Defence on the grounds of defects

Law of Sale, Defects, Defence in the Event of Defects

Court	*Federal Court of Justice [Bundesgerichtshof – BGH], Fifth Civil Senate*
Date	*14 February 2020*
Case number	*V ZR 11/18*
Reference	*BGHZ 225, 1*
Finality	*Final*
Provisions	*Sections 275, 320, 323, 433, 437, 439 of the German Civil Code (BGB)*

Headnotes

Section 320 BGB

The mere existence – and not merely the raising – of the defence of non-performance of the contract pursuant to Section 320 BGB precludes the enforceability of the claim standing in a reciprocal relationship to the unfulfilled counterclaim and, consequently, withdrawal pursuant to Section 323 para. 1 BGB. This also applies to the defence of defects.

Sections 433, 439 BGB

a) The purchase of a co-ownership share in a plot of land is directly subject to the provisions governing the sale of goods. The point of reference for any claims for subsequent performance is not a right, but the plot of land of which the purchaser intends to become a co-owner.

b) Pursuant to Section 433 para. 1 second sentence BGB, the purchaser of a co-ownership share is also entitled to expect the property as a whole to be free from defects in title and physical defects. Subject to the seller's inability to fulfil, the purchaser is entitled to full subsequent performance.

c) The seller of a co-ownership share in a property is released from their obligation to provide subsequent performance under section 275 para. 1 first case BGB

if the buyer is unable, or could only succeed by bringing legal proceedings, to persuade the other co-owners to agree to the measures necessary to remedy the defects and to bear the costs incurred in doing so in proportion to their co-ownership share

Operative Part

Upon the defendant's appeal on points of law, the judgment of the 14th Civil Division of the Oberlandesgericht (OLG - Higher Regional Court) Dresden of 29 November 2017 and the supplementary judgment of the same division of 24 April 2018 are set aside in respect of costs and in so far as they were held to the detriment of the defendant.

The case is referred back to another division of the Court of Appeal for a fresh hearing and decision, including on the costs of the appeal proceedings.

The plaintiff's cross-appeal is therefore without merit.

Facts of the case

1 *The claimant had purchased a let property with the intervener, his then wife, and financed the purchase through a loan secured by mortgages. In 2008, the property was divided into equal co-ownership in connection with the couple's divorce. The intervener assumed sole management of the property. By a notarised contract dated 17 December 2009, the claimant sold his co-ownership share to the defendant for €583,500. Of the purchase price, €83,500 was to be paid in cash, which was done. The remaining €500,000 was to be settled by releasing the claimant from his debt service obligations. To this end, the contract provided that the monthly loan servicing payments of €5,800 were to continue to be debited from the property account; however, the defendant was required to make up any shortfalls in the property account arising from the management of the property by making payments into that account. In the event of a failure to fulfil the obligation to cover any shortfall, the contract provides for the claimant to have a right of withdrawal.*

2 *By letter dated 10 December 2011, the intervener demanded that the claimant reimburse €29,000 as compensation for payments it had made towards the loan for the period from February to November 2011. The claimant unsuccessfully demanded that the defendant release him from this obligation, setting a deadline, and withdrew from the contract of sale by letter dated 21 July 2012. He is demanding that the defendant provide the declarations necessary for the rescission of the contract, as well as payment of €11,592.31 in damages plus interest. Shortly before giving notice of withdrawal, on 18 July 2012, the claimant had sold his former 50 per cent co-ownership share to the intervener's current husband and had undertaken to exercise his right to withdraw from the contract of sale with the defendant. Attached to the contract was an agreement in which the claim for joint and several compensation was deferred. The defendant objects to the claimant's withdrawal, inter alia by asserting a right of retention on the grounds of alleged defects (including dry rot, fire safety defects, defects in the building's main drainage system, inadequate thermal insulation on various structural elements, and inadequate waterproofing of the basement walls) totalling €563,000, and is claiming, by way of counterclaim, reimbursement of out-of-court legal fees amounting to €7,868.28.*

3 *The Regional Court dismissed both the claim and the counterclaim. On appeal by the claimant, the Higher Regional Court set aside the judgment and referred the case back to the Regional Court for a fresh decision. In its first appeal judgment (dated 22 January 2016 – V ZR 196/14, NJW 2016, 2274), the Senate set aside the appeal judgment and referred the case back to the Court of Appeal for its own decision on the merits. In the present second appeal judgment, the Higher Regional Court upheld the action for rescission for the most part and, whilst dismissing the remainder of the claim, ordered the defendant to make the declarations necessary for rescission in exchange for payment of €81,686.64. It dismissed the defendant's appeal. By a supplementary judgment, the Higher Regional Court ordered the costs incurred by the intervener to be borne partly by the defendant and partly by the claimant. By means of the appeal on points of law, authorised by the Senate and directed against the appeal judgment and the supplementary judgment, the defendant continues to seek the dismissal of the claim and an order requiring the claimant to reimburse out-of-court legal costs. By way of a cross-appeal, the claimant seeks a reduction of the 'simultaneous payment' reservation to €39,186.64.*

Reasons for the Decision

I.

4 *In the view of the Court of Appeal, the claimant's withdrawal from the purchase contract is valid, meaning that he is entitled to demand its rescission. Although the parties had not expressly stipulated in the contract that the claimant could demand not only compensation for any shortfall in the house account but also release from his obligations arising from the joint and several liability towards the intervener, However, the latter is consistent with the spirit and purpose of the contract. The purchase price was intended to be paid through release from the loan liabilities. This objective was originally to be achieved through the obligation to make up any shortfalls in the house account, as the loan*

obligations had also been serviced from that account. However, since the intervener has settled the obligations arising from the loan directly with the bank and is demanding joint and several settlement outside the house account, the intended objective of paying the purchase price by offsetting loan liabilities can only be achieved by releasing the claimant from his liabilities towards the intervener. The defendant cannot counter the claim for indemnity by arguing that the intervener's claim against the claimant has not been set out in a comprehensible manner, that the intervener has not provided a statement of account regarding the income from the property, and that the defendant has other claims against the intervener. It is, in fact, the defendant's responsibility, as the party liable for indemnity, to raise such objections against the intervener, not that of the claimant as the party entitled to indemnity. There is no evidence of any contractual agreement to the contrary. On the contrary, it is clear from the contract that the claimant was to be definitively released from the loan obligations and was no longer to have any dealings with the intervener.

5 *The claim for indemnity is not invalidated by the defence of non-performance of the contract. At the time of withdrawal, the defendant was in default of its obligation to indemnify. Any breach of contractual settlement obligations by the claimant, given their minor nature, does not entitle the defendant to refuse to fulfil its obligation to indemnify in full. Nor are material defects an obstacle to its default. It cannot demand rectification simply because it had acquired only half-ownership. Any claim for damages in lieu of performance free from defects would amount to €308,311.72 at most, and therefore does not exceed the outstanding purchase price debt and consequently does not give rise to a defence that would preclude the validity of the withdrawal. The same applies to the failure, in breach of contract, to assign warranty claims against third parties to the extent of €150,000. However, the defendant may demand repayment of the portion of the purchase price paid in cash, as well as the payments it made to cover shortfalls in the property account.*

6 *As a consequence of the rescission, the defendant must make the declarations necessary for the reversal of the contract; furthermore, it must reimburse the claimant for out-of-court legal costs. By contrast, the asserted claim for the distribution of rental income received and for compensation for a shortfall in proceeds from the resale of the co-ownership share does not exist. The counterclaim is unfounded.*

II.

