CASE TRANSLATION: **BELGIUM**

Case citation:

Court of Appeal of Antwerp, 2020/AR/1721, 12 June 2023 (unpublished)

Name and level of the court: Court of Appeal of Antwerp

Date of decision: 12 June 2023

Belgium; hidden defects Tesla S Pl00 DL vehicle; disclosure/discovery; expert investigation frustrated and hampered; lack of loyal cooperation with the expert report and the evidence

Judgment

Civil Chamber

at the hearing on 24 April 2023, represented by Mr D, permanent representative, and by [ ] against the judgment of the Antwerp Enterprise Court, Antwerp Division

at the hearing on 24 April 2023, represented by [ ]

second appellant,

TESLA BELGIUM BV, ON 0521.902.461, with its registered office at 2630 AARTSELAAR, Boomsesteenweg 8, respondent,

represented at the hearing of 24 April 2023 by [ ]

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1. Statement of facts and procedural background

The facts underlying this dispute, as well as the procedural circumstances and the contested judgment, were already sufficiently set out in the interlocutory judgment of 1 February 2021. It is sufficient to refer to it.

In this interlocutory judgment, this court, at the request of the parties, ordered, before rendering judgment, the appointment of an expert to examine the Tesla S Pl00 DL vehicle, which had been purchased on [ ] 2018, by (the first appellant) through leasing from (the second appellant) from TESLA BELGIUM BV (the respondent). The decision on costs was reserved.

On 9 May 2022, the court expert filed his final report with the registry of this court.

2. Claims

2.1. After the interlocutory judgment, the appellants, in their final decisions on the main issue, request a ruling that the respondent is guilty of obstructing the expert investigation and, consequently, that her claim against the respondent be upheld, that the purchase agreement between the second appellant and the respondent be declared dissolved in favour of the respondent, and that this dissolution be enforceable against the first appellant. They subsequently request that the respondent be ordered to (i) reimburse the second appellant the purchase price of 158,680 euro, plus interest accruing from 14 May 2019, until the date of full payment, in accordance with the Act of 2 August 2002, on late payment in commercial transactions, (ii) provisionally pay 1 euro for costs, interest, and taxes, which the second appellant will deduct from the reimbursement to the first appellant of the rent already paid, and (iii) pay 54,338.24 euro to the second appellant as additional damages.

In addition, they file incidental claims against the respondent based on the indemnity for latent defects, with the exception of the right to hear the respondents allege obstruction of the expert investigation.

In a further additional order, they reiterate their claims based on failure of delivery, and in a further order, they request that the claims based on indemnity for hidden defects be declared well-founded, that at least the first plea be established that there is a serious lack of enjoyment, and that the respondent be ordered to pay 149,729.91 euro, including VAT, plus legal interest in accordance with the Act of 2 August 2002 on late payment in commercial transactions.

Finally, the appellants request that the respondent be ordered to pay the costs of the said proceedings.

2.2. Following an interlocutory judgment, the respondent decided to dismiss the appeal and files a cross-appeal against the contested judgment insofar as the contested judgment ordered it to repay 11,970.64 euro to the appellants. She seeks to have the claim declared unfounded, with an order that the appellants pay the costs of both appeals.

3. Assessment

3.1. On the admissibility of the appeals

There is no record of service of the judgment under appeal. The appeal, filed with the petition filed with the registry of this court in 2020, is timely and formally filed. The appeal is also admissible.

The cross-appeal, filed by initial decisions filed with the registry of this court in 2022, is also formally filed, timely, and admissible.

3.2. On the merits of the appeals

3.2.1. The admissibility of the appellants' claim pursuant to the alleged exceeding of the short time limit under article 1648 of the former Civil Code is no longer relevant, as the court of first instance declared the appellants' claim admissible and no cross-appeal has followed on this point.

Moreover, it should be noted that the respondent's alleged violation of this short notice was never raised before the court of first instance and was therefore not even subject to the court's review. Moreover, both parties mutually agreed to request the appointment of a court expert to examine the vehicle, so it can be inferred from all this that the respondent clearly waived this exception, which is not in accordance with public policy.

For the sake of completeness and insofar as necessary, it should be noted that the respondent carried out various extensive repairs on the vehicle between delivery in 2018 and 18 March 2019, so that the short notice was in any case suspended during this period. In an email dated 18 March 2019, the respondent subsequently informed the appellants that it was willing to take back the vehicle and refund the purchase price. When this ultimately did not happen, the appellants proceeded to serve a summons on June 2019, which was certainly timely, within a short period of time.

