

35: What is real?

In almost every fraud case in The Netherlands forgery is part of the suspicions. The offense of forgery can be committed in two ways. It is an offense if someone intentionally makes a false document or falsifies a document that is intended to be used as evidence of any fact. The second way is to intentionally use such a false or falsified document as if it were genuine and unfalsified or intentionally deliver or possess such a document. But when is a document false or not in line with the truth? The Dutch Courts have set some boundaries with regard to question when an agreement is considered to be false.

There are two types of forgeries, the material forgery and the intellectual forgery. A material falseness occurs when an incorrect signature is placed on the document or items or references are crossed out. An intellectual falseness occurs in the situation that the content of the document does not comply with the *reality*. For example a false description of agreed services is mentioned or false content of a report. Especially the intellectual forgery is subject of discussion, because how can you decide that a certain description contradicts the truth? In other words, how do you determine what reality is?

In the Dutch "[NS-case](#)" concerning the national railway services the public prosecution argued that several documents were false because they contained a legal arrangement which was in contradiction with reality. In other words, these documents were considered a scheme. In this case a legal construction was prepared to evade a non-competition clause. For this reason an employee was hired by company X for the duration of a year and that the direct competitor of the former employer of that employee would hire this person. After the competition clause expired the employee was hired directly by the competitor.

A regional Court in The Netherlands judged that although this legal construction was created to possibly conceal that the employee worked in violation of the competition clause for the direct competitor of its former employee, this does not mean that this legal construction was in contradiction with reality. The contracts were factual enacted. Furthermore, the Court argued that it is not up to the public prosecutor to prosecute the motives of legal constructions if the prosecutor would find them unethical. It is up to the former employee to take civil actions in this regard. This thus means that if parties act upon a contract, a legal construction is not unreal even if this legal construction has unethical motives.

Another example of a case in which the public prosecution argued that documents were false because they were not real is the '[Achmea-case](#)' concerning a large Dutch insurance company.

The suspect in this case was the general director of Achmea from 2000 until 2009. From 2009 until 2012 he became strategic director. From 2007 onwards this director rented out some property to the company. In the same period the director held meetings about a new remuneration structure. From the correspondence it follows that because of tax reasons part of the remuneration is converted in the rental fees. A regional Court judged that the rental agreements are not false because parties acted in conformity with the clauses in the rental agreements. The Court rules that although these rental fees should be taxed as income, this does not mean that agreements are not in conformity with reality. This means that the agreements have specific tax implications. If certain agreements are requalified for tax purposes this does not mean that the agreements are contradicting reality. The court argued that the property is real and the rental fees have been paid between the parties, for this reason the agreement is real.

In our opinion the regional courts provide us – and the prosecutor's office – with valuable lessons. If legal

constructions are used for certain reasons this does not mean that the contracts are false, as long as both parties acted upon the contracts. In that case the agreements are real, whatever civil or tax implications these legal constructions may have.

Do you have any questions about this subject, are you struggling with a related issue or would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.