

CASE TRANSLATION: FRANCE

Case citation:

26 June 2014 – no. 13/19600

Name and level of the court:

Cour d'appel (Court of Appeals), Aix-en-Provence, 8e chambre A (8th division A)

Date of decision:

26 June 2014

Docket number:

13/19600

Number:

2014/469

Members of the court:

Mr Guy Schmitt, Presiding Judge, Mrs Catherine Durand, Judge, Mrs Isabelle Verdeux, judge

Lawyer for the appellant:

Me Agnès Ermeneux-Champly

Lawyer for the respondent:

Me Paul Guedj

France; special power of attorney issued online; electronic signature; reliability criteria regarding identification of the author of an electronic document; décret du 30 mars 2001; articles 1316-1 et 1316-2 du Code civil; application of terms

Maître Pierre-Louis EZAVIN

Official Receiver in charge of implementing the plan for the safeguarding of SARL JEAN & JUICE, SARL JEAN & JUICE

SAS OZ

Legal proceedings

COURT OF APPEALS OF AIX EN PROVENCE

8th Division A

DECISION ON THE MERITS

DATED 26 JUNE 2014

No. 2014/469

Docket No. 13/19600

Pierre-Louis EZAVIN

SARL JEAN & JUICE

Vs.

SAS OZ

Official copy issued

SCP ERMENEUX

SCP COHEN

Decision referred to the court:

Judgment handed down by the Commercial Court of Antibes on 06 June 2013, registered with the general inventory under number 2012/06789.

Appellants

Maître Pierre-Louis EZAVIN

In his capacity as Official Receiver in charge of implementing the plan for the safeguarding of SARL JEAN & JUICE, residing [...]

represented by Me Agnès Ermeneux-Champly of Société d'avocats Ermeneux, Levaïque, Arnaud & Associés, *avocats* of the bar of Aix-En-Provence, assisted by Me François Crépeaux, lawyer admitted to the Grasse bar, substituted by Me Rachel Court-Menigoz, *avocat* of the bar of Aix-En-Provence

SARL JEAN & JUICE,

whose registered office is at [...]

represented by Me Agnès Ermeneux-Champly of Société d'avocats Ermeneux, Levaïque, Arnaud & Associés, *avocats* of the bar of Aix-En-Provence, assisted by Me François Crépeaux, lawyer admitted to the Grasse bar, substituted by Me Rachel Court-Menigoz, *avocat* of the bar of Aix-En-Provence

Respondent

SAS OZ

whose registered office is at [...]

represented by Me Paul Guedj of Société d'avocats Cohen L and H Guedi, *avocats* of the bar of Aix-En-Provence,

assisted by Me Catherine Contant Valance, an *avocat* of the bar of Paris

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COMPOSITION OF THE COURT

Pursuant to the provisions of articles 786 and 910 of the French Code of Civil Procedure, the case was argued on 22 May 2014 at a public hearing, the lawyers not being opposed thereto, before Mrs Isabelle Verdeaux, Judge, in charge of the report.

This magistrate reported on the pleadings in deliberations of the Court, composed of:

Mr Guy Schmitt, Presiding Judge

Mrs Catherine Durand, Judge

Mrs Isabelle Verdeaux, Judge

Registrar during the debates: Mrs France-Noelle Masson.

The parties were informed that the decision would be publicly made available at the Registry on 16 June 2014

DECISION

Handed down in the presence of both parties,

Made available at the Registry on 26 June 2014

SIGNED by Mr Guy Schmitt, Presiding Judge, and Mrs France-Noelle Masson, registrar to whom the original copy of the decision was submitted by the judge for signature.

FACTS, PROCEEDINGS AND CLAIMS OF THE PARTIES

By judgment dated 30 September 2011, the Commercial Court of Antibes initiated safeguard proceedings against SARL JEAN & JUICE.

Invoking a €19,246.04 debt and requesting the recovery of the goods sold with a retention of title clause, OZ, represented by EURLER HERMES SFAC RECOUVREMENT, by an application dated 30 January 2012 and received at the Registry on 3 February 2012, requested that JEAN & JUICE's goods be returned to the official receiver.

By order of 19 December 2012, the official receiver, considering no evidence was reported that the principal was the signatory of the power of attorney granted electronically, rejected this request.

An opposition was filed on 28 December 2012 by OZ, as a result of which the Commercial Court of Antibes retracted that order and upheld the claim by judgment dated 6 September 2013.

