

ECLI:NL:RBGEL:2018:1743

Court District Court of Gelderland (the Netherlands)

Date of judgment 18/04/2018

Date of publication 18/04/2018

Case number C/05/325253 / HA ZA 17-432

Areas of law Civil law

Special features First instance – three-judge division

Indication of the contents Class action by *Stichting Sint Jan voor Eerlijk Proces* (Foundation¹ Sint Jan for a fair hearing) versus *Stichting Beheer & Toezicht i.z. Seksueel Misbruik in de R.-K. in Nederland* (foundation for management and supervision with regard to sexual abuse in the Roman Catholic Church in the Netherlands) or its Complaints Committee.

Requirements to be met by the class action under Article 3:305a of the Dutch Civil Code [*Burgerlijk Wetboek*, BW]. The claimant's action which focuses specifically and exclusively on the handling of complaints against a single individual, is inadmissible. The claimant's broader actions for a declaratory decision, however, are admissible. In that context, the handling of individual complaints may be presented as examples of negligent conduct.

The court accepts the compelling reasons for refusing to produce the documents requested in the order for personal appearance under Art. 22 of the Dutch Code of Civil Procedure (Rv).

In an action for a declaratory decision pursuant to Art. 3:302 of the Dutch Civil Code, the court is bound by the wording used by the claimant. Without a change of claim, the court cannot substitute it with a different declaratory decision.

Art. 6 of the ECHR is not directly applicable to complaint handling by a foundation (*stichting*) under civil law.

The Procedural Rules of the Complaints Committee are not in themselves negligent. However, *Stichting Beheer & Toezicht* and its Complaints Committee acted negligently in the example cases submitted to the court. Fundamental principles of law were violated, in particular those of legal certainty, hearing both sides of the argument, and adequate reasoning/evidence.

Sources Rechtspraak.nl
NJF 2018/285
JBPR 2018/38 annotated by R.M. Hermans, LL.M.
PS-Updates.nl 2018-0337

¹ under Dutch law; a Dutch *stichting* is similar to a foundation in Anglo-American law, the main difference being that it is a juristic person which need not be established for charitable, educational, religious, research or other benevolent purposes

Decision

judgment

DISTRICT COURT OF GELDERLAND (the Netherlands)

Subdistrict and Commercial Law Team

Hearing location Arnhem (The Netherlands)

Case number / cause list number: C/05/325253 / HA ZA 17-432

Judgment of 18 April 2018

in the case of

the foundation under Dutch law

STICHTING SINT JAN VOOR EERLIJK PROCES,

established in Simpelveld (The Netherlands),

Claimant,

*advocaat*² M.Ch. Kaaks, LL.M., practising in Amsterdam (The Netherlands),

versus

the foundation under Dutch law

STICHTING BEHEER & TOEZICHT I.Z. SEKSUEEL MISBRUIK IN DE R.-K. KERK IN NEDERLAND,

established in Utrecht (The Netherlands),

Defendant,

advocaat W. Heemskerk, LL.M., practising in The Hague (The Netherlands).

The parties will hereinafter be referred to as *Stichting Sint Jan* and *Stichting B&T*.

1 The Proceedings

1.1. The course of the proceedings is evident from:

- the interim judgment of 25 October 2017
- the abbreviated report of the personal appearance of the parties of 25 January 2018
- the concise speaking notes of the parties' lawyers sent to the court and to the other party afterwards, as agreed at the personal appearance hearing.

1.2. Finally, judgment was given.

² lawyer admitted to the Dutch bar, hereinafter referred to as 'lawyer'

2 The Facts

- 2.1. Since the end of the twentieth century, there has been extensive global coverage of sexual abuse of minors in the Roman Catholic Church (hereinafter referred to as the RC Church), which abuse mainly took place from the 1950s until the end of the 1980s. After sporadic reports had previously appeared in the media about sexual abuse, including in the Roman Catholic Ecclesiastical Province of the Netherlands, one report after another followed from early 2010, about abuse and the failure of those responsible in the RC Church to disclose this abuse. The Bishops' Conference of the Netherlands (*Bisschoppenconferentie*) and the Dutch Religious Conference (*Konferentie Nederlandse Religieuzen, KNR*) instructed the Deetman Committee to conduct an independent investigation into the facts and circumstances with regard to sexual abuse of minors entrusted to institutions and parishes within the Roman Catholic Ecclesiastical Province, including the orders and congregations which are members of the KNR.
- 2.2. The Deetman Committee made an interim recommendation on 9 December 2010. In this interim recommendation, the Deetman Committee established that the existing institution that victims could turn to with complaints, a public ecclesiastical legal entity of the RC Church called '*Hulp & Recht*' (Support and Justice), was unable to act decisively and its organisational form was an obstacle to transparency and accountability. The Deetman Committee made recommendations for a new organisation with a name more befitting of its remit. Subsequently, on 28 September 2011, the Bishops' Conference and KNR established *Stichting B&T* as the legal successor to *Hulp & Recht* in order to continue its activities. *Stichting B&T* is not an ecclesiastical institution, but a foundation under Dutch civil law.
- 2.3. According to its articles, the objects of *Stichting B&T* are to process reports, refer people to appropriate support, handle complaints and provide compensation. For the handling of complaints, *Stichting B&T* has set up a complaints committee, called the Complaints Committee for Sexual Abuse in the RC Church (hereinafter referred to as the Complaints Committee). The articles state that the Complaints Committee is an independent body, that procedural rules are to be adopted, that its decisions constitute recommendations which are not without obligation to the relevant diocesan bishop or major superior of the religious institution, and that the decisions of the Complaints Committee and the ensuing decisions of the relevant ecclesiastical authorities are published on the Complaints Committee website in anonymous form.
- 2.4. The provisions of the Procedure of the Complaints Committee for Sexual Abuse in the RC Church, adopted on 5 October 2011 and amended on 1 July 2014 and 30 October 2014, hereinafter also referred to as the Procedural Rules, that are relevant to this action, read as follows:

PREAMBLE:

Whereas

- *the sexualisation of ecclesiastical relationships of dependence can cause unacceptable and serious harm to the physical and mental integrity of those who rely on mental support from the RC Church;*
- *sexual abuse by persons working in the RC Church causes serious damage to the exemplary function and authority of the RC Church;*
- *it is desirable that complaints of sexual abuse by such persons be investigated in a careful, uniform and independent manner, so that appropriate action can be taken against such persons and the victims of the abuse may be considered for financial redress;*

(...)

Art. 1 Scope and characterisation of sexual abuse

- 1.1. *This procedure applies if someone has filed a complaint about sexual conduct towards her or him*

a. by someone who is or used to be a paid or unpaid official working for an organisation of the RC Ecclesiastical Province of the Netherlands;

b. by someone who performs or used to perform work in a civilian institution on the basis of a mission or assignment from a church authority of the RC Ecclesiastical Province of the Netherlands;

c. by clerics who are or used to be incarnated in a diocese of the RC Ecclesiastical Province of the Netherlands, or who are or were otherwise accepted into it, during the relevant period of abuse;

d. by those who are or were members of an institute of consecrated life or a society of apostolic life based in the Netherlands.

- 1.3. Sexual abuse is to be taken to mean any behaviour whereby someone, under duress or in a relationship of dependence, has to perform or submit to sexual acts, or tolerate sexual advances or remarks in any form. Duress includes: physical violence or the threat thereof, psychological pressure, intimidation and/or blackmail.
Sexual abuse also includes creating visual material of a sexual nature of someone, and the use and dissemination thereof.

Art. 2 Complainant

- 2.1. Anyone claiming to be a victim of sexual abuse under Article 1 (3), hereinafter referred to as the complainant, may submit a complaint to the Complaints Committee before 1 May 2015.

(...)

Art. 3 Notice of Complaint

- 3.1. The Complainant must submit a notice of complaint, signed by the complainant and his(/her³) legal advisor or counsel, to the registry. Copies of the documents relating to the case will be appended to the notice of complaint. The registry of the Complaints Committee will notify the Chair of the Complaints Committee of the notice of complaint received.

- 3.2. The notice of complaint will include at least:

- the surname, forenames and date of birth of the complainant;
- the name of the alleged perpetrator and, if possible, further details of the person against whose conduct the complaint is directed, hereinafter referred to as the alleged perpetrator;
- the description of the complaint, circumstances and facts on which it is based.

- 3.4.1. The proceedings commence on receipt of the notice of complaint by the Chair.

- 3.4.2. The Chair of the Complaints Committee will establish provisionally which church authority/authorities is/are responsible for the alleged perpetrator.

- 3.5. The registry will ensure that after the receipt of the notice of complaint, a copy thereof and a copy of the appendices are sent to the alleged perpetrator, and will inform the church authority of the alleged perpetrator about the submitted and accepted complaint.

(...)

Art. 4 Alleged Perpetrator Deceased or Untraceable

- 4.1. If the alleged perpetrator has died or cannot be found, the notice of complaint is sent to the church authority who is believed to have exercised or be exercising church authority over the alleged perpetrator.

(...)

³ In this document, unless stated otherwise, he/his also means she/her, since the masculine pronouns are used (presumably) solely for grammatical reasons.

