

## Case Details

### Case Details

|               |                          |
|---------------|--------------------------|
| National ID   | link                     |
| État membre   | Belgique                 |
| Common Name   | link                     |
| Decision type | Court decision in appeal |
| Decision date | 27/05/2009               |
| Jurisdiction  | Hof van Beroep Gent      |
| Objet         |                          |
| Demandeur     | S.D.                     |
| Défendeur     | BVBA Autohandel C.V.L    |
| Mots clés     |                          |

### Directive Articles

Consumer Sales and Guarantees Directive, [Article 2, 2](#). Consumer Sales and Guarantees Directive, [Article 3](#)  
Consumer Sales and Guarantees Directive, [Article 5, 1](#). Consumer Sales and Guarantees Directive, [Article 7, 1](#).

### Headnote

(1) The ruling out of any applicable guarantee does not constitute an agreement between the parties to a shorter guarantee period (per article 7(1) of Directive 1999/44, implemented into Belgian law by article 1649quater, §1, third member of the Civil Code) than the two-year period prescribed by article 5(1) of Directive 1999/44 (implemented into Belgian law by article 1649quater, §1, first and second member of the Civil Code).

(2) For the trader to be liable for the guarantee, non-conformity needs to be established, the burden of proof for which lies on the consumer. The four conditions set out in article 2(2) of Directive 1999/44 (implemented into Belgian law by article 1649ter, §1 of the Civil Code) are cumulative conditions and so as soon as one condition fails to be met, the good will not be in conformity with the contract.

(3) The consumer's choice of reparation, as set out in article 3 of Directive 1999/44 (implemented into Belgian law by article 1649quinquies of the Civil Code) may not be exercised randomly. Only when the trader does not or tardily replies to the request to bring the goods into conformity free of charge, or when he does reply but offers an unreasonable or for the consumer seriously cumbersome proposal, will the consumer be able to opt for the price reduction a rescission of the contract as reparation.

### Facts

Plaintiff purchased a second hand car from defendant on 20 November 2006. The invoice stated that the vehicle was sold as is and without guarantee. On 23 February 2007, the car broke down on account of a timing belt having ruptured. On 28 March 2007, plaintiff provided defendant with a notice of default, stating that the invoice was unlawful and that defendant was legally obligated to provide for a guarantee period. The defendant proved unforthcoming and so the plaintiff filed suit on 25 April 2007.

The court of first instance dismissed plaintiff's claim on account of not having granted sufficient time to defendant to make the necessary repairs. The Court of Appeals disagreed, stating that plaintiff was a consumer under article 1(2)

(a) of Directive 1999/44 (implemented into Belgian law by article 1649bis, §2, 1° of the Civil Code) and that any contractual provisions restricting consumers' statute-given rights was null and void.

#### Legal issue

(1) Does the exclusion of a guarantee period equate an agreement pertaining to a guarantee period reduced from the period set out in article 5(1) of Directive 1999/44 (implemented into Belgian law by article 1649quater, §1, first and second member of the Civil Code) when it comes to second hand goods?

(2) Upon whom lies the burden of proof for non-conformity of the good?

(3) Does a consumer have the right to choose his mode of reparation at will, within the confines of article 3 of Directive 1999/44 (implemented into Belgian law by article 1649quinquies of the Civil Code)?

#### Décision

The court reversed the judgment at first instance where it stated that plaintiff's claim was inadmissible on the grounds of not having granted sufficient time to defendant to make the necessary repairs. However, it did uphold that judgment in ruling that plaintiff's claim was unfounded in that the plaintiff did not provide the defendant with sufficient time to make the necessary repairs.

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#### Result

The court dismissed the appeal.