

COURT OF APPEAL

Extract of the minutes of the Clerk of the Court of Appeal of Versailles

OF

VERSAILLES

24th Section

THE REPUBLIC OF FRANCE

IN THE NAME OF THE PEOPLE OF FRANCE

Judgment n° 12

of 4th September 2003

Case filed under n° 03/05038

ON THIS FOURTH DAY OF SEPTEMBER TWO THOUSAND AND THREE

The Court of Appeal of Versailles, 24th District
Handed down the following judgment in an open-court session
The case having been heard on 13 August 2003
The court personnel at this hearing was:

Mr. Jean BESSE, President
Ms. Christine PERRIN, Judge
Mr. Jean-Michel HAYAT, Judge

Assisted by Ms. Hélène FOUGERAT, Clerk

The judges deliberated in accordance with the law

pursuant to an amending Order of the President of this Court of 23 June 2003 taken by virtue of articles R. 213-2, R. 213-8 of the Code of Judicial Organisation and 965 of the Code of Civil Procedure for the holiday period.

IN THE MATTER

Mr. Edward KEMPKA

Acting in his capacity as Administrator of the company ISA DAISYTEK SAS
Residing 9 Bond Court, Leeds, LS1 2JN (England)

The firm of Lissarrague Dupuis Boccon-Gibod, filed written pleadings
Mr. Antoine Adeline, Member of the Paris Bar delivered oral arguments

Mr. Stephen TAYLOR

Acting in his capacity as Administrator of the company ISA DAISYTEK SAS
Residing 9 Bond Court, Leeds, LS1 2JN (England)

The firm of Lissarrague Dupuis Boccon-Gibod, filed written pleadings
Mr. Antoine Adeline, Member of the Paris Bar delivered oral arguments

Mr. Ian GREEN

Acting in his capacity as Administrator of the company ISA DAISYTEK SAS
Residing 9 Bond Court, Leeds, LS1 2JN (England)

The firm of Lissarrague Dupuis Boccon-Gibod, filed written pleadings
Mr. Antoine Adeline, Member of the Paris Bar delivered oral arguments

APPELANTS

Versus

ISA DAISYTEK SA

14, rue du Petit Albi
95800 CERGY SAINT CHRISTOPHE

Served through its legal counsel domiciled for purposes of receiving process at said registered office.

Maître Daniel VALDAM

Acting in his capacity as Administrator of ISA DAISYTEK SAS

Residing 69, rue Saint Martin, 95300 PONTOISE, France

The firm of Jupin & Algrin, filed written pleadings
Mr. Philippe Saigne, Member of the Paris Bar delivered oral arguments

Maître Yannick Mandin

Acting in his capacity as Creditors' Representative in the Administration of ISA DAISYTEK SAS

Residing 23 rue Victor Hugo, 95304 PONTOISE Cedex, France

The firm of Jupin & Algrin, filed written pleadings
Mr. Frank Maisant, Member of the Paris Bar delivered oral arguments

In the presence of Mr. SCHOON, Public Prosecutor

RESPONDENTS

STATEMENT OF FACTS AND PROCEEDINGS

The Court is seized of an appeal lodged by Mr. KLEMPKA, Mr. TAYLOR and Mr. GREEN, acting in their capacity as Administrators (hereafter referred to as the "Administrators") against a judgment handed down on 1st July 2003 by the Commercial Court of Pontoise which rejected their application to have the judgment of the same Court of 26 May 2003 set aside.

By "Administration Order" n° 873 of 2003, dated 16 May 2003, the High Court (District Registry of Leeds) opened insolvency proceedings against SAS ISA DAISYTEK, a company incorporated under the laws of France, having its registered

office within the jurisdiction of the Commercial Court of Pontoise. Mr. KLEMPKA, Mr. Taylor and Mr. Green were appointed Administrators in these proceedings.

By judgment handed down on 26 May 2003, following a filing of a petition for insolvency, the Commercial Court of Pontoise put SAS ISA DAISYTEK into Administration¹ and appointed Maître VALDMAN as Administrator and Maître Mandin as the representative of creditors.

