

EXHIBIT 1.E

ECLI:NL:HR:2005:AT4418

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| Judicial authority | Dutch Supreme Court |
| Date of judgment | June 14, 2005 |
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| Case No. | 03272/04 B |
| Procedural references | Opinion: ECLI:NL:PHR:2005:AT4418 |
| Areas of law | Criminal law |
| Specific features | Cassation appeal |

Content indication Search for purposes of seizure at an attorney (suspect). 1. The attorney's legal privilege is not absolute in the sense that there might be very exceptional circumstances imaginable where the interests of uncovering the truth – including matters entrusted to the attorney's knowledge in that capacity – must take precedence over attorney-client privilege. What this means is that while searching for the purposes of seizure at an attorney's office without his consent can already happen if it pertains to letters and documents that are the subject matter of the criminal offense or have been used in its commission, this consent is likewise unnecessary if there are very exceptional circumstances where the search has a further purpose and is targeted at letters and documents that may be used to uncover the truth. It is not possible to summarize, in terms of a general rule, the answer to the question of which circumstances should be classified as very exceptional. The simple fact that an attorney is classed as a suspect is not enough, in any event, but the suspicion of a serious crime – such as the attorney forming a criminal conspiracy with specific clients – would be. In those cases, the interests of those clients who have entrusted certain knowledge in that criminal situation to the attorney, on the assumption that it will be kept secret, must yield to the interest of uncovering the truth. In such a case, the attorney-client privilege and associated constraints on exercising the power of search and seizure must yield to the interest of criminal prosecution, albeit that the breach of attorney-client privilege may not go further than is strictly necessary for uncovering the truth surrounding the relevant offense. Due care must also be observed to ensure that the interests of the attorney's clients other than those involved in the criminal offenses of which the attorney is suspected are not impacted disproportionately (Dutch Supreme Court NJ 2002, 438 and Dutch Supreme Court NJ 2002, 439). 2. It was neither incorrect nor incomprehensible for the District Court to hold that there were very exceptional circumstances in this case, as a result of which the interest in uncovering the truth – including in relation to knowledge entrusted to the complainant in that capacity – should take precedence over attorney-client privilege (the attorney was suspected, correctly in the view of the District Court, of money-laundering involving potentially a very large amount of cash in terms of Articles 420ter or else 420bis of the Dutch Penal Code ('DPC') and forgery of a notarial deed in terms of Articles 225 and/or 226 DPC, or else of participating or assisting in the commission of those offences, while there appeared to be a serious interest in investigating four joint suspects). Nor is there any evidence of an incorrect legal understanding by the District Court in its finding that when balancing the interests in question in a case like this, one factor that was also significant was that there were joint suspects and there was also an interest in investigating those joint suspects. 3. In a case of very exceptional

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circumstances such as this one, where the interest in uncovering the truth takes precedence over attorney-client privilege, the power of search is not confined to letters or documents that form part of the subject matter of the criminal offense or have been used to commit the offense, so that the question whether the documents are of that nature is irrelevant (Dutch Supreme Court, NJ 2002, 439).

**Statutory
references
Sources**

Dutch Code of Criminal Procedure
Dutch Code of Criminal Procedure 98
Rechtspraak.nl
JOL 2005, 369
NJ 2005, 353
NBSTRAF 2005/253

Judgment

June 14, 2005
Criminal Section
no. 03272/04 B
EC/SM

Supreme Court of the Netherlands

Decision

on the cassation appeal against a judgment by the District Court of 's-Hertogenbosch of October 6, 2004, No. RK 04/968, on a complaint as defined in Article 552a of the Dutch Code of Criminal Procedure, filed by:
[complainant], born in [place of birth] on [date of birth] 1969, residing in [place of residence].

1. The challenged decision

The District Court held that the complaint filed by the complainant for return to him of certain items described in its decision was without merit.

2. Proceedings in cassation

The appeal was filed by the complainant. A.A. Franken, attorney practicing in Amsterdam, filed grounds for cassation in a document on his behalf. The document is attached to this ruling and constitutes a part thereof. Advocate-General Wortel concluded that the Supreme Court should dismiss the appeal.

3. Course of the proceedings

The following assumptions may be applied in the context of the cassation appeal.
The complainant is an attorney. A preliminary judicial investigation against him was initiated in relation to suspected violation of Articles 420bis and/or 420ter and/or violation of Articles 225 and/or 226 of the Dutch Penal Code, or of participating in and/or being an accessory to the commission of those offenses. The charge against the complainant entails – briefly – that he, potentially along with one or more others, forged documents, namely (parts of) a private client administration, business administrations, valuation reports and/or notarial deeds, or else intentionally used those forged documents and disguised or concealed the true nature and origins of cash and residences and the identity of the ultimate beneficiaries.

In the context of the preliminary judicial investigation against the complainant, a search for the purpose of seizure was performed at the complainant's office address on September 21, 2004 under the direction of the Investigating Judge. The Investigating Judge was accompanied by the Dean of the Bar Association for the court district of Amsterdam. The Investigating Judge seized a number of documents in the course of this search. The complainant did not consent to the search of his office, nor to the seizure of documents.

The complainant filed a complaint as defined in Article 552a of the Dutch Code of Criminal Procedure on September 28, 2004. On October 6, 2004, the Investigating Judge submitted three sealed envelopes – numbered 1, 2 and 3 – in judges' chambers. Envelopes 1 and 2 contained the documents that the Investigating Judge had seized, following advise on this from the Dean. Envelope 3 was returned to the complainant with the consent of the Public Prosecutor and without the District Court becoming aware of the contents of the documents it contained, as the Investigating Judge and the Dean considered that these documents were of no interest in the criminal investigation against the complainant or his joint suspects.

