

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Commercial Chamber

(No 04 / 2020, 7 pages)

JUDGMENT OF 14 JANUARY 2020

General Directory Entry Number : **RG 19/17906 - No Portalis 35L7-V-B7D-CAV4R**

Decision referred to the Court: Judgement of 3 October 2019 – Commercial Court of Paris – RG No. 2018043443

APPELLANT:

Ms. (A), retired and manager of R.

Born on (...), French citizen

Domiciled at: (...)

Mr. (B), manager of F. Ltd

Born on (...), French citizen

Domiciled at: (...)

F . Ltd

Hong Kong Special Administrative Region of the People's Republic of CHINA,

Represented by its legal representative, Sir (B)

Having its registered office: Room 1206, 12/F, Eastern Commercial Center, 397 Hennessy WANCHAI – HONG KONG

Registered in the Commercial and Companies Register under the number 22005590

Represented by (...) of the SERARL (...), member of the Paris Bar : [...]

Having as litigator (...), member of the Bar of PARIS, : [...]

RESPONDENT:

IMPORTYS, a company incorporated under French law

Having its registered office: 19 rue de Billancourt – 92100 BOULOGNE BILLANCOURT

Registered in the Commercial and Companies Register under the number 800 89 8 0 90

Represented by (...) of the SERARL (...), member of the Paris Bar , : [...]

Having as litigator (...), member of the Bar of NANTES, : [...]

COURT COMPOSITION

The case was heard on 2 December 2019 in open court, before the Court composed of:

Mr. François ANCEL, President
Ms. Fabienne SCHALLER, Judge
Ms. Laure ALDEBERT, Judge

who ruled on the case, a report was presented at the hearing by Mr. Francois ANCEL in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: Ms. Clémentine GLEMET

JUDGMENT

- ADVERSARIAL
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by Francois ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I. STATEMENT OF FACTS

1. Importys is a company incorporated under French law having its registered office in Boulogne-Billancourt (Postal code 92100), created in 2014 by Mr. (X), who is specialized in wholesales trade and in import of products mainly coming from China. It acquired on the 12 of February 2015 from the Fédération Française de Football (FFF) a license for the marketing of accessories under the FFF brand for a period of two years.
2. F. Ltd (hereinafter referred as to the “F.Ltd”) is a company incorporated under Hong-Kong law created in 2015 and managed by Mr. (B), childhood friend of Mr. (X).
3. Ms (A) is the mother of Mr (B) and manager of R, a company created in 1984 having its registered office in Paris with business activities in trade, import or export of items of Paris.
4. In view of Football Euro that took place in France from 10 June to 10 July 2016, Importys, in charge of canvassing potential clients in France, associated with the company F. for manufacturing in China and import of fan kits.
5. Considering that F Ltd had collected a profit of a total amount of EUR 1,589,698 but had paid to it only EUR 47,820, although it would have been agreed profit-sharing at the rate of 50% each, Importys claimed its share of the profits from it , from Ms. A in her capacity as de facto manager of F.Ltf and from Mr. (B) in his capacity as de jure manager.

II. PROCEEDINGS

6. By writs of summons of 21 and 29 June 2018, Importys brought an action against both F.Ltd and Ms. (A) and Mr. (B) before the Paris Commercial Court to obtain a judgment

ordering them jointly to pay EUR 747,029.19 for the prejudice arising from, on the one hand, the lack of share of profits from F.Ltd and, on the other hand, the misappropriation of these profits attributed to Mr. (B) and Ms. (A). Importys sought furthermore that they be ordered jointly to pay EUR 150,000 for its moral damage and the sum of EUR 50,000 pursuant to article 700 of the Code of Civil Procedure.

