

Statement of Defence on behalf of Van Cann and Jansen

Amsterdam Court of Appeal

Reference: 200.360.223

STATEMENT OF DEFENCE ON BEHALF OF VAN CANN AND JANSEN

In the matter of:

1. Ms. Giselle Jacqueline Marie-Thérèse van Cann,
2. Mr. Paul Edwin Jansen,
both choosing domicile for service in Amsterdam, hereinafter jointly referred to as
“Respondents”,
counsel: Ms. A. Bekema and Mr. P. Lichtendahl

against:

1. Mr. [REDACTED], residing in Leeuwarden
2. Ms. [REDACTED], residing in Brunssum
3. Mr. [REDACTED], residing in Leeuwarden
hereinafter jointly referred to as “Applicants”,
counsel: Mr. P.W.J. Stassen

A. INTRODUCTION

4. By petition dated 15 September 2025, Applicants lodged an appeal against the order of 20 August 2025 of the District Court of Northern Netherlands (the “Order”), in which the District Court—briefly put—rejected the request to hold a preliminary taking of evidence (the hearing of experts regarding Covid-19 vaccines).
5. Pursuant to Article 200 Rv, in principle no appeal lies against a decision on a request for a preliminary taking of evidence, unless the court determines otherwise.
6. Only in very exceptional circumstances can the appellate bar formulated in Article 200(2) Rv be departed from. Respondents take the position that such exceptional circumstances are not present in this case and therefore request the Court to declare Applicants inadmissible in their claims, or alternatively to dismiss their claims.

B. APPEAL AND “BREAKTHROUGH” GROUNDS

7. Applicants state that they are not only appealing the Order, but also “the procedural decisions taken prior thereto regarding the public nature of the oral hearing and the possibility withheld from the public and the ‘non-accredited journalists’ to make audio and video recordings of the hearing.”
8. No independent appeal lies against measures of order or procedural decisions of the District Court, since these measures of order do not form part of the Order. Respondents therefore understand the Petition to mean that Applicants take the position that, because the District Court did not offer an opportunity to make audio and video recordings of the hearing, there was a failure to observe essential formalities by the District Court, and that this point underlies the possible breaking through of the appellate bar.
9. The initiating petition in these proceedings is dated 7 March 2025 (the “Petition”). Accordingly, the Act on Simplification and Modernisation of the Law of Evidence applies. Under Article 200(2) Rv, no higher remedy lies against a decision rejecting a request for a preliminary taking of evidence, unless the court determines otherwise.
10. It is undisputed that, in the Order, the District Court did not open the possibility of an appeal against its decision to reject the request to hold a preliminary hearing of party experts. This means that, under Article 200(2) Rv, Applicants cannot lodge an appeal and must be declared inadmissible in their request.
11. Applicants have, however, argued that a breakthrough ground applies, as a result of which the statutory bar on remedies would not apply.

C. NO BREAKTHROUGH OF THE STATUTORY BAR ON REMEDIES

12. In its so-called breakthrough case law, the Supreme Court has developed grounds on the basis of which a remedy may nonetheless be used despite statutory exclusion. The bar on remedies can be broken through if the court: (1) has stepped outside the scope of the relevant provision, (2) has wrongly left that provision unapplied, or (3) in handling the case has disregarded such a fundamental principle of law that the case cannot be said to have been dealt with fairly and impartially.¹
13. These proceedings concern a request for a preliminary taking of evidence under Article 196 Rv, which request the District Court grants unless one of the refusal criteria mentioned in Article 196(2) Rv applies. Applicants do not dispute that Article 196 Rv applies. Moreover, Applicants have not argued that the District Court wrongly left this test out of consideration or that the District Court stepped outside the scope of that article.

