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Sources	Rechtspraak.nl
	JIN 2020/117 with commentary by Analbers, R.J.W.

Opinion

PROCURATOR GENERAL

OF THE

SUPREME COURT OF THE NETHERLANDS

No. 19/01958

Hearing date January 3, 2020

OPINION

L. Timmerman

In the matter of:

1. F.J.G.M. Cremers

2. F.D. Stibbe

3. E.M. Jansen Schoonhoven

vs.

1. SRH N.V.

2. De Volksbank N.V.

3. Vereniging van Effectenbezitters

This matter turns on whether corporations that are the subject of an investigation may invoke (derivative) legal privilege against the investigators in the disclosure of documents that the investigators have requested as part of their investigation, more specifically whether they may refuse to allow the investigators to inspect privileged information that is contained in, among other things, their executive and investigating boards' minutes and board resolutions. In a decision of February 26, 2019, the investigating justice of the Enterprise Chamber ruled that the functional legal privilege of inter alia attorneys and civil law notaries, which is based on a general legal principle in the Netherlands, extends to include the investigation proceedings. The corporations may deny the investigators access to privileged information on that basis. In the disputed decision, the investigating justice prescribed a procedure in which the investigators could ask the investigating justice to order the corporations to disclose the relevant information to the investigators. In such a case, the investigating justice would make a ruling on this, if necessary after examining the relevant information and after giving the person relying on legal privilege the opportunity to comment on this and without the investigators and other interested parties having access to that information. In my view, the investigating justice's decision must be upheld in cassation.

This matter is related to the cassation appeal by the State and NLFI and the cassation appeal by SNS Reaal and SNS Bank against the decision of the Enterprise Chamber of July 26, 2018, in which the Chamber ordered an investigation into the policy of and course of proceedings at SNS Reaal and SNS Bank. In those cases, pending under case nos. 18/04509 and 18/04511, I issued opinions to dismiss the cassation appeal.

[…]

2.23 If the legal entity relies on the right of refusal, the investigators must make a decision. If they believe that the reliance on legal privilege is legitimate, they can acquiesce in the refusal to give access to information. This is evidently what happened in the *Unilever* case (see para. 2.15 above). It should be noted that this turned on written advise of attorneys and civil-law notaries as such, rather than on information in other documents that fall under attorney-client privilege (cf. para. 3.14 of the disputed decision). If they believe that the legal entity was not entitled to rely on its right of refusal or if they believe that the reliance on legal privilege is legitimate in itself but is outweighed by the interests of uncovering the truth in this case, they may ask the investigating justice to make a ruling on this. To make this decision, the investigators must be given the opportunity to do what is necessary to substantiate the plausibility of the assertion that it is information covered by attorney-client privilege.[126] If the information covered by attorney-client privilege is part of minutes or other written documents, this can be achieved by not redacting the names of the attorneys, civil law notaries and their firms. This may be submitted to the investigating justice in the manner set out in provision 5.6 of the Guidelines (see para. 2.16 above), resulting in an instruction by the investigating justice as referred to in Article 2:350(4) of the Dutch Civil Code ('DCC') or an order as referred to in Article 2:352 DCC. It should be noted here that an appeal in cassation may only be filed against an Article 2:352 DCC decision by the investigating justice (see para. 2.2 above). This matter involves an Article 2:352 DCC decision by the investigating justice.

The question that then arises is how broadly the investigating justice may review the refusal to give access by relying on legal privilege. As I noted earlier (in para. 2.21 above), the professional parties relying on legal privilege are in principle the ones that are designated to protect the interests that led to the introduction of legal privilege.[127] Ever since the *Notaris Maas*

decision, it is established case law that the court simply conducts a limited review of the position of the party relying on legal privilege based on the criterion of whether "thre is considered to be a reasonable doubt as to whether (…) those answers could be given truthfully without disclosing what should remain concealed." [128] The Dutch Supreme Court is also reticent in assuming "very exceptional circumstances" in which the interest of uncovering the truth outweighs legal privilege.[129] That reticence springs from the principle of legal certainty.[130] This doctrine is subject to criticism in the literature.[131] Asser notes the following on this:

