**CASE TRANSLATION: BELGIUM**

CASE CITATION:
**CSWARE bvba v Pepijn Descampes, trader**

CASE NUMBER:
**Case 2007/AR/462**

NAME AND LEVEL OF COURT:
**Ghent Court of Appeal, Chamber 7bis**

DATE OF DECISION: **10 March 2008**

MEMBERS OF THE APPEAL COURT:
**Frank Deschoolmeester, Judge and Frank Jodts, Clerk**

LAWYER FOR THE PLAINTIFF:
**Mr Jan Leysen (on appeal)**

LAWYER FOR THE DEFENDANT:
**Mr Guido Callewaert**

The Court rules as follows:

The parties and their arguments were heard in public session and their statements have been examined.

1.
By petition deposited on 15 February 2007, the claimant has appealed the decisions of 25 March 2005 and 24 November 2006 of the 3rd chamber of the Commercial Court of Kortrijk (AR. A/2821/04). The latest decision was served on the claimant on 17 January 2007.

## Facts and procedure of first instance

2.
Pepijn DESCAMPS (hereinafter 'defendant') acted as a consultant to bvba CSWARE, an IT company that manages systems and networks for companies (hereinafter 'claimant'), of which he was a partner at the time.

By summons served on 6 July 2004, the defendant *[claimant in the procedure of first instance]* demanded the payment by claimant of ten invoices and/or bills, diminished by the amount of two invoices he owed the claimant, or, the payment of: 13.633,86 EUR (principal sum) + 416,32 EUR (9,5% agreed interest) + 1.363,39 EUR (10% damage clause) = 15.413,57 EUR.

The claimant demanded by counterclaim the payment by the defendant of the two invoices (of which the defendant recognizes he owed them) for a total sum of 3.297, 35 EUR (principal sum), plus 12% agreed interest and plus 10% damage clause (329,73 EUR).

The claimant claims it was agreed on 25 October 2003 that she would only accept invoices of which she had approved and signed on the order form in advance. She also states she informed the defendant (who contests this) of this by e-mail.

Furthermore, the claimant states she objected to every one of these invoices by e-mail.

The defendant claims he never received the e-mails and states such documents can easily be produced after the event by anyone with sufficient technical knowledge.

By interlocutory judgment of 25 March 2005, the first judge sustained both the claim and the counterclaim. Before ruling on the merits of the case, the judge appointed engineer Philippe WUYLENS as an expert. He had to determine the true nature of the creation, the sending and the receipt of the relevant e-mails.

The final report of the expert was deposited at the court registry on 26 October 2005.

By final judgment of 24 November 2006, the first judge accepted the claim and ordered the claimant to pay to the defendant the following sums: 15.413,57 EUR, 9,5% judicial interest per year on the amount of 13.633,86 EUR and the legal interest on 1.363,39 EUR, all to be calculated from the day of summons until the day of payment. The defendant also had to pay the costs of the proceedings and her counterclaim was ruled to be unfounded.

## Procedure of appeal

3.
The defendant in the first instance procedure (the claimant in this procedure) appealed the decision. The claimant states the alleged manipulation of her e-mails is not proven, which entails their evidence still stands. Fraud must be proven. In a subsidiary order, she requests permission to order witnesses and/or the parties to appear in court.

The defendant requests that the judgments of the court of first instance to be upheld.

Detailed statements of the complaints and arguments of the parties can be found in the appeal and the conclusions.

## Evaluation

4.
The expert was asked if the e-mails, which are of vital importance for the judgment of this case, were actually sent to the defendant via internal company mail, if they

reached him and if he read them.

The expert concluded as follows in his report:

> 'The e-mail system of the defendant (claimant in this procedure) is an internal system that does not route e-mails through the internet (world wide web) and thus functions without being controlled by an independent internet service provider.' (page 4, point 4a);
>
> 'The defendant is the system administrator to her own mail server. This implies that she has unlimited access to the mailboxes and properties of all e-mail users. This means she can log on to the e-mail system using another name (e.g. the name of the claimant) and can act as she wishes using another name... In other words, the internal concept of the e-mail system of the defendant does not allow the conclusion with technical certainty that the claimant did receive and read the e-mails.' (page 5, point b and page 7, conclusions 6a and 6b);
>
> 'In theory, it would be possible for the defendant, in her capacity of system administrator, to manipulate the clock of the server and thus send e-mails with a forged date, possibly using another name. A simple command can randomly set the clock of a computer and for example antedate the clock. From a practical point of view, this will be less easy because the system clock of the e-mail server applies to all e-mails of the system, which implies date of all e-mails would be changed.' (page 5, point d and page 7, conclusion 6c);.

