

CASE TRANSLATION: FRANCE

Case citation:

jugement du 19 décembre 2014

Name and level of the court:

Tribunal d'Instance de Nantes (Small claims court of Nantes)

Date of decision:

19 December 2014

Members of the court:

Marie-Caroline Mathieu de Boissac (Presiding Judge), Elise Vilain (Registrar)

Lawyers:

Me Yassine Maharsi, Me Margaux Sportes, Me Laurent Douchin

France; procedure; electronic signature; validity; litigation; writ of summons; telephony; subscription

SUMMARY OF THE DISPUTE AND CLAIMS OF THE PARTIES

By declaration at the registry received on 31 December 2012, Mr. Bernard O. requested that SAS FREE be summoned to appear before the local court of Nantes and that it be sentenced to pay:

the principal sum of €1,000;

the sum of €100 in damages for loss of use;

He states that he is seeking a reduction in the cost of the package under the contract with FREE because his line was not operational for two years (poor quality, slow broadband speed and numerous cuts).

The parties were summoned by the court registry pursuant to article 844 of the French Code of Civil Procedure to attend the hearing held on 19 April 2013 and finally the matter was raised at the hearing held on 14 November 2014, following four adjournments requested by the parties.

At the beginning of the hearing, SAS FREE raised the nullity of the document instituting the proceedings, pursuant to articles 1, 58, 114, 117, 411, 828 and 843 paragraph 2 of the French Code of Civil Procedure for lack of regularity of the plaintiff's signature, made by electronic means, the validity of the authentication of which, existing in the contractual relationship between the commercial company that makes and submits declarations to the registry

(demanderjustice.com) and its client, does not concern the referral of the matter to the court.

SAS FREE also invoked the nullity of the referral insofar as Mr. O gave demanderjustice.com power of attorney to act on his behalf, even though, in accordance with article 414 of the French Code of Civil Procedure, it is not legally authorized to act.

In his defence, Mr. O argued that it was he who had referred the matter to the judge, speaking in the first person singular, having only used the services of demanderjustice.com to use the tools provided (CERFA form, link to the Ministry of Justice's web site...), and had not given it power of attorney to act on his behalf. He insisted on the fact that he had himself approved his applications by clicking at the end of the process and attaching a copy of his ID card. He sought the denial of FREE's application for nullity.

Pursuant to the provisions of article 455 of the French Code of Civil Procedure, one should refer to the parties' documents, produced and mentioned at the hearing of 14 November 2014, for a fuller account of the arguments and claims.

The matter argued in court has been reserved for the final judgment.

On the merits, Mr. O., who said he had a broadband internet line since 08 October 2010, highlighted the many incidents and disconnections that occurred and persisted between 25 October 2010 and the summer of 2013, despite the assistance provided by technicians of FREE or FRANCE TÉLÉCOM, preventing him from keeping the TV option on 11 March 2011. He stressed that following a joint attempt on 2 October 2012 by experts of both services to solve the problem,

FREE, had finally admitted its inability to improve the efficiency of his line, the service being provided 'as is'.

He recalled the existence of an obligation of result in favour of the consumer, that lies, pursuant to article L121-20-3 of the French Consumer Code, with the service provider regarding the accessibility of the network, and having failed to guarantee continued access to the network, and in the absence of evidence of force majeure, FREE incurred its liability and was required to reimburse him the costs incurred during the vesting period and for the unused TV option valued at €300 (10 months without full access to the service).

Pursuant to articles 1142 and 1147 of the French Civil Code, Mr. O applied for €700 in damages to repair his injuries, lack of enjoyment and moral damages suffered on the one hand due to the network shortage or regular and unwanted disconnections, and on the other hand due to FREE's inertia, which left him for more than three years to struggle with his difficulties. He finally changed his equipment during the summer of 2013. He explained that other problems had occurred in October 2013 but insofar as the problem had been referred to the legal department, he could not ask for technical assistance.

He applied for €1,000 on the basis of article 700 of the Civil Procedure Code and requested that the provisional execution of the decision be ordered by the court.

In its defence, SAS FREE sought the dismissal of Mr. O's applications and the sum of €800 under article 700 of the French Code of Civil Procedure, arguing that it had provided assistance on 25 October 2010 in order to repair the initial malfunction and that subsequently no default was recorded until 10 September 2012, after which it does not dispute that it was unable to improve the line and suggested on 13 November 2012 the termination of the contract without charge, but the customer refused.

FREE argued that Mr. O. had not provided evidence of malfunction of the services offered between November 2012 and the summer of 2013 or even to this day, noting that it was using the FRANCE

TELECOM network's copper telephone lines to transport its services, and that it was only after the wiring that one could measure the good or average performance of the line. The performance of the services offered by FREE, is subject to the technical characteristics of the line.

