COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF PÉLISSIER AND SASSI v. FRANCE

(Application no. 25444/94)

JUDGMENT

STRASBOURG

25 March 1999

In the case of Pélissier and Sassi v. France,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr L. FERRARI BRAVO,
Mr GAUKUR JÖRUNDSSON,
Mr L. CAFLISCH,
Mr J.-P. COSTA,
Mr W. FUHRMANN,
Mr K. JUNGWIERT,
Mr M. FISCHBACH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mrs M. TSATSA-NIKOLOVSKA,
Mr T. PANȚÎRU,
Mr E. LEVITS,
Mr K. TRAJA,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 10 December 1998 and 17 March 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") and by the French Government ("the Government") on 28 April and 4 June 1998 respectively, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 25444/94) against the French Republic

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

lodged with the Commission under former Article 25 by two French nationals, Mr François Pélissier and Mr Philippe Sassi, on 18 July 1994.

The Commission's request referred to former Articles 44 and 48 and to the declaration whereby France recognised the compulsory jurisdiction of the Court (former Article 46). The Government's application referred to former Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 3 (a) and (b) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (former Rule 30).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Thór Vilhjálmsson, acting through the Registrar, consulted the Agent of the Government, the applicants' lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 26 October 1998.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Sir Nicolas Bratza and Mr M. Pellonpää, Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 § 3). The other members appointed to complete the Grand Chamber were Mr L. Ferrari Bravo, Mr Gaukur Jörundsson, Mr L. Caflisch, Mr W. Fuhrmann, Mr K. Jungwiert, Mr M. Fischbach, Mrs N. Vajić, Mr J. Hedigan, Mrs M. Tsatsa-Nikolovska, Mr T. Panţîru, Mr E. Levits and Mr K. Traja (Rule 24 § 3 and Rule 100 § 4).

5. At the Court's invitation (Rule 99), the Commission delegated one of its members, Mr R. Nicolini, to take part in the proceedings before the Grand Chamber.

6. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 10 December 1998.

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1. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

There appeared before the Court:

(a) *for the Government*
Mrs M. DUBROCARD, Deputy Head of the Human Rights Office, Department of Legal Affairs, Ministry of Foreign Affairs, *Agent*,
Mr G. BITTI, Human Rights Office, Department of European and International Affairs, Ministry of Justice,
Mrs C. ETIENNE, *magistrat*, on secondment to the Criminal Justice and Individual Freedoms Office, Criminal Cases and Pardons Department, Ministry of Justice, *Counsel*;

(b) *for the applicants*
Mr M. HENRY, of the Paris Bar, *Counsel*;

(c) *for the Commission*
Mr R. NICOLINI, *Delegate*,
Ms M.-T. SCHOEPFER, *Secretary to the Commission*.

The Court heard addresses by Mr Nicolini, Mr Henry and Mrs Dubrocard.

THE FACTS

7. Mr Pélissier was born in 1944 and lives at Sanary-sur-Mer; Mr Sassi was born in 1935 and lives at Cannes. Both are French nationals.

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

8. On 16 October 1975 Mr Fernand Cortez and Mr Claude Cortez formed a private limited company (*société à responsabilité limitée – Sàrl*), Bleu Marine, whose object was the sale of pleasure craft. Fernand Cortez was appointed manager. In 1976 Bleu Marine started to trade with a public company, Chantiers Beneteau S.A., whose object was boat-building. On 8 October 1981, Bleu Marine became Chantiers Beneteau's exclusive distributor for the Var *département* coast.

9. On 31 March 1980 both applicants became shareholders in Bleu Marine, each holding 250 of a total of 1,000 shares (the remaining 500 belonged to the promoters, Fernand and Claude Cortez).

10. On 29 September 1982 Fernand Cortez, the applicants and Mr Dominique Stizi formed a private limited company, Station Service du Bateau Sàrl, which was run by Fernand Cortez and Dominique Stizi. Its objects were the development of port infrastructures, harbour building and the sale and outfitting of boats. The share capital was held by Fernand Cortez (48 shares), the applicants (24 shares), and Dominique Stizi (104 shares). On 29 February 1984 the Toulon Commercial Court declared the company insolvent and ordered its judicial reorganisation.

11. By agreements made with Station Service du Bateau and another company, Cortez et C^{ie}, Bleu Marine was granted a licence allowing it to launch its boats on the sea front.

12. In 1983 relations between Bleu Marine and Chantiers Beneteau started to deteriorate, the former owing the latter nearly three million French francs (FRF). Chantiers Beneteau then terminated the distribution agreement with Bleu Marine.

13. On 30 May 1983 Bleu Marine filed for insolvency. On 1 June 1983 the Toulon Commercial Court held that the company was insolvent and ordered its judicial reorganisation.

14. On 4 July 1984 the Toulon Commercial Court, finding that Bleu Marine had debts of almost FRF 10 million, ordered its liquidation under the supervision of the court.

