusion; without considering whether the cost of reimbursement of the loan could be supported from the funds for which the loan had been obtained and in giving little regard to how layman investors could obtain such information from the bank, the Court of Appeal did not give a proper legal basis for its decision.

Argument on the second ground of appeal: [no issue of interest].

For these reasons the judgment was set aside and the case remitted to the Court of Appeal of Paris.



Creating an internet site does not amount to setting up a point of sale

The internet has had a disruptive impact on networks for the distribution of goods. The Cour de Cassation has for the first time ruled on the question of whether creation of an internet site by a franchiser violates exclusive territorial rights clauses in franchise agreements.

The Court has ruled that the creation of internet sites does not amount to setting up a point of sale in the sector covered by the exclusive territorial rights clause. Therefore unless there is a contractual provision to the contrary, exclusive territorial rights clauses will not apply to, and will permit, the creation of a website by a franchiser.

However, this ruling will only apply to franchise agreements containing exclusive territorial rights clauses. The results could be different if the franchise contract contains an exclusive rights clause for the supply of goods. It means practically that the insertion of this clause requires the franchiser to use his distributor's network for all sales taking place in the relevant sector

CNB [2006] 8 - Cour de Cassation, Chambre commerciale, 14 March 2006 , Pourvoi n° 03-14639

The Court: On the first ground of appeal, considering the second argument:

Having regard to article 1134 of the Civil Code:

According to the judgment appealed from, in a franchise agreement entered into on 24 March 1998 Flora Partner (the franchiser) granted to the Company Laurent X Rouvelet LPR (the franchisee), a company managed by Mr X, exclusive rights until 24 October 2003 to operate a shop in the 6th arrondissement of Marseille called "Le Jardin des fleurs". This included use of the name and business know how. Article 7-3 of the agreement stipulated: "The provision for exclusive territorial rights means the franchiser undertakes, for the duration of the agreement, not to authorise the opening of other points of sale for "Le Jardin des Fleurs" in the restricted area defined above without the authority of the franchisee." At the end of 1999 the franchisee opened an internet site called "Le Jardin des fleurs". The judgment appealed from held that the franchiser had violated his contractual guarantee for the franchisee to have sole operation rights in the restricted area and awarded payment of damages and interest for breach of contract to the franchisee and to Mr X.

The judgment appealed from held the contract was breached solely by the tortious acts of the franchiser because the territorial restriction clause was fundamentally intended to protect the franchisee from any sales by the franchiser, directly or indirectly, in the restricted area. Sale on the internet, although a sale of a passive nature, was capable of amounting to a breach of this exclusive right in that the sale was made without any financial benefit to the franchisee who was in fact contributing to the running of the site by reason of the advertising fee he was paying to the franchiser.

However, without disputing this finding, while it was the case that the agreement signed by the parties contained a guarantee of exclusive territorial rights, the creation of an internet site did not amount to creating a point of sale in the protected geographical area. Thus, the Court of Appeal had failed to have regard to the provision in question, regardless to regulation n° 2790/1999 of 22 December 1999 of the EEC which is not applicable/relevant in this matter.

For these reasons the appeal was allowed and the case remitted to the Court of Appeal at Toulouse .



The Cour de Cassation revisits private copying

French law has traditionally permitted the user of a literary or artistic work to copy it for personal use.

Copying for private use, as an exception to the right of authorship, does not amount to the crime of breach of copyright ("piracy").

However, is the right to make a copy for private use a right to use the work, and does this right prevail over the right to install anti-copying technology on a CD?

The First Civil Chamber of the Cour de cassation has replied in the negative.

Nevertheless, while not amounting to a right, does this exception for the making of private copies cover downloading from the internet?