SAS FREE claimed to have undertaken all investigations and technically possible improvements, the broadband speed having been noted as complying with contractual requirements, which ruled out any breach of its obligations and therefore any claim in respect of damages.

Alternatively, it asserted that no prejudice was established by Mr. O. and sought the termination of the contract.

Again, in accordance with article 455 of the French Code of Civil Procedure, it is appropriate to refer to the parties' documents, filed and mentioned at the hearing held on 14 November 2014, for a fuller account of the arguments and claims.

Pursuant to article 467 of the French Code of Civil Procedure, this judgment is not subject to appeal, will be handed down in the presence of all parties, the latter being present or represented.

GROUNDINGS OF THE DECISION:

Regarding the procedural matter, reserved for the final judgment:

The general terms and conditions of DemanderJustice SAS, which offers litigants, in proceedings in which legal representation is not mandatory, as part of a company contract, an automated referral to the court, provided that the client-plaintiff only fills in and completes by itself the application forms offered on the Internet, without help or advice, scans the documents contained in his file and attaches them to his online declaration. The file is then generated by computer and sent by post to the court.

Mr. O.'s declaration, dated 21 December 2012, written in the first person singular in a very personal manner, was clearly not written following advice given by a lawyer. A lawyer would not have failed to invoke legal texts and more professional reasoning.

On the one hand, the system used by DemanderJustice indicates that the application is validated only by the customer's 'click' on his computer keyboard, a gesture which belongs only to the client-plaintiff, who, in addition, attaches a copy of his identity card. On the other hand, it follows from the discussions at the hearing that it is indeed Mr. O. who completed the declaration on the demanderjustice.com web site, formulated his initial applications, subsequently amended when he resorted to the services of a lawyer, and affixed his electronic signature.

Regarding the electronic signature by which Mr. O. validated his application on 21 December 2012, and which is formalized in the declaration by an impersonal graphic, it should be noted that such signature received authentication from CertEurop in accordance with the Decree of 30 March 2011, giving it the same value as a manuscript signature, under articles 1316-3 and 1316-4 of the French Civil Code and ensuring the identity of the signatory. (Exhibit 4 and certificate of 21 March 2013)

There is no reported evidence to the contrary challenging the presumption of reliability conferred by the CertEurope authentication, pursuant to article 288-1 of the French Code of Civil Procedure.

Moreover, at the hearing, Mr. O. had confirmed that the declaration and the documents submitted to the court are those that proceed from his online application.

Finally, there is no reported evidence of the existence of a retainer agreement between Mr. O and SAS Demander Justice, while it results from the general terms and conditions that the latter provides neither counsel, drafting writing or representation and that his name is not on any act of referral.

Therefore, Mr. O, plaintiff of the action for contractual liability, validly referred the matter before the local court of Nantes, under articles 58 and 843 of the French Code of Civil Procedure, without the nullity of his declaration, whereby he refers the matter to the court, being established.

On the merits:

Under the provisions of article 1142 of the French Civil Code, any obligation to do or not to do something resolves into damages in the event of non-performance on the part of the debtor.

Under the provisions of article 1147 of the French Civil Code, the debtor is sentenced to pay damages, if necessary, either due to the breach of the obligation, or due to the delay in performance of the obligation, whenever he does not prove that the breach is due to an external cause that cannot be attributed to him, even though there is no bad faith on his part.

The access provision contract with FREE Broadband was entered into on 8 October 2010 between SAS FREE and Mr. O for €29.99/month, including broadband Internet access and telephone service, and is covered by article L121-20-3 of the French Consumer Code, in force (Exhibit no. 11 plaintiff).

Under the terms of article L.121-20-3 of the French Consumer Code, a professional is automatically liable vis-à-vis a consumer for the proper performance of the obligations resulting from the contract concluded remotely, whether such obligations are to be performed by the professional or by other service providers, without prejudice to his right of recourse against them. However, the professional may be exempt from all or part of his liability by proving that non-performance or improper performance of the contract is attributable either to the consumer or to the unpredictable and insurmountable act of a third party to the contract, or to force majeure.

It results from documents no. 12, 12-1, 12-2, 12-3, 12-4, 16, 15 of the plaintiff and documents no. 17, 18, 19 of FREE that as of 25 October 2010, Mr. O.'s line suffered a malfunction resulting from regular disconnections or insufficient broadband speed, and that on 13 and 14 November 2012, FREE informed him, acknowledging the difficulties, that it could not improve the capacity of his line, dependent as it was on FRANCE TELECOM, and that the service was provided 'as is'.

Compensation was then offered to Mr. O., based on the duration of the incident, as well as the termination of the contract, without charge.