B. The investigation

15. On 20 June 1983 Chantiers Beneteau lodged a complaint with the senior Toulon investigating judge against a person or persons unknown for forgery of commercial documents and fraud by the falsification of a balance sheet and its use with a view to obtaining a rescheduling of debt which would never be honoured. On 16 December 1983 the investigating judge sent instructions to the Marseilles Regional Police Department.

16. On 27 June 1984 Fernand Cortez, the manager of Bleu Marine, was charged by the Toulon investigating judge assigned to the case. On 8 October an additional charge of negligent and fraudulent bankruptcy was brought against him. On 22 January 1985 the investigating judge's instructions of 16 December 1983 were carried out. The results revealed in particular the existence of a property holding company (*société civile immobilière*), SCI Le Ponant, which had been set up by Fernand Cortez, Mr Pélissier and Mr Sassi's wife, in order to acquire land for letting to Bleu Marine.

17. On 15 October 1984 Mr and Mrs Grouzet lodged a complaint against Fernand Cortez and any other person having managerial responsibility for Bleu Marine, alleging misappropriation and, subsequently, fraud, in connection with the purchase and payment for a boat that was never delivered. On 4 October 1985 a Mr Louis Dreyer lodged a complaint against Fernand Cortez for misappropriation and applied to be joined to the proceedings as a civil party claiming damages.

18. On 14 September 1984, after appearing before the investigating judge on 20 and 21 August and 13 September 1984, the first applicant was charged with the offences set out in the complaint of 20 June 1983 and with negligent and fraudulent bankruptcy and misappropriation.

19. On 12 June 1985 the second applicant was charged with the same offences.

20. After Law no. 85-98 of 25 January 1985, which reformed insolvency law, came into force, the public prosecutor, considering there to be "strong evidence of criminal bankruptcy", lodged an additional application to have Fernand Cortez, Dominique Stizi and the applicants charged with that offence under the new law. In so doing, he relied on the provisions relating to criminal bankruptcy and aiding and abetting criminal bankruptcy.

21. In a letter of 14 November 1985 to the investigating judge, the lawyer acting for Chantiers Beneteau argued that a charge of aiding and abetting criminal bankruptcy might lie against the applicants. On 17 July 1986 Chantiers Beneteau applied to be joined to the criminal bankruptcy proceedings as a civil party claiming damages.

22. On 1 December 1986 the investigating judge preferred an additional charge of "criminal bankruptcy" against Fernand Cortez under sections 196 and 197 of the Law of 25 January 1985 and Articles 402 and 403 of the Criminal Code. On 4, 16 and 19 December 1986 he preferred identical additional charges of "criminal bankruptcy" against the first applicant, the second applicant and Dominique Stizi respectively.

23. On 15 June 1987 the investigating judge appointed two accounting experts to audit the accounts.

24. On 30 June 1988 they submitted their report to the investigating judge.

25. On 10 January 1989 the investigating judge made an order transmitting the file to the public prosecutor for submissions (*ordonnance de soit-communiqué*).

26. On 27 June 1990 the investigating judge made a discharge order on the charges of forgery and using forged commercial documents, negligent and fraudulent bankruptcy and fraud; ultimately, the only charge on which the applicants were committed to stand trial at the Criminal Court was that of criminal bankruptcy under the Law of 25 January 1985. A discharge order was also made in the case of Fernand Cortez on the same charges and

on the complaint lodged by Mr and Mrs Grouzet. He was committed to stand trial at the Criminal Court alone (on certain charges for which he was the sole defendant), with Dominique Stizi (on charges relating to the management of Station Service du Bateau), and with the applicants. In his order, the investigating judge cited Articles 402, 406 and 408 of the Criminal Code and sections 196 and 197 of the Law of 25 January 1985.

C. Judgment of the Toulon Criminal Court of 12 March 1991

27. On 12 March 1991 the Toulon Criminal Court sentenced Fernand Cortez to one year's imprisonment and a fine of FRF 20,000 for fraudulent bankruptcy, concealment of assets and misappropriation. It acquitted Dominique Stizi of the charges against him. Of the civil parties, Chantiers Beneteau's application to be joined to the criminal bankruptcy proceedings was declared inadmissible and the court noted that Mr and Mrs Grouzet had withdrawn their application to be joined as civil parties; the only person to be awarded compensation was Louis Dreyer (in respect of the misappropriation by Fernand Cortez).

28. In the same judgment, the Toulon Criminal Court held with regard to the bankruptcy charges against the applicants:

> "It should firstly be noted that under the Law only *de jure* or *de facto* managers, not, as suggested by the prosecution, members, can commit the offence.
>
> Without it being necessary to consider whether the indictment is bad for failure to allege that the members [the applicants] were *de facto* managers, that being an essential element of the offence, it need only be observed that [the applicants] have not performed any acts of management, the *de jure* manager cannot be regarded as having been a 'replaceable', compliant manager and it does not appear that he gave the other two the right to sign on his behalf.
>
> ...
>
> Thus, as they cannot properly be described as *de jure* managers, the defendants Sassi and Pélissier must be acquitted of these offences."