7 *This does not stand up to legal scrutiny on key points. The appeal judgment and the supplementary judgment must be set aside on the defendant's appeal. The plaintiff's cross-appeal thus becomes moot.*

Admissibility of the appeal

8 *The appeal is admissible in its entirety. This also applies in so far as it is directed against the supplementary judgment. If the appeal is admissible against the preceding judgment, it is also admissible against the supplementary judgment if the latter – as in this case – relates exclusively to the issue of costs (see Senate, judgment of 17 October 2003 – V ZR 71/03, VIZ 2004, 234, 235 et seq. and Federal Court of Justice, judgment of 6 July 2006 – III ZR 13/05, WM 2006, 1956 marg.no. 4, each with further references).*

Merits of the appeal

9 *The defendant's appeal is also successful on the merits.*

10 *The claimant may only require the defendant to make the declarations necessary for the restitution of the performance rendered by the claimant under the parties' contract of sale on the basis of section 346 para. 1 BGB, and only if he has validly withdrawn from the contract in accordance with section 323 para. 1 BGB in conjunction with the withdrawal provision in clause 5.6 of the contract. This is the case if the defendant is also obliged to indemnify the claimant against his obligations towards the intervener arising from the joint obligation towards the lending bank (see A. below), if this obligation is due (see B. below), if it is enforceable (see C. below) and if the defendant has failed to fulfil it within a period of six*

weeks. The reasoning given by the Court of Appeal does not support its assumption that these conditions are met in two decisive respects.

11 *A. The Court of Appeal is, however, correct in assuming that the defendant must also indemnify the claimant against his obligations to make good the shortfall as a joint and several debtor in respect of the loan liabilities vis-à-vis the intervener.*

12 *1. The Court of Appeal has reached this conclusion on the basis of an interpretation of the indemnity clause in the parties' contract of sale. This interpretation is subject to only limited review in appeal proceedings (see Senate, judgments of 22 April 2016 – V ZR 189/15, NZM 2016, 640 marg. no. 7 and of 21 October 2016 – V ZR 78/16, ZfIR 2017, 355 marg. no. 20) and is not open to challenge within this framework. By settling any shortfalls in the house account, the defendant should, pursuant to clause 3.2.(a) of the contract, have been able to fulfil its obligation to indemnify the claimant against the debt service payable to the bank, even without statements from the intervener. Once the intervener ceased to process the debt service via the house account, the provision could no longer fulfil its purpose; consequently, the indemnity obligation assumed by the Court of Appeal also corresponds to the interests of the contracting parties with regard to a claim by the intervener from the perspective of internal set-off amongst joint and several debtors (see, in this regard, the Senate's first appeal judgment of 22 January 2016 – V ZR 196/14, NJW 2016, 2274 marg. No. 24–26). The appeal raises no objections to this either.*

13 *2. Nor is there any grounds for objection to the Court of Appeal's finding that the defendant's obligation to indemnify does not require either a statement of account from the claimant or a statement of account from the intervener regarding the management of the estate.*

14 *a) The Court of Appeal correctly assumes that, according to general principles, the defence against claims from which the indemnity creditor is to be indemnified is not the latter's responsibility but that of the party obliged to provide indemnity (Senate, judgments of 19 April 2002 – V ZR 3/01, WM 2002, 1358, 1359 and of 22 January 2016 – V ZR 196/14, NJW 2016, 2274 marg. no. 27; Federal Court of Justice, judgments of 19 January 1983 – IVa ZR 116/81, NJW 1983, 1729, 1730 and of 15 December 2010 – VIII ZR 86/09, WM 2011, 861 marg. no.12). It is also correct that the parties did not make use of the option to deviate from this set of obligations by contract. They merely agreed to settle the matter via the house account, which was intended to spare them the need to deal with the intervener.*

15 *b) Nor can a different conclusion be reached by means of a supplementary interpretation of the parties' contract. The – in itself necessary (see the Senate's first appeal judgment of 22 January 2016 – V ZR 196/14, NJW 2016, 2274 marg. no.27) – examination of whether such an interpretation of the parties' contract is possible was not, however, carried out by the Court of Appeal. The Senate can, however, carry it out on the basis of the facts subject to its review, because the necessary findings have been made and no further findings are to be expected (see, in this regard, Senate judgments of 12 December 1997 – V ZR 250/96, NJW 1998, 1219 et seq. and of 12 October 2012 – V ZR 222/11, NJW-RR 2013, 494 marg. no.16, as well as the order of 18 July 2019 – V ZR 77/18, NZM 2019, 904 marg. no.3). Accordingly, a supplementary interpretation of the contract is ruled out.*

16 *(aa) It is already doubtful whether the parties' agreements concerning the plaintiff's indemnification contain any unintended gap at all; such a gap is a prerequisite for a supplementary interpretation of the contract (see Senate, judgments of 12 October 2012 – V ZR 222/11, NJW-RR 2013, 494 marg. no.9, of 23 May 2014 – V ZR 208/12, NJW 2014, 3439 marg. no.8 and of 30 June 2017 – V ZR 248/16, WM 2017, 1937 marg. no.7). According to the parties' understanding, the purchase price for the claimant's co-ownership share was to be settled, for the most part, from the defendant's share of the rental surpluses and through additional payments by the defendant. As stated in the preamble to the contract, it was clear to them that they were unable to determine either any rental surpluses or the need for additional payments, because the intervener collected the rents alone and did not settle the accounts. With full knowledge of the facts, they decided to settle accounts via the ' ' house account,*

although this could only work for as long as the intervener actually settled the accounts via that house account.

17 *bb) In any event, a supplementary interpretation of the contract fails because the hypothetical intention of the parties, as required for such an interpretation (Federal Court of Justice, judgment of 20 July 2005 – VIII ZR 397/03, WM 2005, 1963, 1965 et seq.), cannot be ascertained. As the Senate has already pointed out in its first judgment on appeal (judgment of 22 January 2016 – V ZR 196/14, NJW 2016, 2274 marg. no.27), the parties sought to achieve two mutually incompatible objectives with the provision that ultimately failed: On the one hand, the claimant was to transfer the rights arising from his co-ownership share in full to the defendant and, through her, be released from his loan obligations. On the other hand, the defendant wished to avoid a dispute with the intervener regarding the settlement of rental income, the benefits of free accommodation and the expenses; however, the claimant was also unable to achieve this settlement. In this situation, a supplementary interpretation of the contract is out of the question. The normal scope of obligations under an indemnity agreement therefore remains in force, and with it the defendant's obligation to defend against the intervener's claims for compensation.*

18 *c) This is not altered by the fact that a creditor under an indemnity agreement is, in principle, obliged to inform the debtor under the indemnity agreement of the basis, the amount and the defences and objections to the claims that are to be the subject of the indemnity (Senate, judgment of 17 July 2009 – V ZR 254/08, NJW-RR 2010, 200 marg. no.37; Federal Court of Justice, judgment of 19 January 1983 – IVa ZR 116/81, NJW 1983, 1729, 1730). In this case, however, no such obligation exists. The scope of the defendant's obligation to indemnify depends solely on the outcome of a calculation of the rental income, the rental benefits to be set off and the expenditure on the building on the land, which only the intervener can carry out; however, according to the preamble to the contract, she has not carried out such a calculation in the past and continues to refrain from doing so. It was therefore clear from the outset that the provision of such information would have to be enforced against the intervener in accordance with the provisions of Community law. In such a situation, the creditor of the indemnity has no ancillary obligations. Rather, it remains solely the responsibility of the debtor of the indemnity – in this case, the defendant – to obtain the information necessary to defend against unjustified claims.*