Art. 8 Written Defence

8.1. Within eight weeks of the date of dispatch of the copy of the complaint and its appendices to the alleged perpetrator or the church authority/their authorised representative, the alleged perpetrator or the church authority/their authorised representative must submit a written defence or, in the case of the church authority/their authorised representative, a substantive response to the case, to the registry. All copies of the documents relating to the case must be enclosed.

(...)

Art. 11 Composition of the Panel

11.1. After receipt of the written defence referred to in Article 8, the Chair will set up the panel which is to handle the complaint and will appoint a panel chair.

11.2. Decisions of the panel are adopted by a simple majority.

11.3. In cases not provided for in this procedure, the panel is entitled to proceed with due observance of the generally accepted principles of procedural law and fairness.

Art. 12 Investigation

12.1. Prior to the hearing, the Chair of the Complaints Committee may appoint a clerk, a member or a deputy chair of the Complaints Committee to conduct an investigation. This investigation may involve a fact-finding investigation, hearing the complainant, alleged perpetrator, church authority/their authorised representative, third parties and/or witnesses and experts. The complainant, the alleged perpetrator and the church authority/their authorised representative will be informed of this. They will receive a copy of each report prior to the panel hearing. If they wish, the complainant, alleged perpetrator and the church authority/their authorised representative may respond to this in writing within two weeks. A copy of the written response is sent to the other party by the registry.

12.2. If the Chair of the Complaints Committee considers it necessary for the decision-making in the case, he may decide, for the purposes of the investigation referred to in the preceding paragraph, to request that the church authority of the alleged perpetrator/their authorised representative provide access to the file and/or the records pertaining to the alleged perpetrator and to provide copies thereof. The church authorities/their authorised representative are obliged to cooperate in this.

12.3. The powers vested in the Chair of the Complaints Committee as laid down in paragraph 1 and 2 are also vested in the Chair of the panel from the moment a case is assigned to a panel. He may appoint the clerk or a member of that panel for this purpose.

Art. 13 Setting a Date for the Hearing

13.1. Unless there are special circumstances, including a preliminary investigation as referred to in Article 12, or unless the Chair of the Complaints Committee extends this period, the location, date and time at which the complaint will be heard will be announced within thirty days of receipt of the written defence.

(...)

Art. 16 Panel Hearing

16.1. The panel hearing will not be open to the public.

16.2. At the request of the complainant, the alleged perpetrator, or the church authority or its authorised representative, the Chair of the Chamber may decide that the complainant and the alleged perpetrator and the church authority/their authorised representative are to be heard without the other being present.

16.3. During the hearing, the complainant, the alleged perpetrator and the church authority/their authorised representative will be given the opportunity to:

a. present their interests or have them presented;

b. have witnesses and experts heard, to the extent deemed necessary by the panel for the assessment of the case.

16.4. *If the panel deems it necessary for the assessment of the case, witnesses and experts may be heard at the hearing. If the panel exercises this power, the chair will notify the complainant, the alleged perpetrator and the church authority/their authorised representative of this.*

(...)

Article 18 Opinion

18.1. *Unless the panel has decided to conduct a further investigation as referred to in Article 17, it will draw up a written and reasoned opinion for the church authority of the alleged perpetrator within six weeks. (...)*

18.2. *The opinion as referred to in the first paragraph will be adopted at a plenary meeting of the panel. The panel's opinion will be based on the notice of complaint and the written defence, the documents submitted with these, as well as the documents and/or reports added to the file, and on the explanatory statements made at the hearing by the complainant, the alleged perpetrator and the church authority/their authorised representative, as well as any witnesses and experts.*

18.3. *The opinion referred to in paragraph 1 will in any case contain a brief account of the facts and an assessment thereof.*

18.4. *The opinion will contain a reasoned assessment of the merits of the complaint.*

18.5. *The opinion will be sent by the panel chair to the church authority of the alleged perpetrator, and to the complainant and the alleged perpetrator, by registered letter within two weeks after its adoption.*

18.6. *The opinion will be published in anonymous form.*

Article 19

19.1. *If the panel considers the complaint to be well-founded, it may, depending on the gravity of the facts and taking all circumstances into account, recommend that the church authority of the alleged perpetrator:*

a. caution, admonish or reprimand the alleged perpetrator;

b. take an administrative measure against the alleged perpetrator;

c. institute canonical criminal proceedings against the alleged perpetrator;

d. take further measures to prevent sexual abuse by the alleged perpetrator;

e. provide support for persons directly involved in the sexual abuse, including the complainant, the complainant's close relatives, the parish, the religious community and the colleagues of the alleged perpetrator.

19.2. *If the panel considers the complaint to be unfounded, it may advise the church authority of the alleged perpetrator on measures to be taken to fully restore the alleged perpetrator's rights, taking the circumstances into consideration.*

19.3. *If the complaint is considered either well-founded or unfounded, the panel may attach a further opinion as it deems appropriate.*

19.4. *The Chair of the Complaints Committee will ensure that the complainant is informed of the possibility of financial redress.*

Art. 20 Objection

20.1. *A written objection to the opinion as referred to in Articles 18 and 19 may be lodged by the complainant and the alleged perpetrator as well as by the church authority of the alleged perpetrator/their authorised representative, within two weeks of the date of receipt, if he or she believes that a general principle of proper complaint handling has not been observed.*

20.2. *For the purpose of handling the objection, the Chair will set up a special panel, consisting of three (deputy) chairpersons. He will also appoint the chair of that special panel.*

In any event, the chair of the panel which delivered the opinion will not be on this panel.

- 20.3. *The special panel may hear the complainant and the alleged perpetrator as well as the church authority of the alleged perpetrator/their authorised representative, and the members of the panel that delivered the opinion.*
- 20.4. *The special panel will give a decision on the admissibility and merits of the objection within six weeks after it was lodged. This period may be extended once by six weeks. The decision will be sent to the complainant, the alleged perpetrator and the church authority of the alleged perpetrator/their authorised representative.*
- 20.5. *If the objection is declared well-founded, the complaint will be reheard by a panel with a different composition from the one that delivered the opinion against which the objection was raised. To that end, the file, without that opinion, will be handed over to the chair of the new panel. No objection or appeal may be lodged against the opinion of this panel.*

Article 21 Completion of the Procedure

- 21.2. *Within thirty days after the church authority of the alleged perpetrator has received the decision on whether or not the complaint is considered well-founded, and has received the recommendation from the Complaints Committee regarding the measures to be taken on the basis of the declaration that the complaint is well-founded, he will notify the complainant and the alleged perpetrator in writing of the decision he has taken in response, stating reasons.*
- 21.1. *If the alleged perpetrator's church authority intends to deviate from the Complaints Committee's recommendation, they must first consult the Chair of the Complaints Committee.*
- 21.2. *In his decision, the alleged perpetrator's church authority will indicate the manner in which his decision may be challenged or appealed and the time limits for doing so in accordance with canons 1732 - 1739 of the Code of Canon Law (Wetboek van Canoniek Recht).*
- 21.3. *The chair of the panel will receive a copy of the decision referred to in the first paragraph.*
- 21.4. *The decision will be published in anonymous form.*

Article 22 Review

- 22.1. *Review of an opinion, whether or not confirmed or reissued following an objection, may be requested because and if new facts or circumstances have arisen, or if facts or circumstances have arisen which for other reasons were not taken into consideration in the earlier opinion.*
- 22.2. *A review request will be addressed to the Chair of the Complaints Committee and will state the new facts and/or circumstances that were not taken into consideration during the earlier assessment of the complaint.*
- 22.3. *The Chair will appoint a special panel of three (deputy) chairpersons to assess the review request. He will also designate the chair of that special panel.*
- 22.4. *The chair of the special panel will have the powers of the chair as laid down in Article 12.*
- 22.5. *The special panel may hear third parties as well as those who were the complainant, alleged perpetrator or church authority /their authorised representative in the proceedings leading to the opinion to be reviewed.*
- 22.6. *The special panel will give a decision on the merits of the review request within six weeks of the date on which the request was submitted or, if it holds a hearing, within six weeks of that hearing. This period may be extended once by six weeks. Article 18(5) applies, 'mutatis mutandis'.*
- 22.7. *If the special panel declares the review request well-founded, the case will be reviewed by one of the regular panels of the Complaints Committee. Any documents exchanged in the review procedure and the decision of the special panel will form part of the file for the new procedure.*
- 22.8 *A request for review of an opinion of the Complaints Committee – whether or not confirmed or reissued following an objection - may be made no later than six months after the date on which the Complaints Committee delivered its last opinion in response to a complaint. (Court note: this paragraph was introduced by the amendment of 1 July 2014)*

Article 23

23.1 *The members of the Complaints Committee and the clerk will be bound to strict secrecy. (...)*

2.5. The Complaints Committee website lists its basic principles, including that the victim, not the (suspected) perpetrator, is central to the procedure, that the interests and opinions of the victims are decisive, that limitation or the death of the suspected perpetrator are not an impediment, and that it is governed not by the formal-legal law of evidence, but by the question as to whether the complaint is plausible.