29. On 14 March 1991 Chantiers Beneteau appealed against that judgment. The public prosecutor and Fernand Cortez did likewise on 22 March 1991. On 2 April 1992 Chantiers Beneteau lodged additional submissions with the registry of the Court of Appeal in which they proposed, in the alternative, recharacterising the acts the applicants were alleged to have committed as "aiding and abetting" criminal bankruptcy.

D. Judgment of 26 November 1992 of the Aix-en-Provence Court of Appeal

30. On 26 November 1992, after hearings on 16 April and 25 June 1992, the Aix-en-Provence Court of Appeal held that although the applicants could not be regarded as having been *de facto* managers of the company, they had nonetheless been informed of the serious difficulties it was in and had "wilfully performed positive, material acts that had facilitated, aided or abetted Cortez in the concealment of assets to the detriment of Bleu Marine". It appears from the judgment that the applicants were regarded as appearing before the Court of Appeal as "defendants on criminal bankruptcy charges".

31. The Court of Appeal consequently held that the applicants were guilty, not of the offences charged, but of the separate offence of aiding and abetting criminal bankruptcy through the concealment of assets. As regards the first applicant in particular, the Court of Appeal found, *inter alia*, that he had furnished a false certificate in order to justify the payment of a sum of money in a suspect operation. It referred in its judgment to Chantiers Beneteau's main submissions requesting the applicants' conviction for criminal bankruptcy, but made no mention of the additional submissions lodged on 2 April 1992 concerning the accusation that they had aided and abetted criminal bankruptcy. There is a dispute as to whether that request was brought to the attention of the applicants; however, it is common ground that it was mentioned, as an ancillary point, by the civil party at the hearing.

32. The Aix-en-Provence Court of Appeal sentenced each of the applicants to a suspended term of eighteen months' imprisonment and to a fine of FRF 30,000. While upholding the conviction of Fernand Cortez and the partial discharge order made in his favour by the Toulon Criminal Court, it nonetheless increased the term of imprisonment to eighteen months, while suspending it, and the fine to FRF 30,000. Lastly, the Court of Appeal upheld Dominique Stizi's acquittal, the award of damages to Louis Dreyer and the declaration that Chantiers Beneteau's application to be joined as a civil party was inadmissible.

E. Proceedings in the Court of Cassation

33. On 26 and 27 November 1992 the applicants appealed against that decision to the Court of Cassation on points of law. In their pleadings they denied the offence and contended on the basis of Article 6 of the Convention that the Court of Appeal's decision to convict them of an offence different from that charged had not been the subject of adversarial argument and had infringed the rights of the defence. In addition, the first applicant submitted that when referring to alleged irregularities on his

account the Court of Appeal had relied on allegations that had never been put to him and were incapable of showing that he had aided and abetted criminal bankruptcy.

34. In a judgment of 14 February 1994 the Court of Cassation dismissed the applicants' appeal on the grounds that:

> "... the reasons given in the impugned judgment enable the Court of Cassation to satisfy itself that the court below sufficiently made out, within the limits of its jurisdiction, all the constitutive elements of the *actus reus* and *mens rea* of both the principal offence of criminal bankruptcy committed by Fernand Cortez through the concealment of assets and the offence committed by Philippe Sassi and François Pélissier of aiding and abetting criminal bankruptcy through the concealment of assets. The grounds of appeal, which merely contest the findings which the court below, in its unfettered discretion, came to on the facts and circumstances of the case after hearing the parties' submissions, cannot be upheld."

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure

35. The relevant provisions of the Code of Criminal Procedure provide:

Article 388

> "The Criminal Court shall be seised of offences within its jurisdiction on the voluntary appearance of the parties, a summons accompanied by a statement of the charges, an immediate summary trial or, lastly, a committal by the investigating judge or judges."

Article 509

> "The case is transferred to the Court of Appeal to the extent determined in the notice of appeal ..."

B. Former Criminal Code (provisions in force at the material time)

36. The relevant provisions of the Criminal Code in force at the material time were as follows:

Article 59

> "Accessories to a serious crime (*crime*) or other major offence (*délit*) shall be liable to the same penalties as the principals, except where statute provides otherwise."

Article 60

"A person who, by gifts, promises, threats, abuse of authority or power, scheming or contrivance, has incited the commission of a serious crime (*crime*) or other major offence (*délit*) or given instructions for its commission;

has procured weapons, implements or any other means of assisting in the commission of an offence knowing that such weapons, implements or other means were intended for that purpose; or

has knowingly aided or abetted the principal or principals in acts preparatory to the commission of the offence or facilitating its commission or in carrying out the offence, shall be guilty of an offence as accessories, without prejudice to the penalties specially imposed by this Code on persons conspiring to commit or inciting breaches of State security, even if the crime intended by those conspiring or inciting is not committed."