19 *B. The defendant further argues, unsuccessfully, that the claim for indemnity was not due at the time of withdrawal.*

20 *1. The defendant bases its objection on a provision in the agreement concluded between the intervener and the claimant on 18 July 2012, according to which the intervener 'defer[s]' the claimant's claim on the basis of joint and several liability, until such time as the claimant is re-registered as the owner in the land register following the rescission of the contract of sale with the defendant, or until the withdrawal has failed. However, this agreement does not affect the due date of the claim for indemnity.*

21 *2. The agreement relates solely to the internal relationship between the intervener and the claimant. It is not to be interpreted as a deferral agreement, but as a pactum de non petendo, which, unlike a deferral, does not postpone the due date, but is merely intended to prevent a legal dispute over a claim for the time being (see Federal Court of Justice, order of 25 March 1998 – VIII ZR 298/97, NJW 1998, 2060, 2061; judgment of 28 February 2002 – VII ZR 455/00, WM 2002, 872, 873, each with further references). In the absence of any further findings to be expected, the Senate is itself able to adopt this interpretation, which has not yet been applied. This is supported by the fact that the claimant sought to base his withdrawal from the contract with the defendant – which was intended to form the basis of the agreement of 18 July 2012 – on the failure to release him from his obligations arising from the joint and several settlement. A deferral of the settlement obligation would have invalidated this ground for withdrawal and was clearly neither intended nor prompted. The classification of the agreement as a pactum de non petendo is also supported by the fact that the agreement between the intervener and the claimant of 18 July 2012 was intended to comprehensively resolve the property-related disputes*

between them and to suspend pending family law proceedings for the duration of the intervener's abstention from pursuing the claim arising from the joint and several debt settlement.

22 *C. However, the reasoning on which the Court of Appeal based its finding that the claim for indemnity is enforceable – the non-performance of which the claimant cites as the basis for his withdrawal – is ultimately untenable. The claim for indemnity may not be enforceable because the defendant may have been entitled to raise the defence of non-performance of the contract under section 320 para. 1 BGB and the defence of defect based on the same provision. In that case, however, the withdrawal would be invalid and the action for rescission based on it would be unfounded.*

23 *1. The Court of Appeal is, however, still correct in assuming that the enforceability of the claim for indemnity – and thus the validity of the withdrawal – was not undermined by the claimant's own failure to perform the contract.*

24 *a) It is, however, a matter of dispute whether the creditor's withdrawal requires the creditor to have performed the contract in good faith. In the case of withdrawal under section 326 BGB (old version), the creditor's own performance in good faith was an unwritten prerequisite for the right to withdraw (see, on this point, the Senate, judgment of 13 November 1998 – V ZR 386/97, ZIP 1999, 367, 369 with further references). Whether this also applies to a withdrawal under section 323 BGB (new version), which is at issue here, is a matter of differing opinion. Some authorities answer the question in the affirmative, whilst others answer in the negative on the grounds that, in view of the strict conditions for excluding the right of withdrawal laid down in section 323 para. BGB, the creditor's own compliance with the contract no longer constitutes an independent element of the legal requirement under section 323 BGB (for details, see BeckOGK/Looschelders, BGB [1 December 2019], § 323 marg. no. 103 et seq., with further references to both views). This question need not be decided here.*

25 *b) The Court of Appeal correctly concludes that the claimant did not breach his duty to perform the contract.*

26 *aa) Contrary to the defendant's view, a breach of the plaintiff's duty of good faith does not arise from the fact that, as she contends, he breached his duty to support all efforts to redeem the loan under clause 3.2.(c)(aa) of the contract by failing to give his consent to the loan takeover. It is already doubtful whether the plaintiff was under any such obligation at all. According to the contractual arrangements, the loan repayment was intended to be to his own advantage, not that of the defendant. In any event, according to the findings of the Court of Appeal, the loan repayment failed not because of the claimant's refusal to give consent, but because of the intervener's refusal to give consent. Furthermore, as the Court of Appeal found, the claimant had granted the defendant sufficient power of attorney, so that the defendant could have validly given the required consent herself.*

27 *bb) Nor does the defendant's assertion that the claimant concluded extension and debt restructuring agreements without consulting her demonstrate a breach of contract on the claimant's part. It is true that, under the provision in clause 3.2.(c)(cc)(β) of the contract, the claimant may only exercise his rights vis-à-vis the bank after prior consultation with the defendant. However, this would only constitute a breach of contract on the part of the claimant if such agreements had been concluded prior to the declaration of withdrawal and if they had been detrimental to the defendant. The defendant has not demonstrated this. In the submission referred to in the grounds of appeal, she merely states that she is unaware of the specific details of the alleged extension and debt restructuring agreements.*

28 *cc) Contrary to the defendant's view, the plaintiff's own breach of contract does not arise from the fact that, by concluding the contract of sale with the intervener's current husband on 18 July 2012, he had renounced the contract with the defendant. It is true that this contract provides that the claimant is to give notice of withdrawal to the defendant and to sell his co-ownership share, which had been transferred to the defendant, to the intervener's husband. However, the matter does not end there. Rather, the contract goes on to state that the sale is to take place only in the event of a valid withdrawal, and that such a withdrawal may not occur. By contrast, it cannot be inferred from the*

contract that the claimant would be required to give notice of withdrawal even if the legal conditions for doing so were not met.

29 *2. However, the Court of Appeal failed to recognise that, according to the defendant's submission, she may have been entitled to raise the defence of non-performance of the contract pursuant to Section 320 para. 1 BGB at the time of declaring her withdrawal. If this were the case, the claimant's claim for indemnity would have been unenforceable simply because of the existence of that defence at the time of declaring withdrawal, and the withdrawal would have failed as a result.*

30 *(a) However, the existence of this defence does not follow merely from the defendant's submission that the claimant had not granted her power of attorney over the building accounts, contrary to clause 3.2.(b)(aa) of the contract, nor had he cooperated in the prompt opening of a new building account, contrary to clause 3.2.(b)(dd) of the contract, which is why, during the period from May 2010 to July 2011, rent totalling €75,000 was paid into the old property account, over which she had no control, but of which she was entitled to half. However, a claim for damages or a defence by the defendant under section 320 para. 1 first sentence BGB could only arise from these circumstances if the alleged rent payments, in whole or in part, were not to be used either for the management of the property or for the repayment of the loan. The defendant, however, has not put forward any substantiated arguments in this regard.*

31 *b) Nor does the defendant's allegation that a statement of account relating to the economic transfer was not provided call into question the enforceability of the claimant's claim for indemnity. It is true that, in clause 7.2 of the contract, the claimant undertook to settle the uses and encumbrances spanning the cut-off date of the economic transfer. However, the defendant is obliged to perform in advance in fulfilment of its indemnity obligation in this regard, which, pursuant to Section 320 para. 1 first sentence, second clause BGB, precludes the defence of non-performance of the contract. The obligation to perform in advance was impliedly agreed by the parties in that they entered into the contract in the knowledge that the intervener had not provided a statement of account for the management of the jointly owned property for years, and thus assumed that the claimant could not readily produce the intended statement of account. The indemnity provided for in clause 3.2(a) of the contract could therefore only be successfully implemented if the defendant was under an obligation to perform first in respect of the indemnity. Her obligation to perform first is offset by the fact that the claimant has assigned to her all claims for accounts and information to which he is entitled against the intervener.*