Considering the insolvency proceedings opened in the United Kingdom prevented the opening of other insolvency proceedings in France, the Administrators appointed by the High Court of Leeds, applied to have the judgment of the Commercial Court of Pontoise of 26 May 2003 set aside.

By judgment handed down on 1st July 2003, the Commercial Court of Pontoise dismissed the application of the Administrators to have the judgment of 26 May 2003 set aside and ordered the Administrators to pay Maître Valdam, acting in his capacity as Administrator, the sum of 5.000€ as legal costs pursuant to article 700 of the Code of Civil Procedure.

In order to rule as it did, the Commercial Court of Pontoise considered that if the opening of insolvency proceedings in one Member State prevented other insolvency proceedings to be opened in another Member State, this was subject to the caveat that the first proceedings had to be opened in accordance with the conditions laid down by EC Regulation n° 1346/2000 of 29 May 2000. The Court considered that this had not been the case.

In order to rule that the High Court of Leeds had not followed the Regulation by opening insolvency proceedings against SAS ISA DAISYTEK, the Commercial Court of Pontoise underlined the following:

- SAS ISA DAISYTEK was a subsidiary of DAISYTEK-ISA Limited, the latter being incorporated under the laws of England and Wales, having its registered office within the jurisdiction of the High Court of Leeds. The latter Court rendered, on 16 May 2003, fourteen Administration Orders against the parent company and its thirteen subsidiaries, including SAS ISA DAISYTEK.

- the fact that SAS ISA DAISYTEK was the subsidiary of the English company DAISYTEK-ISA Limited, the registered office of which was located within the jurisdiction of the High Court of Leeds, did not give jurisdiction to the latter to open insolvency proceedings against the French company, in so far as the notion of "group" had no legal standing, and that each company of the group had an independent corporate existence of its own.

- that the decision of the Court amounted to denying the separate legal existence of companies and could not lead to the application of the European Regulation.

- that the High Court of Leeds could not rely on the fact that SAS ISA DAISYTEK had an establishment within its jurisdiction because an establishment was not a separate corporation; according to the European Regulation the presence of an establishment within the territory of a Member State only permits the opening of a secondary insolvency proceedings.

¹ "*redressement judiciaire*".

The Administrators applied to have the Judgment rendered on 1st July 2003 by the Commercial Court of Pontoise set aside; before this Court, they argue:

- that the judgment rendered on 1st July 2003 before the Commercial Court of Pontoise should be overturned;

- consequently, this Court should either annul or set aside the judgment rendered on 26 May 2003;

- as a result, this Court should hold that no insolvency proceedings can be opened against SAS ISA DAISYTEK by the Commercial Court of Pontoise, hold therefore that the insolvency office-holders appointed pursuant to the Judgment of 26 May 2003 have no standing to act *vis-à-vis* SAS ISA DAISYTEK and to hold that only Messrs. Edward KLEMPKA, Stephen TAYLOR and Ian GREEN are lawful Administrators of SAS ISA DAISYTEK pursuant to the terms of the *administration order* of the High Court of Leeds on 16 May 2003;

- to order Maître VALDMAN, in his capacity as Administrator, to pay them the sum of 10.000 € as legal costs pursuant to article 700 of the New Code of Civil Procedure.

The Public Prosecutor asks this Court to confirm the Judgment handed down on 1st July 2003 by the Commercial Court of Pontoise.

The Public Prosecutor underlines that article 16 of European Regulation of 29 May 2003 lays down that any decision opening insolvency proceedings in one Member State should be recognised in all other Member States but points out that this decision should have been taken by a Court **having jurisdiction pursuant to article 3**. He believes that this was not the case in this matter for the following reasons:

- the European Regulation does not regulate groups of companies and only applies in relation to the registered office and establishments of the debtor, not its subsidiaries;

- according to the guidance notes issued by the French Ministry of Justice ("*circulaire*") on 17 March 2003, an establishment, as defined by article 2-h of the Regulation, is not a subsidiary with separate corporate personality.

Maître VALDMAN, acting in his capacity as administrator, argues that this Court should confirm the Judgment handed down on 1st July 2003 by the Commercial Court of Pontoise and order the Administrators jointly to pay him 15.000 € as legal costs pursuant to article 700 of the New Code of Civil Procedure.

