

CASE TRANSLATION: FRANCE

CASE NAME:

In re Advocate Christopher X

CASE CITATION NO:

Cour de cassation chambre criminelle du 12 décembre 2007 n°07-83228

APPEAL NUMBER:

No. 07-83228

NAME AND LEVEL OF COURT:

**Cour de cassation, chambre criminelle
(Court of Cassation, Criminal Division)**

DATE OF DECISION:

12 December 2007

PRESIDENT OF THE COURT:

M. Cotte

RAPPORTEUR:

Mme Nocquet

ADVOCATE GENERAL:

M. Boccon-Gibod

LAWYERS:

SCP Piwnica and Molinié

Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters; liability of French lawyer for taking evidence without authority of the Hague Convention; articles 1134 of the Civil Code, 111-4 of the Penal Code, 1 bis of law No. 68-678 of 26 July 1968 amended by law No. 80-538 of 16 July 1980 (articles 1134 du code civil, 111-4 du code pénal, 1 bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi n° 80-538 du 16 juillet 1980)

Court of Cassation, Criminal Division

Public Hearing Wednesday, 12 December 2007

Appeal number: 07-83228. Decision number: 7168.

Published in the Criminal Bulletin

M. Cotte (président)

SCP Piwnica and Molinié, avocat(s)

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

THE COURT OF Cassation, Criminal Division, issued the following decree:

Ruling on the appeal by:

- X... Christopher

against the decision of the Court of Appeal of Paris, 9th chamber, dated 28 March 2007, which, in respect of his search for information of an economic, commercial,

industrial, financial or technical nature towards the establishment of evidence in foreign proceedings was sentenced to a fine of 10,000 euro;

On the pleadings submitted;

The first ground of appeal, alleging an infringement of and false application of Chapter 2 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, and articles 1134 of the Civil Code, 111-4 of the Penal Code, 1 bis of law No. 68-678 of 26 July 1968 amended by law No. 80-538 of 16 July 1980, 591 and 593 of the Code of Criminal Procedure, failure and contradictory grounds, lack of legal basis;

“in that the decision under appeal declared Christopher X... guilty of the crime defined in Article 1 bis of the law of 26 July 1968 as amended by the law of 16 July 1980;

“on the grounds that it follows from the letter sent on 21 December 2000 by Jean-Claude Y... to Christopher X..., in response to an interview earlier, this lawyer asked the interlocutor to provide him with information on how the decisions of the Board of Directors of MAAF had been taken at the time of the purchase of Executive Life, alleging that ‘the members of the board of directors were not well informed ... he did not debate the issue and that decisions were taken in the corridors’; and having ‘preached falsehood to know the truth,’ Christopher X... was told by Jean-Claude Y... that he had

never ‘taken a decision in the corridors in any of the board meetings at which he participated’; in his way he obtained, or at least sought to obtain, proof that the directors of MAAF had made their decisions with full knowledge of the facts; that contrary to his claims, Christopher X... did not merely approach, neutrally, persons whose testimony could later be applied through a procedure consistent with Chapter 2 of the Hague Convention, which allows for evidence by a diplomatic agent or an independent commissioner appointed by the foreign jurisdiction, subject to agreement by the competent authority designated by the State of enforcement; he sought, although he was devoid of any warrant authorized under this Convention, for information of an economic, commercial or financial nature in order to gather evidence, since this was likely to justify the appointment of Jean-Claude Y... as a witness in the proceedings pending before the California court and direct questioning later, that the infringement of Article 1 bis of law No 68-678 of 26 July 1968, as amended by law No. 80-538 of 16 July 1980 is established;

“1) while the provisions of Article 1 bis of law No 68-678 of 26 July 1968 as amended by law of 16 July 1980 are issued subject to treaties or international agreements which include the Convention Hague on 18 March 1970, which provides in Chapter 2, for the obtaining of evidence by a diplomatic agent or an independent commissioner appointed by the foreign jurisdiction; and that, as Christopher X... did in his pleadings that were filed correctly and on his own initiative, he neglected, by obtaining evidence under the provisions of this chapter, to abide by the requirements of the need for prior consent of any witnesses as provided under Article 17 of the Convention, the Commissioner has no power to carry out acts of investigation and that such a prior agreement that he had therefore sought to collect from his partner, Jean-Claude Y...;