32 *c) The same applies to a possible breach of clause 4.1.(b) of the contract. Under that clause, the claimant guarantees that there is no agreement binding on the defendant regarding compensation for use in respect of the flat occupied by the intervener. It can be left open whether – as the defendant claims – it was agreed between the claimant and the intervener that the latter would not be required to pay compensation for use. This is because, pursuant to Section 1010 para. 1 BGB, such an agreement would only be binding on the defendant if it were entered in the land register as an encumbrance, which is not the case according to the status of the land register described in clause 1.1 of the contract of sale.*

33 *d) However, the enforceability of the claimant's claim for indemnity may, according to the – as a contingent ground for the defence to be taken into account irrespective of the order of priority (see: OLG Cologne, MDR 1970, 686; Palandt/Ellenberger, BGB, 79th ed., § 214 marg. no. 2 regarding the defence of limitation) – may fail because the claimant has not validly assigned to the defendant his warranty claims against previous owners, tradespeople, parties responsible for damage and other third parties, and the defendant was therefore entitled to refuse indemnification under section 320 para. 1 BGB.*

34 *(aa) The claimant undertook to assign these claims to the defendant in clause 7.5 of the parties' contract of sale. According to the findings of the Court of Appeal, he did not fulfil this obligation.*

Although the contract does contain a declaration of assignment, this declaration was rendered ineffective because the claimant had previously assigned the same claims to the intervener.

35 *bb) However, this has not released the claimant from his obligation to assign these claims. It is true that the claims now belong to the intervener. However, the claimant's inability (see Section 275 para. 1 first case, BGB) to assign the claims arises only and exclusively if the claimant requests the intervener to reassign these claims to him or to assign the claims to the defendant, and the intervener definitively refuses such a request (see Senate, judgment of 19 January 2018 – V ZR 273/16, DNotZ 2018, 686 marg. no.25 with further references). The Court of Appeal did not establish this. For the purposes of the appeal on points of law, it must therefore be assumed that this did not happen. In that case, however, the defendant remains entitled to a claim for specific performance against the claimant.*

36 *cc) The continued existence of the claim for performance could give rise to the right to raise the defence of non-performance of the contract pursuant to Section 320 para. 1, first sentence BGB.*

37 *(1) For the purposes of the appeal proceedings, in the absence of any findings to the contrary, it must be assumed that the obligation to assign is reciprocal to the defendant's obligation to indemnify.*

38 *(2) In that case, however, the defence would be well-founded, regardless of whether the defendant raised the defence of non-performance pursuant to Section 320 BGB before or after the plaintiff's declaration of withdrawal. For the mere existence – not merely the raising – of the defence of non-performance under section 320 BGB precludes the enforceability of the claim standing in a reciprocal relationship to the unfulfilled counterclaim and, consequently, withdrawal under section 323 para. 1 BGB and any contractual provisions modelled on or supplementing that provision.*

39 *This has been held to be decisive for the commencement of default under section 284 BGB (old version) or section 286 (new version) (Senate, judgments of 26 October 1965 – V ZR 87/63, NJW 1966, 200 et seq., of 7 May 1982 – V ZR 90/81, BGHZ 84, 42, 44, of 6 December 1991 – V ZR 229/90, BGHZ 116, 244, 249, and of 11 December 2009 – V ZR 217/08, NJW 2010, 1272 marg. no.23; Federal Court of Justice (BGH), judgements of 8 July 1982 – VII ZR 96/81 – NJW 1982, 2494, 2495, of 6 May 1999 – VII ZR 180/98, NJW 1999, 2110 and of 9 June 2016 – IX ZR 314/14, BGHZ 210, 321 marg. no.98) and the right to rescind the contract on the grounds of default pursuant to section 326 BGB (old version) (Senate, judgments of 18 January 1991 – V ZR 11/90, BGHZ 113, 232, 236; of 6 December 1991 – V ZR 229/90, BGHZ 116, 244, 249 et seq. and of 5 December 2003 – V ZR 341/02, ZfIR 2004, 394, 395).*

40 *Nothing else applies to withdrawal under section 323 para. 1 BGB (see BeckOGK/Looschelders, BGB [1 December 2019], section 323, marg. no.95; BeckOK BGB/Schmidt [1 February 2020], section 323, marg. no.5; Erman/Westermann, BGB, 15th ed., Section 323, marg. no.10; MüKoBGB/Ernst, 8th ed., Section 323, marg. no.47 with Section 286, marg. no.25; Palandt/Grüneberg, BGB, 79th ed., § 323 marg. no.11; Soergel/Gsell, BGB, 13th ed., § 323 marg. no.51; Staudinger/Schwarze, BGB [2015], § 323 marg. no.B28). Unlike the former Section 326 BGB (old version), this provision makes withdrawal conditional not on the occurrence of default, but on the debtor's failure to perform a due obligation, or to perform it in accordance with the contract, despite the creditor having set a reasonable period for performance or subsequent performance. However, in § 323(1) BGB, the law understands a 'performance due' to mean nothing other than what is meant in section 286 para. 1 BGB, which, in terms of both wording and content, has replaced the previous section 284 BGB (old version) (MüKoBGB/Ernst, 8th ed., § 323, marg. no.47; Palandt/Grüneberg, BGB, 79th ed., § 323, marg. no.9).*

41 *(e) The Court of Appeal erroneously regards the defects alleged by the defendant as irrelevant simply because the defendant failed to specify which rights arising from defects she derives from them. If her submission were correct, the defendant would be entitled to raise the defence of defects pursuant to Section 320 para. 1 BGB. The mere existence of this defence would, without the need to specify the rights purportedly derived from the defects, render the claimant's claim for indemnity unenforceable and render his withdrawal, based on the non-performance of that claim, invalid.*

42 *(aa) With one exception, the Court of Appeal did not address either the existence or absence of the defects in the building alleged by the defendant, nor the question of whether the claimant had fraudulently concealed these defects. Therefore, for the purposes of the appeal proceedings, it must be assumed that the defects do, in fact, exist to the extent alleged by the defendant, that they are remediable, and that the claimant, by virtue of his knowledge of these defects, cannot rely on the agreed exclusion of liability.*

43 *bb) Contrary to the view of the Court of Appeal, the defendant's defence based on these defects does not fail from the outset on the grounds that the defendant acquired only a co-ownership share in the property and is therefore, at most, entitled to a claim for exemption from the costs of rectifying defects limited to the proportion of her co-ownership share. Rather, the purchaser of a co-ownership share in a plot of land is also entitled to a full claim for subsequent performance.*