The District Court issued the disputed decision on October 6, 2004 after hearing the case in chambers.

4. Assessment of the first ground for appeal in cassation

4.1. This ground complains, among other things, that the District Court was incorrect in taking into consideration that there was a compelling investigation interest in relation to the complainant's joint suspects.

4.2. The District Court made the following finding in the disputed judgment:

"Under Article 98(1) of the Dutch Code of Criminal Procedure, letters or other documents in the custody of those who are entitled to legal privilege (in this case the attorney) may not be seized without their consent if those letters or documents are covered by their duty of confidentiality. Paragraph 2 of that Article provides that, unless they consent, a search will only occur for such persons to the extent that it can be done without violating their positional, professional or official confidentiality and any such search will not extend to letters or documents other than those that are part of the subject matter of the criminal offense or have been used in its commission.

In the view of the District Court, there is a further exception to the assumption contained in Article 98(1) of the Dutch Code of Criminal Procedure, which is – briefly – if the interest of uncovering the truth takes precedence over professional secrecy. That will only be the case in very exceptional circumstances, which may be present if the individual protected by attorney-client privilege is suspected of a serious criminal offense.

The District Court supports the premise that the opinion on whether letters or documents are protected by privilege is in principle a matter for the individual entitled to the privilege.

There is an exception to this, however, in an exceptional case as defined above. When balancing the interests in this sense, the fact that there are joint suspects and an interest in investigating those joint suspects as well is a factor that may be considered.

In this case, the District Court considers that this is one such exceptional case as outlined above. The complainant is an attorney and attorney of record and, in the District Court's view, is correctly suspected of money-laundering within the meaning of Articles 420ter of the Dutch Code of Criminal Procedure or money-laundering within the meaning of Article 420bis of that Code, and also of (aggravated) forgery in a notarial deed, as defined in Articles 225 and/or 226 of the Dutch Code of Criminal Procedure, or else of participating or assisting in the commission of these offenses.

There is sufficient evidence from the documents currently available to conform that the potential money-laundering related to a very large amount of cash. Those documents also confirm a compelling investigative interest against the joint suspects 1, 2, 3, and 4, [joint suspect 1], [joint suspect 2], [joint suspect 3] and [joint suspect 4] who may or may not be under arrest.

The seizure of the relevant documents is accordingly lawful.

In this case, therefore, the complainant loses his right to attorney-client privilege.

In this regard, the District Court has noted the documents that were ultimately seized.

The seized documents in envelope number 1 are also, in the view of the District Court, documents that [...] form part of the subject matter of the criminal offense or that have been used in its commission and, for this reason also, it must be concluded that the seizure was lawful."

4.3. The explanation accompanying the ground for appeal in cassation states that the investigative interest relating to joint suspects may not play any part in the decision as to whether uncovering the truth must take precedence over attorney-client privilege of the suspect who benefits from that privilege.

4.4. The attorney's legal privilege is not absolute in this sense; there might be very exceptional circumstances imaginable where the interests of uncovering the truth – including matters entrusted to the attorney's knowledge in that capacity – must take precedence over attorney-client privilege. What this means is that while searching for the purposes of seizure at an attorney's office without his consent can already happen if it pertains to letters and documents that are the subject matter of the criminal offense or that have been used in its commission, this consent is likewise unnecessary if there are very exceptional circumstances where the search with a view to seizure has a further purpose and is targeted at letters and documents that may serve to uncover the truth. It is not possible to summarize, in terms of a general rule, the answer to the question of which circumstances should be classified as very exceptional. The simple fact that an attorney is classed as a suspect is not enough, in any event, but the suspicion of a serious crime – such as the attorney forming a criminal conspiracy with specific clients – would be. In those cases, the interests of those clients who have entrusted certain knowledge in that criminal situation to the attorney, on the assumption that it will be kept secret, must yield to the interest of uncovering the truth. In such a case, the attorney-client privilege and associated constraints on exercising the power of search and seizure must yield to the interest of criminal prosecution, albeit that the violation of attorney-client privilege may not go further than is strictly necessary for uncovering the truth surrounding the relevant offense. Due care must also be observed to ensure that the interests of the attorney's clients other than those involved in the criminal offenses of which the attorney is suspected are not impacted disproportionately (cf. Dutch Supreme Court NJ 2002, 438 and Dutch Supreme Court NJ 2002, 439).

4.5. Applying the correct criterion, the District Court explained that and why it held that there were very exceptional circumstances here, meaning that the interest of uncovering the truth – including matters entrusted to the knowledge of the complainant as such – must take precedence over attorney-client privilege. That finding does not show an incorrect understanding of the law and is not incomprehensible. Nor is there any evidence of an incorrect legal understanding by the District Court in its finding that when balancing the interests involved in this case, it should attach weight to the fact that there were joint suspects and that in a case such as this one weight should also be attached to the investigative interest relating to those joint suspects.

4.6. The ground for appeal accordingly fails.

4.7. Nor can the other ground for appeal in cassation described in the complaint be successful. In the light of section 81 of the Judiciary Organization Act [*Wet op de Rechterlijke Organisatie*], this does not require any further substantiation, as the complaint does not warrant the answering of legal issues in the interests of the unity or the development of law.

5. Assessment of the second ground for appeal in cassation

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