If the claimant claims she sent certain e-mails to the defendant in which it was 'agreed' that she would only accept invoices of which she had approved and signed the order form in advance, or in which she objected to the invoices and bills, it is for her to prove she did send them.

As did the first judge, the Court concludes from the expert report that the claimant fails to deliver this proof. The print-outs presented of the e-mails have no evidential value (exhibit 1 to 4 of the claimant).

5.

This judgement is even strengthened by the following:

Apparently, Mr Tjerk BEKE, a colleague of the defendant, also never received similar e-mails supposedly sent by the claimant (exhibit 24 of the defendant).

Also, certain invoices and bills of the period October 2003-January 2004 (after the alleged e-mail of 25 October 2003), were paid by the claimant without reservation, even though she had not approved and signed order forms for these invoices and bills in advance (exhibits 16 to 22 of the defendant).

Finally, the claimant never spoke of the e-mail confirming the agreement and the e-mails in which she supposedly objected to the invoices (exhibits 1 to 4 of the claimant) until after she received the summons.

6.

The final invoices (exhibits 2 to 5 of the defendant) and bills (exhibits 8 to 13 of the defendant) of the defendant were never paid. The claimant does not prove that she, as a trader, objected to the invoices in time, not even after being served two formal notices on 21 April 2004 and 9 June 2004 (exhibits 14-15 of the defendant).

The defendant presented his invoice book which shows the invoices were regularly recorded, on their specific dates (exhibit 27 of the defendant). The bills did not have to be included in the accounting since they only concerned the reimbursement of established costs that had been advanced by the defendant (exhibits 28 and 31 of the defendant).

The claimant mistakenly states that the burden of proof concerning the alleged manipulation of the e-mails lies with the defendant. It is, on the contrary, for the claimant to prove her 'agreements' and 'objections' by establishing with certainty the creation, sending and receipt of the e-mails.

The Court considers no further measures of investigation are necessary, since an expert (who also talked to all persons involved and examined the system) has already analysed this question thoroughly.

By lack of proven objections to the invoices and bills, the original claim of the defendant is considered to be legitimate. The judgment of the Court of First Instance is upheld.

FOR THESE REASONS

THE COURT

Ruling on the inter partes procedure;

Considering article 24 of the Act of 15 June 1935 concerning the use of language in court;

Finds the appeal to be admissible, but unfounded;

Upholds the appealed judgments;

Sentences the claimant to pay the costs of the appeal proceedings, settled on 1.100,00 EUR (Royal Decree 26 October 2007);

 

Ruled and judged in the public session of the Ghent Court of Appeal, Chamber 7bis, Civil affairs, of 10 March 2008.
Present:
Frank DESCHOOLMEESTER, Judge
Frank JODTS, Clerk

## Précis and commentary

E-mail – Evidential value and force – Electronic signature

If the authenticity of an e-mail is contested, it is for the party invoking the e-mail to prove its authenticity. An e-mail sent through an internal e-mail system that is under the control of the sender and does not route e-mails over the public internet, cannot be used as proof by the sender of the e-mail.

## Facts

Mr Descamps acted as a consultant to CSWARE, an IT company that manages systems and networks. When CSWARE stopped paying for his services, Mr Descamps demanded the payment of ten outstanding invoices and bills. CSWARE, however, claimed both parties agreed in October 2003 that CSWARE would only accept invoices that had been approved by it in advance. CSWARE stated it informed Mr Descamps of this by e-mail and also claimed it objected to every invoice dated after October 2003.

To prove its claims, CSWARE presented printouts of the relevant e-mails to the court. Mr Descamps, however, argued he never received any of the e-mails, and pointed out that the e-mails could easily have been produced after the event by anyone with sufficient technical knowledge.