The Criminal Chamber of the Cour de cassation, ruling a few months later, appears to have answered this in the negative. The right to make a private copy is subject to the legality of the work's source For the exception of the right of private copying to be made out, it is necessary first to look at the circumstances of the placing of works on the internet

CNB [2006] 9 - Cour de Cassation, 1 ère Chambre civile, 28 February 2006 , Pourvoi n° 05-15824

The Court:

The plaintiffs brought proceedings complaining of the inability to make a copy of the DVD "Mulholland Drive", produced by Alain Sarde Films, edited by Société Studio canal and broadcast by Universal Pictures Video (France). This was as a result of technology installed on the DVD to prevent copying. Asserting that such measures breach the right to make private copies recognised by articles L122 - 5 and L211 - 30 of the Intellectual Property Code, Mr X and the Federal Union of Consumers UFC "Que choisir" have brought proceedings against the defendants to prevent them using such measures and from selling DVDs containing such protection. They seek payment firstly of 150 euros for breach of loss of rights and, secondly, of 30,000 euros for breach of the collective rights of consumers. The Video Syndicate has intervened in the proceedings to appear alongside the defendants.

(...)

The Court had regard to L122 - 5 and L211 - 3 of the Intellectual property Code, interpreted in light of the provisions of Directive n° 2001/29/CE of 22 May 2001 on the harmonising of certain aspects of authorial rights with other rights of society to information, as considered in article 9.2 of the Berne Convention.

According to article 9.2 of the Berne Convention, reproduction of literary and artistic works protected by authorial rights can be authorised, in certain special cases, where such reproduction does not violate the normal use of the work or cause unwarranted prejudice to the legitimate rights of the author. One such exception is the right to make a copy for private use as set out in L 122 - 5 and L211 - 3 of the Intellectual Property Code, which must be interpreted in the light of the EEC directives referred to above, and cannot be an obstacle to the insertion of protective devices to prevent copying, because the effect of violating the right to normal use of the work must be seen in light of the economic effects that such a copy could have in the context of the digital technology environment.

In considering whether to prohibit the defendants Alain Sarde Pty Ltd, Société Studio canal and Universal Pictures Video (France) from installing protective devices in copies of the DVD "Mulholland Drive", the judgment appealed from noted that the right of copying for private use is only a legal exception to the rights of the author and not an absolute or separately recognised user right. This exception could not be limited other than by French legislation, which contains no provisions to this effect. In the absence of reprehensible conduct, of which there is none in this case, a copy made for private use is not by its nature a breach of the ordinary rights of use of a work in the form of a DVD, which generates revenue necessary to defray the expenses of the film's production.

Though it is proper to have an exception for the rights of private use considered in the light of the risks inherent in the new digital technology concerning the rights of the author and concerning the economic consequences of the exploitation of work in the form of a DVD, which represented the defraying of film production costs, the Court of Appeal had failed to apply correctly the abovementioned provisions.

For these reasons the decision is set aside and the matter remitted to the Court of Appeal in Paris.

CNB [2006] 10 - Cour de Cassation, Chambre criminelle, 30 May 2006 , Pourvoi n° 05-83335

The Court:

In answer to all the appellant arguments:

Having regard to article 593 of the Criminal Procedure Code;

The Court noted that each judgment or appeal decision must contain sufficient reasons to justify the decision and deal with the principal arguments of the parties. Failure to give reasons or giving conflicting reasons amounts to not giving any reasons.

The judgment on appeal and the pleadings showed that Aurélien X had been charged with having made CD-roms of films after having downloaded them from the internet or after borrowing them from friends. He had been directed to appear in court on charges of video piracy in that he reproduced a work without regard for the rights of the author.

Video and production companies holding rights to the works in question were parties to the civil action, as were the syndicate for video editions and the national distributor of films. They had particularly stressed that films (in the form of videos on demand) had not yet been the subject of legal use on the internet. In a judgment of 13 October 2004 , the Tribunal Correctionnel before whom the accused asserted his right to make private copies, brought the State's proceedings to an end and dismissed the civil proceedings. The Minister and the civil parties then brought an appeal.

The judgment under appeal had considered the provisions of articles L122 - 3, L 122-4 and L122 - 5 of the Intellectual Property Code. When a work was made available, the author could not prevent copies or reproductions

solely intended for private use of the copier and not intended for public use. The judges additionally noted that the accused had confirmed that he had made copies only for private use and he had not made any available for public use.

However, in determining this, but without examining the circumstances in which the works had come into the possession of the accused or dealing with the arguments of the civil parties concerning the exception for private copying under article L122 - 5 of the Intellectual Property Code and how this could constitute a derogation from the exclusive right of an author to ownership of his work, even if the source is legal and exempt from an attack on the rights of copyright holders, the Court of Appeal has given insufficient reasons for its decision.