Article 402

"Persons found guilty of criminal bankruptcy shall be liable on conviction to between three months' and five years' imprisonment and a fine of between FRF 10,000 and FRF 200,000 or to either of those penalties.

In addition, an order may be made barring them from exercising the rights referred to in Article 42."

Article 403

"Accessories to criminal bankruptcy shall be liable to the same penalties as those laid down in the preceding Article, even if they are not merchants, craftsmen or farmers and do not directly or indirectly, *de facto* or *de jure*, manage a private-law legal entity having an economic activity."

C. Law no. 85-98 of 25 January 1985 on the judicial reorganisation and liquidation of undertakings

37. The relevant provisions of this law read as follows:

Section 196

"The provisions of this Chapter are applicable to:

(1) all traders and craftsmen;

(2) anyone who has directly or indirectly, whether *de jure* or *de facto*, managed or liquidated a private-law entity having an economic activity; and

(3) individuals who are permanent representatives of entities managing entities as defined in subsection 2 above."

Section 197

"Where judicial reorganisation proceedings are commenced, the persons referred to in section 196 shall be guilty of criminal bankruptcy if they are found to have done any of the following:

(1) with the intention of avoiding or delaying the commencement of judicial reorganisation proceedings, made purchases with a view to resale at less than market value or used ruinous means to procure funding;

(2) misappropriated or concealed all or part of the debtor's assets;

(3) fraudulently increased the debtor's liabilities; or

(4) held fictitious accounts or caused accounting documents of the undertaking or entity to disappear or failed to keep any accounts."

PROCEEDINGS BEFORE THE COMMISSION

38. Mr Pélissier and Mr Sassi applied to the Commission on 18 July 1994. They alleged a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention.

39. The Commission declared the application (no. 25444/94) admissible on 23 May 1997. In its report of 13 January 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 6 §§ 1 and 3 (a) and (b). The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

40. In their memorial, the Government invited the Court to hold that neither the fact that the applicants had been convicted of an offence different from the one charged, nor the use of a contested document against the first applicant, nor the length of the proceedings constituted a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention.

41. The applicants asked the Court to hold that there had been a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention and to award them just satisfaction under Article 41 of the Convention.

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (a) AND (b) OF THE CONVENTION AS REGARDS THE FAIRNESS OF THE PROCEEDINGS

42. The applicants submitted that the fact that they had been convicted of an offence different from the one charged and the use against the first applicant of a document whose admissibility was contested gave rise to a violation of Article 6 §§ 1 and 3 (a) and (b) of the Convention, the relevant part of which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

43. The Government contested those submissions. The Commission agreed with the submission concerning the conviction of an offence different from the one charged.

44. The first applicant complained, firstly, about the use of a "false certificate", which was a document that had not been referred to in the order committing him for trial before the Criminal Court.

45. The Court observes that the Convention does not lay down rules on evidence as such. It cannot therefore exclude as a matter of principle and in the abstract that evidence obtained in breach of provisions of domestic law may be admitted. It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 § 1 (see the Mantovanelli v. France judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, pp. 436-37, § 34; and, *mutatis mutandis*, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 46).

46. The fairness of proceedings is assessed with regard to the proceedings as a whole (see, *inter alia*, the following judgments: Delta v. France of 19 December 1990, Series A no. 191-A, p. 15, § 35; Imbrioscia v.

Switzerland of 24 November 1993, Series A no. 275, pp. 13-14, § 38; Miailhe v. France (no. 2) of 26 September 1996, *Reports* 1996-IV, p. 1338, § 43).

47. In the instant case, the Court finds on the basis of all the evidence in its possession that the document in issue and the Aix-en-Provence Court of Appeal's reliance on it (see paragraph 31 above) were not decisive in the conviction or sentence of Mr Pélissier. Thus, the fact that the document in issue was admitted in evidence did not impair the fairness of the proceedings. Consequently, the use by the Court of Appeal of the document in issue did not entail a violation of Article 6 § 1 of the Convention.

The Court now turns to the decision of the Aix-en-Provence Court of Appeal to convict the applicants of a different offence.

48. The applicants did not dispute the French courts' right to return an alternative verdict, only the manner in which that right was exercised in the course of their trial. In that connection, they stressed the importance of the adversarial principle.

Returning an alternative verdict entailed an obligation for argument to be heard not only on the facts but also on whether such a verdict was justified. The rights of the defence could be effectively exercised only if the trial court heard argument on the proposed alternative charge. As they had not been able to contest that charge, since it was not decided on until deliberations, the applicants had not had adequate time and facilities for the preparation of their defence. They submitted that theirs was a similar position to that considered by the Convention institutions in the case of Chichlian and Ekindjian v. France (judgment of 28 November 1989, Series A no. 162-B, opinion of the Commission, p. 52, § 65).