44 *(1) As far as can be ascertained, the question of the content and scope of claims for subsequent performance in relation to the sale of a co-ownership share in a plot of land is not addressed in case law or legal literature. However, a comparable issue is discussed in relation to the purchase of a flat, namely whether the purchaser is entitled to a claim for subsequent performance also in respect of defects in the common property, or whether they have a claim for exemption from the costs of remedying defects limited to the proportion of their co-ownership share. The question is answered in some cases in the latter sense. The claim for subsequent performance under section 439 para. 1 BGB is not tailored to the purchase of a fractional share in an item. This is because, when acquiring a co-ownership share, the subject matter of subsequent performance cannot be individualised; rectifying the defect in the abstract share is therefore impossible. A person selling a fractional share is not fully liable for the rectification of defects. Furthermore, rectification is impossible because the seller is not authorised vis-à-vis the other co-owners to claim their property for the purpose of rectifying the defect (see Greiner, NZM 2017, 713, 716; ibid. in ESWID [ed.], Bauträgerhaftung, PiG Vol. 104, pp. 43 ff., 48 f.; Pause, NZBau 2017, 22, 25; Poschitz, GWR 2016, 353, 355 f.). However, it is generally accepted that the purchaser of a newly built flat is entitled to a full claim for rectification (see BeckOK WEG/Müller [1 February 2020], § 10 marg. no.720a.7; Bub/Bernhard, FDMietR 2016, 377317; Cramer/Cziupka, RNotZ 2016, 289, 292; Dötsch, ZWE 2016, 315, 317; Häublein, ZfIR 2015, 805, 806; Thode, jurisPR-PrivBauR 12/2016, note 2; Vogel, ZWE 2016, 442, 446). However, the focus of consideration is usually on the scenario of a newly constructed or to-be-constructed flat, in which the purchasers are entitled to warranty claims against the developer. However, the question of a claim for subsequent performance in relation to defects in the common property may also arise in the purchase of an existing flat. The Senate has so far left this question open (see judgment of 24 July 2015 – V ZR 167/14, ZfIR 2015, 801 marg. no.22; see also Federal Court of Justice, judgment of 25 February 2016 – VII ZR 156/13, ZfIR 2016, 419 marg. no.39).*

45 *(2) In the case of the purchase of a co-ownership share in a plot of land not divided into flats, the question must be decided in accordance with the second view.*

46 *(a) Even in the case of the purchase of a co-ownership share in a plot of land, the point of reference for the purchaser's claim for subsequent performance is not the co-ownership share as a right in rem, but the (developed) plot of land.*

47 *(aa) The determination of the point of reference for the buyer's claim for subsequent performance depends crucially on whether the purchase of a co-ownership share in a plot of land is to be classified as a purchase of a right or as a purchase of property. In the former case, the point of reference would, in principle, be solely the legal position in rem. Defects in the land or the building standing on it would be relevant only, as is the case, for example, with the purchase of a business (see: Federal Court of Justice, judgment of 27 February 1970 – I ZR 103/68, WM 1970, 819, 821; Staudinger/Beckmann, BGB [2013], § 453 marg. no.148 with further references), would only be relevant if the condition of, for example, the building on the land were decisive for the purchase of the legal interest. If, on the other hand, the purchase of a co-ownership share in a plot of land is to be classified as a sale of goods, the purchaser's claim for subsequent performance automatically extends to the acquired plot of land and*

the building standing on it, in the ownership of which the purchaser wishes to acquire a share upon acquiring the co-ownership share.

48 *(bb) The purchase of a flat – defined under Section 1 para. 2 of the German Condominium Act (WEG) as the separate ownership of a flat in conjunction with a co-ownership share in the common land – is generally and implicitly regarded as a sale of goods. The Senate, too, assumes – without raising the issue as a problem – that this constitutes a sale of goods (incorporating elements of a sale of rights) (see judgment of 24 July 2015 – V ZR 167/14, ZfIR 2015, 801 marg. no.22 et seq.). Similarly, the purchase of a plot of land by several purchasers who wish to acquire fractional ownership of it is, as far as can be seen, unanimously regarded as a sale of property. It is disputed whether this also applies to the acquisition of a co-ownership share in a developed plot of land that is not divided into flats under the Condominium Act. Some view this as a sale of rights (Palandt/Weidenkaff, BGB, 79th ed., § 453 marg. no.4). According to another view, whilst a purchase of a right does exist, it should be treated as a purchase of goods (OLG Hamm, DB 1985, 2400 et seq.). According to a third view, the purchase of a co-ownership share in a plot of land is a purchase of goods (OLG Cologne, WM 1990, 1082, 1084; MüKoBGB/Westermann, 8th ed., § 433, marg. no.12, at the end; Staudinger/Beckmann, BGB [2014], § 433, marg. no.9).*

49 *(cc) The latter view is correct. The right of a co-owner holding a fractional share is not, for example, a fractional right existing alongside ownership and encumbering it. Rather, it is, in its nature, akin to ownership of the thing itself; that is to say, it is ownership and an independent right of the same kind as the right as a whole (Federal Court of Justice, judgment of 14 February 1962 – IV ZR 156/61, BGHZ 36, 365, 368 with further references; MüKoBGB/Karsten Schmidt, 8th ed., § 1008 marg. no.1; Staudinger/Thole, BGB [2019], § 1008 marg. no.4). Anyone who acquires a co-ownership share in a plot of land therefore does not acquire a limited right in rem to the land, but rather a share in the ownership and (exclusive) possession of the land. The purchase of a co-ownership share in a plot of land is therefore directly subject to the provisions governing the sale of goods. The point of reference for any claims for subsequent performance is therefore not a right, but the plot of land of which the purchaser intends to become a co-owner.*

50 *(b) Accordingly, the purchaser of a co-ownership share is also entitled, under section 433para. 1 second sentence BGB, to expect the property as a whole to be free from defects in title and defects in the property itself. The scope of the claim for subsequent performance is determined accordingly.*

51 *In the legislature's view, this is not an independent, new claim triggered by the delivery of a defective item. Rather, the claim for subsequent performance builds upon the original claim for performance under section 433 para. 1 second sentence BGB in the sense of 'residual performance', so that it continues in its original form, subject only to the modifications necessitated by the delivery of the defective item (Explanatory Memorandum to the Draft in Bundestag printed Paper 14/6040, p. 220). According to the legislature's conception, the purpose of subsequent performance is merely to ensure that these obligations of the seller are fulfilled; through subsequent performance, the buyer is to receive what he is contractually entitled to (see BGH, judgment of 17 October 2012 – VIII ZR 226/11, BGHZ 195, 135 marg. no. 24 with further references). The difference from the claim for performance lies – apart from the specific limitation period under section 438 BGB and the exclusions under sections 442, 444 BGB) – essentially in the fact that the subject matter of the claim for subsequent performance is no longer the initial delivery of a defect-free item, but rather the restoration of its defect-free condition through rectification or the replacement with a defect-free item (see BGH, judgment of 13 April 2011 – VIII ZR 220/10, BGHZ 189, 196 marg. no.50 with further references). Subject to the seller's inability to perform (see marg. no.61 below), the buyer of a co-ownership share in a plot of land is also entitled to full subsequent performance. The provision offers no basis for limiting such a purchaser's claim for subsequent performance to a merely proportionate obligation to indemnify (see, for example, in relation to flat ownership: Cramer/Cziupka, RNotZ 2016, 289, 292; Vogel, ZWE 2016, 442, 446).*

52 *cc) If the purchased item is defective, as must be assumed in this case, the seller cannot withdraw from the contract on the grounds of non-payment of the purchase price. This is because the claim for the*

purchase price cannot then be enforced, as the buyer is entitled to raise the defence of defects under section 320 para. 1 BGB even if he has neither asserted any defects nor specified which rights he wishes to derive from any such defects. In principle, the buyer is under no obligation to do either of these things. However, the buyer may be under an obligation to inform the seller of the reason for the failure to pay the purchase price owed to the seller or to provide the corresponding consideration – in this case, indemnification – (see marg. no.60 below).