2.6. Up to the end of October 2016, a total of 3,678 victims came forward, of whom 2,060 actually filed a complaint. A number of complaints were subsequently withdrawn and a settlement was reached in a number of cases. In the end, the Complaints Committee declared almost 1,000 complaints well-founded and 311 unfounded. In total, more than 30 million euro was paid out in compensation. By now, the Complaints Committee has delivered its final opinion and the time limits set in the above complaints procedure for submission of new complaints and review requests have expired.

2.7. *Stichting Sint Jan* was established on 6 April 2016. Its objects according to its articles are:

a. (a) to contribute to fair and just complaints procedures involving employees of the Roman Catholic Church (hereinafter: the Church);

b) to prevent, address and contest rash accusations, insinuations, slander and defamation of employees of the Church;

c) to promote the restoration of the reputation of living and deceased employees of the Church whose honour and good name have been tarnished without a prior fair hearing;

d) and to perform all that is related or may be conducive to this.

The articles provide that *Stichting Sint Jan* endeavours to achieve its objects by, among other things:

a. a) supporting accused persons in proceedings before the courts, arbitrators or mediators;

b) checking and/or monitoring the due process of law in complaint proceedings against employees of the Church;

c) conducting proceedings on its own behalf, as a mandatory of third parties, and instituting legal proceedings for the purpose of protecting similar interests of other persons, as referred to in Article 3:305a of the Dutch Civil Code (BW);

d) giving advice;

all in the broadest sense of the word.

It is also provided that the foundation pursues a public benefit purpose and operates on a non-profit basis.

2.8. *Stichting Sint Jan* was established in response to the investigations by the Complaints Committee and the opinions it delivered on the basis of these investigations on 11 February 2014, following two complaints filed successively in 2011 and 2013 against former bishop [X] for sexual abuse of underage boys. Former Bishop Monsignor [X] (hereinafter: [X]) died on 24 June 2013.

2.9. The first complaint, with case number 2011-T390, was submitted to the Complaints Committee on 2 September 2011. This complainant's complaint concerned sexual abuse by [X] in the years 1958/1959, when [X] was a parochial vicar in the parish of this complainant, who was 9 and 10 years old at the time.

The Complaints Committee gave its decision on 23 January 2012.

2.10. In this decision, the description of the complaint reads that the complainant was sent to [X] to deliver letters, that one time, [X] took him on his lap, groped him and put his hand in the complainant's underpants to play with his penis, that [X] subsequently took his behaviour further. For instance, the complainant had to give [X] (a) hand job(s), resulting in [X] having several orgasms, and once [X] also put the complainant's penis in his mouth. In addition, [X] made several attempts at anal penetration of the complainant with his penis. Every time, it was impressed on the complainant that he was not to tell anyone anything about it.

In its decision, the Complaints Committee describes that the complaint was brought to the attention of [X] and that he, through his lawyer, sent the Complaints Committee an official report for defamation which he had filed with the police. The decision also states that the Complaints Committee handled the complaint at a closed session on 28 November 2011, at which the complainant, assisted by a legal advisor, was heard, but that [X] and his lawyer failed to appear. The decision states that the complainant added at the hearing that there had not only been an attempt at penetration, but that [X] had also penetrated the complainant twice during this period.

According to the decision, the hearing was deferred in order to give the complainant the opportunity to provide further supporting evidence, which his legal advisor did by letters of 12 December 2011 and 5 January 2012, submitting a total of three written statements.

Subsequently, on 23 January 2012, the Complaints Committee issued its final decision. The decision, referred to as 'The Opinion', reads: "*On the basis of the above, the Complaints Committee cannot recommend that the Diocese of Roermond declare the complaint well-founded*".

2.11. The Complaints Committee gave the following reasons for its decision:

4. The Assessment

4.1. *The Procedure for complaints of sexual abuse (hereinafter referred to as the Procedure) applies. According to Article 2.1 of the Procedure, sexual abuse is to be taken to mean any behaviour whereby someone, under duress or in a relationship of dependence, has to perform or submit to sexual acts, or tolerate sexual advances or remarks in any form whatsoever, which violates their mental and/or physical integrity. Duress includes physical violence or the threat thereof, psychological pressure, intimidation and/or blackmail.*

4.2 *It is not in dispute that the facts alleged by the complainant constitute sexual abuse within the meaning of Article 2.1 of the Procedure.*

4.3 *The complainant's statement appeared sincere to the Complaints Committee. However, when assessing a complaint, the Complaints Committee takes as a starting point that it cannot rely solely on the statement of one complainant. It is an elementary principle of law that a person is not convicted on the basis of one single statement. This elementary principle of law must also be observed in these proceedings.*

4.4 *In the present case, no facts or circumstances have come to light which support the complainant's statement. The complainant and his authorised representative, Cremers, LLM, have submitted statements from a sister and two brothers of the complainant which, although casting reasonable doubt on the facts as stated in the alleged perpetrator's report to the police, do not support the alleged sexual abuse by the alleged perpetrator.*

The Complaints Committee wishes to point out that in its opinion, under the given circumstances, the alleged perpetrator's response to the complaint, i.e. making a report for defamation, shows little respect for the complainant, all the more since, as is evident from the statements of the sister and brothers, there is reasonable doubt about a number

of facts as presented to the investigating officer by the alleged perpetrator in support of his report.

However, these facts do not relate to the sexual abuse as such, but to the fact that it is plausible that the complainant had to bring letters from his father to the alleged perpetrator and that the alleged perpetrator came to their home. The statements of the sister and brothers can therefore not be regarded as supporting evidence of sexual abuse.

Cremers, LLM, furthermore argued that the case with reference 2010 T 023 must be regarded as supporting evidence. In that case, however, the complaint was declared inadmissible and the Complaints Committee consequently did not get to the question of whether it is plausible that the alleged perpetrator actually committed the alleged conduct. Therefore, the aforementioned case with reference 2010 T 023 cannot serve as evidence for the plausibility of the sexual abuse of the complainant by the alleged perpetrator either.

4.5 In view of the above considerations, the Complaints Committee has had to conclude that insufficient evidence has been found for the facts alleged by the complainant, and the complaint can therefore not be declared well-founded, which, incidentally, certainly does not mean that the facts alleged by the complainant are untrue either.

2.12. No objections to this final decision were lodged within the time limit specified in the Procedural Rules.

2.13. More than a year later, in a decision of 28 June 2013, a few days after [X]'s death, the special panel of the Complaints Committee declared a review request from the complainant well-founded and decided that the case was to be heard again. This decision has not been submitted by the parties, but was downloaded and printed from the public website of the Complaints Committee by the court during the adjournment of the hearing of the case. The parties were informed of this during their personal appearance.

2.14. This decision to reopen states that the complainant's authorised representative (referred to as the applicant in the reopening procedure) requested a review of the opinion on behalf of the complainant by a letter of 26 April 2013 and that this request was heard behind closed doors by the special panel on 24 May 2013. The decision does not state that [X], who was still alive at the time, and/or his church authority, was notified of the review request, and according to the statement of the head of *Meldpunt Misbruik RKK* (RC Church abuse reporting centre), who was present at the hearing, they were not.

The decision states that the existence of new facts or circumstances was put forward as an argument in support of the review request, to which end the authorised representative referred to the form attached to the request: "Permission to use report as supporting evidence" in the case with case number 2012-T890 (4), which also concerns a complaint about sexual abuse by [X]. The special panel gave the following reasons for its decision to declare the review request well-founded and reopen the case:

3. The Assessment

According to the provisions of Article 22.1 of the new Procedure, a review of an opinion may be conducted because and if new facts or circumstances have come to light or facts or circumstances have come to light that were not taken into account in the previous opinion for other reasons.

The special panel has taken note of the contents of the complaint file, the opinion of 23 January 2013 (presumably 23 January 2012, court note) and the aforementioned form "Permission to use report as supporting evidence" in the case with case number 2012-T890 (4).

The special panel is of the opinion that if, at the time the opinion of 23 January 2013 was drawn up, the KLAC [presumably Complaints Committee - translator's note] had been aware of the above form "Permission to use report as supporting evidence" in the case with case number 2012-T890, which also concerns a complaint about sexual abuse by the alleged perpetrator, it cannot be ruled out that the KLAC would have delivered a different opinion.

In view of the foregoing, the special panel will declare the request well-founded and order the case to be handled again.

The special panel points out that the case will consequently be handled again. The complainant should not draw the conclusion in advance that his complaint will be declared well-founded on the basis of the new documents. This is at the discretion of the KLAC, which will handle the case again.

- 2.15. The Complaints Committee, with a different composition, subsequently handled the complaint again and delivered a further opinion on 11 February 2014, recommending that the Bishop of Roermond declare the complaint well-founded insofar as the abuse consisted of [X] stroking the complainant's penis, and declare the rest of the complaint unfounded.

This decision states that the complaint was reheard at a closed session on 15 January 2014, at which the complainant appeared with his wife, and assisted by his legal advisor, and at which the Vicar General of the Roermond Diocese also appeared. The complaint was again described in similar terms, with the proviso that at the hearing of 15 January 2014, the complainant added that [X] had penetrated him three or four times.