“2) while the letter of 21 December 2000 sent by Jean-Claude Y... to Christopher X... is in the record of the proceedings, the Court of Cassation is able to ensure that it does not follow from his words that Christopher X... has committed, in the words of the Court of Appeal, ‘a misuse of the search for evidence’ that may characterize the infringement of Article 1 bis of the law of 26 July 1968, but being charged with the interests of

the State of California in the Executive Life case, he merely approached people whose testimony could be sought later in the proceedings in accordance with the provisions of Chapter 2 of the Hague Convention, and in distorting the plain language of the letter before it, the appellate court reached a decision that consisted of contradictory grounds, which should be quashed;

“3) while obtaining evidence without being solicited is not an offence under the provisions of Article 1 bis of the law of 26 July 1968, that the terms of the same letter show that the ‘information’ that Jean-Claude Y... would ‘never be decided in the corridors of any of the boards to which he has contributed’ and is not the result of a solicitation of Christopher X... but a spontaneous declaration of his interlocutor, and as such, is not punishable;

“4) while it is also the result of the particulars of the letter sent on 21 December 2000 by Jean-Claude Y... to Christopher X... that ‘the approach’ taken by Christopher X... was ‘based on finding the truth’ thus excluding the latter sought to ‘steer the possible subsequent testimony’ of his contact as enunciated by the Court of Appeal in its grounds, are once again full of contradiction”;

The second ground of appeal, alleging infringement and false application of Articles 1 bis of law No. 68-678 of 26 July 1968 as amended by law No. 80-538 of 16 July 1980, 591 and 593 of the Code of Criminal Procedure, faulty argument, lack of legal basis;

“in that the contested decision invalidating the said Christopher X... guilty of the offence defined in Article 1 bis of the law of 26 July 1968 as amended by law of 16 July 1980;

“on the grounds that it follows from the letter sent on 21 December 2000 by Jean-Claude Y... to Christopher X... in response to an interview earlier, this lawyer asked the caller to provide information on how decisions of the Board of Directors of MAAF had been taken at the time of purchase of Executive Life, alleging that ‘members of the board of directors were not well informed ... he did not debate the issue and that decisions were taken in the corridors’ and having ‘preached falsehood for truth,’ Christopher X... was told by Jean-Claude Y... ‘that he had

never taken any decisions in the corridors in any of the boards at which he had participated' and in this way he obtained, or at least sought to obtain, proof that the directors of MAAF had made their decisions with full knowledge of the facts;

"While, as had been effectively stated by the first judges, the mere hint that the decisions of a board of directors would be or not taken 'in the corridors', is not intelligence of an economic, commercial, industrial, financial or technical nature that falls under section 1 bis of the law of 26 July 1968";

The third ground of appeal, alleging violation of Articles 6 and 7 of the European Convention on Human Rights, 1 bis of law No. 68-678 of 26 July 1968 as amended by law No. 80-538 16 July 1980, 591 and 593 of the Code of Criminal Procedure, faulty argument, lack of legal basis;

"in that the contested decision invalidating said Christopher X... guilty of the crime defined in Article 1 bis of the law of 26 July 1968 as amended by law of 16 July 1980;

"on the grounds that, contrary to what Christopher X... alleges ... this offence is intended to limit the abuse that can be committed in finding evidence, and did not constitute 'a disproportionate obstacle to the rights of defense' that the exercise of these rights is ensured by the guarantees attached to the procedures established by the Hague Convention;

"1) while not being considered an offence, soliciting evidence, even if proven, of intelligence of an economic, commercial, industrial, financial or technical nature as carried out here is not constrained;

"2) while the right to fair trial cannot be restricted by States (except as regards the public nature of the hearing) implies for free and unimpeded evidence, and Article 1 bis of the law of 26 July 1968, as it is interpreted as impeding the exercise of that right is incompatible with the provisions of Articles 6 and 7 of the European Convention of Human Rights";

The fourth ground of appeal, alleging infringement of Article 10 of the European Convention on Human Rights, 1 bis of law No. 68-678 of 26 July 1968 as amended by

law No. 80-538 of 16 July 1980, 591 and 593 of the Code of Criminal Procedure, faulty argument, lack of legal basis;