53 (1) As set out above (marg. no.40), the very right to raise the defence under section 320 para. 1 BGB precludes the enforceability of the buyer's payment obligation and, consequently, the seller's right to rescind the contract on the grounds of non-payment despite the setting of a deadline. This also applies to the buyer's right, arising from section 320 para. 1 BGB, to raise the defence of defect. This has been decided in cases where the buyer notices the defect in the goods upon delivery and rejects them. Even in the case of minor defects, the buyer may withhold not only a portion of the purchase price necessary to remedy the defect, but the entire purchase price (Federal Court of Justice, judgment of 26 October 2016 – VIII ZR 211/15, WM 2017, 1180 marg. no.23 and of 6 December 2017 – VIII ZR 219/16, WM 2018, 1811 marg. no.42 et seq.). This applies all the more so in the case of significant defects, the existence of which must be assumed here. There is no apparent objective reason to deny the buyer this right in the circumstances of this case on the grounds that the defect in the item was not noticed at the time of delivery or, in this instance, handover of the property, but only subsequently. The buyer is entitled to withhold the purchase price in full even if a defect in the property is only noticed after delivery or handover (see BeckOGK/Rüfner, BGB [1 January 2020], § 320 marg. no.60; BeckOK BGB/Schmidt [1 February 2020], § 320 marg. no.22; BeckOK BGB/Faust [1 February 2020], § 437, marg. no.172; jurisPK-BGB/Beckmann, 9th ed., § 320, marg. no.37; MüKoBGB/Emmerich, 8th ed., § 320 marg. no.4 et seq.; where a claim for subsequent performance exists, see also H.P. Westermann, ibid., § 437 marg. no.22; Palandt/Grüneberg, BGB, 79th ed., § 320 marg. no.9 et seq.; Staudinger/Schwarze, BGB [2015], § 320, marg. no.71; similarly, see also Grunewald in FS H. P. Westermann [2008], pp. 245, 251, referring to the general defence of defect; for a different view, see Hk-BGB/Saenger, 10th ed., § 438, marg. no.13).

54 (2) Contrary to the view of the claimant's legal representative, nothing to the contrary follows from Section 437 BGB. As explained above (marg. no.51), the purchaser's claim for subsequent performance under Section 437 no. 1 BGB is not a separate claim triggered by the defective delivery which would have to be asserted separately. Rather, it is the modified original claim for performance, which, following delivery, is reduced to the remaining part of the performance still outstanding – namely, the removal of the defect – and, above all, is subject to a shorter limitation period from the date of delivery. The delivery and handover of the goods do not alter the nature of the claim as a claim for performance, nor the fact that it merely continues the original claim for performance. This is already apparent from the wording of the provision, which, in its introductory sentence, does not refer to the handover and delivery of the goods, but rather to the existence of defects. This approach is also in line with the legislature's intentions. In its report, on which the legislature based its work, the Commission on the Law of Obligations had merely proposed a provision granting the buyer a claim for subsequent performance, understood as a claim for residual performance (BMJ [ed.], Final Report of the Commission on the Revision of the Law of Obligations, 1991, p. 209 on Section 438 BGB-KE). Like the Commission, the legislature intended to make the warranty part of the seller's obligation to perform, as had already been provided for at that time in relation to liability for defects and the claim for subsequent delivery under section 480 BGB (old version), and above all in contractual practice, which largely deviated from the law (Bundestag printed paper no. 14/6040, p. 220). The introduction of the current Section 437 BGB was not intended to alter this nature of the claim for subsequent performance. On the contrary, it was intended merely to prevent the misunderstanding that subsequent performance, like a secondary remedy, requires the setting of a time limit (commentary on Section 437 BGB in the consolidated version of the discussion draft of a bill on the modernisation of the law of obligations dated 6 March 2001, http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/15wp/schuldrechtsmodG/diskekf.pdf).

55 *(3) Nor can this interpretation of Section 437 BGB be countered, as the claimant's legal representative suggests, by the argument that the legislature, when enacting the Act on the Modernisation of the Law of Obligations, abolished the defence of defect without providing a replacement. That is not, in fact, the case.*

56 *(a) Under the law of sale in force until 31 December 2001, the purchaser of a plot of land was no longer entitled to raise the defence of non-performance of the contract under Section 320 BGB on the grounds of any material defects following the transfer of title and handover of the land. Instead, the purchaser was limited to the rights granted to them under the warranty provisions of the law of sale. However, this did not mean that the purchaser was only permitted to withhold payment of the purchase price if they opted for one of the claims for rescission, reduction or damages. Even without specifying the warranty claim, the purchaser could, in fact, withhold the purchase price as soon as and to the extent that they were entitled to claim rescission, reduction or damages. The admissibility of such a general defence based on a warranty claim that had not yet been specified in detail was not expressly regulated by law. However, it was effectively presupposed in section 478 BGB (old version). According to that provision, the timely notification of defects entitled the buyer to withhold payment of the purchase price in whole or in part 'even' after the limitation period had expired. It followed from this that the right had already existed prior to that point. A buyer wishing to defend against the claim for the purchase price should not, by virtue of the right of choice to which they were entitled, be required to commit to a specific warranty claim as long as the seller had not brought legal proceedings to enforce their claim and the state of the legal proceedings did not compel the buyer to make a decision (for the full context: Senate, judgments of 18 January 1991 – V ZR 11/90, BGHZ 113, 232, 235 and of 23 April 1999 – V ZR 340/97, juris marg. no.20). Under the old law, it had not been decided whether the mere existence of the defence of defect, or only its assertion against the creditor, precluded default and thus also withdrawal under section 326 BGB (old version). It was, however, recognised that raising the defence of defect in a subsequent legal dispute had, in effect, retroactive effect. This was because it meant that the buyer's default – and with it the withdrawal based on that default under section 326 BGB (old version) – ceased to apply from the time and to the extent that the buyer was entitled to raise the defence of defect (Senate, judgment of 18 January 1991 – V ZR 11/90, BGHZ 113, 232, 236, with reference to the Federal Court of Justice, judgment of 16 March 1988 – VIII ZR 184/87, BGHZ 104, 6, 11 et seq. regarding the defence of limitation).*

57 *(b) The Act on the Modernisation of the Law of Obligations of 26 November 2001 (Bundesgesetzblatt [BGBl. Federal Official Journal] I p. 3138) has not, in effect, altered this position. The defence of defect required under Section 478 of the BGB (old version) has not been abolished without replacement, but has been subsumed into the defence of non-performance of the contract pursuant to Section 320 para. 1 BGB.*

58 *(aa) The legislature regarded the provision of § 478 BGB (old version) as a provision relating purely to the limitation period and, as such, replaced it with the current § 438 BGB (Bundestag printed Paper no. 14/6040, p. 205).*

59 *(bb) The legislature had no reason to maintain the defence of defect provided for in the provision by means of an express provision. The aim of the amendment to the law of sale by the Act on the Modernisation of the Law of Obligations was to abolish the previous special warranty law and to regard the delivery of a defective item as a breach of the seller's obligations (Bundestag printed Paper no. 14/6040, pp. 209 ff. and 219 ff.). Following the model of the earlier provisions on defects of title in section 440 BGB (old version) and on the sale of goods of a specific kind in section 480 BGB (old version), the buyer's remedies were to be governed by the general law on breach of contract. In this context, a distinction should no longer be made, as in the past, between the sale of a specific item and the sale of a generic item. Rather, the delivery of a goods free from defects should, under the current Section 433 para. 1 second sentence BGB, form part of the seller's primary obligation (Bundestag printed Paper no. 14/6040, p. 209). This removed the need to provide for a specific defence based on defects in law. Such a defence was necessary under the previous law of sale because the delivery of an item free from material defects did not form part of the seller's primary obligation, and a claim for*

subsequent delivery existed only in the case of a sale by description. A provision was therefore required to entitle the buyer to withhold payment in respect of existing material defects. This right of the buyer now arises directly from Section 320 para. 1 BGB, because the seller only partially fulfils their primary obligation by delivering and transferring ownership of a defective item.