The reasons for the new opinion, following similar considerations on what sexual abuse should be taken to mean and that the facts alleged by the complainant constitute this, are as follows:

- 4.3. *More than 50 years have passed since the facts took place for which the complainant blames the alleged perpetrator.*

The passage of time and the death of the alleged perpetrator alone make it impossible to examine these facts in detail.

However, the Complaints Committee considers it plausible that the complainant was sexually abused by the alleged perpetrator, insofar as the abuse consisted of the alleged perpetrator stroking the complainant's penis.

What has convinced the Complaints Committee of this is the authentic manner in which and the details with which the complainant gave his account in his notice of complaint and at the hearing.

Furthermore, the Complaints Committee has taken note of the case with case number 2012-T890 (4) which also concerns a complaint of sexual abuse by the alleged perpetrator, consisting of the alleged perpetrator stroking the complainant's penis.

In the opinion of the Complaints Committee, all of the above factors, viewed in their interrelationship, sufficiently support the plausibility of the sexual abuse of the complainant by the alleged perpetrator, in so far as the abuse consisted of the alleged perpetrator stroking the complainant's penis.

The complainant furthermore indicated that the sexual abuse went further than described above. However, insufficient evidence was found to support these further acts, and the complainant's complaint in this respect can therefore not be declared well-founded, which, incidentally, certainly does not mean that the facts alleged by the complainant are untrue either.

The Complaints Committee does not consider it plausible that the alleged perpetrator cannot remember the complainant and that he never received any letters from the complainant's father, since statements from the complainant's family members show that the alleged perpetrator regularly visited the complainant's family and that other members of the family sometimes had to bring letters from their father to the alleged perpetrator too.

4.4. *It goes without saying that the sexual abuse by the alleged perpetrator, abusing his authority and in a relationship of dependence, was deplorable.*

4.5. *Since the alleged perpetrator is no longer alive, no measures can be taken against him.*

2.16. The second complaint, with case number 2012-T890 (4), was submitted to the Complaints Committee on 29 April 2013. Unlike the first complaint, this notice of complaint and its appendices have been submitted to the court. One of those appendices is a form signed by the previous complainant "Permission to use report/complaint as supporting evidence" dated 17 April 2013, which refers to the file with case number 2011-T390. This second complaint was also heard in a closed session on 15 January 2014, with the same composition. According to the decision, this complainant appeared, assisted by a (different) legal advisor, as did the Vicar General on behalf of the Roermond Diocese.

2.17. This complaint, in brief, is described as follows. The complainant spent the period 1959-1961 at the [boys' boarding school]. At that school, he was physically and sexually abused. A priest from [Seminary A] visited the [boys' boarding school] shortly after Whitsun 1961. The complainant was told to go to the priest for information. His face and mouth looked patently twisted. He said that he was from [Seminary A]. The complainant was told to stand in front of him. After some general questions about school, he asked if the complainant already had wet dreams. He then told the complainant to take off his trousers and underpants. The complainant stood before him naked, wearing only his shirt. The priest from [Seminary A] took the complainant by the hand and pulled him towards him. He wrapped both his hands around the complainant's thigh as if to measure its size. He moved up higher and higher until his hands touched the complainant's penis. The priest from [Seminary A] began to stroke the complainant and talked about feelings of love and ejaculations. The complainant sat naked on his leg. The priest from [Seminary A] continued stroking the complainant, telling him that everyone sometimes had wet dreams and that there was no need for the complainant to lie about it. The priest from [Seminary A] suddenly stopped and ordered the complainant to get dressed again.

Years later, the complainant saw a photograph of Bishop [X] in the Limburg newspaper. The complainant knew immediately and without any doubt that the priest in question from [Seminary A] was the alleged perpetrator.

2.18. Below the description of the substantive response to the complaint, the published decision states that [X] had died in the meantime, but that before his death, his former lawyer stated on his behalf in response to the complaint, that although [X] was at [Seminary A] in the period from 1959 to 1967, he could not remember ever having visited the [boys' boarding school] in or around this period. It was also put forward that [X] considered what happened to the complainant according to his statements to be reprehensible and that he was not involved in this in any way and was completely unaware of it. It is mentioned that [X] stated emphatically that the complaints expressed by the complainant did not relate to him personally.

Furthermore, below the response to the complaint, mention is made of a statement on behalf of the diocese that there was no systematic contact between [Seminary A] and the [boys' boarding school].

2.19. In its assessment, the Complaints Committee first outlines in two considerations, identical to those of the other decision of 11 February 2014, what is meant by sexual abuse. Subsequently, the Complaints Committee considers as follows:

4.3. *More than 50 years have passed since the facts took place for which the complainant blames the alleged perpetrator. The passage of time and the death of the alleged perpetrator alone make it impossible to examine these facts in detail. However, despite the fact that the alleged perpetrator claims that the complaints made by the complainant do not relate to him personally, the Complaints Committee considers it plausible that the complainant was sexually abused by the alleged perpetrator, as described by the complainant.*

What has convinced the Complaints Committee of this is the authentic manner in which and the details with which the complainant gave his account in his notice of complaint and at the hearing.

Furthermore, the Complaints Committee has taken note of the case with case number 2011-T390 which also concerns a complaint of sexual abuse by the alleged perpetrator.

In the opinion of the Complaints Committee, all of the above factors, viewed in their interrelationship, sufficiently support the plausibility of the sexual abuse of the complainant by the alleged perpetrator.

The Complaints Committee has no reason to doubt the complainant's assertion that it was the alleged perpetrator who abused the complainant. Although the Complaints Committee is willing to believe that there was no systematic or regular contact between the [seminary] and the [boys' boarding school], that does not rule out occasional reciprocal visits.

4.4. *It goes without saying that the sexual abuse by the alleged perpetrator, abusing his authority and in a relationship of dependence, was deplorable.*

4.5. *Since the alleged perpetrator is no longer alive, no measures can be taken against him.*

The decision reads: *the Complaints Committee recommends that the Diocese of Roermond declare the complaint well-founded.*

2.20. Both decisions have been published on the Complaints Committee's website in anonymous form, albeit initially with the date of [X's] death.

The Diocese of Roermond has acknowledged the abuse by [X] and financial compensation has been awarded to both complainants.

Both decisions by the Complaints Committee on sexual abuse by [X] have been widely publicised and are mentioned in his Wikipedia entry with a link to the decisions in the footnote.

2.21. On 6 February 2017, consultations took place between Stichting Sint Jan and Stichting B&T. During these consultations, Stichting Sint Jan explained its objections to the working method of the Complaints Committee. Stichting Sint Jan insisted on acknowledging negligence in the proceedings conducted by the Complaints Committee in the cases against [X], among others. Stichting Sint Jan also asked if the decisions could be reviewed, to which the Chair of Stichting B&T replied in a letter dated 7 February 2017 that the board sees no reason to grant Stichting Sint Jan's request for a review of two complaints against [X].

3 The Dispute

3.1. Stichting Sint Jan requests that a judgment be given, provisionally enforceable as far as possible:

I. ruling that, in the handling and assessment of the complaint cases with case numbers 2011-T390 and 2012-T890(4), Stichting B&T acted contrary to Article 6 ECHR and therefore unlawfully;

II. ruling that the Procedure of the Complaints Committee on Sexual Abuse in the RC Church as adopted on 5 October 2011, and amended on 1 July 2014, 30 October 2014 and 9 September 2016 is contrary to Article 6 ECHR and therefore unlawful; and that the working method of Stichting B&T, which was based on the application of these principles and rules of procedure, constituted and/or constitutes a breach of Article 6 ECHR and is therefore unlawful;

III. ordering Stichting B&T to pay the costs of these proceedings.

3.2. Stichting Sint Jan accuses the Complaints Committee of inadequate fact-finding, bias in favour of the victim, inadequate application of the principle of hearing both sides of the argument, disregard for the presumption of innocence, and conducting proceedings against accused persons who have already died, as well as a negligent

manner of making its decisions public. After all, the published decisions against [X], who was well-known nationally, originally mentioned his date of death, making it easy to discover his identity, which is exactly what happened in practice.

3.3. Stichting Sint Jan bases its above-mentioned claims on the proposition that the complaints procedures and the decisions of the Complaints Committee in these cases were negligent to the extent that [X]'s fundamental right to a fair hearing was violated, and the Complaints Committee consequently acted unlawfully under Article 6:162 of the Dutch Civil Code (BW).

Stichting Sint Jan furthermore argues that the procedural rules as drawn up by the Complaints Committee and set out in the Procedure of the Complaints Committee for Sexual Abuse in the RC Church, as well as the working method of the Complaints Committee, are contrary to Article 6 ECHR and therefore unlawful under Article 6:162 of the Dutch Civil Code (BW). The main concern of Stichting Sint Jan is the presumption of innocence provided in the second paragraph of Article 6 ECHR.

Furthermore, Stichting Sint Jan argues that some fundamental, constitutive, legal principles of public-law criminal procedure have also been violated, in particular the *unus nullus* rule, the minimum evidence requirement and the lapse of the right to prosecute on the death of the person accused.

During the personal appearance of the parties, Stichting Sint Jan added that the Complaints Committee had also violated the standard of Article 8 ECHR and that it would also constitute a violation of legal principles if, as the chair of Stichting B&T had allegedly informed them, a review would be open only to the complainant and not to the alleged perpetrator found guilty.

