

IN THE NAME OF THE QUEEN

Pronounced: 7 December 1995  
Cause list no.: 95/813  
Cause list no.  
District Court: 95/303

The Court of Appeal in The Hague, Section IVA, rendered the following judgment in the case of:

1. **Murex Diagnostics Benelux BV**,  
having its registered office in Utrecht,
2. **Murex Diagnostics S.A.**,  
having its registered office in Chatillon (France),
3. **Murex Diagnostics S.A.**,  
having its registered office in Madrid (Spain),
4. **Murex Diagnostics S.P.A.**,  
having its registered office in Rome (Italy),
5. **Schiapparelli Diagnostici Ismunit S.P.A.**,  
having its registered office in Rome (Italy),
6. **Murex Diagnostics Ltd.**,  
having its registered office in Dartford (United Kingdom),

appellants, as also plaintiffs in the cross-appeal,  
procurator<sup>1</sup>: C.J.J.C. van Nispen,

v e r s u s

**Chiron Corporation,**

having its registered office in Emeryville, California, United States of America,  
respondent, as also defendant in the cross-appeal,  
procurator: G.M.H. Hoogvliet,  
attorney-at-law: P.A.M. Hendrick (Amsterdam).

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<sup>1</sup> attorney-at-law with an exclusive right of appearance before a specific court

## The proceedings

1. In first instance Chiron claimed - among other things - that Murex c.s. be ordered not to be involved in any manner in any acts which directly or indirectly infringe its European patent 0 318 216, relating to "NANBV diagnostics and vaccines", not only in respect of the Netherlands, but also in respect of direct or indirect infringements in other countries for which the patent has been granted, and furthermore that Murex c.s. be ordered to ask all the buyers to whom it supplied infringing products to return the supplied products, all this under penalty of astreintes<sup>2</sup>.

2. By judgment of 8 May 1995 the president of the district court in The Hague partly allowed the claims of Chiron.

3. Murex c.s. lodged an appeal from the said judgment. Next they filed a statement in cross-appeal aiming at a provisional claim to suspend the extraterritorial effect of the judgment a quo in respect of appellants, as also plaintiffs in the cross-appeal in 2, 3 and 5.

Next Chiron filed a statement of reply in the cross-appeal, including a conditional (alternative) statement aiming at the extension of the extraterritorial effect of the judgment a quo in respect of appellants in 1, 2, 3, 4 and 6.

Murex c.s. filed a statement of reply in the conditional (alternative) cross-appeal.

At the session of 2 November 1995 parties had their stands pleaded in the cross-appeal, Murex c.s. by their procurator and Chiron by its attorney-at-law. The memoranda of oral pleading have been included in the file of the proceedings.

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<sup>2</sup> a sum of money to be paid if the principal order made by the court is not complied with

## **Examination of the cross-appeal**

4. In the first place parties disagree on the question of whether the judge is allowed to order a provisional measure in the appeal from a judgment in interim injunction proceedings.

5. The Court establishes first that, unless the contrary results from the law, even without being granted such competence by a specific disposition, the judge is allowed to order a provisional measure, if asked, in a case brought before him.

6. Since the contrary does not result from the law, the judge is also allowed to order such a provisional measure in the appeal from a judgment in interim injunction proceedings from which no urgent appeal was lodged.

7. In the second place parties disagree on the question of whether in the present case there is sufficient reason to intervene by way of a provisional measure in the enforcement of the judgment declared enforceable by the president.

8. There is only room for partial suspension of the enforcement of the judgment declared enforceable by the president, as claimed, if - also taking into account the interests on the part of Murex c.s. which will be harmed by the enforcement - Chiron does not have any interest to be respected in reasonableness in proceeding to enforcement while waiting for the result of the appeal.

9. In the present case Murex c.s. did not argue that the judgment be founded on an apparent error. Neither did they argue that since the judgment of the president facts occurred or were revealed by reason whereof it can be expected that the judgment will be reversed. Murex c.s. take the stand that the president made a legal error. It has not become plausible that this is the case. Art. 6 introduction and in 1 of the European Convention on jurisdiction and the enforcement of judgments does not exclude the opinion of the president. Furthermore there is no established case law which the opinion of the president

derogates from. Taking all this into account it cannot be stated that apparently the judgment is founded on an error. Also taking into account that the president made the enforcement of the judgment subject to security, the court considers the condition described above required to intervene in the enforcement of the judgment declared enforceable, not to be met.

10. It results from the above that the provisional measure claimed by Murex c.s. will be dismissed. So the condition on which Chiron filed a conditional claim has not been met, and this will not have to be discussed anymore. Being the parties found to be at fault Murex c.s. will be ordered to pay the cost of the cross-appeal.

### **Decision in the cross-appeal**

The Court of Appeal dismisses the claim and orders Murex c.s. to pay the cost of the cross-appeal, estimated until the present judgment pronounced on the part of Chiron at NLG 3,075.-, and refers the case to the cause list of 25 January 1996 for the filing of the statement of grounds of appeal.

This judgment was rendered by Brinkhof, Fasseur - van Santen and Grootoink, and pronounced at the public session of 7 December 1995, in the presence of the clerk of the court.

(signature)

(signature)

certified authentic copy

issued to C.J.J.C. van Nispen

procurator of app.

the clerk of the court of appeal

in The Hague

(signature)