60 *(4) The buyer's defence on the grounds of defects does not lead to a state of limbo that places an undue burden on the seller. This is because the defence under Section 320 of the BGB is also subject to the requirement of good faith. For example, a tenant may, in respect of a defect in the flat of which the landlord is unaware, only assert a right of retention in respect of rent due after the tenant has notified the landlord of the defect (BGH, judgment of 3 November 2010 – VIII ZR 330/09, ZGS 2011, 95 marg. no.12). Admittedly, this principle cannot be readily applied to the law of sale due to the one-off nature of the exchange of performance. However, even in the case of a sale, the defence under section 320 BGB is subject to the requirement of good faith. A party to a contract of sale is not entitled to raise this defence, for example, if they have made it clear that they do not wish to continue with the contract (BGH, judgment of 17 July 2013 – VIII ZR 163/12, WM 2013, 1720 marg. no.26). Even a party to a contract of sale who wishes to uphold the contract may not use the defence under Section 320 BGB to frustrate the rights of the other party to the contract (MüKoBGB/Emmerich, 8th ed., Section 320, marg. no.5). This applies equally to the defence based on defects. It lapses if, within a reasonable period set for that purpose by the seller, the buyer fails to specify the defects claimed and also fails to exercise any of the rights to which they are entitled in respect of those defects; this follows from the prohibition of contradictory conduct (see Senate, judgment of 11 December 2009 – V ZR 217/08, ZNotP 2010, 98 marg. no.24 regarding section 321 BGB; MüKoBGB/Emmerich, 8th ed., section 320 marg. no.5 and H. P. Westermann, ibid., section 437 BGB marg. no.22; Grunewald, FS H. P. Westermann [2008], pp. 245, 252 et seq.). In the absence of any findings to the contrary, it must be assumed for the purposes of the appeal proceedings that the claimant did not make a corresponding enquiry or set a deadline.*

61 *dd) Nor, according to the findings of the Court of Appeal to date, is the defendant's defence of defect precluded by the claimant's inability (Section 275 para. 1 first case BGB).*

62 *(1) As a general rule, the seller can only fulfil their obligation to remedy the defect if the buyer cooperates. The buyer is therefore under an obligation to give the seller the opportunity to remedy the defect. This is not limited to a verbal or written request for subsequent performance, but also includes, for example, the buyer's willingness to make the purchased item available to the seller so that the seller can verify the complaints raised (BGH, judgment of 10 March 2010 – VIII ZR 310/08, NJW 2010, 1448 marg. no.12 et seq.). When purchasing a co-ownership share in a plot of land, the buyer is under an obligation not only to give the seller the opportunity to remedy the defect themselves, but also to ensure that the other co-owners consent to the implementation of the measures, where necessary, and, insofar as these measures are necessary for the preservation of the property within the meaning of Section 744 para. 2 BGB or constitute measures relating to the management and use of the common property which, within the meaning of Section 745 para. 2 BGB, correspond to the interests of all co-owners in accordance with the principles of equity, to contribute to the financing of the measures in proportion to their co-ownership shares. If the buyer is unable to persuade the other co-owners to agree to the measures necessary to remedy the defect and to bear the costs incurred in doing so in proportion to their co-ownership shares, or if this can only be achieved through legal proceedings, the seller shall be released from their obligation to provide subsequent performance in accordance with Section 275 para. 1 first case BGB. This is because the seller, who is in principle prepared to provide subsequent performance, cannot be expected to await the outcome of such a legal dispute.*

63 *(2) The Court of Appeal did not find that the claimant was unable to do so. However, as will be shown below (marg. no.79), this is not decisive for the validity of his withdrawal.*

64 *ee) Finally, the findings made do not indicate that the defendant had waived its defence based on defects. Such a unilateral waiver is, admittedly, possible. However, strict requirements must be imposed on an implied waiver, as the holder generally does not wish to curtail their rights without a clearly discernible external cause (see Senate, judgment of 30 September 2005 – V ZR 197/04, BGH-*

Report 2006, 4, 5; BGH, judgment of 7 March 2002 – IX ZR 293/00, WM 2002, 999, 1002 with further references). The mere acceptance of the defective property by the defendant and the fact that, according to the findings of the Court of Appeal, the defendant did not assert any claims for defects or subsequent performance prior to declaring its withdrawal do not satisfy these requirements.

65 3. The reasoning provided by the Court of Appeal also fails to support the dismissal of the defendant's counterclaim. The success of that counterclaim depends, in fact, on the validity of the plaintiff's withdrawal. However, as set out above, the reasoning provided by the Court of Appeal does not allow for the conclusion that the plaintiff's withdrawal was valid.

66 4. Nor is the Court of Appeal's decision correct on any other ground. Although the claimant did declare his withdrawal from the contract of sale on further occasions, these fail, according to the facts of the case to be taken as the basis for the appeal on points of law, for the same reasons as the withdrawal of 21 July 2012, which the Court of Appeal considered.

III.

67 The contested judgments must therefore be set aside on the defendant's appeal in so far as they were decided to the defendant's disadvantage. The matter is not ready for a final decision with regard to the defendant's appeal (Section 563 para. 3 Zivilprozessordnung (ZPO = German Code of Civil Procedure), as further findings are required. It must therefore be referred back to the Court of Appeal for a fresh hearing and decision in this respect (Section 563 para. 1 first sentence ZPO). In doing so, the Senate makes use of the option provided for in Section 563 para. 1 second sentence ZPO). With regard to the further proceedings, the Senate draws attention to the following:

68 1. The validity of the withdrawals declared by the claimant depends crucially on whether his claim for indemnity was enforceable. This, in turn, depends on whether the defendant was entitled either to raise the defence of non-performance of the contract pursuant to Section 320 para. 1 BGB in view of the failed assignment of the warranty claims, or to raise the defence of defects arising from the same provision on the basis of the defects it alleged.

69 2. Whether the validity of the claimant's withdrawals is rendered ineffective by the failed assignment of warranty claims against third parties depends, first of all, on whether the claimant's obligation to assign these claims, as determined by the interpretation of the contract to be carried out, is in a reciprocal relationship with the defendant's indemnity obligation. If this is to be affirmed, it would be necessary to determine whether, and to what extent, defects exist which give rise to the assigned warranty claims. If warranty claims of more than a minor nature arise, the intervener's willingness to re-assign these claims may be decisive.