3.2.2. Based on the documents and elements presented, and in particular the content of the expert report, the appellants sufficiently demonstrate that the respondent frustrated and seriously hampered the expert investigation by their lack of loyal cooperation with the expert report and the evidence.

4. Discussion

4.1. The expert report shows that the respondent initially kept the appellants and the expert in the dark for a long time about where the log data from vehicle Tesla S P100 DL was stored and whether it was possible to retrieve this data. Initially, the respondent argued that the log data could not be retrieved from the vehicle itself because it was stored in the cloud. The respondent then claimed that the data was indeed present in the vehicle but refused to disclose it. After this, the respondent changed their position again, claiming that the log data was only present in the vehicle for a short time and then sent to the cloud. During a later expert meeting, several of the respondent's technicians then asserted that the log data was stored in the vehicle for 18 months but was then overwritten. Moreover, at the first scheduled technical meeting on 9 September 2021, after the test drive, the respondent refused to immediately read the vehicle's log data and share it with the expert, even though the expert clearly stated that reading (all) the log data was necessary for the execution of his assignment. Subsequently, the expert also had to establish that, after the expert's assessment had ended on 9 September 2021, and the appellants and

the expert had left the Tesla garage in Hasselt, the respondent unilaterally read the vehicle's log data without sharing it with the parties and the expert. The expert confirmed in his report that this course of action, on the respondent's part, "*was a handicap to the proper conduct of the expert assessment*."

Only after much insistence and heated debate between the parties, counsel, and the expert, the respondent ultimately provide only partial, very limited, incomplete log data from the car, which had been filtered by the respondent regarding the aforementioned test drive. Previous log data from the period prior to the first expert meeting and test drive was not shared, nor was other specific information requested by the expert (or not) provided or (fully) answered. Consequently, the expert could not usefully verify whether the defects and deficiencies in the car cited by the appellants corresponded with the vehicle's log data. The respondent claims that they fully cooperated with the expert's investigation is therefore inconsistent with the documents and elements submitted and the content of the expert's report.

The way in which the respondent justifies their lack of cooperation is not at all convincing. There is no evidence that the disclosure of the complete log data would have been prevented are subject to GDPR regulations. There is no evidence that some of the log data contained protected personal data, and the manager/director of the first appellant had clearly given his consent to transfer this vehicle log data to the expert, as evidenced by the expert report. Nor can the respondent hide behind their – not even proven – unilateral assertion that the limited log data they have provided was sufficient for the expert investigation and that other log data was (or was) irrelevant. Such an assertion is clearly contradicted by the court expert in the expert report. The fact that the log data was raw data that could not simply be interpreted and/or read by the expert and required the intervention of Tesla technicians does not detract from the foregoing and in no way prevents full cooperation in the evidence. Nor does the respondent demonstrate, based on the documents and elements presented, that the complete vehicle log data requested by the expert could be classified as a trade secret. A mere assertion to that effect, unsupported by underlying documents or elements, does not constitute proof. If there had been any discussion about this—which the respondent never raised during the expert examination—the respondent would have been free to request the court to take any necessary measures to ensure the confidentiality of the data in a manner proportionate to the right to a fair trial and to adequately safeguard the adversary, which it failed to do.

There is no evidence that the full vehicle log data requested by the expert was a so-called "*phishing expedition*," i.e., a request for a comprehensive investigation in which a whole range of documents was randomly searched. In the expert report, the expert clearly explained what information he sought to obtain and why it was necessary for the execution of his assignment.

The fact that the expert did not dispute the accuracy of the scarce and limited data ultimately provided by the respondent does not detract from the foregoing.

The respondent's refusal to fully cooperate with the expert's investigation, and in particular the refusal to provide all the information and complete log data requested by the expert, qualifies as a breach of the duty to cooperate in the production of evidence. Parties to the proceedings are required to cooperate loyally with any investigative measure ordered by the court, regardless of whether they bear the burden of proof and even if this requires them to present evidence that is to their own detriment (see, in this sense, Cass. 25 September 2000, Arr. Cass. 2000, 1424). This duty to cooperate concerns not only the provision of evidence, but also the expediting and efficient presentation of evidence and also applies to expert examination.