Maître MANDIN, in his capacity as representative of the creditors, explains that considering his residual mission of verifying the debts pursuant to the continuation plan which was approved by the Court pursuant to the Judgment of 16 July 2003, he will abide by any decision this Court may render.

SAS ISA DAISYTEK was duly summoned to appear before this Court but did not do so.

DISCUSSION

On the nature of main insolvency proceedings

Whereas, for the sake of clarity of the arguments before this Court, it should be underlined that both set of insolvency proceedings (opened by the High Court of

Leeds on 16 May 2003 on the one hand and the Commercial Court of Pontoise on 26 May 2003 on the other hand) are to be considered as **main** insolvency proceedings pursuant to article 3(1) of the Regulation and that the notion of secondary proceedings is not relevant to this dispute;

Whereas this Court has to rule which set of proceedings are the main insolvency proceedings of SAS ISA DAISYTEK;

On jurisdiction

Whereas paragraphs 1 and 2 of article 3 of the Regulation (EC) n° 1346/2000 of the Council of 29 May 2000 relating to insolvency proceedings are drafted as follows :

"Article 3 : International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State".

Whereas, it results from this article that :

- the Court having jurisdiction to open the main insolvency proceedings is that within the jurisdiction of which the company's **centre of main interests** is located;

- any other Court does not have such jurisdiction;

- for companies, the centre of main interests is presumed to be the place of the registered office;

- when the place of the registered office is not the centre of main interests of the company, the Court having jurisdiction is not that within the jurisdiction of which the registered office of a company is located, but that within the jurisdiction of which the company has its main interests, bearing in mind that the latter Court must ensure, on the evidence available, that this is indeed the case;

Whereas, in other words, the only test, as far as jurisdiction to open main insolvency proceedings is concerned, is the centre of main interests of the company;

Whereas the notion of establishment is only relevant for the opening of secondary proceedings (of article 3(2)) and therefore not relevant for the purposes of this dispute as held above;

Whereas, as the Commercial Court of Pontoise has ruled and as recognised by all the parties to these proceedings, the notions of group of companies or subsidiaries are not relevant as far as jurisdiction is concerned;

On the test applied by the High Court of Leeds for jurisdiction purposes

Whereas the High Court of Leeds has handed down 16 different decisions on 16 May 2003, bearing numbers 861 to 876 of 2003, pursuant to which the Court has suspended the opening of insolvency proceedings for two companies ("Hundleby" and "Source") and pursuant to which it opened the main insolvency proceedings of 14 companies, including SAS ISA DAISYTEK (pursuant to administration order n° 873 of 2003);

Whereas each such "administration order" was made for the reasons set out in the Judgment handed down the same day by Judge McGonigal.

Whereas it clearly results from this Judgment that :

- the Judge considered that the necessary conditions to open insolvency proceedings *vis-à-vis* the 14 companies were met; the Judge considered that he could also open insolvency proceedings *vis-à-vis* the three German companies and the French company provided that "the English Court did have jurisdiction".

- the Judge underlined that the English Court did have jurisdiction if the "centre of the main interests" of the German and French companies was located in England or in Wales.

- the Judge considered that the applicants had to adduce sufficient evidence to show that centre of the main interests of the company was in England in order to rebut the presumption that the such centre was located at the place of the registered office;

- the Judge pointed out to significant acts having been executed in Bradford for the German companies, and then set out the criteria which, in law, should apply to determine the centre of main interests; he concluded that this centre was indeed located in Bradford, England;

- the Judge underlined, as far as the French company SAS ISA DAISYTEK was concerned, that the Bradford office did operate with SAS ISA DAISYTEK in the same way as it did with the German companies and concluded that "Bradford is the centre of main interests of the French company";

Whereas it results from the above that the High Court of Leeds declared that it did have jurisdiction over SAS ISA DAISKYTEK to open insolvency proceedings by way of an administration order of 16 May 2003, considering that the centre of main interests of this company was located in Bradford, England.