The applicants maintained that the special nature of the concept of "aiding and abetting" in French law meant that, had they been charged with aiding and abetting criminal bankruptcy rather than with the principal offence, they would have had to adopt a fresh defence strategy and put forward different arguments. As regards the extent to which they had been aware that an alternative verdict might be returned, the applicants stated that while it was true that aiding and abetting had been referred to at the investigation stage, it had subsequently been intentionally discounted by the investigating judge and disregarded by both the Criminal Court and the Court of Appeal at the hearings. They were adamant that the additional submissions lodged by Chantiers Beneteau with the Court of Appeal had not been served on them. They had only become aware of the request for their conviction of aiding and abetting when it was made – as a purely ancillary point – at the end of the oral submissions on behalf of that civil party.

The applicants argued that the alternative charge had necessarily changed the "nature of the accusation" against them, as the difference between criminal bankruptcy and aiding and abetting criminal bankruptcy was not,

as the Government maintained, merely a question of degree of participation (see paragraph 50 below).

As to the information required by paragraph 3 (a) of Article 6 of the Convention, the applicants contended that it had to be detailed and direct and provided by the judicial authorities, not a civil party.

49. The Commission agreed in substance with those arguments.

50. In the Government's submission, provided that no reliance was placed on new facts, alternative verdicts could be returned by virtue of the principle that the trial courts exercise jurisdiction *in rem*. Under that principle, a trial court had jurisdiction to hear the facts and was not bound by the legal characterisation set out in the summons or indictment. In the instant case, the Aix-en-Provence Court of Appeal's decision to convict of a separate offence in law had not altered the basis of the criminal charge, but simply constituted a different assessment of the degree to which the applicants had participated in the criminal bankruptcy offence.

The Government contended that the notion of aiding and abetting, despite requiring three constitutive elements to be proved, was not really an autonomous one and was applied very flexibly by the courts. In particular, this was due to the difficulties that sometimes arose in distinguishing acts of aiding and abetting from acts committed jointly (*coaction*). The wording of former Article 60 of the Criminal Code, which had been in force at the material time, had contained deficiencies that the courts had sought to remedy through judicial interpretation in which aiding and abetting had on occasion been equated with acts committed jointly.

Accordingly, aiding and abetting constituted an element that was intrinsic to the initial charge (see the De Salvador Torres v. Spain judgment of 24 October 1996, *Reports* 1996-V), especially as the offence the applicants were convicted of was among those mentioned in the order committing them for trial before the Criminal Court. The alternative verdict, which the applicants could have foreseen, had not fundamentally changed the nature of the accusation against them, involving as it did no more than a revised assessment of the degree of their participation.

The Government argued that the requirements of Article 6 § 3 (a) and (b) should not be applied too formally and noted that the applicants had been informed that the offence might be considered to be one of aiding and abetting criminal bankruptcy when they were charged with the additional offence after the new law on 25 January 1985 entered into force. The fact that the investigating judge had not mentioned it in the committal order was not decisive for the purposes of Article 6 § 3 (a) of the Convention, as it had been referred to on at least one occasion during the course of the proceedings, and the Criminal Court and the Court of Appeal had jurisdiction *in rem*. Furthermore, as the additional submissions of the civil party, Chantiers Beneteau, had been lodged before the hearing of the appeal in the Court of Appeal, the applicants could easily have apprised themselves

of them. The applicants, who acknowledged that the issue of aiding and abetting had been mentioned by Chantiers Beneteau's counsel during his oral submissions, had, moreover, been assisted by experienced lawyers.

51. The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed.

52. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention (see, *mutatis mutandis*, the following judgments: Deweer v. Belgium of 27 February 1980, Series A no. 35, pp. 30-31, § 56; Artico v. Italy of 13 May 1980, Series A no. 37, p. 15, § 32; Goddi v. Italy of 9 April 1984, Series A no. 76, p. 11, § 28; and Colozza v. Italy of 12 February 1985, Series A no. 89, p. 14, § 26). The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.

53. Article 6 § 3 (a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him (see, *mutatis mutandis*, the Kamasinski judgment cited above).

54. Lastly, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.

55. The Court notes, firstly, that the only charge set out in the order of 27 June 1990 committing the applicants for trial before the Criminal Court was criminal bankruptcy (see paragraph 26 above). Although reference was made in the additional charges preferred on 4 and 16 December 1986 to provisions on both criminal bankruptcy and aiding and abetting criminal bankruptcy (see paragraph 22 above) – without specific reasons being stated – the Court finds that the investigation conducted by the investigating judge was clearly confined to the offence of criminal bankruptcy. There is nothing to suggest that a charge of aiding and abetting criminal bankruptcy, to

which counsel acting for Chantiers Beneteau referred in a letter to the investigating judge (see paragraph 21 above), was considered to be a genuine possibility during the investigation.