14. Insofar as Applicants cannot agree with how the District Court applied Article 196 Rv (grounds 1 through 6), that cannot lead to breaking through the appellate bar. An incorrect application of a rule is not a ground for breaking through the bar on remedies.²
15. Applicants take the position that there has been such a disregard of fundamental principles of law that the case cannot be said to have been dealt with fairly and impartially. This breakthrough ground can be applied only in exceptional circumstances.
16. The arguments advanced by Applicants as the basis for this cannot lead to the conclusion that fundamental principles of law were disregarded, let alone to such an extent that it justifies breaking through the bar on remedies.
17. Applicants submit the following:

The proceedings were not public

18. According to Applicants, the proceedings were not public because not all members of the public and no “non-accredited journalists” were admitted to the oral hearing and these “journalists” were not allowed to make photo, audio and video recordings in the courtroom.
19. The hearing was public and took place in the presence of members of the public. “Non-accredited journalists” were also free to attend the hearing and to report on it in writing. In addition, an audio recording of the hearing was provided by the court. The fact that not everyone who wished to could attend the hearing or make recordings does not mean that the hearing was not public, let alone that this led to an unfair or biased hearing.

Right to be heard (adversarial principle)

20. According to Applicants, there was a violation of the right to be heard because the District Court allegedly did not take Applicants’ response into account in its decision regarding admitting the public and “non-accredited journalists”.
21. This concerns a measure of order in respect of which the District Court has broad discretion, and not the right to be heard in relation to the substantive handling of the case. It is not clear how this led to an unfair or biased handling of the substance of the case.

Context and societal importance

22. According to Applicants, the proceedings were not fair and impartial because the District Court did not take account of the context and societal importance of the request and, without any reasoning, did not open the decision to appeal.
23. In paragraph 2.2 of the Order, the District Court briefly described Applicants’ background and interest. The District Court is then free to evaluate the parties’ statements and to assess to what extent it does or does not (visibly) base its judgment or order on them. The fact that

Applicants may attach greater weight to this argument than the District Court does, does not mean that the proceedings were unfair or biased.

24. Moreover, the bar on remedies in Article 200 Rv is the default for a request for a preliminary taking of evidence, and the District Court need only provide reasons if it departs from that default—rather than the other way around.

Time limit

25. By rejecting the request, it would be made impossible for Applicants to obtain a fair and public hearing of their case within a reasonable time.
26. This reasoning cannot be sustained. The rejection of the request is based on the fact that the substantive criteria were not met. As Applicants themselves state, the District Court acted within normal or even short time frames. If a matter has very great societal urgency, other remedies are available and a request for a preliminary taking of evidence is not the appropriate course. This cannot support the conclusion that the case was not dealt with within a reasonable time, let alone that a fundamental principle of law was violated.

Qualification of party experts

27. According to Applicants, the District Court was biased by “disqualifying” the experts proposed by Applicants as “party experts” and by not providing reasons.
28. The classification of experts as party experts is a substantive assessment. The fact that Applicants (after the fact) disagree with it does not mean that the proceedings were unfair or biased. Moreover, the District Court did provide reasons in paragraphs 3.2 through 3.4.

D. CONCLUSION

29. Applicants’ reliance on breaking through the bar on remedies in Article 200 Rv fails, because it has not been shown that there was such a violation of fundamental principles of law that the case can no longer be said to have been dealt with fairly and impartially.
30. Respondents therefore conclude that the appeal should be declared inadmissible, or in the alternative dismissed, and that Applicants should be ordered jointly and severally to pay the costs of the appeal proceedings, increased by post-judgment costs, all payable within fourteen days of the date of the judgment, and—if payment of the (post-)costs is not made within that period—further increased by statutory interest on the (post-)costs calculated from the end of that period.

Counsel

¹ Supreme Court of the Netherlands 29 March 1985, ECLI:NL:HR:1985:AG4989, NJ 1986/242 (Enka/Dupont), paras. 3.2–3.3.

² Supreme Court of the Netherlands 24 September 1993, ECLI:NL:HR:1993:ZC1076, NJ 1993/758.