Whereas it is therefore untrue to argue that the High Court of Leeds took into consideration the notions of establishment, group of companies or subsidiary;

On the consequences as a matter of principle, in France, of the prior opening of main insolvency proceedings in England, reserving the questions of procedure

Whereas it results from article 16 of the Regulation that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States;

Whereas, as indicated above, the High Court of Leeds ruled that it did have sufficient jurisdiction to open insolvency proceedings considering sufficient evidence

had been adduced before it to the effect that the centre of main interests of SAS ISA DAISYTEK was located in Bradford, England.

Whereas the High Court of Leeds therefore appears to have had jurisdiction over SAS ISA DAISYTEK to open insolvency proceedings pursuant to article 3(1) of the Regulation; as a consequence, the administration order relating to SAS ISA DAISYTEK of 16 May 2003 must be recognised in France.

Whereas it results from article 17 of the Regulation that this "administration order" produces, with no further formalities, the same effects in France as under English law;

Whereas one should conclude from these provisions that the opening of the main insolvency proceedings of SAS ISA DAISYTEK by the High Court of Leeds prevented any French Court opening a subsequent main insolvency proceedings ; the Commercial Court of Pontoise therefore had no jurisdiction to put this company into Administration²;

Whereas it was thus in violation of European Regulation 1346/2000 of 29 May 2000 that the Commercial Court of Pontoise opened Administration proceedings³ against SAS ISA DAISYTEK and appointed insolvency office-holders in the context of these proceedings.

On procedural requirements

Whereas, in order to dispute the effects of the administration order handed down on 16 May 2003 by the High Court of Leeds, Maître VALDMAN, acting in his capacity as administrator, raises a number of procedural arguments, including:

- the Administration Order of 16 May 2003 was not subject to any notice at the Corporate Registry ("*greffe*") of the Commercial Court of Pontoise, and no application was made to register such order with the Registry;

- the Administration Order was made without SAS ISA DAISYTEK being given notice of the proceedings and thus without having been informed of the possibility of the opening of insolvency proceedings sufficiently in advance to lodge a valid defence and without any meeting of the labour management committee of the French company; these procedural irregularities amounted to violations of article 6 of the European Convention on Human Rights;

- the enforcement of such decision, rendered in violation of a right to a fair trial, would be contrary to French public policy⁴ and should therefore be denied, pursuant to article 26 of the Regulation;

Whereas the Administrators, in response to the above arguments, argue that:

- the Commercial Court of Pontoise was perfectly aware of the existence of the insolvency proceedings opened in England, as this decision is referred to in its Judgment of 26 May 2003;

² "*redressement judiciaire*".

³ "*redressement judiciaire*".

⁴ "ordre public"

- they applied to the Corporate Registry of the Commercial Court of Pontoise to have the administration order published, pursuant to article 22 of the Regulation but that this was refused by the Corporate Registry;

- that the administration order produces its effects in all Member States, without any formality; therefore, even if the decision was not publicized according to the laws of these States;

- that the production of a free translation of the administration order suffices to demonstrate the existence of such decision and of its applicability, without the need to adduce a sworn translation or any "affidavit";

- that SAS ISA DAISYTEK sought from the English Court the opening of insolvency proceedings against it; the latter can therefore not claim that a right to a fair trial was in any way violated because it had not been duly served in the English proceedings;

Whereas it transpires from the administration order and from the judgment of Judge McGonigal handed down on 16 May 2003 that it was upon the application of SAS ISA DAISYTEK, represented by its officer, that the main insolvency proceedings were opened; consequently the proceedings were opened without violation of the right to a fair trial even if SAS ISA DAISYTEK was not, in fact, a party duly served in the English proceedings;

Whereas, if French law requires a Judgment opening insolvency proceedings to be published at the relevant Corporate Registry, the absence of such publication is of no consequence to the fact that this Judgment did prevent the French Court from opening, at a later stage, main insolvency proceedings; indeed article 17 of the Regulation provides that the judgment opening the proceedings produces its effects "without further formality";

Whereas it results from these provisions that there is no need to produce an "affidavit" nor to obtain the recognition and enforcement of the foreign decision, this very last point not being, in fact, contested by the parties.