Argument before the Criminal Court was confined to the offence of criminal bankruptcy (see paragraph 28 above). The wording of the court's judgment confirms that the issue of "aiding and abetting" was not aired at the trial (ibid.).

On the public prosecutor's appeal to the Aix-en-Provence Court of Appeal the applicants were at no stage, whether in the summons to appear or at the hearing (see paragraph 30 above), accused by the judicial authorities of having aided and abetted criminal bankruptcy. Admittedly, the Court notes that Chantiers Beneteau lodged additional submissions with the registry on 2 April 1992, that is to say before the hearing in the Court of Appeal (see paragraph 29 above). However, the Government have not provided any information to show that those submissions were effectively communicated to the applicants or their counsel when lodged with the registry or, indeed, subsequently. The Court considers that the mere fact that the civil party's additional submissions were made available at the Court of Appeal's registry could not suffice, by itself, to satisfy the requirements of paragraph 3 (a) of Article 6 of the Convention.

The applicants have acknowledged that they heard counsel acting for Chantiers Beneteau raise as an ancillary point the possibility of their being convicted of aiding and abetting criminal bankruptcy (see paragraph 31 above). The Court notes, however, that it does not appear that either the judges of the Court of Appeal or the public prosecutor referred to that possibility at the hearing or even addressed the civil party's submission. On this point, the Court finds in particular that the arguments put forward by Chantiers Beneteau in its main submissions are referred to in the judgment of the Aix-en-Provence Court of Appeal, but there is no reference to that party's additional submissions (see paragraph 31 above).

56. Having regard to these factors, the Court finds that it has not been established that the applicants were aware that the Court of Appeal might return an alternative verdict of "aiding and abetting" criminal bankruptcy. In any event, having regard to the "need for special attention to be paid to the notification of the accusation to the defendant" and to the crucial role played by written particulars of the offence in the criminal process (see the Kamasinski judgment cited above), the Court considers that none of the Government's arguments, whether taken together or in isolation, could suffice to guarantee compliance with the provisions of Article 6 § 3 (a) of the Convention.

57. The Court must now determine whether the notion of aiding and abetting under French law meant that the applicants ought to have been

aware of the possibility that a verdict of aiding and abetting criminal bankruptcy might be returned instead of one of criminal bankruptcy.

58. The Court notes that the provisions of Articles 59 and 60 of the Criminal Code as applicable at the material time expressly provided that aiding and abetting could only be made out on proof of a number of special elements, subject to strict, cumulative conditions (see paragraph 36 above). Admittedly, aiding and abetting, by its nature, is related to the substantive offence committed by the principal. Acts of accessories only become criminal by reference to offences committed by the principal, which explains the notion of "related criminality" (*emprunt de criminalité*). However, in addition to this first constituent element, aiding and abetting also requires a factual element, that is to say the commission of one of the specific acts referred to in former Article 60 of the Criminal Code, and an element of intent: the awareness by the accessory that he was assisting in the commission of the offence (see paragraph 36 above).

59. The Court cannot, therefore, accept the Government's submission that aiding and abetting differs from the principal offence only as to the degree of participation. The Criminal Code provided otherwise at the material time and, moreover, a clear distinction is drawn in Articles 402 and 403 between accessories and principals: for a defendant to be convicted as a principal, it has to be shown that he acted in one of the capacities set out in section 196 of the Law of 25 January 1985, and referred to in former Article 403 of the Criminal Code (see paragraphs 36-37 above).

60. It is not for the Court to assess the merits of the defences the applicants could have relied on had they had an opportunity to make submissions on the charge of aiding and abetting criminal bankruptcy. The Court merely notes that it is plausible to argue that the defence would have been different from the defence to the substantive charge. On a charge of aiding and abetting, Mr Pélissier and Mr Sassi would have had to persuade the court, firstly, that they had not committed any of the statutorily defined acts of aiding and abetting and, secondly, if they were accused of specific acts of aiding and abetting, that they had been unaware that they were assisting in the commission of an offence. Further, the principle that criminal statutes must be strictly construed means that it is not possible to avoid having to make out the specific elements of aiding and abetting (see paragraph 36 above). The Court notes, too, that the notion of joint offending (*coaction*) referred to by the Government, as indeed that of joint enterprise (*complicité corespective*), concern special situations unrelated to the present case. In the instant case, the Court confines itself to noting that both the Toulon Criminal Court and the Aix-en-Provence Court of Appeal expressly discounted the possibility that the applicants were principals or, therefore, joint principals. The Government's argument that aiding and abetting an offence had on occasion been equated by the courts with acts committed jointly by principals cannot therefore be accepted in the present case.