It therefore followed that the judgment should be set aside.

For these reasons the judgment was set aside, and the proceedings and parties remitted to the Court of Appeal in Aix-en-Provence.



Parental authority and Joint custody : Homosexuality is not an impediment

In a landmark ruling the Court of Cassation has given its first judgment concerning the law of 4 March 2002 which established "shared custody". The intention of this law is to render the circumstances of exercise of parental authority more flexible. It was applied on the facts in this case to a homosexual partner.

What the court held, having regard to article 377(1) of the Civil Code was that a mother who is a sole parent could delegate the whole or part of her parental authority to the woman with whom she was living in a stable and continuous relationship, from that time onwards whenever circumstances required it and where such an arrangement was consistent with the best interests of the child.

Thus, a homosexual partner who participates on a daily basis in the education of the child can be the holder of parental authority, either partially or totally. This new interpretation gives judicial blessing to an increasingly common factual situation and permits the law to deal with family needs which are increasingly less uniform and standardised. Nevertheless, this right of delegation can only exist while parental authority exists.

It should be noted, however, this judgment does not sanction homosexual parentage and that adoption by homosexuals couples remains forbidden by the law in France .

CNB [2006] 11 - Cour de Cassation, 1 ère Chambre civile, 24 February 2004 , Pourvoi n °04 -17090

Mrs X and Mrs Y have live together since 1989 and entered into a Civil Solidarity Contract (Pacte civil de solidarité) on 28 December 1999 . Mrs X is the mother of two children whose paternity has not been established, Camille (born on 12 May 1999) and Lou (born on 19 March 2002) .

Concerning the first argument and on the argument brought up by the Court:

The procurator of the Court of Appeal of Angers has appealed a decision (Angers , 11 June 2004) which partially delegated to Mrs Y the exercise of parental authority to which Mrs X is solely entitled and divided between them this partially delegated authority. However Article 377 of the Civil Code provides for the voluntary delegation of parental authority from one of the parents to the other to take place when specific circumstances warranting this occur, not on the basis of a mere fear of a hypothetical event. To give way to the request of Mrs X on the basis of a purely hypothetical circumstance, in the most general terms, without stating what the expected or foreseeable circumstances would be which would prevent Mrs X from exercising her parental authority on her children, the Court of Appeal had not given its decision a proper legal basis (violation of Article 377 of the Civil Code and of Articles 455 and 604 of the Procedural Code). Thus there arose a question as to whether the exercise of parental authority for which the parent was the sole person entitled could be delegated in whole or in part at the request of that parent to a person of the same sex with whom he/she was living in a stable and permanent union.

However, Article 377(1) of the Civil Code does not prevent a mother who is a single parent from delegating whole or part of her exercise of these duties to the woman with whom she lives in a stable and permanent relationship where circumstances warrant it and where it is in the best interests of the child.

Noting that Camille and Lou were described as children who were outgoing, stable and happy, enjoying the love, respect, discipline and harmonious environment necessary for their development, that the relationship between Mrs X and Mrs Y have been stable for a number of years and was considered as harmonious and based on a respect of their duty to the children and that the absence of a father could give rise to concern that in the event of an accident to the mother, who was professionally absent for long periods, that if she was unable to express her wishes, Mrs Y might face a legal impediment in seeking to maintain the educative role that she had always held in the eyes of Camille and Lou. Accordingly, the Court of Appeal

was of the view that it was in the interests of the children to delegate partially to Mrs Y the exercise of parental authority for which Mrs X was the sole holder and to divide it between them and that it was appropriate so to order.

On the second ground of appeal: [no legal issues of interest].

The appeal was accordingly dismissed.



“The Jurisprudence Bulletin of the Conseil National des Barreaux” has been prepared under the direction of Mr Marc Jobert, an advocate at the Paris bar and the Vice-President of the Commission des Affaires Européennes et Internationales, with help from David Levy, Head of the Legal Department of the Conseil National, Alexandre Huot, Webmaster of the Conseil National and Ms Charlotte Spencer and Mr Jeremy Blond, students-at-law at the Ecole de formation du Barreau de Paris.

The English version has been prepared with the assistance of Judge Judith Gibson, a judge of the District Court of New South Wales.



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