3.4. Stichting Sint Jan states that in these proceedings it is conducting a class action to protect the interests of all employees of the RC Church, so they can be assured of a fair hearing in the event of allegations of sexual abuse, in accordance with Article 6 ECHR.

3.5. Stichting B&T puts forward a defence.

Stichting B&T argues that Stichting Sint Jan's action is inadmissible, because it fails to meet the requirements of Article 3:305a of the Dutch Civil Code (BW).

Furthermore, Stichting B&T argues that because of a lack of interest within the meaning of Article 3:305a of the Dutch Civil Code, Stichting Sint Jan's actions are inadmissible, in so far as these relate to [X].

With regard to the substance, Stichting B&T argues that Article 6 ECHR does not apply to the complaints procedure, while the procedure of the Complaints Committee is conducted with due care and there is no question of rash insinuations.

In conclusion, Stichting B&T argues that the claim does not meet the requirements for a declaratory decision, because Stichting Sint Jan is not involved in the juridical relationship in which [X] was a party, and it has not been proven either that Stichting Sint Jan represents the/all employees of the Church.

3.6. Where relevant, the parties' statements will be discussed in further detail below.

4 The Assessment

The admissibility of Stichting Sint Jan's action

4.1. Stichting B&T has argued that Stichting Sint Jan's actions cannot be admissible under Article 3:305a of the Dutch Civil Code (BW) because they fail to meet the requirements of this article. In this respect, the court considers as follows.

4.2. Article 3:305a(1) of the Dutch Civil Code reads:

A foundation or association with full legal capacity may institute an action intended to protect similar interests of other persons to the extent that its articles promote such interests.

4.3. These requirements have been met as far as the broader actions are concerned. Stichting Sint Jan is a foundation (under Dutch law) which, according to its articles, represents the fairly broadly-defined similar interests of a large group of people. In particular, this relates to the approximately thousand employees of the RC Church who have been found guilty by the Complaints Committee. In these proceedings, Stichting Sint Jan wishes the regular court to check if this has been done with due care, i.e. whether the Procedural Rules and the working method of the Complaints Committee in general meet the requirements set by law.

4.4. The interests of priests, fathers and employees of the RC Church, who have been subject to the complaints procedure of the Complaints Committee and who may have been wrongly found guilty, lend themselves to being combined in order to promote efficient and effective legal protection for them.

Stichting B&T is regarded as an authoritative institution and the decisions of the Complaints Committee are presented and have so far been widely regarded as high-quality independent and impartial opinions. Those decisions have always been published and the recommendations of the Complaints Committee have nearly always been followed by the church authorities of the persons concerned. It is a natural consequence that the persons concerned, even if wrongly found guilty, may be reluctant to raise the allegations of sexual abuse again in a public trial before the regular courts. After all, this may bring the alleged abuse to the public's attention once again, and accusations of this kind are taken very seriously.

In addition, the alleged perpetrators found guilty, given the establishment of their guilt by the Complaints Committee and agreement by their own (former) employer, run a considerable risk of being burdened with a burden of proof in civil proceedings that they will find difficult to meet. After all, if they seek a decision ruling that they are innocent, they will, in principle, have to state and if necessary prove their innocence themselves under Article 150 of the Dutch Code of Civil Procedure (Rv), rather than the complainant having to prove their guilt. Such proof, however, of either guilt or innocence, is very difficult to provide in cases of alleged abuse, which took place in the distant past and out of the sight of witnesses. What is more, in regular proceedings before the civil court, under Article 164 of the Dutch Code of Civil Procedure, the testimony of the person bearing the burden of proof does not constitute any evidence in their favour if this testimony is not supported on the essential points by strong corroborative evidence, whereas the testimony of the other party is usually accepted as full counter-evidence.

Those found guilty (or their heirs) therefore run a significant risk, even if they are in fact innocent, of losing the action, which would only weaken their case.

4.5. The church fathers and priests who may have been negligently found guilty and whose interests Stichting Sint Jan claims to stand up for are therefore at a disadvantage, and this class action may alleviate that disadvantage. This may be the case if it is established in these proceedings that the Procedural Rules and/or the working methods of the Complaints Committee were negligent in certain cases. Those who have been wrongly found guilty may then invoke this in their environment or in a follow-up case in court.

4.6. Stichting B&T argues that Stichting Sint Jan would be required to have actually undertaken activities in this field before. That is beyond what may be required in this case. Stichting Sint Jan must be allowed to start achieving its objects with a first legal action. This case may lead to subsequent class actions, individual actions under a mandate and/or mediations with the church authority that has taken measures against the persons concerned based on the recommendations of the Complaints Committee.

4.7. Stichting B&T's requirement that Stichting Sint Jan would have to represent the interests of *all* employees of the RC Church, as stated by Stichting B&T in the context of Articles 3:305a and 3:302 of the Dutch Civil Code (BW), is also a step too far. The same applies to the requirement that Stichting Sint Jan would have to comply with the principles of the Claims Code. Stichting Sint Jan does not concern itself with financial claims or large-scale damage or loss, but with idealistic objectives. It operates on a non-profit basis, and there have neither been allegations nor evidence of any financial interests at stake in this case.

4.8. In conclusion, the powers of attorney, mandates and expressions of support submitted during the hearing show that a sufficiently large number of interested parties support the initiative of Stichting Sint Jan. The law does not require Stichting Sint Jan to act as a spokesperson in the media, while the preliminary consultations with Stichting B&T, required under Article 3:305a of the Dutch Civil Code (BW), have actually taken place.

4.9. The court therefore considers Stichting Sint Jan's class action admissible, in so far as it concerns the generally formulated claims.

4.10. However, the court concurs with B&T in its argument that Stichting Sint Jan's class action cannot be admitted in so far as it concerns claims specifically and exclusively based on the handling of complaints against [X]. Although these complaints and their handling may serve as an illustration of the allegedly negligent principles and working method of the Complaints Committee, Stichting Sint Jan's action for a declaratory decision requested under (I) cannot be admitted, because it relates only to the handling of complaints against a single individual. This therefore does not constitute a class action and a combining of similar interests, while Stichting Sint Jan has not argued that it serves a public interest because the negligent declaration that the complaints are well-founded affects an important part of society.

4.11. The court therefore emphatically does not express an opinion on [X]'s guilt or innocence. That would require further investigation of those individual cases, and possibly the hearing of witnesses and/or consulting of registers, but that would be beyond the scope of this class action. If Stichting Sint Jan wishes to bring this matter before the court and claim rehabilitation for [X], it may do so on the basis of its object under (c) in its articles, but it will have to obtain an explicit mandate from the heirs of [X] and this mandate is lacking, although there is an heir. During the hearing, it was not disputed that this heir is aware of this case, but wishes to stay out of it.

Interest as referred to in Article 3:303 of the Dutch Civil Code (BW) and requirements for a declaratory decision under Article 3:303 of the Dutch Civil Code

4.12. It follows from the above considerations that the court is of the opinion that Stichting Sint Jan, with its generally formulated claims, has a sufficient interest within the meaning of Article 3:303 of the Dutch Civil Code, while its objects mean that it is sufficiently involved to be able to elicit a declaratory decision under Article 3:302 of the Dutch Civil Code in this class action.

4.13. The interim conclusion is that Stichting Sint Jan's claim under (I) cannot be admitted, but its claim under (II) can be.

Due care in the Procedural Rules

4.14. The court dismisses the assertion of Stichting Sint Jan that the Procedural Rules of the Complaints Committee quoted in the facts are in conflict with the principles of a fair, just and impartial hearing, as laid down in Article 6 ECHR but also in national and ecclesiastical law, in particular the Dutch Criminal Code (Sr), Code of Criminal Procedure (Sv) and Code of Civil Procedure (Rv), the General Administrative Law Act (Awb) and the Code of Canon Law (*Wetboek van Canoniek Recht*).