## Internal e-mail system

The Court of First Instance appointed an expert to determine the true nature of the contested e-mails and to investigate whether or not, how and when the e-mails had been sent and received. The expert found that CSWARE used an internal e-mail system that did not route internal e-mails over the public internet. Consequently, internal e-mails never passed the servers of an independent internet service provider and never left a reliable audit trail. Moreover, CSWARE administered the e-mail server itself, and therefore had access to the mailboxes of all users.

This system setup enabled CSWARE, in its capacity of system administrator, to manipulate the clock of the server and to send out e-mails with forged dates, possibly even under another name, should it wish to. Taking into account the architecture of the internal e-mail system and the possibility of manipulation, the expert stated there was no certainty as to whether or not Mr Descamps did in fact receive and read the alleged e-mails regarding the prior approval of invoices.

## Decisions

The Court of First Instance followed the reasoning of the expert and ruled in favour of Mr Descamps. CSWARE appealed this verdict on the grounds that the alleged manipulation of the e-mails was never proved, and that their evidential value would thus still stand.

The Court of Appeal confirmed, however, that the burden of proof was with CSWARE, and that CSWARE needed to prove it did in fact send the e-mails. The Court of Appeal did not accept the simple print-outs of the e-mails as evidence, also taking into account the fact that a colleague of Mr Descamps never received similar e-mails purportedly sent by CSWARE. Furthermore, some invoices and bills from the period October 2003 – January 2004 had been paid by CSWARE, even though no order forms had been issued and signed previously. The Court also noted that CSWARE never mentioned the e-mails until after it received the summons. The Court of Appeal therefore confirmed the decision of the Court of First Instance.

## Consequences

Both decisions concern the evidential value and force of e-mails. Following EU legislation in this field (Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, OJ L 13, 19.01.2000, p.12), Belgium introduced several laws on electronic signatures in 2000. In short, these laws hold that a court can accept any type of electronic signature (provided it can be uniquely linked to the signatory and demonstrates the integrity of the document), and must accept certain advanced ('qualified') types of electronic signatures. The evidential force of such qualified electronic signatures (often digital signatures) is equal to the evidential force of traditional, handwritten signatures. The electronic signature laws are accompanied by the national provision of electronic identity cards, enabling every Belgian citizen to sign documents with a qualified electronic signature. Digital signature schemes can also be provided by third party providers.

Although the system of electronic signatures is legally

sound, qualified electronic signatures are not yet frequently used in Belgian legal practice. They are often found to be too complex and too difficult to use, leading to a 'chicken-and-egg' situation where providers wait for users to adopt them to develop products and services, and customers wait for a wide availability of products and services to effectively use qualified electronic signatures. So far, qualified electronic signatures are mainly found in specific, controlled environments, although promising trials indicate that their use may increase in the future.[1]

Even though qualified electronic signatures are not often used yet, the evidential value of e-mails, not signed with such a signature, is not generally found to be problematic in Belgian legal practice. Belgian courts generally accept regular (printed) e-mails as evidence, unless a party invokes its alleged invalidity. An example is a 2003 decision of the Ghent Labour Court of Appeal, which held that a regular e-mail with no qualified electronic signature can be used to prove a contract when no formally signed contract was available.[2]

The two decisions discussed above constitute an interesting illustration of this legal practice. Belgian courts generally accept e-mails without qualified electronic signatures, provided it can be reasonably proved that the e-mail was effectively sent by the alleged sender, and that the content has not been tampered with. Internal e-mail systems might not meet these criteria, as they might be easily manipulated by their administrators, depending on the architecture of the system.

The legal argument would have been even more interesting should the contested e-mail have been sent using public e-mail servers that are under the control of a third party (such as an internet access provider).

In light of the technical nature of regular e-mail systems, it can be expected that additional cases will arise in the future, where courts require a party to deliver the difficult prove that a contested e-mail has effectively been sent and that its content has not been forged. Given a critical amount of such cases, the merits of the current cases may lie in the fact that they spur companies to adopt electronic signatures and accompanying features, such as digital certificates and trusted timestamps.



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[1] *See http://www.fedict.be for an overview of trials and examples of use.*

[2] *Ghent Labour Court of Appeal (Bruges department, 7th chamber), 23 September 2003, Journal des tribunaux de travail, Volume 893, 2004, p. 334.*

 