70 (a) The intervener's refusal to assign the warranty claims either to the claimant for onward assignment to the defendant or directly to the defendant would result in the claimant's obligation to assign these claims under section 275 para. 1 first sentence, case 1 BGB ceasing to apply. This would thereby extinguish the defendant's claim for subsequent performance. At the same time, pursuant to Section 326 1 first sentence, and Section 441 para. 3 BGB, the defendant would, by operation of law, be released from its obligation to indemnify in accordance with the principles of reduction, to the extent that the value of the co-ownership share—including the assignment of the claims—would have stood in relation to the value of the co-ownership share without such assignment.

71 b) However, it does not automatically follow from this that the claimant's withdrawals are valid.

72 aa) Contrary to the view of the Court of Appeal, the defendant is not then obliged to indemnify the claimant without restriction to the extent remaining following the statutory partial extinguishment of the obligation to indemnify. Rather, the only question that arises is whether it may refuse to indemnify the claimant against the loan instalments to be repaid until the lapsed portion of the duty to indemnify has been exhausted, and only then resume full indemnification, or whether it must continue to *indemnify the claimant against the instalments due, but only to an extent reduced by the amount of the reduction apportioned across the instalments.*

73 *bb) As far as is apparent, there is no discussion of what the partial extinguishment of the obligation to render consideration pursuant to section 326 para. 1 first sentence, second clause BGB entails where the consideration – as in the present case – is to be rendered in instalments. However, the reference to Section 441 para. 3 BGB in Section 326 para. 1 first sentence, second clause BGB suggests a parallel with the case of a reduction in price. There, situations comparable to the present case – namely a partially deferred claim for the purchase price and a hire purchase – are resolved differently. In some cases, the buyer is assumed to have the option either to make no instalments until the reduction amount has been exhausted, after which full instalments are payable again, or to make instalments from the outset that are reduced only by the amount of the reduction, distributed evenly across all instalments (see MüKoBGB/H. P. Westermann, 8th ed., Section 441, marg. no.8). In other cases, such a right of choice is denied and a pro rata distribution across the instalments is assumed (RG, SeuffertsA 67, 438, 439 [No. 247] and BolzePr [Practice of the RG in Civil Matters] Vol. XXII No. 331, 332, though this still applies to the legal situation prior to the entry into force of the BGB; Planck/Knoke, BGB, 4th ed., § 472 note 3; Staudinger/Matusche-Beckmann, BGB [2014], Section 441 marg. no.29). Even if the second solution is more convincing in the case of section 326 para. 1 first sentence, second clause BGB, it would be necessary, first and foremost, to determine through interpretation which solution corresponds to the mutual interests of the parties in accordance with the terms of their contract.*

74 *cc) Should the interpretation lead to the conclusion that the defendant's obligation to indemnify is reduced on a pro rata basis, the validity of the claimant's withdrawals would depend on whether he had, in each instance, validly set the defendant a time limit for indemnification in accordance with Section 281 para. 1 BGB. Doubts in this regard arise from the fact that he demanded an unrestricted indemnity, whereas he should only have been entitled to demand a reduced indemnity. According to the case law of the highest courts on the demand for performance under Section 286 para. 1 BGB/Section 284 BGB (old version), which is applied mutatis mutandis to the setting of a time limit under Section 281 para. 1 BGB (MüKoBGB/Ernst, 8th ed., Section 281, marg. no.36), the validity of the demand depends on whether the defendant was required to understand the claimant's demand for unrestricted indemnity as a request to perform the obligation actually owed, and whether the claimant was also prepared to accept a performance that fell short of his expectations (Senate, judgments of 19 May 1967 – V ZR 24/66, WM 1967, 660, 662 and of 25 June 1999 – V ZR 190/98, NJW 1999, 3115, 3116). Should these conditions not be met, the claimant's withdrawals would be invalid.*

75 *3. Whether the defendant is entitled to raise a defence of defects under section 320 para. 1 BGB depends decisively on the existence and extent of the defects alleged by the defendant.*

76 *a) The claimant's objection that the intervener does not consent to subsequent performance does not preclude the defence of defects.*

77 *aa) It is true that, under Section 275(1), first case, of the German Civil Code (BGB), the seller of a co-ownership share in a plot of land is released from their obligation to provide subsequent performance if the buyer is unable, or can only succeed by bringing legal proceedings, to persuade the other co-owners to agree to the measures necessary to remedy the defects and to bear the costs incurred in doing so in proportion to their co-ownership share.*

78 *bb) However, unlike in the case of the failure to assign warranty claims (see marg. no.70 above), the claimant's inability to provide subsequent performance did not result in a partial extinction of the defendant's obligation to indemnify by operation of law under section 326 para. 1 first sentence, second clause BGB. This is because, according to the second sentence of the provision, the rule in Section 326(1), first sentence BGB does not apply if, in the event of non-conforming performance, the debtor is not required to provide subsequent performance under Section 275 para. 1 to 3 BGB. Under Section 437 para. 2 and Section 439 para. 1 BGB, subsequent performance does not mean any form of subsequent fulfilment, but only the subsequent rectification of a defect (MüKoBGB/Ernst, 8th ed.,*

Section 326, marg. no.36). With this distinction, the legislature sought to take account of the fact that the statutory partial exemption is in the creditor's foreseeable interest only in the case of partial performance, whereas withdrawal is structured as an optional remedy under Section 437 para. 2 and Section 441 BGB. The right of withdrawal under Section 326 para. 5 BGB was intended to take account of the purchaser's potential interest in terminating the contract (Bundestag printed Paper no. 14/6040, p. 188 et seq., 14/6857, p. 55 et seq. and 14/7052, p. 193).

79 *cc) The defendant would therefore be entitled to withdraw from the contract pursuant to Section 326 para. 5 (BGB) should the claimant be unable to remedy the defects. This right of withdrawal led – subject to the defendant's obligation, as described above (marg. no.60), to specify the defects claimed and the remedies sought – to the continued validity of the defence of defects. The exclusion of a statutory exemption from the obligation to render consideration in the event of impossibility of subsequent performance serves to preserve the creditor's right to choose between the various remedies, which exists in principle; in the case of a contract of sale, this means the buyer. If the provision in section 326 para. 1 second sentence BGB did not exist, a reduction in price would, in such cases, occur by operation of law, even if the buyer actually wished to choose a different remedy. As explained (marg. no.78), this outcome is to be avoided by the provisions in section 326 para. 1 second sentence and para. 5 BGB. However, this can only be achieved if – subject to the obligation described above (marg. no.60) to specify the defects and remedies – the defence of defect also applies until the point of withdrawal or the claim for damages in lieu of performance (cf. Section 281 para.4 BGB).*

80 *b) However, this defence of defect applies automatically only to defects arising from the absence of an agreement on quality made in accordance with Section 434 para. 1 first sentence BGB. Such defects would not, in fact, be covered by the exclusion of liability (see Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no.9).*

81 *(c) In the case of other defects, the defence of defect applies only if the claimant cannot rely on the exclusion of liability. This, in turn, depends on whether the claimant has acted fraudulently. In such circumstances, he would not be entitled to rely on the exclusion of liability under Section 444 BGB.*

Editor's note

It is a fundamental jugement tot he buyers remedies in case of defect. It should be read carefully.