- 4.15. More specifically, the Procedural Rules do not violate the presumption of innocence, as set out in, *inter alia*, Article 6(2) ECHR – insofar as applicable, as discussed below. Article 18 of the Procedural Rules provides that the panel must arrive at a reasoned opinion on the merits of the complaint on the basis of what has been stated and alleged by the parties and/or the documents submitted and the witnesses and experts heard. There is no mention of it being sufficient for the Complaints Committee to find the complaint plausible, at least not insofar as that would mean that a suspicion on the part of the Complaints Committee is sufficient to consider a complaint well-founded.
- 4.16. The following should be noted. According to the dictionary, 'well-founded' (*gegrond*) means "based on good grounds or reasons, justified by good reasons", which may be equated with "true, sound, correct". That means 'well-founded' does not mean 'probably correct' or with a probability of more than 50% on a scale of 0-100%.
- A general principle in law is that a judicial or dispute resolution body may not rely solely on its belief or conviction that the complainant or claimant is right, and that (juridical and other) facts stated by the person bringing the action and challenged by the other party, stating reasons, must not be accepted as established facts by the person deciding on this, with the exception of generally known facts or circumstances. A judicial or dispute resolution body or official does not express views, but establishes, and gives a judgment. In principle, the party relying on the legal consequences of facts or rights asserted by that party and challenged by the other party, bears the burden of proving these facts and, when evaluating the evidence provided, in order to be able to accept those facts or rights as being proven and established, there must be a reasonable degree of certainty. A 'reasonable degree of certainty' need not be 100% certainty, but must come close, with the minimum being that the juridical fact is 'beyond reasonable doubt' or may be accepted 'with a probability bordering on certainty'.
- 4.17. The Procedural Rules do not fail to recognise this. The Procedural Rules do not set aside the normal rules of evidence. Article 18.4 of the Procedural Rules provides that the panel must give a reasoned opinion on the merits of the complaint, which means that in order to find a complaint well-founded, the panel must substantiate that opinion in its decision by means of suitable evidence. The Procedural Rules do not give any indication as to what evidence is or is not suitable, thus allowing the panel some discretion, but in using that discretion the tribunal must be guided by the general principles of written and unwritten law, including the due care that is generally considered appropriate. In this case, particularly high requirements may be set on these principles because it concerns an accusation which is rightly taken very seriously, of sexual abuse under duress or in a relationship of dependence, which abuse may cause the victim serious psychological and/or physical harm, but which, if declared proven, also has a defamatory effect on the perpetrator and his environment.
- The procedural rules do not fail to recognise this.
- 4.18. In any case, the official procedural rules do not state that, unlike in criminal, civil and canon law, the complainant's statement alone (disputed by the alleged perpetrator, stating sufficient reasons) constitutes sufficient proof of the alleged fact, nor that an unproven complaint from another complainant about a different type of abuse in a different context, in a different place and at a different time, may serve as useful additional evidence.
- 4.19. Furthermore, it cannot be said that the Procedural Rules are in conflict with Article 8 ECHR (the right to respect for private and family life), insofar as it is applicable, while the official rules do not state either that a review would be open only to complainants and not to alleged perpetrators. If and insofar as the Chair of Stichting B&T has communicated this to Stichting Sint Jan, this is not based on the text of the Procedural Rules. Article 22 of the Procedural Rules opens up the possibility of review, but does not specify that this applies only to unsuccessful complainants.

4.20. It is true, however, that the Procedural Rules also allow proceedings against deceased alleged perpetrators. This would not be possible under general criminal law, as Article 69 of the Dutch Criminal Code (Sr) provides that the right to institute criminal proceedings lapses on the death of the accused, but it would be possible in civil actions, which may also be brought against the heirs of the person concerned. The same applies to limitation/prescription (*verjaring*). In criminal law, the right to action lapses on expiry of the limitation period (Art. 70 of the Dutch Criminal Code), but in civil law, statute-barred actions may also be instituted. There, extinctive prescription is only an optional defence which cannot be applied *ex officio*, and the prescription only extinguishes the legal action and not the right itself (see Article 3:306 *et. seq.* of the Dutch Civil Code, BW). If, in civil law, the defendant does not invoke expiry of the prescription period or late protest (within the meaning of Article 6:89 of the Dutch Civil Code), the court must disregard the expiry of the prescription period and/or the right to complain. If the defendant invokes the expiry of the prescription period and/or the right to complain, the court must dismiss the action for performance for that reason, but a natural obligation will still remain intact and a performance carried out on the basis of that obligation cannot be reclaimed.

This means that the Procedural Rules cannot be said to be in conflict with generally applicable fundamental legal principles on these points.

4.21. The conclusion of the above is that the first part of the claim under (II), requesting a declaratory decision to the effect that the Procedural Rules are unlawful, must be dismissed, irrespective of the court's considerations on the applicability of Article 6 ECHR set out below.

Due care in the working method of Stichting B&T and Complaints Committee

4.22. In the following, the court will arrive at the opinion that the working methods of Stichting B&T and the Complaints Committee do not stand the test of due care in some respects, although the court wishes to state first and foremost that this does not pertain to the way in which the victims were treated, but to the way in which the rights of the alleged perpetrators were handled.

4.23. A key point in this matter is that, on its website and in its final report, the Complaints Committee stresses the fact, and applies this in the statements below, that the focus of the Complaints Committee is the victim and not the alleged perpetrator, that the interests and opinions of the victims are decisive and that no legal evidence is required, but that it is sufficient if the complaint is plausible.

There is no objection to this if and insofar as it concerns showing empathy for the complainants, who are often traumatised by distressing experiences in the distant past and have suffered the consequences all their lives. Nor is there any objection to this if and insofar as it concerns the issuing of a 'further opinion' as referred to in Article 19.3 of the Procedural Rules, which opinion can be given both if the complaint is considered well-founded and if it is not, and which according to the website may pertain to possible therapeutic treatment(s) or other measures, such as (financial or other) compensation for the complainant, but could also concern an acknowledgement and apology on the part of the church authority as an institution.

However, there is a serious objection to this if it results in the violation of the alleged perpetrator's fundamental rights to respect for private life, honour and good name, and a fair, just and impartial hearing, and that person is rashly found guilty of a serious and shameful offence such as sexual abuse. This would be contrary to the due care which is to be expected from an adjudicating institution, which received a great deal of publicity when it was established by the authoritative bodies of the Dutch RC Church and which presents itself as a high-quality authoritative, impartial and independent tribunal, whose decisions are published. In the case of [X] this was done in such a way that his identity could easily be discovered.

4.24. The court reiterates that a tribunal such as that of the Complaints Committee, when assessing a complaint of sexual abuse disputed by the alleged perpetrator, may not consider that complaint well-founded merely because it believes the complainant's statement, and must base its decision on sufficiently strong and relevant additional evidence. In the

cases against [X], the Complaints Committee did not demonstrate this in its last decisions.

- 4.25. Moreover, in the opinion of the court, in one of those cases, the Complaints Committee acted contrary to the content or purport of its own Procedural Rules and, in the other case, it failed to properly examine the correctness of a procedural defence which is incompatible with the finding of fact. The court will return to this below.
- 4.26. Firstly, the court has already established that the Chair of Stichting B&T gave an interpretation of the foundation's Procedural Rules which is incorrect and unacceptable in judicial matters, or at least created such an appearance, giving rise to legal responsibility. Stichting Sint Jan states in its summons that they had been informed by the Chair of Stichting B&T that the Complaints Committee only grants reviews to complainants who claim to have been the victim of sexual abuse, whose complaints have been declared unfounded and who request a review based on new facts. This is not stated in the letter submitted by Stichting Sint Jan, but this is what the Chair supposedly said in person in the conversation on 6 February 2017. This was not contradicted in so many words by Stichting B&T in its statement of defence, and the court asked further questions about this at the personal appearance hearing. On that occasion, the Chair of Stichting B&T, not being the Chair of the Complaints Committee also present, again did not clearly contradict his statement that the Procedural Rules do not provide for a request for review by the alleged perpetrator. On the contrary, he stated: "They wanted a review, but I said that is not possible". The Chair of Stichting B&T stated that he had said this because the alleged perpetrator had died and that he meant to say that the situation was such that there was nobody who could request a review. However, this is not correct. Above, the court has already considered that [X]'s heir may claim rehabilitation, while Stichting Sint Jan may do the same, provided that it is based on a special order. That also includes a review request, and the text of the Procedural Rules does not rule out review requests by alleged perpetrators found guilty.

In this respect, the court also notes that the submitted final report of the Complaints Committee only mentions requests for review by unsuccessful complainants. This points to biased dispute resolution and prejudice in favour of the complainants to the detriment of the alleged perpetrators, all the more so since in general criminal law, review is only possible for judgments constituting a conviction (Article 457 of the Dutch Code of Criminal Procedure, Sv) and no review whatsoever is therefore possible for judgments in which the alleged perpetrator is acquitted.

The two cases against [X] considered more closely

- 4.27. In the following, the decisions against [X] which have been submitted in these proceedings will be considered in more detail, partly as an illustration of the negligent working method of the Complaints Committee. Stichting B&T has argued that the Complaints Committee acted with due care in these cases, in accordance with the Procedural Rules and the general principles of law. The court is of a different opinion.

The first case

- 4.28. The first complaint, case number 2011-T390, was submitted to the Complaints Committee on 2 September 2011. The complaint of this complainant concerned sexual abuse by [X] in the years 1958/1959, when [X] was a chaplain in the complainant's parish (see 2.9). The complainant was 9 and 10 years old at the time. In the order for personal appearance of the parties, the court ordered Stichting B&T to bring the notice of complaint into the proceedings, but Stichting B&T refused to do so because of the confidential information it was said to contain, which confidential information, as explained in more detail at the hearing, is shared only with the Complaints Committee and the church authority, and which confidentiality may not be breached in legal proceedings, not even if, as the court suggested, the document is anonymised and/or a prohibition of disclosure pursuant to Article 29 of the Dutch Code of Civil Procedure (Rv) is imposed.

After a protest by Stichting Sint Jan and further debate, during which it was raised that both Stichting Sint Jan and the court were aware of the complainant's identity because the decision of the Complaints Committee had been submitted with the summons in non-anonymised form, the court informed the parties that it would decide in this judgment on the legal consequences of the refusal to submit the document requested by the court.

- 4.29. That decision is that the court accepts that in this case there are compelling reasons which justify safeguarding the complainant's confidentiality and not providing the notice of complaint to Stichting Sint Jan or to the court for inspection.

