

#17: White lies or swindle?

Various classic criminal offences are getting more common in the area of fraud cases. Examples are charges of forgery or money laundering in a case which is in principle a tax fraud case. The wide coverage of those penal provisions make them a beloved weapon for the authorities to prosecute alleged fraud. If tax or another kind of financial fraud cannot be proven, these kind of provisions are a good back-up. In practice they are some sort of safety net. The new kid in town seems to be the charge of swindle. Jurisprudence shows that article 326 of the Dutch Penal Code is getting more and more popular. But when does an act qualify as swindle? The Supreme Court of the Netherlands has set some records straight by the end of last year by giving an [overview judgement](#) .

Swindle in the Netherlands is often used in our day-to-day language. There is even a popular television show called 'Swindled?!', in which various (alleged) crimes are documented and tips and tricks how to avoid being swindled are given. This might be a reason that one would assume to know what the legal scope of the provision is. Case-law however shows that the (lower) courts struggle with the qualification of swindle. Because when does a white lie turn into swindle? Since the overview judgement of 20 December 2016 of the Supreme Court r there is more guidance.

Based on article 326 of the Dutch Penal Code any person who, with the intention of benefitting himself or another person unlawfully, either by employing a false name or a false capacity, or by cunning manoeuvres, or by a contexture of lies, induces a person to hand over any property, to render a service, to make data available, to incur a debt or relinquishes a claim is guilty of swindle. Practice shows that it is often unclear when the swindle means – a contexture of lies, cunning manoeuvres or employing a false name or capacity – are at hand. The Supreme Court in its overview judgement

ruled that an important mutual reference of all these means is that the suspect by a specific and serious form of deceitful actions gives someone a misrepresentation of the truth in order to misuse that to his own advantage.

With respect to the contexture of lies according to the Supreme Court in principle it has to concern a verbal or written statement which can create a misrepresentation of the truth by more than one false notice or piece of information. With respect to cunning manoeuvres, it has to concern more than one sole misleading act which could create a misrepresentation of the truth. When it comes to employing a false name or false capacity that the acts of the suspect could lead to a misrepresentation of the suspect himself.

Jurisprudence thus shows that a single (white) lie or a single misleading act is not enough to qualify as swindle. The judgement of the Supreme Court led to more critical case-law of lower courts when it comes to the assessment of the alleged used swindle means. This was for instance the case in the decisions of lower courts of [27 March 2017](#) and [29 March 2017](#).

Also the requisite that the victim has to be induced to hand over a certain good is tricky. The Court of Appeal of Amsterdam was very critical in a [recent judgement](#) on the position of the victim, rather than the suspect. In that case the suspicion was that the suspect had made agreements in order to invest in apartment rights, while the investment would not lead to the result as agreed upon. The Court emphasized that the legislator wanted to avoid that default – for which via a civil procedure compensation can be claimed – would qualify as a criminal offense. Perhaps embezzlement would be more suitable in such a situation, depending on the facts of course.

The Court also pointed out that that it is of importance to determine whether the swindle means was conflicting with the truth. As future uncertain events – the profit of the

investments – are involved in this case to which the victim had committed himself in an agreement the Court judged that this cannot be qualified as swindle.

Hence, there are various defense lines conceivable when confronted with a charge of swindle. Dutch jurisprudence shows that the means – the acts of the suspect or the information spread by the suspect – have to be assessed very carefully. Were these acts or notifications conflicting with the truth or not? And were they all conflicting with the truth? And if so, did these acts or notifications result in the false idea of the truth of the suspect? Or was it the suspect who should have been more careful or less naive? Or is it a plain civil tort issue when something does not turn out as agreed upon and is a criminal investigation or prosecution simply out of line? These questions are all relevant in order to avoid that the swindle line is crossed too soon in court.

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.