Under article 972bis of the Judicial Code, parties are obliged to cooperate with the expert examination, and if they fail to do so, the judge may draw whatever conclusions they deem appropriate. The legislature has not provided for a specific sanction in this regard, so this is an open standard that grants the judge broad discretion. The legislature therefore allows the judge to attach substantive legal consequences to the disloyal conduct of a party to the proceedings. The fact that the respondent, against whom proof must be given, refused to fully cooperate with the judicial expert examination can therefore be used to infer a

factual presumption against them as evidence of the disputed fact invoked by the appellants, who requested this investigative measure. Such a factual presumption is, in principle, sufficient in itself to prove the vehicle's defects. In this case, the parties are businesses, and evidence between businesses is open and can be provided by any means, including factual presumptions. In this case, the court takes into account the aforementioned factual presumption derived from the respondent's lack of full cooperation, as well as the elements listed below, all of which, in the court's opinion, provide sufficient evidence of the vehicle's defects (see, in this regard, Cass. 17 December 1998, Arr.Cass. 1998, 1141), so there is no reason to reverse the burden of proof within the meaning of article 8.4, paragraph 5, of the Civil Code.

4.2. According to the court expert's findings, after the numerous and varied repairs already carried out on the vehicle by the respondent, the Tesla S P100 DL still had defects, including a faulty summon function, a faulty parking function due to intermittent malfunctions of the right-hand sensors, a problem with the tailgate lock, and faulty or defective front-right sensors. Furthermore, the expert also confirmed in his report the existence of a known problem with phantom breaking (sudden braking of the vehicle for no apparent reason) and the display failure in Tesla vehicles, which the appellants had also complained about. Although the expert could not establish this during the test drives, the court considers this to be the case based on the documents and elements submitted and the lack of complete disclosure. The factual suspicion gathered from all the vehicle's log data by the respondent has been sufficiently proven.

Moreover, the documents and elements presented also sufficiently demonstrate that the vehicle had to be returned to the respondent several times, beginning from the first few months after purchase, due to persistent problems and defects. The order forms and other documents show that numerous repairs had to be made to the vehicle, and a significant number of parts had to be replaced.

Although the expert stated that the remaining defects would be easily resolved during a subsequent service, this appears not to be the case. Indeed, some of these defects were already raised by the appellant directly after the purchase, and after seven repairs to the respondent, they were still not resolved. Moreover, after the expert examination and after the vehicle had been extensively serviced at a Tesla garage in Eindhoven, the Netherlands, the appellants continued to encounter problems with the car, which, among other things, required the replacement of the axles – one of many – and the installation of a new charging port. Problems with the mirrors, the auto-park function, and the display failing also persisted. The fact that the vehicle was brought to an authorized Tesla garage in Eindhoven and not to the respondent does not detract from the clear evidence presented by the appellants of the persistent defects in the vehicle. For example, based on the documents and elements presented, the appellants demonstrate that after the expert examination, problems arose again with the vehicles' charging port, which did not open, preventing the car from charging. Although the respondent did not respond to the request for a contradictory finding of this, they sent a technician to the site and subsequently claimed—completely contrary to the documents and evidence before them—that the repair would have taken only a few minutes, while their own repair receipt shows that it took approximately 45 minutes.

The fact that the expert confirmed in his report that, apart from the defects he cited, none of the defects cited by the appellants could be found during the test drives and that the vehicle behaved normally at that time and no safety risk could be identified, does not affect the foregoing.

4.3. In accordance with article 1641 of the Old Civil Code, the seller is in principle obliged to indemnify against hidden defects of the item sold, which make it unsuitable for the intended use, or reduce this use to such an extent that the buyer, had they been aware of the defects, would not have purchased the item or would only have purchased it for a lower price. The obligation to indemnify exists when the sold item is afflicted with a defect that is latent and serious and that existed at least in infancy at the time of the purchase (see, in this connection: B. TILLEMAN, S, DE REY, N, VAN DAMME, and F. VAN DEN ABEELE, "Special agreements. Purchase (2007-2020). Overview of case law," TPR 2020/3·4, no. 300).