The court hereby states first and foremost that for the assessment of the actions of Stichting Sint Jan, i.e. to answer the question of whether or not there was a fair hearing, it is not necessary to know what facts took place in the distant past. What matters in the case to be assessed by the court is the procedure followed by the Complaints Committee, not the facts themselves.

Furthermore, the court considers it likely that in addition to the allegations below, which are evident from the published decision of the Complaints Committee, the complaint mentions further intimacy and details, which if they were to become public, would be very harmful and uncomfortable for the complainant and his family and friends, irrespective of whether such humiliating abuse actually took place.

The court takes into account, on the one hand, that the alleged perpetrator in this case was a prominent person within the Dutch Roman Catholic Ecclesiastical Province, who held a very high position there and was and still is widely known. The court must take account of the fact that this judgment, just like the decisions of the Complaints Committee, will be given publicity. Since in this case, the court cannot express an opinion on the question whether the alleged abuse actually took place or not, because that is not what the actions pertain to and - aside from the admissibility of Stichting Sint Jan's actions - this cannot be determined without further investigation, the allegations and the question of guilt will remain unresolved and consequently the complainant and his family and friends have a legitimate interest in ensuring that what happened to the complainant, or at least what he seems to remember about it, is not publicly trivialised or magnified by supporters or opponents.

On the other hand, the court takes into consideration that it may be deduced from the statements of the Complaints Committee that the Complainant's childhood experiences, whether partly fictitious or not, had a significant impact on his whole life, and that he felt deep shame and had been hesitant to disclose his memories for a very long time (50 years). Partly for this reason, the court deems it undesirable to rake this up further than strictly necessary by forcing Stichting B&T to provide further details in this public follow-up process.

- 4.30. The downside of accepting Stichting B&T's refusal to submit the notice of complaint is that the court must assume that nothing happened other than the situations described by the Complaints Committee in its decisions and that no other or additional evidence for this is available.
- 4.31. According to the documents disclosed to the court, this complainant stated that he was told to go to [X] to deliver letters, that [X] took him on his lap, groped him and, with his hand in his underpants, played with the complainant's penis, that this happened more often and that [X] had gone much further after that first time. The complainant stated that he had to give [X] (a) hand job(s), resulting in [X] having several orgasms, that [X] once put the complainant's penis in his mouth and that [X] made several attempts at anal penetration of the complainant with his penis.
- 4.32. The complaint was brought to the attention of [X], who, through his lawyer, sent an official report for defamation to the Complaints Committee. On 23 January 2012, the Complaints Committee delivered an opinion and advised that, based on its considerations, the Complaints Committee could not recommend that Diocese of Roermond declare the complaint well-founded (see 2.11).

The opinion submitted states that the Complaints Committee handled the complaint at a closed session on 28 November 2011, at which the complainant, assisted by a legal advisor, was heard, but [X] and his lawyer did not appear. At the hearing, the complainant added that there was not only an attempt at penetration, but that [X] had penetrated the complainant twice during this period (see 2.10).

According to the decision, the hearing was deferred in order to give the complainant the opportunity to provide further supporting evidence, which the legal advisor did by letters of 12 December 2011 and 5 January 2012, submitting a total of three written statements.

4.33. The essence of the considerations of the Complaints Committee, which led to the negative opinion of 23 January 2012 to the effect that it could not recommend that the complaint be declared well-founded, is that the statement of the complainant appears to be sincere, but that when assessing a complaint, the Complaints Committee takes as a starting point that it cannot rely solely on the statement of one complainant. The Complaints Committee considers it an elementary principle of law that a person is not convicted on the basis of one single statement and that this elementary principle of law must also be observed in this procedure. Subsequently, the Complaints Committee considers that in the present case, no facts or circumstances have come to light that support the complainant's statement. In particular, the submitted statements of a sister and two brothers of the complainant do not support the alleged sexual abuse by [X]. In the opinion of the Complaints Committee, this also applies to the case with reference 2010 T 023, put forward by the complainant's legal advisor as supporting evidence, since in that case the complaint was declared inadmissible and the Complaints Committee consequently did not get to the question of whether it is plausible that the alleged perpetrator actually committed the alleged conduct.

4.34. The court is of the opinion that the Complaints Committee appears to have arrived at this first decision with due care and in accordance with the generally prevailing principles of the burden of proof, the provision of evidence and the evaluation of evidence in legal proceedings as described above. It is surprising, however, that the Complaints Committee added that it felt it was inappropriate for [X] to make a report for defamation in response to the complaint about serious offences, which the committee itself considered to be unfounded. On this point, the court cannot follow the Complaints Committee. A prelate accused of sexual abuse is entitled to respect for his honour and good name too. If the accusation is unfounded, there is no need for the alleged perpetrator to humbly apologise and he has the right to take action to restore his reputation.

4.35. No objection was filed within the time limit, rendering the final decision of 23 January 2012 irrevocable.

4.36. Over a year later, however, the special panel of the Complaints Committee, by a decision of 28 June 2013, granted a review request from the complainant and determined that the case was to be reheard. In the order for personal appearance, the court requested that Stichting B&T submit the review request to the proceedings, but Stichting B&T refused to do so because of the confidential information it was said to contain. The decision of the special panel of 28 June 2013 has not been submitted either, but the court downloaded this document from the public website of the Complaints Committee during the adjournment of the hearing, of which the court subsequently notified the parties. They did not object to this.

This decision shows the following.

4.37. Firstly, it appears that the Complaints Committee, when reopening the case, acted contrary to its own Procedural Rules. Prior to reading that decision on the review request, the court had asked Stichting B&T at the personal appearance hearing whether members of the panel that had delivered the first opinion were allowed to sit on the special panel that assessed the review request. This is not clearly specified in article 22.3 of the Procedural Rules, but it is in article 20.2, which relates to the special panel handling objections to opinions. This provides that the chair of the panel that delivered the opinion may not be on the special panel handling the objection. In response, Stichting B&T stated that the special panel handling a review request must consist of different chairpersons.

However, it appears from the downloaded decision that the chair of the panel which delivered the opinion of 23 January 2012 was in fact also on the special panel which granted the review request. This is contrary to the Complaints Committee's own interpretation of the Procedural Rules.

- 4.38. Furthermore, from the description of the proceedings in the decision on the review request, it appears that the Complaints Committee did not inform [X] of the review request which was submitted on 26 April 2013, i.e. before his death. Nor were [X] and his church authority given the opportunity to oppose the review request, which request was handled at a hearing before his death. Although the Procedural Rules do not specifically prescribe this, this course of events is contrary to the generally prevailing legal principle of hearing both sides of the argument.
- 4.39. Finally, and the court considers this to be crucial, the decision to grant the review request shows the application of an incorrect assessment standard. According to Article 22 of the Procedural Rules, a review may be requested because and if new facts or circumstances have come to light or if facts or circumstances have come to light that were not taken into account in the earlier opinion for other reasons.
- 4.40. The only new fact taken into consideration by the special panel is the submitted form "Permission to use report as supporting evidence" in the case with case number 2012-T890 (4). This document has been submitted to the court file. It is Exhibit 5 in the submitted notice of complaint in the case with case number 2012-T890 (4), discussed below. This form is dated 'April 2013'. However, this other complaint concerns a different type of abuse, much less serious and once-only, of a different complainant in a different period and in a different setting, which means that in principle, this complaint cannot add anything concrete to the earlier, much more extensive abuse. The only connection the court can find is that [X] is the alleged perpetrator in both cases and that in both cases the alleged conduct constitutes sexual abuse. In the opinion of the court, this is insufficient. There is no direct link between the two cases, as might have been the case if it concerned similar indecent acts in the same period and in the same setting, e.g. in the infirmary of a boys' boarding school or during sex education by a visiting priest. But that is not the case here.
- 4.41. Furthermore, the plausibility of this new complaint had not yet been examined by a panel of the Complaints Committee assessing the merits. This was the reason why the advisory panel in the decision to which the review request related, decided not to accept another earlier complaint (the one in the case with reference 2010 T 023) as supporting evidence. The reason for not accepting it was that the Complaints Committee, due to inadmissibility of the complaint, had not dealt with the question of whether it was plausible that the alleged perpetrator had actually committed the conduct alleged in that other complaint. The plausibility of the conduct alleged in this newly added other complaint had not been examined prior to the handling of the review request either, nor was it examined by the special panel itself during that assessment. Consequently, the conduct alleged in the newly added complaint could not be regarded as 'facts', because it could not yet be regarded as plausible, let alone proven. They were mere insinuations.
- 4.42. The only new 'fact' was that another complaint had been submitted after the decision had become final, and this single fact, the submission of an unproven complaint, cannot reasonably be accepted as a relevant 'new fact' or 'new circumstance' or as facts or circumstances which had been wrongly disregarded in the opinion for some other reason. In reasonableness and under the rules of general law on review and revocation, facts or circumstances can be taken into consideration only if they occurred prior to the decision and were not known at the time of that decision. That was not the case in this instance. The new complaint was not submitted until more than a year after the decision.