Whereas, with respect to the absence of notice to the representatives of the labour management committee, the Court observes that the French administrator has no standing to invoke this argument and that this irregularity can only be invoked through an application to review the administration order; it has no consequence on the effects of the administration order in France;

Whereas the proof the existence of the administration order is sufficiently adduced by the production of a certified copy; a sworn translation is also produced into evidence;

Whereas it is not contested that the disputed administration order is applicable in the United Kingdom and that the legal formalities attached thereto were duly complied with;

Whereas it results from the above that none of the procedural arguments raised by Maître VALDMAN, in his capacity as administrator, are capable of defeating the application of the administration order in France and that, therefore, this decision could not possibly have effects which would be contrary to French public policy⁵;

⁵ "ordre public"

On the effects of the administration order of the High Court of Leeds dated 16 May 2003

Whereas it has been indicated above, subject to the procedural arguments, that the effect of administration order of the High Court of Leeds was to preclude the opening of later administration⁶ proceedings against SAS ISA DAISYTEK by the Commercial Court of Pontoise.

Whereas the procedural arguments raised by Maître VALDMAN, in his capacity as administrator, have been dismissed;

Whereas it is therefore in violation of the provisions of the European Regulation of 29 May 2000 that the Commercial Court of Pontoise opened administration⁷ proceedings against SAS ISA DAISYTEK by judgment of 26 May 2003;

Whereas the application by the Administrators to have the said judgment set aside is therefore well grounded; the judgment handed down by the Commercial Court of Pontoise on 1st July 2003 must therefore be overturned as well as the judgment handed down on 26 May 2003;

Whereas it results from the combined provisions of articles 584 and 591 of the New Code of Civil Procedure that in a case of indivisibility *vis-à-vis* several parties to the judgment appealed, the binding nature of the outcome of the application to set aside the judgment will concern all the parties called to be heard on this application;

Whereas the effects of the judgment the opening the insolvency proceedings are indivisible; therefore, the setting aside of the judgment of 26 May 2003 will be binding not only *vis-à-vis* the Administrators, the applicants, but also *vis-à-vis* SAS ISA DAISYTEK, Maître VALDMAN, in his capacity as administrator, and Maître MANDIN, in his capacity as representative of the creditors;

On the other claims

Whereas it would not be unfair to let the parties bear their own counsels' costs;

Whereas Maître Valdman and Maître Mandin, acting both in their respective capacities, have lost before this Court; they will therefore have to pay jointly the Courts' costs of first instance and appeal;

ON THESE GROUNDS

The Court, handing down its ruling in an open-court hearing, with all parties represented, against which no further appeal lies,

Overturns the judgment rendered on 1st July 2003 by the Commercial Court of Pontoise,

⁶ "*redressement judiciaire*".

⁷ "*redressement judiciaire*".

Declares that the application presented by Messrs. KLEMPKA, TAYLOR and GREEN, acting in their capacity as Administrators, to have the judgment of the Commercial Court of Pontoise handed down on 26 May 2003 is well grounded,

Consequently, rules that no administration⁸ proceedings can be opened against SAS ISA DAISYTEK in France, overturns the judgment handed down on 26 May 2003 by the Commercial Court of Pontoise, and rules that this result will be binding against the appellants, SAS ISA DAISYTEK, Maître VALDMAN and Maître MANDIN, both acting in their respective capacities,

Dismisses the claims made for counsels' costs pursuant to article 700 of the New Code of Civil Procedure,

Orders Maître VALDMAN and Maître MANDIN jointly to pay the Courts' costs of first instance and appeal and allows SCP LISSARRAGUE, DUPUIS, BOCCON-GIBOD the right to recover the said costs pursuant to article 699 of the New Code of Civil Procedure.

This judgment was signed by:

Monsieur Jean BESSE, who handed down the ruling,
Madame Agnès ANGELVY, who was present when the ruling was handed down,

The CLERK

The PRESIDING JUDGE

(signature)

(signature)

Consequently, the FRENCH REPUBLIC mandates and orders to all process servers, upon this request, to enforce this Judgment; to all public prosecutors and attorneys general with the district courts to lend their assistance; to all law enforcement officials to enforce this judgment when legally required to do so.

BY THE COURT

(signature)

(stamp of the Court of Appeal of Versailles)

*Translation by Michaël Haravon, LL.B. (London), B.C.L. (Oxon), DPSI (IoL)
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⁸ "redressement judiciaire".