In view of the documents and elements presented, and considering, among other things, the expert report and the other documents and elements submitted by the appellants, the court finds that the appellants sufficiently demonstrate that the vehicle was indeed (and still is) afflicted with a defect that made it unsuitable for its intended use, or that this use was so diminished that, had they been aware of the defect, they would not have purchased the vehicle, or would only have paid a lower price. Moreover, the documents and elements presented sufficiently demonstrate that the defects were hidden, as they only came to light following various repairs. Based on the documents and elements presented, the appellants also sufficiently demonstrate that these defects were already present, at least in their infancy, at the time of purchase, as just a few days after delivery, the respondent asked the appellants to bring in the vehicle due to a series of identified problems (which were by no means purely aesthetic in nature, as the respondent wrongly claims). The fact that many of the defects—due to seven interventions by the respondent—have since been repaired does not prove that the goods were not defective at the time of sale, but rather that these defects were indeed present and had to be repaired. These defects were serious because they related to driving comfort, safety (see, among other things, the sensors), and the possibility of refuelling. The ability to refuel, or in this case, charge the vehicle electrically, is fundamental and essential for its use. If, as in this case, the tailgate apparently blocked several times and did not open, making charging impossible, normal use of the vehicle is impossible. The fact that the buyer was continually confronted with an accumulation of minor, medium, and serious defects from the moment of delivery sufficiently demonstrates that the vehicle was not suitable for its normal intended use. In addition to the numerous repairs, the full cooperation with the expert assessment and the commercial proposals made by the respondent demonstrate that this vehicle did indeed suffer from serious defects. It is sufficient to accept reimbursement of the purchase price. The respondent's claim that he did not respond to this and did not provide his account information contradicts the documents and evidence presented.

As a specialized professional seller, the respondent is deemed to have been aware of these defects and is therefore liable for them. The respondent wrongly refers to the conventional limitation of liability to avoid any liability. In accordance with the purchase agreement concluded between the parties, the "limited warranty for new vehicles" applies (p. 3 of the purchase agreement), which, according to the enclosed general warranty conditions, "is limited, to the extent legally permitted, to the repair and/or replacement of defective parts of the vehicle" and which also includes "the free repair or replacement of parts that become defective as a result of material and/or construction defects." Even taking this limitation of their warranty obligation into account, the appellants, in view of what has already been explained and based on the documents and elements presented, sufficiently demonstrate that the respondent, as a specialized professional seller, has also failed to fulfil its conventional limited warranty obligation, as even after several successive repairs and various replacements of various vehicle parts, the vehicle still suffers from significant defects and faults that have not yet been resolved.

The buyer of a defective item, for which the seller is liable, has a discretionary right to request the rescission of the sale or a price reduction. The court has no discretionary power over the buyer's choice in this regard (also in this sense: B. TILLEMAN, S. DE REY, N. VAN DAMME and F. VAN DEN ABEELE, "Overview of Jurisprudence on Special Agreements - Purchase (2007-2020)", TPR 2020-3/4, 1366). The use of the item after the discovery of the defect that diminishes its value does not preclude the right of termination (also in this sense: B. TILLEMAN, S. DE REY, N. VAN DAMME and F. VAN DEN ABEELE, "Overview of Jurisprudence on Special Agreements - Purchase (2007-2020)", TPR 2020-3/4, 1369).

The delivery was made in September 2018. Immediately afterward, the appellants complained about all the defects that had manifested since delivery and about the numerous, lengthy, and fruitless attempts to repair and replace the item. The appellants repeatedly gave the respondent the benefit of the doubt and were willing to have repairs carried out repeatedly by the respondent, who promised to fix everything. In March 2019, the respondent finally made an offer to take back the car, but—although the appellants provided sufficient evidence that they were willing—the appellants were

unwilling to address this, but this was not forthcoming, so a summons was issued. The fact that the vehicle has now driven approximately 30,000 km and has since become obsolete is therefore entirely not attributable to the appellants, but to the respondent himself, so that this should not be deducted from the claim under the circumstances. Based on the documents and information presented, it appears that the appellants no longer use the vehicle for fear of the problems that may arise.

In this case, the respondent must take back the vehicle and refund the full purchase price. There is no reason to award interest on this amount in accordance with the Act of 2 August 2002 on late payment in commercial transactions, as this Act does not apply to payments by way of compensation or other monetary obligations that may arise from the commercial transaction, such as the payment of damages for hidden defects (i.e., in this sense: C. VANACKERE, N. PEETERS and J. VAN DE VOORDE, "Interest", in X., Bestendig Handboek Verbintenissenrecht, V.2bis - 23). Interest on this amount can be awarded at the statutory interest rate, or the date of the summons.

4.4. The additional compensation the appellants are claiming primarily relates to the alleged need to purchase another car and the related costs. However, there is no evidence that the leasing of a BMW 3300 Sedan by the first appellant in October 2019 is causally linked to the defects in the Tesla vehicle, which the first appellant purchased from the respondent in August 2018, especially since the expert report shows that the first appellant had not used the Tesla vehicle since 8 May 2019. Furthermore, the documents and evidence before the court show that the first appellant owns several company vehicles, and there is no evidence that these were unavailable. The claim for damages is therefore unfounded.