- 4.43. However, there is another new fact that can be identified, which is that the Complaints Committee has apparently 'changed course' in the meantime and has now started to accept as supporting evidence other complaints that are unproven or have been declared inadmissible, whereas in the final decision to which the review request related, they had not yet done so. However, this cannot justify the reviewing and reopening of a final decision that has become irrevocable. It is true that an adjudicating body may develop new insights and subsequently judge cases and legal issues differently (even the Supreme Court sometimes reconsiders earlier case law), but general fundamental principles of law dictate that this must not result in a situation in which the same adjudicating body starts reviewing its earlier, now irrevocable, final decisions and then considers complaints that had been declared unfounded to be well-founded after all. This is contrary to legal certainty and the principles of criminal and civil law respectively, of *ne bis in idem* of Article 68 of the Dutch Criminal Code (Sr) and *res judicata* of Article 236 of the Dutch Code of Civil Procedure (Rv).
- 4.44. The reasons of the special panel for reopening the handling of the complaint, apart from the technicalities, can therefore not sustain that decision. The reopening in the decision of 28 June 2013 was not properly substantiated and, moreover, contrary to the fundamental principle of legal certainty. The reopening was therefore unlawful. This renders the reopened handling of the complaint based thereon and the subsequent decision of 11 February 2014, considering the complaint partly well-founded, unlawful as well, aside from the fact that the court is of the opinion that this subsequent decision also shows an inadequate evaluation of the evidence.
- 4.45. The evaluation of the evidence was inadequate because, in the opinion of the court, another complaint, not in itself proven, about a different type of abuse in another period and under different circumstances, cannot be used as supporting evidence. Furthermore, without a further explanation, which is lacking, it is incomprehensible that the new panel considers the way in which and the details with which the complainant gave his account in his notice of complaint and at the hearing, to be 'authentic'. After all, the complainant only revealed his story after 50 years and then, during the handling of his complaint, added more and more horrible details to the alleged abuse, which, in the opinion of the court, could hardly have been forgotten after 50 years and then suddenly surfaced. It concerns the anal penetration, of which the complainant stated in his notice of complaint of 2 September 2011 that only attempts were made, then at the hearing of 28 November 2011 claimed that this penetration had actually taken place twice, and later at the hearing of 15 January 2014 claimed that it had happened three or four times. This is not consistent and these recollections therefore colour the credibility of the statement. It requires further explanation that the Complaints Committee nevertheless describes the complainant's account in his notice of complaint and at the hearing as 'authentic'. This explanation is lacking.

The second case

- 4.46. The foregoing implies that the court is of the opinion that the reasoning in the decision of 11 February 2014 in the second case, case number 2012-T890 (4), is also unsound.
- 4.47. A complaint considered unfounded by the same tribunal in a previous decision can obviously not serve as supporting evidence for another complaint, and the way in which that earlier complaint was considered well-founded, not prior to the decision but at the same time, was negligent and unlawful and should therefore not have been used as evidence.
- 4.48. In addition, any reasonable assessor, who in his assessment is guided not only by empathy and compassion for the complainant i.e. claimant, but also by the elementary principles of methodologically sustainable reasoning, ought to realise that two facts which in themselves cannot be proven and are not even connected in a relevant way, together still do not constitute any evidence whatsoever. In these two decisions, the tribunal in question employed an unfruitful and unsound cross-pollination.

4.49. In addition, without further explanation, which is lacking, it is incomprehensible that the panel considered this complainant's account to be authentic as well. This complainant did seek publicity and in November 2010, he gave an account of his experiences at the boys' boarding school in question on an Internet forum. When writing about the incident with the visiting priest, who had touched him during sex education, he stated that he was unable to find out his name. However, in his notice of complaint of 29 April 2013, two and a half years later, he stated that he had known that [X] was that priest since [X]'s episcopal consecration, i.e. since about 1970. These statements are inconsistent.

4.50. What is more, as acknowledged during the personal appearance hearing, the Complaints Committee failed to do any investigation into the defence submitted by [X] before his death, which was that, as far as he could remember, he never visited that boys' boarding school, or the addition by the diocese, that there was no systematic contact between the seminary and the boys' boarding school. This was an affirmative defence that could have been investigated with objective evidence, such as witness statements and/or registers, and the Complaints Committee could not reasonably omit to conduct such an investigation by merely arguing that the assertion by the diocese that there was no systematic contact between the seminary and the boys' boarding school did not rule out that there were occasional reciprocal visits.

4.51. The court is of the opinion that in the second case too, the decision-making was negligent and the reasoning inadequate.

Relief requested

4.52. Although it follows from the foregoing that the court is of the opinion that in the two cases presented as examples, the working method of the Complaints Committee was negligent and elementary principles of law were violated, which means that this working method must be regarded as unlawful, the requested declaratory decision cannot be granted nevertheless. This refers to the second declaratory decision, remaining after the earlier dismissal, requested under (II). This request from Stichting Sint Jan is for a declaratory decision to the effect that the working method of the Complaints Committee constituted or constitutes a breach of Article 6 ECHR and is therefore unlawful. In its claim, Stichting Sint Jan asserts a direct causal link between the unlawfulness and the breach of Article 6 ECHR, even though Article 6 ECHR is not directly applicable to dispute resolution by the Complaints Committee. Although Article 6 ECHR sets a standard and provides a framework which the Complaints Committee must observe, that does not mean that it can be ruled that the working method of the Complaints Committee constituted or constitutes a breach of Article 6 of the ECHR.

4.53. Article 6 ECHR reads:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

4.54. Article 6 ECHR thus has two components: the so-called 'civil limb' and the 'criminal limb'. The first paragraph of Article 6 ECHR relates to the determination of civil rights and obligations as well as to criminal charges. Paragraphs 2 and 3, in particular the presumption of innocence invoked by Stichting Sint Jan, apply directly only if someone has been charged with a criminal offence.

4.55. The Complaints Committee is a body of Stichting B&T. Stichting B&T is a private legal entity, established by the Bishops' Conference and the KNR. The proceedings before the Complaints Committee are not criminal proceedings, nor are they connected to those in any other way. There is no question of a 'criminal charge'. The proceedings before the Complaints Committee do not lead to the imposition of a sanction, but to an opinion on the merits of the complaint. Under national law, complaints handling by a private foundation is considered to be a civil-law matter, even if the violated standard to which the complaint relates, could also be considered a criminal offence.

4.56. Nor is there any question of a 'determination' of civil rights and obligations by a court established by law. Although the opinions of the Complaints Committee are not entirely 'free of obligation' in the sense that the Bishops' Conference and KNR committed themselves to them in advance and the ecclesiastical authorities cannot deviate from them without consulting the Chair of the Complaints Committee, they are not fully binding either (in the sense of decisive under the present law). In proceedings before the regular courts, complainants cannot claim performance from the church authorities the way they could if the opinion were based on a contract of settlement as referred to in Article 7:900 of the Dutch Civil Code (BW), while there is no question of a contract of arbitration as referred to in Article 1020 of the Dutch Code of Civil Procedure (Rv) either.

The accused employees of the RC Church are not bound by the decisions of the Complaints Committee at all, at least not unless they themselves have also entered into a contract of settlement or arbitration. This was not the case in the discussed cases of [X]. The mere circumstance that, during his life, [X] did not immediately distance himself from the procedure used for complaint handling or put up a substantive defence, does not mean that his heirs are bound by the decisions. The alleged perpetrators, like the complainants, are free to submit their cases to the regular courts for a completely new and neutral hearing, even though the alleged perpetrators found guilty will often be at a disadvantage, depending on their claims in such proceedings.

4.57. Since Stichting Sint Jan, in its claim, has made an inextricable link between the applicability and breach of Article 6 ECHR and the unlawfulness of the working method of the Complaints Committee, the requested declaratory decision cannot be granted. If Article 6 of the ECHR is not applicable, there can be no question of a breach of Article 6, leaving aside the question of whether Article 6 ECHR may be invoked in proceedings in which no government body is involved. As was explicitly discussed with Stichting Sint Jan during the personal appearance of the parties, the court is bound by the wording of the declaratory decision as requested by Stichting Sint Jan, and the court cannot substitute it with a different declaratory decision.

4.58. During the personal appearance of the parties, Stichting Sint Jan requested to read into [*inlezen*] its claim the breach of Article 8 ECHR, which provision does have a direct horizontal effect and can have an effect in a private relationship, and/or the violation of the general standard of due care of Article 6:162 of the Dutch Civil Code (BW), but the court cannot do this without a formal change of claim within the meaning of Article 130 of the Dutch Code of Civil Procedure (Rv) and Stichting Sint Jan has not changed its claim in the prescribed manner, i.e. in writing by a statement or supplementary motion.

Costs of the proceedings

4.59. As Stichting B&T is unsuccessful on substantive grounds and Stichting Sint Jan is unsuccessful on formal grounds, both parties must be considered to be partially unsuccessful. The court orders both parties to pay their own costs.

5 The Decision

The court

Declares Stichting Sint Jan's claim under (I) inadmissible,

Dismisses the claims under (II) and (III),

Orders both parties to bear their own costs.

This judgment was given by N.W. Huijgen, LL.M., D.M.I. de Waele, LL.M., and D.T. Boks, LL.M and pronounced in open court on 18 April 2018.