It results from the sheets recording maintenance provided by FREE on 25 October 2010, and by FRANCE TÉLÉCOM on 27 October 2010, that the initial problem on the line was resolved ('good line testing' – Exhibit no. 13 of FREE). Moreover, it results from Mr. O.'s documents that the faulty periods of access to the Internet only resumed again as from 1 June 2012. The maintenance sheets of 10 September 2012, and of 14 and 29 January 2013, only prove slow speed of the line, below the floor board, provided by the general terms and conditions in force on 1 October 2010 (63 instead of 64 Kbits) and the absence of solution to the problem, the last maintenance sheet indicating that the line cannot be optimized.

The inability to enjoy his TV option from 11 March 2011 is not proved in any exhibit, insofar as following the assistance provided on 9 November 2010, during which the customer was advised to remove a surge-protected multi-strip and change his faulty Telecom socket, the problem is no longer mentioned in the maintenance sheets produced, including that of 20 June 2011, nor in Mr. O.'s letters of complaint of 19 November 2012 and 9 December 2013.

As Mr. O. made clear in his documents that the inopportune disconnection issue had been resolved when the hardware was changed in the summer of 2013, the periods of technical failure targeted by Mr. O.:

from 1 June 2012 to 28 August 2012,

from 27 May 2013 to 7 June 2013,

from 21 July 2013 to 6 August 2013, are established.

However, even though it appears that Mr. O. complained again about a poor line in December 2013 and about poor speed as of 25 June 2014, and that he asked FREE once again to compensate him for the period running from 25 June to 5 September 2014, it should be noted on the one hand that he produces no evidence corroborating his claims, whereas a technician provided assistance at his home twice in

July 2014, and the proper functioning of his equipment, renewed on 4 July 2014, was verified (Exhibits no. 31 and 35 M. O.), and, on the other hand, he made no application in this regard.

Given that it has an obligation of result regarding the services provided, FREE proves neither an unpredictable and insurmountable case of force majeure, or act by a third party, in this case FRANCE TÉLÉCOM, while the possibility of the poor quality of the FRANCE TÉLÉCOM line potentially used to transport its services is mentioned in the general terms and conditions, and precisely this line could well have been tested before having Mr. O. sign the subscription agreement.

By acknowledging, in its letters of 13 and 14 November 2012, that the inadequate service which cannot be remedied justifies compensation and termination of the contract, FREE admits that it has breached its contractual obligations.

However, even though it is legitimate to provide compensation to the customer in case of breach of contract, it is appropriate to draw the consequences of FREE's lasting impossibility to meet its commitments, which should not serve as a basis for repeated applications for compensation, while Mr. O. has known since 13 November 2012 that the service will remain defective, and still maintains his subscription.

Therefore, pursuant to article 17.1 of the general terms and conditions of sale, and pursuant to FREE's application, the termination of the contract should be pronounced, seeing as 'serious and/or repeated disruption of the local loop network, the cause or origin of which is the subscriber's access' is established. Termination without cost for Mr. O., who has not failed in his obligation to pay, will take effect 16 days after service of this decision.

To compensate for the loss of enjoyment relating to the established periods during which those incidents took place, FREE SAS will be ordered to pay Mr. O. the sum of €120.

The number of maintenance sheets and the amount of energy spent on both sides in calls, e-mails, complaint letters, justification and various trips made show that this ADSL subscription was a regular source of concern for the customer. His moral prejudice, tempered by the fact that he knowingly maintained the subscription after November 2012 when he knew it was unsatisfactory, will be repaired by the allocation of €200 in damages.

It is fair to allocate €500 to Mr. O. under article 700 of the French Code of Civil Procedure and thus dismiss the claim filed by FREE in the same way.

Neither the urgency nor the nature of the case requires that the judge order the provisional execution of this decision.

FREE, the unsuccessful party, will be required to pay the entire costs of the proceedings under article 696 of the French Code of Civil Procedure.

DECISION

The local court, acting publicly, in the presence of both parties and ultimately:

Declares the referral of the court by Mr Bernard O. to be regular.

Sentences FREE SAS to pay Mr. Bernard O. the following amounts:

- €320 (three hundred and twenty euros) in damages for all harms suffered;
- €500 (five hundred euros) pursuant to article 700 of the French Code of Civil Procedure.

Pronounce the termination, without cost for Mr. O., of the Freebox subscription package contract dated 8 October 2010, effective 16 days following service of this decision.

States that there are no grounds for ordering the provisional execution of the decision.

Sentences FREE SAS to pay the costs of the proceedings.

The Court: Marie-Caroline Mathieu de Boissac (Presiding Judge), Elise Vilain (Registrar)

Lawyers: Yassine Maharsi, Me Margaux Sportes, Me Laurent Douchin

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