61. In the light of the foregoing, the Court also finds that aiding and abetting did not constitute an element intrinsic to the initial accusation known to the applicants from the beginning of the proceedings (see the De Salvador Torres judgment cited above, p. 1587, § 33).

62. The Court accordingly considers that in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late.

63. In the light of the above, the Court concludes that the applicants' right to be informed in detail of the nature and cause of the accusation against them and their right to have adequate time and facilities for the preparation of their defence were infringed.

Consequently, there has been a violation of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, which provides for a fair trial.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE LENGTH OF THE PROCEEDINGS

64. The applicants maintained that, contrary to Article 6 § 1 of the Convention, the criminal proceedings brought against them had been unduly long.

65. The Commission agreed with the applicants' submissions. The Government considered that the facts of the case did not disclose any violation of Article 6 § 1.

A. Period to be taken into consideration

66. The Court notes that the period to be taken into consideration in determining whether the proceedings satisfied the "reasonable length" requirement laid down by Article 6 § 1 began when Mr Pélissier and Mr Sassi were charged, that is to say on 14 September 1984 and 12 June 1985 respectively (see paragraphs 18-19 above), and ended with the judgment of the Court of Cassation of 14 February 1994 (see paragraph 34

above). Consequently, the proceedings lasted nine years and five months in the case of the first applicant and eight years, eight months and two days in the case of the second applicant.

B. The reasonableness of the length of proceedings

67. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities (see, among many other authorities, the Kemmache v. France (nos. 1 and 2) judgment of 27 November 1991, Series A no. 218, p. 27, § 60).

1. Submissions made before the Court

68. The applicants argued that there was nothing exceptional about their case and no complex features to it; the fact that it was commercial in nature did not make it inherently complex. In reply to the Government's arguments, Mr Pélissier and Mr Sassi pointed out in particular that there had been only three companies involved (in what had been a normal commercial relationship), four defendants, four charges, and three civil parties who had intervened in the proceedings. They also stated that the oral submissions had been made over two hearings for reasons of convenience pertaining to the judges, not because the case was complex. They submitted that they could not be held responsible for the conduct of Fernand Cortez and that Mr Pélissier's three weeks' absence in July 1986 could not justify the investigation's having taken six years. They argued that the judicial authorities had failed to discharge their obligation of diligence.

69. The Government contested those submissions. They maintained that the economic nature of the case, the fact that there were several defendants, the need to establish what the relationship between the defendants and their companies had been and the discovery of further offences had helped to make the proceedings complex. In addition, the Government contended that Law no. 85-98 of 25 January 1985 reforming insolvency law had created difficulties for the judicial authorities from the moment it came into force, though it had enabled the offence of criminal bankruptcy to be simplified. The Government also argued that by being slow to lodge requested observations or documents, Fernand Cortez had contributed to delays in the proceedings, as had Mr Pélissier, who had informed the investigating judge that he would be away from home from 2 to 24 July 1986. The Government asserted, lastly, that the judicial authorities had conducted the proceedings diligently throughout, apart from a period of inactivity between 3 August 1987 and 30 June 1988 when they had been awaiting a report from an accounting expert. As to the interval between appeals being lodged by the

public prosecutor and Fernand Cortez on 22 March 1991 and the first hearing held by the Aix-en-Provence Court of Appeal on 16 April 1992, the Government explained that there had been a large number of summonses to send to the various parties to the proceedings.

70. The Commission considered that there was no particular complexity to the case and found nothing to suggest that the applicants' conduct had contributed to delays in the proceedings. As regards the conduct of the judicial authorities, the Commission found that there had been delays or periods of inactivity attributable to the national authorities.

2. The Court's assessment

(a) Complexity of the case

71. The Court shares the applicants' view on this issue. In particular, it considers that the economic nature of the offences did not, of itself, make the proceedings especially complex. Furthermore, the Court finds that, as the Government noted, the Law of 25 January 1985 simplified the offence of criminal bankruptcy, which ought to have made the investigating judge's task that much easier. Lastly, the Court finds that the case involved only four defendants, connected with companies engaged in the same line of business, and that there was no evidence of the use of legal structures sophisticated enough to have impeded the investigators' work to any great extent. Accordingly, the length of the proceedings cannot be justified by the complexity of the case.

(b) Conduct of the applicants

72. Like the Commission, the Court finds nothing to suggest that the applicants were responsible for the delays in the proceedings. In particular, the Court considers that in view of the length of the investigation, no criticism can properly attach to Mr Pélissier for his absence from 2 to 24 July 1986 (see paragraph 69 above), that is to say for less than a month during the judicial vacation. As regards the conduct of Fernand Cortez (see paragraph 69 above), for which, it is noted in passing, the applicants cannot be held responsible, the Government have not shown how it could be said to have been dilatory to the point of materially delaying the outcome of the investigation.