Having regard to the judgment appealed on 06/09/3013 by the Commercial Court of Antibes,

Having regard to the pleadings filed on 10 March 2014 by SARL JEAN & JUICE and Me EZAVIN, in his capacity as official receiver in charge of implementing the safeguard plan, appellants;

Having regard to the pleadings filed on 30 April 2014 by SAS OZ, respondent;

Whereas pursuant to the provisions of article 455 of the French Code of Civil Procedure, the claims and arguments of the parties are set out with reference to the above-mentioned pleadings;

FOUNDATIONS

Whereas SARL JEAN & JUICE and Me EZAVIN concluded that OZ's claim was invalid, due to the absence of power of attorney granted to EULER, collection firm, and in the alternative, the unenforceability of the retention of title clause;

Whereas a special power of attorney issued electronically on 5 October 2011 by OZ to exercise on its behalf all its rights as a creditor against the debtor JEAN & JUICE, including to lodge appeals before all competent courts, was attached to the request made successively by EULER HERMES SFAC RECOUVREMENT to the administrator and to then to judge-official receiver;

Whereas, pursuant to the provisions of articles 1316-1 and 1316-2 of the French Civil Code, a document in electronic form can only be considered as evidence provided that the author thereof can be duly identified and that it is drawn up and stored in conditions that guarantee its integrity;

Whereas article 1316-4 of the French Civil Code provides that signing, in electronic form, 'consists in using a reliable means of identification that guarantees the signature's link with the document it is affixed to. The reliability of this means is presumed, until proof to the contrary, when an electronic signature is created, the identity of the signatory is assured and the integrity of the document is guaranteed, under the conditions laid down by decree of the Conseil d'État.

Whereas the special power of attorney produced by the agent was prepared and sent electronically on 5 October 2011, as part of an online contentious request through the secure extranet EOLIS by OZ; whereas EULER HERMES SFAC recorded such request on 5 October 2011 and sent an acknowledgment of receipt thereof to OZ on 7 October 2011;

Whereas the respondents do not have grounds to invoke the provisions of the Decree of 30 March 2001, defining the conditions under which 'an electronic signature creation device ... may be regarded as secure', among which there is the authorisation by an accredited body, even though it results from the bailiff's official report dated 19 May 2010, for the purpose of recording the process enabling an online power of attorney to be granted at the address <https://eolis-uatm.eulerhermes.com/sfac/>, minutely describing the different stages of validation and describing 'the whole process by talking screenshots, while connected in the conditions of an actual user, i.e. outside the premises of EULER HERMES SFAC R RECOUVREMENT by an internet access whose path has been identified', that the voluntary process unequivocally demonstrates the wish to empower EULER HERMES SFAC RECOUVREMENT to sue;

Whereas it stems from the bailiff's official report that the power of attorney granted by OZ to its

representative meets the reliability criteria regarding the identification of the author of an electronic document and the immutability of its content as prescribed by articles 1316-1 *et seq.* of the French Civil Code, the electronic submission medium used by OZ complies with the rules relating to the online subscription of contracts, the use of secure access codes, access and submission of documents being also in secure mode, and printable PDF forms, such as the power of attorney, are no longer editable once submitted;

Whereas, moreover, the President of OZ, Mr Abou, attested that on 5 October 2011; he filed, on EULER D'HERMES' EOLIS site, JEAN & JUICE (the client)'s contentious application, and submitted the electronic power of attorney; even though such attestation originates from the President of OZ, it is nevertheless admissible as a means of evidence submitted for the discretion of the trial court; it follows, in the absence of evidence to the contrary, that the respondents' challenge of the power of attorney granted by OZ to EULER HERMES SFAC RECOUVREMENT is unfounded;

Whereas the extract of the general terms and conditions of sale, including the retention of title clause, appearing on all of OZ's outstanding invoices, the removal of some of these conditions, following a software modification, does not affect in the least the validity of the retention of title clause duly reproduced in legible characters, even though slightly smaller than those used to designate the supplies that are sold, at the bottom left of the invoice under the title in bold 'General Terms and Conditions of Sale';

Whereas JEAN & JUICE, which had a regular business relationship with OZ, as it results from OZ's client account between January 2008 and May 2010, received throughout this entire period, without protest or reservations, invoices on which appeared the retention of title clause; performing the contract in full knowledge of the facts is equivalent to accepting the retention of title clause;

Whereas furthermore, the appellant, who failed to provide proof of the inventory of its stock on the date of the opening of the collective insolvency

proceedings, challenged only the outstanding balance appearing on the invoices, but did not dispute the existence in kind of the goods delivered in August and September 2008; in addition, OZ's debt was admitted by order of 6 March 2013 by the judge-official receiver, in the amount of €19,246.04; therefore, the appealed judgment that granted the unpaid goods claim must be upheld;

Whereas JEAN & JUICE shall be ordered to pay compensation in the amount of €2,000 to OZ, under the provisions of article 700 of the French Code of Civil Procedure;

Whereas the losing party shall be sentenced to pay the entire costs of the proceedings;

ON THESE GROUNDS

The court, whose ruling is made available at the Registry, given in the presence of both parties and relates to commercial matters,

Upholds the judgment appealed in its entirety,

Sentences JEAN & JUICE to pay OZ compensation in the amount of €2,000 pursuant to the provisions of article 700 of the French Cod of Civil Procedure,

Dismisses all other claims,

Sentences JEAN & JUICE to pay all the costs that will be recovered in accordance with article 699 of the French Code of Civil Procedure.

THE REGISTRAR THE PRESIDING JUDGE

Previous decision

Commercial Court of ANTIBES 6 June 2013
2012/06789

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