"in that the decision under appeal that is claimed to be invalid indicated that the said Christopher X... guilty of the crime defined in Article 1 bis of the law of 26 July 1968 as amended by law of 16 July 1980;

"1) while the provisions of Article 1 bis of law No 68-678 of 26 July 1968 are issued subject to treaties or international agreements which include the European Convention on Human Rights; that Convention specifies in Article 10 that the right of everyone to freedom of expression includes the freedom to receive and impart information without interference by public authorities and regardless of frontiers, and to criminally punish a lawyer who merely reported during a telephone conversation addressed to the former leader of a mutual insurance company that 'the members of the board (this mutual) had not been well informed that he had not discussed the issue and that decisions were taken in the corridors' represents an obstacle to freedom of expression and therefore a violation of Article 10 above;

"2) while the barrier to freedom of expression is not justified under Article 10-2 of the Convention since the general and absolute prohibition to disclose any 'information' – even if it is trivial – 'of an economic, commercial, industrial, financial or technical nature towards obtaining evidence for judicial or administrative proceedings in foreign judicial or administrative proceedings or part thereof', constitutes an unnecessary and therefore disproportionate measure in a democratic society, including to protect the rights and reputations of others and for maintaining the authority and impartiality of the judiciary";

The means being met;

It is clear from the decision under appeal and pleadings that the Federal Court in California, hearing a dispute concerning the conditions of the purchase of the life insurance company in North America, Executive Life, and opposing the commissioner of insurance of the Mutuelle d'Assurance Artisanale de France (MAAF), was issued, particularly in April and December 2000, international civil rogatory commissions for disclosure

by that company, documents relating to the dispute, as defined by the Hague Convention of 18 March 1970; that Christopher X..., the lawyer in France corresponding to the counsel for the North American lawyer of the insurance commissioner, at the end of 2000, contacted Jean-Claude Y..., a former director of MAAF, for information on the conditions under which the decisions of the board of directors of the corporation were taken at the time of purchase of Executive Life, alleging that 'the Members of the Board were not well informed ... he had not discussed the issue and that decisions were taken in the corridors'; only after a judicial inquiry for information, opened with the filing of a civil action by MAAF, Christopher X... was brought before the tribunal for requesting or searching for information of an economic, commercial, industrial, financial or technical nature towards the establishment of evidence for foreign judicial or administrative proceedings, facts defined and penalized by Articles 1 bis and 3 of the law of 26 July 1968, as amended;

Whereas, to declare the accused guilty of the offense, the decision states that he was not content to approach, neutrally, persons whose testimony might later be applied in accordance with the provisions of the Hague Convention, but has obtained, or at least sought, proof that the directors of MAAF had made their decision in full knowledge of the facts; that the judges add that in doing so, Christopher X... sought, devoid of any warrant authorized under the terms of the above agreement, information of an economic, commercial and financial nature for the purpose of the provision of evidence that could justify the designation of the person approached as a witness in the proceedings before the Californian court and direct questioning later; they note that, finally, contrary to the contention of the defendant, the law aims to limit the abuse that can be committed in researching the evidence, does not constitute a disproportionate obstacle to the defense of rights whose exercise is ensured by the guarantees attached

to the procedures established by the Hague Convention;

Considering that the state of these particulars, from which it follows that the information sought on the circumstances by which the Board of Directors of MAAF made its decisions on the acquisition of the company Executive Life are of an economic, financial or commercial nature and tend to the establishing evidence in foreign judicial proceedings, the Court of Appeal, which responded to the arguments in the pleadings, justified its decision, without violating the treaty texts invoked;

Hence it follows that the appeal must be set aside; And whereas the decision that is challenged is properly drawn up;

DISMISSES the appeal;

So tried and decided by the Court of Cassation, Criminal Division, in its public hearing, day, month and year as above;

Present for discussion and deliberation: Cotte Mr. President, Advisor Ms. Nocquet rapporteur, Mr. Dulin, Mrs Thin, Desgrange, Mr. Kidney, Ms. Ract-Madoux Bayet advisors of the Chamber, M. Soulard, Mrs Slove, Degorce, Labrousse counsellors;

Advocate General: M. Boccon-Gibod;

Clerk: Mrs Randouin;

In witness whereof, this ruling was signed by the President, the rapporteur and the Clerk of the Chamber;

Publication:

Contested decision: Court of Appeal of Paris of 28 March 2007