(c) Conduct of the judicial authorities

73. The Court notes that the investigation lasted five years, nine months and thirteen days in the case of the first applicant, and five years and fifteen days in the case of the second applicant.

In the light of its findings that the case was not complex and that the applicants' conduct had been reasonable, the Court holds that there was no

justification for the investigation's taking more than five years. Like the Commission, it also notes that there were unjustified delays and periods of inactivity during the investigation, in particular between the *ordonnance de soit-communiqué* of 10 January 1989 (see paragraph 25 above) and the order of 27 June 1990 committing the applicants for trial before the Criminal Court (see paragraph 26 above), and between the order of 15 June 1987 for an expert's report (see paragraph 23 above) and the lodging of that report on 30 June 1988 (see paragraph 24 above). Nor does the Court find persuasive the argument that the judges' work had been made more difficult by the entry into force of the Law of 25 January 1985 (see paragraph 20 above), for, as the Government acknowledged (see paragraph 69 above), that statute had enabled the offence of criminal bankruptcy – the only one the applicants were accused of – to be simplified.

As regards the proceedings before the Criminal Court and the Court of Appeal, the Court further finds that there was an unjustified delay between 22 March 1991, when the public prosecutor and Fernand Cortez lodged their appeals (see paragraph 29 above), and 16 April 1992, when the Aix-en-Provence Court of Appeal held its first hearing (see paragraph 30 above). It considers in particular that the taking of procedural steps as basic and commonplace as serving summonses to appear, in proceedings in which the number of parties cannot be said to have been unusually high, cannot explain such a lengthy delay.

74. The Court observes in this connection that Article 6 § 1 of the Convention imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to decide cases within a reasonable time (see, among many other authorities, the Duclos v. France judgment of 17 December 1996, *Reports* 1996-VI, pp. 2180-81, § 55 *in fine*). The evidence adduced in the present case shows that there were excessive delays, which were attributable to the national authorities.

(d) Conclusion

75. Having regard to all the evidence before it, the Court holds that the "reasonable time" requirement of Article 6 § 1 has been exceeded.

Consequently, there has been a violation of Article 6 § 1 of the Convention as regards the length of the proceedings.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Under Article 41 of the Convention,

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

77. The applicants maintained that they had sustained pecuniary damage under three heads, namely: 30,000 French francs (FRF) being the amount each were fined by the Aix-en-Provence Court of Appeal, FRF 100,000 each to compensate them for the time they had spent, to the detriment of their work, defending what had been abnormally lengthy criminal proceedings, and FRF 275,000 each being their assessment of their loss of profit and business opportunities as a result of their convictions. The applicants claimed FRF 250,000 each for non-pecuniary damage they had suffered.

78. The Government contended that the latter claim for reimbursement could not be satisfied as the applicants had not established a causal link between the violation or violations found and the alleged damage. They also argued that the alleged pecuniary damage resulting from the length of the proceedings had not been shown. As to the remaining heads, a finding of a violation would in itself constitute just satisfaction.

79. The Delegate of the Commission left the issue to the Court to decide.

80. The Court notes that in the present case an award of just satisfaction can only be based on the fact that the applicants did not have the benefit of the guarantees of Article 6. Whilst the Court cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicants as having suffered a loss of real opportunities (see the Colozza judgment cited above, p. 17, § 38). To this has to be added the non-pecuniary damage which the findings of a violation of the Convention in the present judgment do not suffice to remedy. Ruling on an equitable basis, in accordance with Article 41, it awards them FRF 90,000 each.

B. Costs and expenses

81. The applicants, relying on documentary evidence, respectively sought FRF 155,517.62 and FRF 147,215.62 for the costs and expenses incurred in retaining counsel. They apportioned that sum as follows: in the Court of Cassation, Mr Pélissier's costs and expenses were FRF 14,232 and Mr Sassi's FRF 5,930; in the proceedings before the Commission and the Court, each had incurred FRF 141,285.62.

82. The Delegate of the Commission made no observation.

83. The Government maintained that the applicants' claim, in particular concerning the proceedings before the Commission, was clearly excessive. They submitted that any award should not exceed FRF 40,000.

84. On the basis of the information before it, the Court, ruling on an equitable basis, awards the applicants FRF 70,000 each.

C. Default interest

85. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.47% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a breach of paragraph 3 (a) and (b) of Article 6 of the Convention, taken together with paragraph 1 of that Article, as regards the fairness of the proceedings;

2. *Holds* that there has been a breach of Article 6 § 1 of the Convention as regards the length of the proceedings;

3. *Holds* that the respondent State is to pay each of the applicants, within three months, 90,000 (ninety thousand) French francs for pecuniary and non-pecuniary damage and 70,000 (seventy thousand) French francs for costs and expenses, and that simple interest at an annual rate of 3.47% shall be payable thereon from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 March 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar