

# EXHIBIT 3

# ECLI:NL:HR:2013:BY6101

Court	Dutch Supreme Court
Date of judgement	15/03/2013
Date of publication	15/03/2013
Case number	12/02667
Official relations	Opinion: ECLI:NL:PHR:2013:BY6101
Field of law	Civil law
Special characteristics	Appeal in cassation
Indication of the contents	Procedural law. Leapfrog appeal to the Dutch Supreme Court possible in application proceedings? Provisional examination of witnesses; lawyer-client privilege of in-house lawyers.
Statute citations	Dutch Code of Civil Procedure (applicable in case of digital proceedings) Dutch Code of Civil Procedure (applicable in case of digital proceedings) 165 Dutch Code of Civil Procedure (applicable in case of digital proceedings) 398 Dutch Code of Civil Procedure (applicable in case of digital proceedings) 426
Sources	Rechtspraak.nl RvdW 2013/405 NJB 2013/670 NJ 2013/388 with annotation from H.B. Krans JWB 2013/150 JBPR 2013/19 with annotation from N.A.M.E.C. Fanoy LLM JOR 2013/229 with annotation from R.G.J. de Haan LLM JIN 2013/75 with annotation from P.C.M. Kemp

## Judgement

15 March 2013

First Chamber

12/02667

EE/MD

Supreme Court of the Netherlands

Decision

in the case of:

1. [Appellant 1],

residing in [place],

2. [Appellant 2],

residing in [place],

APPELLANTS in cassation,

counsel: initially K.G.W. van Oven LLM

now F.E. Vermeulen LLM,

v e r s u s

1. The foundation STICHTING H9 INVEST,

based in Groningen, the Netherlands,

2. SUNOIL B.V.,

based in Coevorden, the Netherlands,

3. DELTA BIOVALUE B.V.,

based in Groningen, the Netherlands,

4. DELTA N.V.,

based in Middelburg, the Netherlands,

RESPONDENTS in cassation,

failed to appear.

The appellants in cassation will hereinafter also be referred to as [appellant 1] and [appellant 2]. The respondents in cassation also as H9 Invest, Sunoil, Delta Biovalue and Delta.

1. The proceedings in the fact-finding instance

With regard to the course of the proceedings in the fact-finding instance, the Dutch Supreme Court refers to the following decisions in the case 126861/HA RK 11-171 of the District Court

of Groningen of 11 July 2011 and 28 February 2012.

The decision of the District Court of 28 February 2012 is attached to this decision.

## 2. The proceedings in cassation

[Appellant 1] and [appellant 2] lodged an appeal in cassation against the decision of the District Court of 28 February 2012. The application for cassation is attached to, and forms part of, this decision.

H9 Invest, Sunoil, Delta Biovalue and Delta did not file a defence.

The opinion of Advocate-General J. Wuisman relates to annulment of the contested judgement.

The counsel of [appellant 1] and [appellant 2] responded to that opinion by a letter dated 19 December 2012.

## 3. Established facts in cassation

3.1 The cassation proceedings can be conducted on the basis of the following established facts.

(i) From March until early August 2010, meetings regarding the takeover of the shares of Delta Biovalue Nederland BV took place between, on the one hand, [person involved 1], who acted on behalf of H9 Invest and Sunoil, or, at any rate, on behalf of either of them, and, on the other hand, [appellant 1], who according to his statement acted with power of attorney from Delta Biovalue and Delta.

(ii) The shares of Delta Biovalue Nederland BV are held by Delta Biovalue, of which Delta Development&Water BV is the sole director and shareholder. The sole shareholder and director of this latter company is Delta.

(iii) On 5 August 2010, consensus was reached regarding the takeover, at any rate according to H9 Invest and Sunoil. At some point after 5 August 2010, this was contested by Delta Biovalue BV and Delta NV, however, on the ground that [appellant 1] was not authorised and his discussion partners were aware of this.

3.2 H9 Invest and Sunoil submitted a request for a preliminary examination of witnesses (which related, among other things, to the examination of [appellant 1]), which request was granted by the District Court. During the preliminary examination, [appellant 1] was asked, among other things, what had been said by Delta NV's counsel [appellant 2] at a meeting at the end of August 2010, at which two other members of the board of Delta NV and Delta NV's in-house counsel were present, in addition to himself. [Appellant 1] indicated through his counsel that he was not obliged to answer that question. After all, [appellant 2] was

present at that meeting in his capacity as lawyer, which implies that [appellant 1] is entitled to the right, derived from [appellant 2]'s lawyer-client privilege, to request that he be excused from the obligation to make a statement as a witness with regard to the question posed to him. The District Court dismissed [appellant 1]'s plea of entitlement to a derivative right of non-disclosure and ordered that [appellant 1] answer the question as to what [appellant 2] had said during the meeting at the end of August 2010.

The District Court held, among other things:

"12. (...) The position of the person who, like [appellant 2], is a company lawyer and in-house counsel must now be discussed. In its judgement of 14 September 2010 (LJN BN8974, hereinafter also: the Akzo judgement), the Court of Justice of the European Communities held (again) that entitlement to legal privilege requires that (1) the exchange with the lawyer relates to the client's rights of defence and (2) that the exchange must emanate from an independent lawyer. The Court of Justice held that, with regard to independence, in-house lawyers cannot be equated with external lawyers, as the requirement of independence implies that no employment relationship exists between the lawyer and their client. In that judgement, the Court of Justice repeated (ground 42) the opinion it had expressed earlier, namely that the second requirement is based on the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. In the Akzo judgement, the Court of Justice further held (ground 47) that the lawyer, as a result of the fact that they have an employment relationship, is not allowed to ignore the commercial strategies pursued by their employer, which affects their ability to exercise professional independence.

13. The Akzo judgement was given in a (European) competition case, but that context does not differ from that of (Dutch) civil proceedings to such an extent that the considerations of the Court of Justice are completely irrelevant in the present case. The District Court adopts the arguments of the Court of Justice and holds that in-house lawyers are not entitled to the lawyer-client privilege as regards information exchanged between them and their client, the company that employs them.

14. The judgement above dismisses the District Court from the obligation to carry out a virtually impossible task, namely to divide the in-house lawyer's actions into two categories: what he has done, heard or said 'as company lawyer' and what he has done, heard or said 'as counsel'."

#### 4. Assessment of the admissibility of the appeal

4.1 [Appellant 1] and [appellant 2] brought a leapfrog appeal. Section 398 of the Dutch Code of Civil Procedure (DCCP), which provides for bringing a leapfrog appeal to the Dutch Supreme Court against judgements in a defended action in the first instance, is not declared applicable by analogy to application proceedings in Section 426(4) DCCP. However, if all parties and stakeholders who are entitled to lodge an appeal have consented to a leapfrog appeal to the Dutch Supreme Court after a decision was given in the first instance, there is

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