7. F.Ltd, Ms. (A) and Mr. B raised, in limine litis, a plea of lack of jurisdiction of the French court in favor of the jurisdiction of Hong Kong Special Administrative Region of the People's Republic of CHINA.
8. By a judgment of 3 October 2019, ruling solely on jurisdiction, the Paris Commercial Court dismissed the plea of lack of jurisdiction raised by F.Ltd, Ms. (A) and Mr. (B) on the grounds of articles 42 and 46 of the Code of Civil Procedure, accepted jurisdiction and referred the parties back to a hearing on the merits. The Court held that the jurisdiction of the Paris court could be upheld on the ground of the Parisian residence of one of the co-defendant (Ms. A) and the place of delivery of the fan kits (France).
9. F.Ltd, Ms. (A) and Mr. (B) lodged an appeal against that decision by a statement of appeal dated 8 October 2019 and were authorized by order of 22 October to summon, by a deed of a bailiff dated 29 October 2019, Importys for a hearing on a fixed day on the 2 December 2019.
10. As this is a fixed day procedure, the procedure protocol dated 7 February 2018 has not been applied.

III. CLAIMS OF THE PARTIES

11. According to their latest submissions sent electronically on 25 November 2019, F.Ltd, Ms. (A) and Mr. (B) seek from the Court a ruling to :

- DECLARE admissible the appeal lodged by F.Ltd, Ms. (A) and Mr. (B) ;
- REVERSE the judgment dated 3 October 2019 of the Paris Commercial Court in all its provisions ;

As a consequence,

- FIND that the Paris commercial court has no territorial jurisdiction and DIRECT Importys to bring its action before the competent Court of the Hong Kong Special Administrative Region of the People's Republic of CHINA ;
- ORDER Importys to pay to F.Ltd, Ms. (A) and Mr. (B), each, the sum of EUR 3,000 pursuant to Article 700 of the Code of Civil Procedure, and to the full costs of the proceedings recoverable by the SERARL (...) represented by (...), member of the Paris Bar ;

12. According to its respondent's submissions sent electronically on 15 November 2019, Importys requests the Court, under articles 42 paragraph 2 and 46 of the Code of Civil

Procedure, to :

- UPHOLD the judgment dated 3 October 2019 handed down by the 3rd Chamber of the Paris Commercial Court ;
- DISMISS the appellants in all their claims

As a consequence,

- FIND AND RULE that the Paris Commercial Court has jurisdiction under the combination of Articles 42 paragraph 2 and 46 of the Code of Civil Procedure ;
- ORDER jointly F.Ltd , Ms. (A) and Mr. (B) to pay Importys the sum of EUR 5,000 pursuant Article 700 of the Code of Civil Procedure ;
- ORDER jointly F.Ltd, Ms. (A) and Mr. (B) to pay the costs of the proceedings.

III. PLEAS OF THE PARTIES

13. In support of their plea of lack of jurisdiction, the appellants argue that the competent court which has jurisdiction over the claims of Importys on the sharing of F.Ltd's profits is that of the place where the sharing is to take place, that is to say in this case the place of the registered office of this company located in Hong Kong. They consider that the criterion of the place of delivery of the fan kits applied by the Court is not an appropriate connecting criterion and that, in all events it cannot result in the jurisdiction of the Paris Commercial Court since these kits have been delivered in China.
14. F.Ltd, Ms. (A) and Mrs. (B) also dispute the Paris Commercial Court's jurisdiction based on Article 42 paragraph 2 of the Code of Civil Procedure according to which in case of multiple defendants, the claimant may bring an action before the jurisdiction of its choice, within the place of the domicile of one of them, on the ground that only Ms. (A) has a domicile in Paris and that she is not a serious co-defendant. They specify in this regard that Importys does not prove that Ms. (A), who has been sued in her capacity of de facto manager of F.Ltd for personal misconducts that are separate from her duties that may give rise to her personal liability, is effectively a de facto manager, a qualification which they believe should be strictly assessed and should be considered only in exceptional circumstances, which must be particularly characterized and justified, in direct link with the alleged harm. They argue therefore that Importys has used the notion of de facto manager with the sole purpose of artificially creating the jurisdiction of the Paris Commercial Court and that the capacity of de facto manager of Ms. (A) could not possibly be inferred from the sending of emails by the latest to Mr. (X) who is, moreover, a third person vis-a-vis F.Ltd . nor from the emails she wrote to her son as a token of encouragement, that are in addition, emails in English without any translation that are not as such, according to the appellants, admissible.
15. As a response, Importys pleads for the dismissal of this appeal, considering that it can rely on the extension of jurisdiction under Article 42 paragraph 2 of the Code of Civil Procedure, applicable to international trade, to justify the jurisdiction of the Paris Commercial Court. It submits that the two conditions necessary for the application of that article are met in the present case, namely the seriousness of the defendants and the