The claim for reimbursement of the insurance costs for the Tesla vehicle is also unfounded. The first appellant decided to stop using the vehicle from May 2019 onward but did not deregister the vehicle until June 2022. The decision to retain the insurance despite this decision constitutes the first appellant's own choice, which is not causally linked to the defects in the Tesla vehicle for which the respondent is liable. Moreover, the first appellant has not submitted any documents or actual proof of payment for these insurance premiums (except for a single payment request from the insurance company from 2019). The fact that the vehicle was repaired by the respondent several times before May 2019 does not detract from the fact that the first appellant continued to use the vehicle after that point, so the insurance costs are her responsibility and cannot be charged to the respondent.

There is no evidence that the legal assistance costs for Allianz vehicle insurance pertain to the Tesla vehicle. The appellants also provide no proof of payment for this. This claim is also unfounded.

The first appellant's choice to continue (limited) insurance for the Tesla vehicle after its deregistration is her own decision and is not causally linked to the defects in the Tesla vehicle for which the respondent is liable.

The purchase agreement provided for a free right to charge at Tesla charging stations. The first appellant claims that she was unable to use this option and claims damages for this. Her unilateral claim that she would have done 50% of her charging sessions at a Tesla charging station if the vehicle had been in good condition is unsubstantiated and is based on the appellants' unilateral assertion and hypothesis. Compensation for this damage is already covered by the refund of the full purchase price. The purchase agreement shows that no additional costs were charged for this option, so it can indeed be assumed that it is included in the purchase price.

The first appellant also requests a reservation for any items that the second appellant, as lessor, might charge her as a result of the termination of the purchase agreement. However, the court is not persuaded by a mere reservation. After all, a reservation is not a claim within the meaning of article 1138, 3, of the Judicial Code, nor a claim within the meaning of article 1138, 2, of the Judicial Code (see, in this regard: Cass., 6 October 2005, Arr.Cass. 2005/10, 1853). Therefore, there is no reason to grant any further reservation as requested by the first appellant.

The cross-appeal is unsuccessful and the appeal is partially successful.

5. Costs

The appeal is largely successful and the cross-appeal is unsuccessful, so the respondent is ordered to pay the costs of both proceedings, including the costs of the expert examination.

Pursuant to article 1022, paragraph 2, of the Judicial Code, the amounts of the legal expenses compensation are established in the Legal Expenses Compensation Rate. Unless a procedural agreement regarding the amount of the legal expenses compensation or a reason or request for a deviation from the basic amount of the legal expenses compensation is available, the court must determine ex officio the correct basic amount of the legal expenses compensation in accordance with the provisions of the Legal Expenses Compensation Rate. A court that thus determines the correct basic amount of the legal expenses compensation in accordance with the provisions of the Legal Expenses Compensation Rate does not violate the general legal principle of the autonomy of the parties to the proceedings in civil proceedings. (In this sense, Cass. AR. C.22.0158.N, 13 January 2023).

6. Decision

The court shall decide by judgment in adversarial proceedings.

The proceedings were conducted in accordance with the law of 15 June 1935 on the use of language in legal proceedings.

Declares the cross-appeal admissible but unsuccessful. Declares the appeal admissible and successful as follows.

Amends the contested judgment.

Declares the claims admissible and successful as follows.

Declares the purchase agreement between TESLA BELGIUM BV and [ ] regarding the vehicle Tesla Model S Pl00 DL with chassis number [ ] dissolved against TESLA BELGIUM BV.

Orders TESLA BELGIUM BV to repay to [ ] the purchase price of 158,680 euro, plus interest at the statutory interest rate from 12 June 2019 (date of summons) until the date of full payment.

Declares, to the extent necessary, the termination of the aforementioned purchase agreement opposable to [ ]

Orders TESLA BELGIUM BV to pay the costs of both actions, estimated on the side of [ ] and settled by the court at 311.54 euro (summons costs), 6,000 euro (legal fees for the first instance), 7,500 euro (legal fees for the appeal), and 12,154.69 euro (expert investigation costs).

Orders TESLA BELGIUM BV to each pay the court fee of 400 euro to the Belgian State, payable upon first request of the competent tax authorities.

This judgment was pronounced in open court in June 2023 by

Judge

Clerk

Translated by Professor Dr Joachim Meese after obtaining the redacted judgment. This case was referred to in Sönke Iwersen and Michael Verfürden, *The Tesla Files* (Penguin Michael Joseph, 2025), but no identifying details were provided by the authors. Thanks to retired Judge Eric Beaucourt for taking the time and trouble to establish the case was not reported, and for providing the citation.