

International Corporate Rescue

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France: The Cassation Court Sets Ground Breaking Precedent to Preserve the Confidentiality of Pre-insolvency Preventative Proceedings

Anker Sørensen, Partner, De Gaulle Fleurance & Associés, Paris, France

Pre-insolvency preventative proceedings (*mandat ad hoc* and *conciliation*) (the 'Proceedings') have existed for a long time in France and largely been used to good effect by practitioners. The efficacy of such Proceedings relies on the maintenance of confidentiality – a recent decision of the *French Cour de cassation*¹ (the 'Decision') ruled that the duty of confidentiality applicable to parties involved in Proceedings also applied to third parties, which included the foreign financial press. This decision has further clarified the confidentiality regime relating to Proceedings.

1. Key aspects of the duty of confidentiality in Proceedings

Whereas a judgement commencing insolvency proceedings (*sauvegarde*, *redressement* and *liquidation judiciaire*) in France is published in the official gazette, Proceedings (governed by articles L.611-3 and L.611-4 et alia of the French *Code de commerce*) impose a statutory duty of confidentiality on the parties involved in such Proceedings and on the persons who are aware of the Proceedings by virtue of their functions. This duty of confidentiality has for years been viewed as a key contributor to the success of Proceedings as it incentivises the debtor to provide a wide range of information to its main creditors with the aim of swiftly reaching agreement consensus. The confidentiality and the speed of the Proceedings also has the effect of preventing the other ordinary or trade creditors, not involved in the Proceedings, from amending their payment terms in a manner that could adversely affect the debtor at a moment where it is the most vulnerable.

2. The facts of the Decision

A French holding company of around a hundred subsidiaries (the 'Holding Company'), which had been acquired by a large cap investment fund, applied for the opening of *mandat ad hoc* proceedings in July 2012 (which would be subsequently be converted into *conciliation* proceedings). The *mandataire ad hoc's* appointment consisted in 'reaching a new agreement with the debtor's main lenders (senior, second lien and other concerned party), or any operation enabling the debtor and its subsidiaries to remain viable and maintain its operations, whilst taking the concerned parties' interests into account equally and ensuring the strict confidentiality of the future negotiations by any legal means'².

Following the appointment of the *mandataire ad hoc* and thereafter of the *conciliateur*, a media company providing online information globally to the corporate and financial world (the 'Respondent') published several detailed articles on the Holding Company and its subsidiaries' financial situation, the implementation of Proceedings and the evolution of the on-going *conciliation*. This information had clearly been provided to the Respondent by a party with inside information and involved in the Proceedings.³

The *conciliateur*, the Holding Company and several of its subsidiaries then decided to begin legal proceedings against the Respondent. This followed the Respondent publishing further information on the on-going *conciliation* following receipt of a notice to cease any publication regarding the on-going *conciliation* from the *conciliateur*.

Notes

- 1 Cassation Court, Commercial Chamber, December 15, 2015, No. 14-11.500.
- 2 'la conclusion d'un nouvel accord avec les Prêteurs Senior et Second lien et ou autre partie prenante, ou toute opération de nature à assurer la pérennité des sociétés du groupe dans le respect équitable des intérêts en présence et ce. en assurant la confidentialité la plus stricte de ces négociations par tout moyen de droit' – extract of the order appointing the *mandataire ad hoc*, referred to in the decision made by the Versailles Court of Appeal – see footnote 5 hereafter.
- 3 Page 7 of the court order referred to under footnote 4.

3. The prior decisions of the lower courts

On 16 November 2012,⁴ the presiding judge of the Nanterre commercial court, ruling on provisional measures:

- rejected a number of arguments of a procedural nature and linked to freedom of expression raised by the Respondent;
- held that the Respondent was aware of i) the confidential nature of information published on its website and that such information had been obtained following a breach of the statutory confidentiality provision, and ii) the fact that the publication would adversely affect the Holding Company and its subsidiaries;
- held that the publication of information, provided during the course of Proceedings relating to the Holding Company and its subsidiaries, had caused a gross unlawful disturbance (*un trouble manifestement illicite*) which had to cease immediately;
- ordered the withdrawal of the relevant information from the Respondent's website from the 3rd day following the service of the order, or incur a daily fine of 50,000 euros;
- ordered the Respondent to cease publishing any further information relating to the Proceedings applicable to the Holding Company and its subsidiaries covered by the confidentiality obligations, or incur a fine of 50,000 euros per breach;
- dismissed the Holding Company's request that a provisional payment of 2 million euros be paid by the Respondent in anticipation of the damage suffered by the Holding Company and its subsidiaries (as estimated by a court appointed auditor); and
- ordered the Respondent to bear a portion of the appellant's legal fees.

This decision was appealed by the Respondent and overturned by the Versailles Court of Appeal,⁵ which held that:

- the Holding Company did not prove that it had suffered a material loss, resulting from the publication of the relevant information by the Respondent;
- article L.611-15 of the Code of Commerce, which imposes the duty of confidentiality on the parties involved in the Proceedings, or on the persons aware of Proceedings by virtue of their functions:

i) 'clearly does not apply to, nor creates any obligation for, the Respondent, as it was not involved in the proceedings',⁶ and that the term 'functions' referred to in this article 'did not refer to the investigation work carried out by journalists'; and

- therefore, the publication of the relevant information, taking into account the essential right of freedom of expression and the protection of journalists' sources, did not constitute a clear breach of the law which would give rise to sanctions by an interlocutory judge.

4. The Decision

The *Cour de cassation* overturned the decision made by the Court of Appeal, essentially on three grounds:

- the Court of Appeal's decision that i) article L.611-15 of the French *Code de commerce* creates no obligations for the Respondent, and ii) the publication of the relevant confidential information, in consideration of the essential right of expression of journalists, was not a clear breach of the law which could give rise to sanctions by an interlocutory judge, was in breach of article 10-2 of the European Convention on Human Rights (the 'ECHR') and also of article L.611-15 of the French *Code de commerce*;
- the Court of Appeal failed to provide a proper legal basis for its decision, as it did not determine whether the publication of confidential information by the Respondent was pursuing a debate of public interest;
- the Court of Appeal's decision, that a clear breach of the law was not characterized since the Holding Company did not prove that it suffered a material loss resulting from the publication of the relevant information, is in breach of article 10-2 of the ECHR and article L.611-15 of the French *Code de commerce*, because the Court of Appeal added a condition (i.e. the need to prove a loss) which is not provided for in such articles.

Even though the decision of the *Cour de cassation* is in relation to an interlocutory order, which does not address the merits of a case, several statements by the court strengthen the status of Proceedings:

- Firstly, the *Cour de cassation* delivered a clear position on the application of article L.611-15

Notes

⁴ Ordonnance de référé, Tribunal de commerce de Nanterre, November 16, 2012, No. 2012R01221.

⁵ Versailles Court of Appeal, 14th Chamber, November 27, 2013, No. 13/00670.

⁶ 'Il ressort à l'évidence que la société X ne peut être directement tenue par cette obligation, n'ayant pas été appelée à la procédure concernée' ... 'l'article L.611-15 du code de commerce ne crée aucune obligation à son égard ...' extracts from the decision made by the Versailles Court of Appeal.

of the French *Code de commerce* in a preliminary statement where it held that: i) the information in relation to Proceedings falls under the scope of the exceptions to the freedom of expression, and ii) third parties fall under the duty not to disclose confidential information in order to protect the rights of others.

The takeaway here is that the publication by third parties of information related to Proceedings constitutes a clear breach of the law and as such may give rise to sanctions and preventive measures (*mesures conservatoires*) by interlocutory judges.

- Secondly, the *Cour de cassation* ruled that the mere publication of information related to confidential Proceedings does *per se* cause a gross unlawful disturbance *save where* the publication contributes

to informing the public in respect of a debate of public interest.⁷

This issue will be further addressed by the Paris Court of Appeal, which was ordered by the *Cour de cassation* to rule on this issue as a second court of appeal. Considering the current case law, it is rather unlikely that the publication of confidential information regarding the evolution of the *mandat ad hoc* or *conciliation* measures ordered by a French judge meets that criterion.

This decision by the *Cour de cassation* therefore sends a clear message that anyone who becomes aware of Proceedings applicable to a French debtor company and its foreign subsidiaries is bound to strictly comply with the duty of confidentiality, failing which the party in breach of this statutory duty may be heavily sanctioned.

Notes

7 'l'information légitime du public sur un débat d'intérêt général'.