"These strong basic premises [from the *Notaris Maas* decision, A-G] are clear but, contrary to the fears of the Dutch Supreme Court in the *Notaris Maas* decision, it is entirely possible for the court to conduct a nuanced review in concrete cases, in the footsteps of Vranken and De Bock, when it comes to the question of whether attorney-client privilege must be overridden or not. A nuanced approach does not produce the feared consequences contemplated by the Dutch Supreme Court in that decision if the court respects the basic premises as such, namely that departing from them is reserved for exceptional cases. The review does not otherwise differ fundamentally from the review in so many other cases in which public and private interests are at stake." [132]

I noted earlier that the legal entity will, in part, base its decision to rely on legal privilege or not on its own procedural interests. The public interests that are served by attorney-client privilege are therefore more in the background. In my opinion, in investigation proceedings the investigating justice may conduct a review of the merits of the conflict of interests between uncovering the truth and attorney-client confidentiality, in which he can assess in individual cases which interest must outweigh the others.[133]

[…]

Sub-ground for appeal in cassation 1: the interest in clarity about the nationalization may take precedence over attorney-client privilege

2.45 Sub-ground for appeal in cassation 1 takes issue with the investigating justice's finding in para. 3.9 that the circumstance that there was a compelling public interest in obtaining a full picture of the course of events relating to the period before the nationalization of SNS Reaal et al. is not an exceptional circumstance in which the interest in uncovering the truth must take precedence over attorney-client privilege. The first sub-ground for appeal in cassation argues that this finding shows an incorrect interpretation of the law as to which circumstances are sufficient to set aside attorney-client privilege, or is incomprehensible without further substantiation.

2.46 In the *Notaris Maas* decision, the Dutch Supreme Court kept its options open by finding that "very exceptional circumstances" can occur in which the interest in uncovering the truth must take precedence over attorney-client privilege.[182] The Dutch Supreme Court exercises restraint in assuming these "very exceptional circumstance" (see also para. 2.23 above).[183] In that context, A-G Leijten noted in an opinion "that exceptional circumstances are rare, so that very exceptional circumstances are difficult to imagine for ordinary people."[184] Nonetheless, very exceptional circumstances tend to multiply.[185] Very exceptional circumstances have been assumed in some criminal cases. According to the Dutch Supreme Court, 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.[186] According to the Dutch Supreme Court, the position that such circumstances, and consequently an exception to the main rule regarding legal privilege, exist is subject to stringent requirements to give reasons.[187] The literature does not rule out that "very exceptional interests" can also occur in civil cases:
"Evidently, attorney-client privilege is only set aside in the event of circumstances that may have serious implications for society; that can also be the situation in civil cases, but is more likely to be the case in criminal proceedings. An individual, financial interest does not, in any event, carry sufficient weight. The interest in uncovering the truth may only take precedence over the public interests served by attorney-client privilege if public interests are involved."[188]

2.47 ..Against this background, the first sub-ground for appeal in cassation must fail. In para. 3.9, the investigating justice did not rule out in a general sense that there might be "very exceptional circumstances". The investigating justice's finding means that the circumstance submitted by the investigators, that there were compelling public interests in obtaining a full picture of the course of events relating to the period prior to the nationalization of SNS Reaal et al. (see also para. 3.1: "that compelling interests are served by obtaining a full picture of the course of events"), does not amount to such an "exceptional circumstance". The investigating justice substantiated his finding by referring to the *Notaris Maas* decision and the *Savanna* decision. That finding does not show an incorrect interpretation of the law and is sufficiently comprehensibly substantiated. Given the exceptional nature of assuming this exception, especially in civil cases, the investigating justice did not have to give further reasons in para. 3.9. The stringent requirements to give reasons that apply to assuming "very exceptional circumstances" do not equally apply to *not* assuming "very exceptional circumstances". I would also like to note that although the "compelling public interests in obtaining a full picture of the course of events" are not enough to assume "very exceptional circumstances", they can play a part in the investigating justice's review of the merits of the legal entity's right of refusal by relying on legal privilege (paras. 3.15-3.16, see also paras. 2.22-2.23 above). In that review, the investigating justice may include all the circumstances of the individual case in his assessment. The literature distinguishes two stages in a judge's review; the first is a judicial assessment of the extent of the right of privilege and the second stage is considering whether there are "very exceptional circumstances" to justify overriding the attorney-client privilege.[189] If the first stage is more substantive, which I have defended in this opinion following on from the literature (see paras. 2.20-2.23 above) and in line with the investigating justice's decision (see paras. 3.15-3.16), there is less reason to stretch the limits of the category of "very exceptional circumstances".[190]

[...]

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