existence of a close connection between the claims.

16. It stresses that, as regards the serious nature of the case, Ms (A) has been sued in her capacity as de facto manager of F.Ltd, for misconducts that are separate from her duties that may give rise to her personal liability and that Mr. (B) has been sued in his capacity as a de jure director of F.Ltd, for misconducts that are separate from his duties that may give rise to his personal liability. It maintains that the serious nature of its claim is apparent, in particular, from its writ of summons dated 29 June 2018, in which the damages suffered and the liability of Ms (A) and Mr (B) are set out.
17. As regards the related actions, Importys argues that its claims are closely connected because they seek that Ms (A) and Mr (B) be each held liable for intentional misconduct with the same objective, namely *“confiscating and appropriating sums which should have been paid to Importys, refusing to pay to it its share of the profits in the transactions carried out with F.Ltd, a company of which they are de facto and de jure managers respectively”*.
18. On the application of Article 46 of the Code of Civil Procedure, applied by the Commercial Court, Importys claims that the fan kits only transited through the city of Ningbo (China) in the hands of SGS CHINA, an intermediary in charge of validating the quality of the products with regard to European legislation, and were then delivered in France. Importys also reminds that the fan kits have been marketed in France in view of the Euro 2016 which took place in France. It concludes that the court was right to consider that the conditions of Article 46 of the Code of Civil Procedure were also met.

IV. Reasons for the decision

On the jurisdiction of the Paris Commercial Court ;

19. Since the main dispute is between, on the one hand, a company registered in France (Importys) and, on the other hand, a company registered in Hong Kong (F.Ltd) and two natural persons, one of whom (Mr B) claims that he also has his-main residence in Hong Kong and the other (Ms A) claims that she has her main residence in France, the international jurisdiction in respect of the two defendants who are domiciled abroad in a State which is not a Member State of the European Union should be determined by extending the rules of domestic jurisdiction.
20. In this respect, pursuant to Article 42 paragraph 2 of the Code of Civil Procedure, “If there are several defendants, the plaintiff may, at his choice, bring his case before the court of the place where one of them has his domicile”.
21. It can be deduced from this text applicable in the international order, that it allows a defendant living abroad to be sued before a French court where the claim brought against him and a co-defendant domiciled in France is serious in relation to the latter and where the various claims, directed against the different defendants, are closely connected.
22. In the present case, the writ of summons served by the company Importys seeks not only an order against F.Ltd on the basis of its contractual liability, but also an order against Ms (A), domiciled in (...) Paris, in her capacity as de facto manager of F.Ltd, for the alleged misappropriation to her benefit of part of the profits of that company, to the detriment of Importys.

23. Several e-mail exchanges between Mr (X), manager of Importys, Mr (B), manager of F.Ltd and Ms (A), concerning the marketing of fan kits bearing the trademark of the Fédération Française de Football have been filed as exhibits to justify the serious nature of the action brought against Ms (A).
24. Thus, in a message dated 23 October 2015 with the subject “FFF” and addressed to Mr (X) and Mr (B), Ms (A) expressly mentions “*the organisation of imports*” referring to the need of setting up “*a strategy with the banks in France and China*”, and the cash flow difficulties related to an order for the customer Carrefour, or “*the personalisation of the product*” for an order for the customer Leclerc, the recipients of these kits.
25. Similarly, in a letter addressed to Mr. (X) on 6 November 2015 with the subject “Letter of Credit”, Ms. (A) invites Mr. (X) to ask the Leclerc client for prior communication of the letter of credit before its bank deposit; and in an e-mail dated 9 November 2015 entitled “Leclerc”, she asks Mr. (X) for information about the Leclerc client and asks him to keep her informed “*as soon as possible*” and specifies that “production must begin no later than November 25”.
26. In addition, on 16 November 2015, in an e-mail with the subject “Leclerc/LC”, Ms (A) e-mailed to Mr (X) her comments on the letter of credit offered by the Leclerc client, suggesting amendments, thus tending to demonstrate her involvement in the transaction, which she had in fact confirmed in a message addressed to her son (Mr. (B)), the manager of F.Ltd on 9 November 2015, entitled “Leclerc”, in which she indicated that he did not have to worry about this, even specifying that she “*assists (Mr X) to secure the Leclerc order as well as possible and you do not have to take care about it for the time being*”.
27. Finally, on 21 February 2016, Ms. (A) sent an email to Mr. (B) and Mr. (X) with the subject “purchase price” containing a table suggesting F.Ltd's billing rates.
28. It follows from this, without it being necessary to take into account the exhibits drafted in English, that Ms (A) was genuinely involved in the operations related to the marketing in France by F.Ltd of fan kits bearing the FFF trademark, so that the personal liability action brought against her by Importys is serious in nature and that the latter's domicile may be taken into account under Article 42 paragraph 2 of the Code of Civil Procedure, in order to determine the international jurisdiction of the Commercial Court of Paris.
29. In addition, it should be noted that the claims against Ms (A), as well as against Mr (B), are based on the facts relating to the profits derived from the manufacture in China, the import and marketing in France of the FFF fan kits, which are also the basis of the claim against F.Ltd.
30. Thus, according to Importys, those same facts may characterise both the misappropriation of part of F.Ltd's profits by Mrs (A) and Mr (B) and the failure by F.Ltd to comply with an agreement on the sharing of the profits relating to the same commercial transaction, there is a close connection between the action in contractual liability brought against F.Ltd and the action in tort brought against Ms (A) and her son M. (B).
31. In the light of the foregoing, it must be held, without it being necessary to assess the international jurisdiction of the Paris Commercial Court in the light of Article 46 of the Code of Civil Procedure, except noting that the kits were delivered and marketed in France on the occasion of a sporting event which took place on that territory, that that court has jurisdiction on the basis of Article 42 paragraph 2 of the Code of Civil

Procedure, one of the co-defendants, being a serious defendant, being domiciled within the jurisdiction of that court.

32. The judgment of the Paris Commercial Court handed down on 3 October 2019 shall therefore be upheld.

Costs ;

33. Costs and the procedural indemnity have been rightly settled by the Commercial Court.
34. F.Ltd, Mr (B) and Ms (A) shall be ordered to pay as losing parties the costs of the appeal proceedings.
35. In addition, F.Ltd., Mr (B) and Ms (A) shall be ordered in solidum to pay to Importys, which had to incur irrecoverable costs in order to assert its rights, compensation under Article 700 of the Code of Civil Procedure which it is equitable to fix at the global sum of EUR 5,000.

ON THOSE GROUNDS, THE COURT HEREBY

UPHOLDS the judgment of the Paris Commercial Court handed down on 3 October 2019 ;

And ruling again :

ORDERS in solidum F.Ltd, Mr (B) and Ms (A) to pay to Importys the sum of EUR 5 000 under Article 700 of the Code of Civil Procedure ;

ORDERS in solidum F.Ltd , Mr (B) and Ms. (A) to pay the costs of the proceedings.

Clerk
G. GLEMET

President
F. ANCEL