Sale of a flat despite suspected contamination in the courtyard

Assertion of rights by the purchaser of a flat in respect of defects in the common property; entitlement to full rectification, not merely to exemption on a pro rata basis; defects where there is a suspicion of contaminated sites; scope of subsequent performance

Court	*Federal Court of Justice [Bundesgerichtshof – BGH], Fifth Civil Senate*
Date	*11. November 2022*
Case number	*V ZR 213/21*
Reference	*ZfIR 2023, 90*
Finality	*Final*
Provisions	*Sections 434 para. 1 second sentence no. 2 in the version applicable until 31 December 2021 (= Section 434 para. 3 first sentence no. 2), 439 para. 1 and 444 of the German Civil Code (BGB), Sections 9a para. 2, 18 para. 1 and 19 para. 2 no. 2 of the Condominium Act (WEG) and Section 2 para. 3 and of the Federal Soil Protection Act (Bundesbodenschutzgesetz - BBodSchutzG)*

Official Headnotes or keywords

Sections 9a para. 2, 18 para. 1 and 19 para. 2 no. 2 WEG; Section 439 para. BGB

The rights of purchasers of flat ownership aimed at the rectification of defects in the common property (in this case: rectification pursuant to Section 43 para. 1 BGB) do not fall within the scope of the power of exercise pursuant to Section 9a para. 2 WEG. Even following the amendment to the Condominium Act, the community of flat owners may continue to assume such rights for its own exclusive enforcement by majority resolution; the authority to pass such a resolution derives from Section 18 para. 1 and Section 19 para. 2 no. 2 WEG.

Sections 434 para. 1 second sentence no. 2 in the version applicable until 31 December 2021 (= Section 434 para. 3 first sentence no. 2), 439 para. 1, 444 BGB; Section 2 para. 3 and of the Federal Soil Protection Act

a) The rectification owed by the seller on the grounds of a suspected contaminated site pursuant to Section 439 para. 1 BGB initially comprises only the dispelling of the suspicion through investigative measures. The buyer may only demand the remediation of a contaminated site once the suspicion has been confirmed.

b) A contamination of a plot of land with pollutants deviating from its usual condition is to be presumed in any event where, according to criteria under public law, there is a harmful alteration to the soil or a contaminated site within the meaning of the Federal Soil Protection Act.

c) If the seller fraudulently conceals a suspicion of a contaminated site of which he is aware and the suspicion is subsequently confirmed, he is, as a general rule, also acting fraudulently with regard to the contaminated sites that actually exist.

Section 439 para. 1 BGB

Pursuant to Section 439 para. 1 BGB, the purchaser of a second-hand flat is entitled to full subsequent performance in respect of defects in the common property, and not merely to a claim for indemnification *against the costs of rectifying defects limited to the proportion of their co-ownership share (continuation of Senate, judgment of 14 February 2020 – V ZR 11/18, BGHZ 225, 1 marg. nos. 45 et seq.).*

Operative Part

Upon the Defendant's appeal and dismissing the Claimant's cross-appeal, the judgment of the Higher Regional Court at Munich – 8th Civil Division – of 2 September 2021 is set aside in respect of costs and to the extent that it was decided to the detriment of the Defendant.
To the extent of the setting aside, the case is referred back to the court of appeal for a fresh hearing and decision, including the costs of the appeal proceedings, to the Court of Appeal.
Ipso iure

Facts

1 *The Claimant is an association of flat owners (GdWE). The flat-ownership development is situated on a plot of land in Munich which was originally owned by the Defendant, one of the largest property companies operating in Germany. In 2012, the Defendant divided the plot, together with the existing old building, into flat ownership and partial ownership and began selling the units. From January 2013, with a view to the originally planned but not carried out construction of an underground car park, it commissioned the firm T. GmbH (hereinafter: Company T.) to test the load-bearing capacity of the ground in the inner courtyard, on which, amongst other things, children's play areas are situated, and the outdoor areas of the complex. In the course of this, a backfilled gravel pit was discovered. Company T. informed the Defendant of this in a letter received by the Defendant on 7 March 2013. Amongst other things, it deemed a soil analysis for pollutants to be necessary, which the Defendant commissioned. From 7 March 2013, the Defendant initially concluded sales contracts for a further nine units, excluding liability for material defects. On 26 March 2013, Company T. produced a site investigation report which revealed varying levels of contamination by hazardous substances in the backfilled soil. The Defendant subsequently halted the sale of the flats. The Department of Health and Environment of the City of Munich (hereinafter: RGU) ordered the Company T. to carry out topsoil investigations for contaminated sites to a depth of 35 cm. The analysis reports dated 23 April 2013 concerning the inner courtyard and 30 April 2013 concerning the southern outdoor area identified contamination of the topsoil with, amongst other things, benzo(a)pyrene (BaP). In its statement of 30 April 2013 concerning the inner courtyard, the company b., which had been consulted by the Defendant, proposed soil replacement to a depth of 30 cm. It was stated that replacement at greater depths was not necessary, as an underground car park was to be built in the foreseeable future, at which point the entire contaminated fill would be replaced. With regard to the southern outdoor area, the statement from company b. dated 3 May 2013 did not consider remediation necessary, as the area was protected from access by a fence; appropriate caution should be exercised during gardening work. In a letter dated 21 May 2013, the RGU provided the Defendant with a summary of the contaminated site information relating to the inner courtyard.*

2 *From 29 May 2013, the Defendant continued to sell flats to a further 29 buyers. In the contracts of sale, it referred to the RGU's report on contaminated sites and undertook to implement safety measures in accordance with the RGU's specifications. Liability for the property being free of contamination outside the inner courtyard was excluded. Subsequently, the Defendant replaced the topsoil of the inner courtyard to a depth of 20 cm. Owners' meetings took place on 22 May 2014 and 8 October 2015. The flat owners passed several resolutions concerning the legal enforcement of potential claims relating to the contaminated sites in the inner courtyard and those in the front gardens facing the street.*

3 *In the action, the Claimant seeks – in so far as is relevant to the appeal proceedings – as its principal claim, a declaration that she is entitled, at her option, to full and unrestricted specific performance under the law of sale against the Defendant, a reduction in price or so-called 'minor damages' in connection with the contaminated sites present in the block of flats, as set out in the annexes specified*

in detail (site investigation report by Company T. dated 26 March 2013 and its analysis reports dated 23 April 2013 and 30 April 2013). In the alternative, she seeks, by way of an action for performance, full and unrestricted specific performance under the law of sale, having originally sought only a corresponding declaration in this regard. The Regional Court found that the Claimant was entitled to so-called 'minor' damages in respect of the contaminated sites within the residential complex. Following appeals by both parties, the Higher Regional Court, after an oral hearing on 1 July 2021, following oral proceedings, the Higher Regional Court amended the judgment, dismissed the main claim in its entirety and ordered the Defendant, pursuant to the alternative claim, to remedy the existing contamination by remediating the inner courtyard (areas specified in detail in the letter from company b. dated 30 April 2013) and the southern outdoor area (areas specified in detail in the letter from company b. dated 3 May 2013) , in each case "insofar as the value of 0.5 mg/kg BaP is exceeded there". By means of the appeal on questions of law authorised by the Higher Regional Court, the Defendant seeks to have the claim dismissed in its entirety. By means of the cross-appeal, the Claimant challenges the dismissal of the principal claim and the limitation of the order to a specific value. Each party moves for the dismissal of the other's appeal.

Reasons for the decision

A.

4 *In the view of the Court of Appeal, whose judgment is published, inter alia, in ZfIR 2022, 77, the principal claim seeking a declaratory judgment is inadmissible. It failed to specify an order for the court's examination of the claims for remedy of defects contained in the application. The alternative claim, on the other hand, was admissible. In this respect, the claim contained a sufficiently specific request, even if the extent of the soil replacement to be carried out is not specifically defined in terms of location and depth. An interpretation of the claim revealed that the Claimant seeked the remediation of contaminated sites to the extent apparent from the annexes referred to. The Claimant also had standing to bring proceedings. Under the new rules governing the right to exercise rights, the GdWE's standing to bring proceedings derived from Section 9a para. 2 WEG, as the claims for subsequent performance asserted as a matter of priority by the individual flat owners relate to the community within the meaning of that provision. In any event, the standing to bring proceedings followed from the fact that the GdWE is – to be assessed under the law of sale – claims of the individual flat owners pursuant to Section 10 para. 6 third sentence, second clause WEG, in the version applicable until 30 November 2020, through the resolutions of 22 May 2014 and 8 October 2015.*

5 *On the merits of the case, the Claimant might demand rectification from the Defendant in accordance with Section 439 para. 1 BGB. The common property exhibited material defects in the inner courtyard and in the southern outdoor area. The mere discovery of a backfilled gravel pit already gave rise to a suspicion of contaminated land, which is to be classified as a material defect. Furthermore, the soil contamination identified constituted more than merely insignificant contamination, deviating from the usual condition. In order to establish significant soil contamination classifiable as a material defect, the test and action values laid down on the basis of the Federal Soil Protection Act (BBodSchG) in conjunction with the Federal Soil Protection and Contaminated Sites Ordinance (BBodSchV). However, the concentration of pollutants determined might not be assessed mechanically against the values set out in Annex 2 to the BBodSchV (in this case: for children's play areas and residential areas). New scientific findings justified applying a lower threshold of 0.5 mg/kg BaP for BaP contamination, which has been exceeded. The Defendant had not remedied the defect by replacing the top 20 cm of soil in the courtyard. In the statement by company b. dated 30 April 2013, a soil replacement down to 30 cm was deemed sufficient and further soil replacement to greater depths was considered unnecessary solely on the basis that it was assumed an underground car park would be built in the foreseeable future, at which point the entire contaminated backfill would be replaced. The Claimant had therefore proved that a not insignificant level of contamination remained beneath the remediated layer. Under Section 444 BGB the Defendant could not invoke the exclusion of liability, which was agreed in the contracts concluded from 7 March 2013 onwards. Following the discovery of the backfilled gravel pit, it*

had been aware of the suspected contamination. Furthermore, it had known about the contamination since 27 March 2013. Finally, in the contracts concluded from 29 May 2013 onwards, it had not fully disclosed to the purchasers the extent of the contaminated site issue of which it was aware. The Defendant was obliged to remedy the defect in full – not merely on a pro rata basis – even if claims existed only on the part of individual flat owners. However, as the Defendant was not obliged to provide soil that is completely free of any contamination, it was only required to carry out remediation where the level of 0.5 mg/kg BaP is exceeded.

B. The Defendant's appeal

6 *The appeal is successful.*

7 *I. The appeal is admissible without restriction. The Defendant's precautionary appeal against non-admission is without merit (see Senate, judgment of 19 April 2013 – V ZR 113/12, NJW 2013, 1948, marg. no. 12 with further references).*

8 *1. According to the established case-law of the Federal Court of Justice, the leave to appeal may be restricted only to a factually and legally independent – and thus separable – part of the overall subject-matter of the dispute, to which the party itself could also limit its appeal. This presupposes that the part of the dispute affected by the restriction on leave to appeal can be assessed factually independently of the remainder of the subject-matter of the dispute and that a change to the part covered by the restricted leave does not risk creating a contradiction with the part that cannot be challenged (see, for example, Senate, judgment of 12 November 2021 – V ZR 271/20, NJW-RR 2022, 349 marg. no. 10 with further references). By contrast, leave to appeal cannot be limited to individual points of law or elements of a claim (see Senate, judgment of 10 July 2015 – V ZR 198/14, ZfIR 2015, 770 marg. no. 7; judgment of 19 April 2013 – V ZR 113/12, NJW 2013, 1948 marg. No. 9).*

9 *2. Measured against this, the decision to allow the appeal, as set out in the operative part and the grounds of the contested judgment, does not contain any valid restriction to the detriment of the Defendant. The legal questions deemed by the Court of Appeal to be relevant to the admissibility of the appeal – namely, when contamination of a plot of land with historical contamination constitutes a material defect, and whether an individual flat owner is entitled to a full claim for subsequent performance in respect of defects in the common property, do not concern an independent part of the overall subject-matter of the dispute, but are relevant to the merits of the claim as a whole. Nor does this constitute an effective limitation – which the Court of Appeal may have intended – of the leave to appeal to the merits of the claim. This is because the Court of Appeal cannot restrict the Court of second Appeal's jurisdiction to review matters where procedural requirements must be examined of its own motion (BGH, judgment of 10 October 2017 - XI ZR 456/16, WM 2017, 2254 marg. no. 10 with further references); in this respect, the situation differs from that where leave to appeal is restricted to the admissibility of the claim (see, in this regard, the Senate, judgment of 8 February 2019 – V ZR 153/18, WuM 2019, 403, marg. no. 6). The appeal is therefore also admissible in so far as the Defendant objects to the Court of Appeal's finding that the claim for performance is sufficiently specific and its acceptance of the Claimant's standing to sue.*

10 *II. The appeal on points of law is also successful on the merits. The reasoning on which the Court of Appeal based its granting of the Claimant's alternative claim does not stand up to legal scrutiny. This claim has come before the Senate for a decision because the principal claim, which the Claimant is pursuing by way of a cross-appeal, is inadmissible (see C.II. below) and the condition for a decision on the alternative claim has therefore been met.*

11 *1. Contrary to the view expressed in the appeal, however, the alternative claim does satisfy the requirements of Section 253 para. 2 no. 2 of the Code of Civil Procedure (ZPO), because, as the Court of Appeal correctly observes, it is sufficiently specific.*

12 *a) Under Section 253 para 2 no. 2 ZPO the statement of claim must contain a specific claim. A claim is, in principle, sufficiently specific if it specifically identifies the claim being brought, thereby defining the*

scope of the court's power to decide (Section 308 ZPO), indicates the content and scope of the substantive res judicata of the sought decision (Section 322 ZPO), does not shift the risk of the Claimant's defeat onto the Defendant through avoidable imprecision, and, finally, allows for the expectation that the judgment may be enforced without the dispute being continued in enforcement proceedings. On the other hand, not every possible uncertainty regarding enforcement leads to the claim being indefinite. The requirements for specifying the subject-matter of the dispute in the claim depend on the particularities of the applicable substantive law and the circumstances of the individual case (Senate, judgment of 22 January 2021 – V ZR 12/19, NJW-RR 2021, 401 marg. no. 9; judgment of 20 September 2019 – V ZR 258/18, ZfIR 2020, 98 marg. no. 25; judgment of 19 January 2018 – V ZR 273/16, ZNotP 2018, 99 marg. no. 10; in each case with further references).

13 *b) The Claimant's alternative claim, raised at second instance, satisfies these requirements.*

14 *aa) The interpretation of claims is not determined by the wording alone. Rather, the decisive factor is the declared intention, as it emerges from the statement of claim, the other accompanying circumstances and, not least, the balance of interests. In cases of doubt, what is reasonable according to the standards of the legal system and corresponds to the correctly understood balance of interests shall prevail (Senate, judgment of 26 February 2016 – V ZR 250/14, WuM 2016, 451 marg. no. 18 with further references).*

15 *bb) Accordingly, it is sufficient that the Claimant, instead of seeking a declaration as originally requested (also in the alternative), now demands subsequent performance from the Defendant by way of an action for performance.*

16 *(1) In the case of the purchase of a second-hand flat – as here – this claim is, by its very nature, directed solely at the rectification of defects pursuant to section 439 para. 1 first alternative BGB. As is the case with contractors under the law governing contracts for work and services, it is in principle the seller who determines how existing defects are to be rectified under the law of sale (see BeckOK BGB/Faust [1 May 2022], Section 439, marg. no. 20; Staudinger/Matusche-Beckmann, BGB [2013], Section 439, marg. no. 31). Therefore, as in proceedings concerning defects under contracts for work and services, it is sufficient for the subject-matter of the dispute to be specified if, in addition to the claim for rectification, the defect to be rectified is identified. According to the case-law of the Bundesgerichtshof, this merely requires the symptoms of the defect to be described in a sufficiently specific manner (established case-law; see, for example, BGH, order of 4 November 2020 – VII ZR 261/18, NJW-RR 2021, 147 marg. para. 14; judgment of 8 May 2003 – VII ZR 407/01, MDR 2003, 984; each with further references); Further details, for example regarding the scope of the rectification of defects, are not required, as is already the case with a demand for rectification of defects (see BGH, judgement of 9 October 1986 – VII ZR 184/85, NJW 1987, 381, 382; Stein/Jonas/Roth, ZPO, 23rd ed. , section 253 marg. no. 31 with further references).*

17 *(2) The original application for a declaratory judgement, the content of which is clearly intended to be relevant to the application for specific performance as well, contained a reference to the site investigation report of 26 March 2013, as well as the analysis reports of 23 April 2013 concerning the inner courtyard and of 30 April 2013 concerning the southern outdoor area. This sufficiently specifies the defects to be remedied. Accordingly, the Claimant seeks an order requiring the Defendant to remedy all contamination of the backfilled gravel pit – irrespective of the concentration of the pollutants – which came to light during the test drilling and from the samples taken of the topsoil in the inner courtyard and in the southern outdoor area. Her claim goes beyond the replacement of the topsoil and concerns the removal of pollutants contained in the entire backfill material. Whether a defect actually exists to this extent is – as the Court of Appeal correctly states in this regard – a question of the merits of the claim.*

18 *2. The Claimant has standing to bring the claim for rectification, a point which the Court of Appeal also correctly assumes – albeit only in its conclusion.*

19 *a) The Claimant's standing to sue derives from the resolutions passed at the owners' meetings of 22 May 2014 and 8 October 2015. These resolutions establish the Claimant's standing to sue not only on the basis of the Condominium Act in the version applicable until 30 November 2020. Rather, this right also continues to exist under the new provisions governing the GdWE's power to act, set out in section 9a*

para. 2 WEG, which came into force during the appeal proceedings. The resolutions on communalisation are decisive, as – contrary to the main reasoning of the Court of Appeal – the right to bring proceedings cannot be derived from section 9a para. 2 WEG.

20 *b) The Court of Appeal correctly assumes – as part of its alternative reasoning – that the Claimant owners' association has assumed any claims for subsequent performance relating to the common property held by individual flat owners under the purchase agreements, on the basis of the Condominium Act in the version in force until 30 November 2020.*

21 *aa) Under the previous law, a resolution was required to establish the Claimant's standing to sue, as there was no case falling under section 10 para. 6 third sentence, first clause WEG in its previous version (so-called 'inherent right to exercise'). According to the case-law of the Bundesgerichtshof, the purchaser of a flat was, in principle, entitled to pursue their individual rights arising from the contract with the vendor independently, provided that their actions did not prejudice the collective interests of the flat owners or the vendor's interests worthy of protection (see, fundamentally, BGH, judgment of 12 April 2007 – VII ZR 236/05, BGHZ 172, 42 marg. no. 18 with further references). An inherent right of the GdWE to exercise its rights was recognised only in the enforcement of claims for a reduction in price and for so-called minor damages, provided that these were to be assessed under the law governing contracts for work and services (see BGH, judgment of 12 April 2007 – VII ZR 236/05, loc. cit., marg. no. 19 with further references). By contrast, claims for a reduction in price and so-called minor damages, which were to be assessed solely under the law of sale, did not fall within the scope of application of Section 10 para. 6 third sentence, first clause WEG (old version) if a second-hand flat was sold with liability for material defects excluded and no guarantee of quality had been agreed (Senate, judgment of 24 July 2015 – V ZR 167/14, ZfIR 2015, 801, marg. no. 11).*

22 *bb) However, according to the established case-law of the Bundesgerichtshof, the GdWE was able, within the framework of proper administration, to exercise the rights to the proper construction of the common property to which the individual purchasers were entitled under their respective contracts with the vendor, in accordance with Section 10 para. 6 sentence 3, second clause in conjunction with Section 21 para. 1 and 5 No. 2 WEG (old version) by means of a majority resolution (so-called 'delegated power of exercise'; see BGH, judgment of 12 April 2007 – VII ZR 236/05, BGHZ 172, 42, marg. o. 20; judgment of 25 February 2016 – VII ZR 156/ 13, NJW 2016, 1575 marg. no. 17; Senate, judgment of 15 January 2010 – V ZR 80/09, NJW 2010, 933 marg. no. 7 et seq.). This included claims for performance or subsequent performance under a contract for work and materials aimed at remedying defects in the common property, even where only one purchaser retained an enforceable right to the proper construction of the common property (see Senate, judgment of 15 January 2010 – V ZR 80/09, loc. cit., marg. no. 7 et seq.; BGH, judgment of 25 February 2016 – VII ZR 156/ 13, loc. cit., marg. no. 17). The Bundesgerichtshof had also recognised the GdWE's exclusive power of exercise in respect of the purchasers' claims for subsequent performance under the contract of sale concerning the common property pursuant to Section 437 para. 1 and Section 439 BGB, provided that these claims – like the claims for performance and subsequent performance under the contract for work — were each directed in their entirety towards the rectification of defects in the common property and thus towards the same objective; in such cases, there was no reason to assess the powers of the owners' association arising from Section 10 para. 6, third sentence, second clause in conjunction with Section 21 para. 1 and 5 No. 2 of the previous version of the WEG differently (see BGH, judgment of 25 February 2016 – VII ZR 156/13, loc. cit., marg. no. 18; Senate, judgment of 20 September 2019 – V ZR 258/18, ZfIR 2020, 98 marg. no. 7 et seq.).*

23 *cc) Taking these principles into account, the Court of Appeal correctly affirms that any claims for subsequent performance – aimed at the same objective – brought by the flat owners under their respective contracts with the Defendant in respect of contaminated sites in the inner courtyard and the southern outdoor area are to be treated as matters of common interest. The required objective of the resolutions of 22 May 2014 (Agenda Item 5.2) and 8 October 2015 (Agenda Item 2) allows the Senate to review them in their entirety (see Senate, judgment of 15 May 2020 – V ZR 64/19, NJW-RR 2020, 1022 marg. no. 11 with further references). Contrary to the view expressed in the appeal, the wording of the resolutions does not preclude such a transfer to the community. It is true that, according to the*

resolutions, 'all the claims mentioned' are to be 'transferred for the purpose of exercising the community's rights relating to the community', thereby linking this to the court action resolved upon by the flat owners to assert the 'claims of the community of flat owners'. However, it was clearly intended to enable claims to be brought against the Defendant in respect of contaminated sites based on the claims of the individual owners arising from the purchase agreements. Had the flat owners, as the appeal suggests, intended solely to assert in court the Claimant's own alleged claims, a separate resolution in accordance with Section 10 para. 6 third sentence WEG (old version) would not have been necessary; with regard to claims for which there was an inherent power of exercise, the resolved transfer of the power of exercise would not have been required. Such a meaning cannot be attributed to the resolutions on the basis of the most obvious interpretation.

24 c) The Claimant's right to bring proceedings continues to exist even under the new provisions governing the GdWE's authority to exercise rights, set out in Section 9a para 2 WEG, which came into force during the appeal proceedings.

25 aa) The Condominium Ownership Modernisation Act (WEMoG) of 16 October 2020 (BGBl. [German federal Official Journal] I 2020 p. 2187), which entered into force on 1 December 2020 in accordance with Article 18, first sentence WEMoG, the authority of the community to exercise rights has been redefined in Section 9a para. 2 WEG. Accordingly, the community of flat owners exercises the rights arising from joint ownership, as well as those rights of the flat owners which require uniform legal action, and fulfils the corresponding obligations of the flat owners. This provision has replaced the previously applicable Section 10 para. 6 third sentence WEG (old version). With this provision, the legislature has abandoned the previously applicable concept, which distinguished between the inherent power of the flat owners' association to exercise or fulfil rights and the delegated power to exercise or authority to act, which required a resolution by the flat owners (Senate, judgment of 7 May 2021 – V ZR 299/19, WuM 2021, 392 marg. No. 6; Bundestag printed Paper 19/18791 p. 46).

26 bb) This amendment to the law does not result in the Claimant losing its right to bring proceedings, without it being necessary to refer to the principles established for transitional cases (see, in this regard, Senate, judgment of 7 May 2021 – V ZR 299/19, WuM 2021, 392 marg. no. 12 et seq.). However, opinions differ as to whether and to what extent the principles set out above continue to apply following the new provisions introduced in Section 9a WEG.

27 (1) According to the prevailing view, the provision in Section 9a para. 2 WEG is not intended to bring about any change to the previous legal position. The provision does not preclude the pooling of the rights of individual flat owners against the developer or the co-owner; the power to pass a resolution in this regard arises from Section 19 para. 2 no. 2 WEG (see Hügel/Elzer, WEG, 3rd ed., Section 9a, marg. nos. 124 and 135a; MüKoBGB/Rüscher, 8th ed., Section 18 WEG (new version), marg. no. 112; NK-BGB/Heinemann, 5th ed., Section 9a WEG, marg. no. 35; Dötsch/Schultzky/Zschieschack, WEG Law 2021, Chapter 3, marg. no. 140; Lehmann-Richter/Wobst, WEG Reform 2020, marg. nos. 139 et seq.; Weber in Würzburger Notarhandbuch, 6th ed., Part 2, Chapter 4, marg. no. 122; Dötsch, WuM 2021, 545; Vogel, ZMR 2021, 181, 185; Jurgeleit, NJW 2022, 2641; presumably also Grüneberg/Wicke, BGB, 81st ed., § 9a WEG, marg. no. 10). In isolated cases, the resolution on pooling is regarded as a circumstance that necessitates uniform legal action within the meaning of § 9a para. 2 second case WEG (cf. Häublein, ZWE 2020, 401, 408).

28 (2) According to another view, the consolidation of any claims for subsequent performance by the flat owners by means of a majority resolution is not compatible with § 9a para. 2 WEG. Since the Act no longer provides for a discretionary power of exercise, the previous case law of the BUNDESGERICHTSHOF on the communalisation of primary rights in respect of defects is at odds with the new statutory framework and cannot automatically continue to apply (see BeckOGK/Falkner, WEG [1 March 2022], § 9a para. 238; BeckOK WEG/Müller [1 March 2022], § 9a marg. no. 150; Abramenko in Jennißen, WEG, 7th ed., § 9a marg. no. 89; Kniffka/Jurgeleit/Pause/Vogel, ibr-online Commentary on Construction Contract Law [15 November 2021], Section 650u BGB, marg. no. 60/1; also critical: BeckOK BGB/Zschieschack/Orthmann [1 February 2022], § 48 WEG, marg. no. 48;

Dötsch/Schultzky/Zschieschack, WEG Law 2021, Chapter 3, marg. no. 140; Manteufel in Werner/Pastor, The Construction Litigation Process, 17th ed., marg. no. 435; Pause, NZBau 2021, 230, 232; Schultzky, MDR 2020, 1409, 1411; Zschieschack, NZM 2022, 32). This contradiction is to be resolved by interpreting Section 9a para. 2 second case WEG, for which various possibilities are outlined. It is partly assumed that the provision fundamentally covers all rights relating to defects (cf. BeckOGK/Falkner, WEG [1 March 2022], Section 9a, marg. no. 244; see, however, marg. no. 192 et seq. for substantive reasons regarding the claim under Section 439 BGB; Abramenko in Jennißen, WEG, 7th ed., § 9a marg. no. 93 on the law of sale; similarly marg. no. 89 on the law of contracts for work and services; this view is likely also shared by jurisPK-BGB/Lafontaine, 9th ed., § 9a WEG marg. no. 188). Consideration is also being given to a tiered right of enforcement, which would cover only the primary remedies for defects and leave the secondary remedies (so-called 'minor damages' and 'reduction') – following a waiver by the GdWE of the right to subsequent performance – with the respective flat owner (cf. Kniffka/Jurgeleit/Pause/Vogel, ibr-online Commentary on Construction Contract Law [15 November 2021], Section 650u BGB, marg. no. 60/3; Pause, BauR 2022, 374, 385; though the same author takes a different view, NZBau 2021, 230, 232). It is sometimes considered that the power to exercise this right should be restricted solely to the decision to waive the right to subsequent performance (see Kniffka/Jurgeleit/Pause/Vogel, ibr-online Commentary on Construction Contract Law [15 November 2021], Section 650u BGB, marg. no. 60/3).

29 *(3) Finally, it is occasionally argued that, whilst the pooling of claims is possible in the case of claims for subsequent performance under a contract for work and materials even under the new law, this is not the case for claims for subsequent performance under a contract of sale. It would be going too far to extend the legislator's intention, as expressed in relation to property development contract law, namely that, despite the abolition of the 'crowned' right of exercise, the principles governing the communalisation of rights arising from defects should remain unchanged, to the rights arising from defects under sales contracts (see Müller in Hügel, Wohnungseigentum, 5th ed., § 3, marg. no. 142 and marg. no. 168).*

30 *(4) The first view is to be preferred. The rights of purchasers of flat ownership aimed at the rectification of defects in the common property do not fall within the scope of the power of exercise pursuant to Section 9a para. 2 WEG. Even following the amendment to the Condominium Act, the community of flat owners may continue to assume such rights for their sole enforcement by a majority resolution; the authority to pass such a resolution derives from Section 18 para. 1 and Section 19 para. 2 no. 2 WEG. Whether a corresponding claim is based – as in this case – on the obligation to remedy defects under the contract of sale (Section 439 para. 1 BGB) or arises from the law governing contracts for work and services is irrelevant in this regard.*

31 *(a) According to the case-law of the Federal Court of Justice, even before the authority to exercise such rights was codified in Section 10 para. 6 third sentence WEG (old version) by the Act Amending the Condominium Act and Other Acts of 26 March 2007 (BGBl. I p. 370), a power to pass resolutions derived from Section 21 para. 1 and 5 no. 2 WEG (old version), pursuant to which the exercise of the rights of flat owners aimed at the proper maintenance of the common property could be transferred, by majority resolution, to the GdWE, which would then have sole responsibility (see BGH, judgment of 12 April 2007 - VII ZR 236/05, BGHZ 172, 42 marg. nos. 20 et seq. with further references). This case law was based on the premise that such claims related, in substance, to the repair of the property to which all co-owners of the community were entitled pursuant to Section 21 para. 5 no. 2 WEG (old version), so that the decision on their assertion and enforcement in court, as an administrative act concerning the common property, was a matter for the flat owners to decide jointly (see Senate, judgment of 28 May 1971 - V ZR 65/69, MDR 1971, 739; BGH, judgment of 10 May 1979 – VII ZR 30/78, BGHZ 74, 258, 262; judgment of 4 June 1981 – VII ZR 9/80, BGHZ 81, 35, 38). In such circumstances, the authority of the owners' association took precedence over the individual's right to pursue legal action. The restriction on the individual flat owner's exercise of his contractual rights, corresponding to the community's power to act, was inherent in the respective contract (see Senate, judgment of 15 January 2010 - V ZR 80/09, NJW 2010, 933 marg. no. 9). This substantive restriction was already established at the time the contractual relationship was formed (see Federal Court of Justice, judgment of 12 April 2007 – VII ZR 236/05, loc. cit. marg. no. 22).*

32 *(b) The legislature first regulated the power to exercise such rights in section 10 para. 6 third sentence WEG (old version). A specific power of the community to exercise such rights was intended, in particular, — though not exclusively — apply to those claims which, up to that point, could have been asserted by the body of flat owners on the basis of a corresponding majority resolution, but which did not fall exclusively within their remit by virtue of the flat owners' administrative powers (see Bundestag printed Paper 16/887, p. 61). With regard to the rights to the proper restoration of the common property to which individual purchasers were entitled under their respective contracts with the vendor, the statutory provision served merely to clarify the law, whereas in other areas it established the power to pass resolutions for the first time (see, for example, the Senate, judgment of 8 February 2019 – V ZR 153/18, WuM 2019, 403 marg. nos. 11 et seq.). The Senate has taken this into account by no longer basing the apartment owners' decision-making authority to transfer to the common property the claims for performance and subsequent performance relating to the common property solely on the administrative competence of the community, but rather on Section 10 para. 6, third sentence, alternative 2 in conjunction with Section 21 para. 1 and 5 no. 2 WEG (old version) (see Senate, judgment of 15 January 2010 – V ZR 80/09, NJW 2010, 933 marg. no. 7; judgment of 20 September 2019 – V ZR 258/18, ZfIR 2020, 98 marg. nos. 7 et seq.).*

33 *(c) The new provision on the power to exercise rights in Section 9a para. 2 WEG has left the Bundesgerichtshofs previous case-law on the conversion into common property of the apartment owners' claims for performance and subsequent performance relating to the common property unaffected.*

34 *(aa) In any event, the provision does not cover the primary rights of flat owners in respect of defects. These claims do not arise from the common property within the meaning of Section 9a para. 2 first case WEG, but from the respective purchase contract. Nor do they require uniform legal action under Section 9a para. 2 second case WEG. By introducing the requirement of uniform legal action, the legislature intended to align itself with the Senate's case law on the community-related nature of claims under section 10 para. 6 third sentence, first clause WEG (old version); this may be in the interests of the flat owners or for reasons of debtor protection (see Bundestag printed Paper 19/18791, p. 46). Caution is required when assuming this requirement. The withdrawal of the substantive right to exercise a right, resulting in the loss of the right to bring legal proceedings by operation of law, constitutes, at least in the case of individually based rights arising from a contract, a serious encroachment on private autonomy (Article 2 para. 1 of the Basic Law [Grundgesetz – GG]), which also guarantees that one's own rights may, in principle, be exercised and enforced in court by the individual themselves. Even as a member of a homeowners' association, a flat owner cannot simply have these powers withdrawn against their will (Senate, judgment of 24 July 2015 – V ZR 167/14, ZfIR 2015, 801 marg. no. 12). Measured against this, the enforcement of claims for performance and subsequent performance arising from the individual flat owners' purchase contracts does not necessarily 'require' a unified legal action if these claims – as in this case – are each directed in their entirety towards the rectification of defects in the common property and thus towards the same objective. This is because a flat owner who independently pursues the rectification of defects against the seller is, in principle, also acting in the well-understood interests of all other flat owners (see BGH, judgment of 10 May 1979 – VII ZR 30/78, BGHZ 74, 258, 264), and is, in principle, entitled to exercise his contractual rights himself.*

35 *(bb) On the other hand, Section 9a para. 2 WEG does not preclude the conversion into common claims of the apartment owners' claims for performance and subsequent performance relating to the common property. The wording of the provision does not preclude this (see BeckOGK/Falkner, WEG [1 March 2022], Section 9a, marg. no. 240). The power of the owners' association to pass resolutions on this matter remains unchanged, deriving from the administrative authority over the common property (Section 18 para. 1 WEG) and the duty to maintain it as set out in Section 19 para. 2 no. 2 WEG. This is further supported by the legislature's intention, most recently expressed in the explanatory memorandum to the Act, to retain the previous case law of the Bundesgerichtshof on property developers' rights (see Bundestag printed Paper 19/18791, p. 46), according to which the communalisation of claims for performance and subsequent performance under a contract for work and services was possible. The same must apply to the consolidation of claims for performance and subsequent performance under*

sales law. The further statement in the explanatory memorandum, to the effect that resolutions adopted on the basis of section 10 para. 6 third sentence, second clause WEG (old version) would, in accordance with general principles, cease to have effect upon the entry into force of the new provisions (Bundestag printed Paper 19/18791, p. 47), clearly does not refer to the exceptional case mentioned above. Only this view takes sufficient account of the interests of the flat owners, which remain unchanged following the amendment to the law. The fact that the management of the common property now falls to the GdWE has not altered the fact that it is for the flat owners to decide, at the owners' meeting, how defects in the common property are to be remedied (see Senate, judgment of 15 January 2010 – V ZR 80/09, NJW 2010, 933 marg. no. 10). As a general rule, proper administration will continue to require the formation of a collective decision on how to ensure the proper restoration of the common property (see BGH, judgment of 12 April 2007 – VII ZR 236/05, BGHZ 172, 42 marg. no. 20) and, where applicable, which contractual claims are to be asserted (see Senate, judgment of 20 September 2019 – V ZR 258/18, ZfIR 2020, 98 marg. no. 10) . Furthermore, there is a need for collective action where only individual flat owners are entitled to enforceable claims for performance and subsequent performance, but are unwilling or unable to pursue these claims in court.

36 *(cc) Such an interpretation of Section 9a para. 2 WEG does not undermine the allocation of rights and obligations intended by the legislature (see Bundestag printed Paper 19/18791, p. 47). The power to pass resolutions, which derives from the GdWE's administrative authority over the common property pursuant to Section 18 para. 1 and Section 19 para. 2 no. 2 WEG, is only relevant in the case of individual claims arising from purchase contracts due to defects in the common property. In other areas – unlike under Section 10 para. 6 third sentence, second clause WEG (old version) – communalisation is no longer provided for.*

37 *(dd) Finally, insofar as it is occasionally assumed that, in the case of claims for subsequent performance under sales law, neither the power to pass a resolution on communalisation nor an inherent power to exercise such a resolution can be presumed (see marg. no. 29 above), a different assessment of the powers of the GdWE depending on whether the claims are governed by sales law or the law of contracts for work and services no basis in the Act; as was already the case under section 10 para. 6 third sentence, second clause in conjunction with section 21 para. 1 and 5 no. 2 WEG (old version) (see above marg. no. 22), there is certainly no basis for such a differentiation where – as in the present case – claims with the same purpose are brought by several purchasers against a single seller.*

38 *3. On the merits, the reasoning provided by the Court of Appeal does not support the order requiring the Defendant to provide subsequent performance under Section 439 1 BGB.*

39 *a) However, the Court of Appeal is correct in its view that the existence of a material defect is governed by Section 434 para. 1 second sentence no. 2 BGB in the version applicable until 31 December 2021. According to this provision, which remains applicable pursuant to Article 229 Section 58 of the Introductory Act to the German Civil Code (EGBGB), the goods are only free from material defects if they are fit for their ordinary use and possess a quality that is customary for goods of the same kind and which the buyer may expect given the nature of the goods. The aforementioned characteristics of the item (suitability for use and customary quality) must be present cumulatively for the item to be free from defects (Senate, judgment of 30 November 2012 – V ZR 25/12, ZfIR 2013, 287 marg. no. 13).*

40 *b) The Court of Appeal's assumption that the land exhibited, or exhibits, a defect in this sense due to the discovery of a backfilled gravel pit and the resulting suspicion of contamination is also not open to challenge as a matter of law.*

41 *aa) According to the Senate's case law, a material defect subject to disclosure exists as soon as there is a suspicion of contamination . A plot of land suspected of being contaminated, irrespective of the purpose for which it was purchased, generally does not possess the usual quality within the meaning of Section 434 para. 1 second sentence no. 2 BGB (old version) simply by virtue of the risk of claims under public law and the reduction in value associated with the suspicion of contamination (Senate, judgment of 21*

July 2017 – V ZR 250/15, ZfIR 2018, 55 marg. no. 6; judgment of 8 July 2016 – V ZR 35/15, ZfIR 2016, 783 marg. no. 11).

42 *bb) In this case, there was already an objective suspicion of contamination simply by virtue of the existence of a backfilled gravel pit. According to the unchallenged findings of the Court of Appeal, there are backfilled gravel pits in the urban area of Munich in connection with a large number of old buildings, the gravel from which was used in the construction of those buildings. Such gravel extraction sites were primarily backfilled with ash and coke residues from the central coke-fired heating systems in use at the time, as well as with brick rubble, cinder and other debris. Ash and coke residues frequently contain polycyclic aromatic hydrocarbons (PAHs), such as those found here. According to the official information from the City of Munich, which was taken into account by the Court of Appeal, backfilled gravel pits are, in principle, sites suspected of being contaminated and are therefore generally included in the contaminated sites register maintained by the State Office for the Environment.*

43 *c) However, the remedial measures owed by the seller on the grounds of a suspected contaminated site pursuant to section 439 para. 1 BGB initially comprise only the clarification of the suspicion through investigative measures. A suspected contaminated site does not, however, justify the remediation of the property, to which the Defendant was ordered by the Court of Appeal (see BeckOGK/ Höpfner, BGB [1 May 2022], Section 439, marg. no. 91; Grüneberg/Weidenkaff, BGB, 81st ed., Section 434, marg. no. 45). The purchaser may only demand the removal of contaminated sites once the suspicion has been confirmed; if, on the other hand, the suspicion proves to be unfounded, any further claim for subsequent performance is excluded (see BGH, judgment of 23 November 1988 – VIII ZR 247/87, NJW 1989, 218, 220 on rescission).*

44 *d) The decisive factor is therefore whether, beyond the suspicion of contamination, there is actual soil contamination to an extent that justifies the order for remediation issued by the Court of Appeal. As the appeal rightly argues, this cannot be assumed on the basis of the findings made to date.*

45 *aa) According to the case-law of the Senate, on which the Court of Appeal also relies, the usual condition of a property under section 434 para. 2 second sentence no. 2 BGB (old version) includes freedom from contamination that is not merely insignificant and which a purchaser would not, as a rule, be prepared to accept without further ado (see Senate, judgment of 30 November 2012 – V ZR 25/12, ZfIR 2013, 287 marg. no. 15). It is not possible to determine mathematically and precisely when the threshold of materiality is exceeded. If the contracting parties have not agreed on a specific condition with regard to contaminated sites, recourse may be had to the provisions of public law for clarification. A contamination of a plot of land with pollutants that deviates from its usual condition is therefore to be assumed in any event if, according to public-law criteria, there is a harmful change to the soil or a contaminated site within the meaning of the Federal Soil Protection Act (Section 2 para. 3 and 5 BBodSchG). A purchaser is generally not prepared to accept such a condition of the property, not only because of the risks associated with the contamination and the reduction in the property's value, but also because of the risk of claims under public law (Section 4 para. 3 BBodSchG). The Court of Appeal correctly holds that, in assessing whether contamination of the property with pollutants constitutes a material defect, the test and action values relevant to the official risk assessment pursuant to Section 8 para. 1 second sentence, nos. 1 and 2 BBodSchG may be applied (see NK-BGB/Thau, 4th ed., Annex I to §§ 433–480, marg. no. 132; Krauß, Immobilienkaufverträge in der Praxis, 9th ed., marg. no. 3843; Hünert, Rechte des Käufers eines mit Altlasten kontaminierten Grundstücks [2004], p. 47; Kothe, ZfIR 2001, 169, 171; Schmidt, ZfIR 2022, 87).*

46 *(1) Pursuant to Section 8 para. 1 second sentence no. 1 BBodSchG, reference values are those values which, if exceeded, require a case-by-case assessment to be carried out, taking into account the land use, to determine whether there is a harmful soil alteration or a contaminated site. Exceeding these values strengthens a suspicion that was previously only of a general nature, but does not in itself justify the assumption of a harmful soil alteration or contaminated site. For the final risk assessment, pursuant to Section 3 para. 4 second sentence of the Federal Soil Protection and Contaminated Sites Ordinance (Bundes-Bodenschutz- und Altlastenverordnung - BBodSchV) of 12 July 1999 (BGBl. I p. 1554), a detailed investigation is generally required to determine the quantity and spatial distribution of pollutants, their*

mobile or mobilisable fractions, their potential for dispersal in soil, water and air, and the possibility of their uptake by humans, animals and plants (Section 2 para. 4 BBodSchV). Accordingly, a material defect going beyond a mere suspicion of a contaminated site under Section 434 para. 2 second sentence no. 2 BGB (old version) cannot be established on the basis of the property's contamination with pollutants resulting from the exceeding of reference values. If, on the other hand, the content or concentration of a pollutant is below the relevant reference value, the suspicion of harmful soil alteration or a contaminated site under Section 4 para. 2 first sentence BBodSchV is thereby dispelled. In this case, the property generally also exhibits the usual quality (see Müggenborg, NJW 2005, 2810, 2811).

47 *(2) By contrast, under Section 8 para. 1 second sentence no. 2 BBodSchG, action levels are those values which, if exceeded, generally give rise to a presumption of a harmful soil alteration or contaminated site, taking into account the respective land use. They indicate the risk threshold; if this is exceeded, remediation, protection or restriction measures are normally triggered (see Landmann/Rohmer/Dombert, UmweltR [December 2021], Section 8 BBodSchG, marg. no. 13; BeckOK UmweltR/Ginzky [1 July 2020], Section 8 BBodSchG, marg. no. 6). If the risk threshold is exceeded, it must generally also be assumed that the property deviates from its usual condition (see NK-BGB/Thau, 4th ed., Annex I to §§ 433–480, marg. no. 132).*

48 *bb) Taking these principles into account, the findings made to date do not provide a sufficient basis for assuming a material defect arising from the contamination of the property with BaP.*

49 *(1) Contrary to the view expressed in the appeal, a material defect under section 434 para. 2 second sentence no. 2 BGB (old version) is not, however, ruled out from the outset merely because the Court of Appeal did not find that the test values for BaP listed in Table 2 of Annex 2 to the Federal Soil Protection and Contaminated Sites Ordinance of 12 July 1999. It is true that, taking into account the assessment set out in Section 4 para. 2 first sentence BBodSchV, a plot of land is deemed to be of normal quality if the content or concentration of a pollutant lies below the relevant reference value. It is also correct that the table specifies reference values of 2 mg/kg for children's play areas and 4 mg/kg for residential areas with regard to BaP. However, the Court of Appeal, without committing any error of law, bases its assessment on a lower reference value of just 0.5 mg/kg; this value has been exceeded both in the inner courtyard and in the southern outdoor area.*

50 *(a) The test values laid down in the Bundes-Bodenschutz- und Altlastenverordnung are intended to define the contamination threshold; exceeding this threshold indicates the presence of harmful soil alteration or a contaminated site and points to the need for a case-by-case assessment (see Landmann/Rohmer/Dombert, UmweltR [December 2021], § 8 BBodSchG marg. no. 10; BeckOK UmweltR/Ginzky [1 July 2020], Section 8 BBodSchG, marg. no. 5). Based on the knowledge available at the time, the regulator assumed that a risk to human health could be ruled out below the screening values and that, pursuant to Section 4 para. 2 first sentence BBodSchV, there was therefore no need for action in this respect where soil contamination was present (see Bundestag printed Paper 13/6701, p. 24) . However, the specified screening values do not constitute limit values in the sense of binding maximum levels for pollutant concentrations; rather, they are merely assessment aids for risk assessment and serve to guide decisions on further investigations into the facts (see Landmann/Rohmer/Dombert, UmweltR [December 2021], § 8 BBodSchG marg. no. 11).*

51 *(b) Given that the specified test values are merely indicative, the trial judge may, when assessing whether a material defect in the property can already be ruled out simply because the test values have not been exceeded, deviate from the standard case implied by the values, if special circumstances so require. Such circumstances exist, in particular, where the assumption underlying the setting of the threshold value – namely, that a risk to human health is ruled out below a certain value – subsequently proves to be incorrect and, instead, lower threshold values correspond to scientific knowledge.*

52 *(c) The Court of Appeal is not in error in law in assuming such circumstances. It points out that the contaminant BaP detected in the soil of the property is an individual substance within the group of polycyclic aromatic hydrocarbons (PAHs), which normally occur as a mixture of substances. As the Court*

of Appeal correctly observes, the Bundes-Bodenschutz- und Altlastenverordnung of 12 July 1999 sets reference values only for the individual substance, because the mixture of substances could not yet be assessed at the time of its adoption in 1999. Instead, reference values for the individual substance were derived on the assumption that the regulation would also adequately cover PAHs as a whole (see Bundestag printed Paper 19/29636, p. 289). It was only following the establishment of the test values for BaP that, on behalf of the Federal Environment Agency and based on the analysis of PAH profiles in contaminated soils, proposed test values were derived which take into account the harmful effects of typical PAH mixtures and provide for lower test values overall for BaP as the reference substance, as well as a uniform value of 0.5 mg/kg for children's play areas and residential areas. This also corresponds to the test value declared binding by the State Office for Health and Food Law (Munich) has declared to be binding; the Court of Appeal relies on this. It is therefore not open to criticism that it applied a value of 0.5 mg/kg on the basis of the expert opinions submitted by the Defendant on 30 April 2013 and 3 May 2013. Given that this value has been exceeded, a risk to human health and the suspicion of harmful soil contamination or a contaminated site cannot be ruled out.

53 (2) The appeal, however, rightly objects that the expert reports of 30 April 2013 and 3 May 2013, relied upon by the Court of Appeal to substantiate the factual defect, are based solely on the established exceedances of the test value (reduced to 0.5 mg/kg). The exceedance of test values constitutes – contrary to the view of the Court of Appeal – does not constitute a material defect going beyond the suspicion of a contaminated site, but merely corroborates an already existing (general) suspicion (see marg. no. 46). It is has not, however, been established.

54 (a) The Bundes-Bodenschutz- und Altlastenverordnung of 12 July 1999 contains no specific action values either for the individual substance BaP or for PAH mixtures. The regulatory gap arising from the lack of such specifications must be closed in accordance with Section 4 para. 5 first sentence BBodSchV. Accordingly, where no screening or action values have been set for a pollutant, the methods and criteria used to derive the corresponding values in Annex 2 of the Ordinance – published in the Federal Gazette No. 161a of 28 August 1999 – must be observed. These are intended to ensure the proper and uniform application of the test and action values with the aim of achieving equivalent decisions in individual cases (see Landmann/Rohmer/Dombert, UmweltR [December 2021], § 8 BBodSchG marg. no. 16). The detailed investigation, which is generally required where test values are exceeded in accordance with Section 3 para. 4 second sentence BBodSchV, must be carried out. On this basis, it must be determined in each individual case whether the soil contamination requires the implementation of specific remediation measures.

55 (b) However, according to the expert opinion of 30 April 2013, which the Court of Appeal relied on to substantiate the material defect, the detailed investigation was dispensed with altogether due to the originally planned construction of an underground car park in the inner courtyard (Section 3 para. 5 second sentence BBodSchV); neither were case-specific action levels determined in accordance with the above-mentioned principles, nor was a conclusive risk assessment carried out. Consequently, the Court of Appeal's assumption that, following the (provisional) remedial measures initiated by the Defendant, further contamination persists and soil replacement in deeper layers is necessary, finds no sufficient basis in the expert opinion of 30 April 2013. In his assessment, the expert confined himself solely to proposing partial remedial measures in the upper layers, as he assumed that the backfill would be removed during the construction of the underground car park and that, consequently, the need for protective measures would only exist for a short period. In this respect, for the provisional protection of individual areas of the inner courtyard, the test value was (provisionally) equated with the action value. However, it cannot be concluded from this that the entire backfilled soil is contaminated to such an extent that the backfill must also be replaced in deeper layers; the expert did not prescribe such measures.

56 C. The Claimant's cross-appeal

57 The cross-appeal is unsuccessful.

58 *I. The Claimant's cross-appeal is admissible. The Claimant is adversely affected by the judgment on appeal (see, regarding this requirement, the Senate's judgment of 22 January 2021 – V ZR 12/19, NJW-RR 2021, 401 marg. no. 53 with further references), in so far as the principal claim was dismissed in its entirety and the alternative claim was dismissed in part. Furthermore, both claims relate to a single set of facts which is directly linked, both legally and economically, to the subject-matter of the dispute covered by the appeal (see, on this requirement, BGH, judgment of 10 January 2019 – III ZR 109/17, NJW-RR 2019, 428, marg. no. 19 with further references).*

59 *II. The cross-appeal is unfounded in so far as the Claimant continues to pursue the principal claim. The Court of Appeal correctly held that this claim for a declaratory judgement is already inadmissible.*

60 *1. The Claimant cannot seek a declaration that she may, at her discretion, claim subsequent performance, a reduction in price or so-called 'minor' damages. Since the claim contains various, mutually exclusive heads of claim which can only be asserted alternatively, the various procedural claims (subject-matters of the dispute) must be placed in a relationship of subordination in order to satisfy the requirement of specificity under Section 253 para. 2 no. 2 ZPO (see BGH, judgment of 31 May 2022 – VI ZR 804/20, juris marg. no. 12 with further references). This also applies to an action for a declaratory judgement (see BGH, judgment of 28 September 1989 – IX ZR 180/88, NJW-RR 1990, 122).*

61 *2. Contrary to the view expressed in the cross-appeal, the action for a declaratory judgement is also not admissible on the grounds that the Claimant merely seeks a declaration that the common prerequisites for the claims or rights set out in the statement of claim were met.*

62 *a) The subject-matter of an action for a declaratory judgement under Section 256 ZPO can only be the existence or non-existence of a legal relationship, i.e. the legal relationships arising from a specific set of facts; a declaratory judgement seeking to clarify individual preliminary issues is not admissible, to clarify the elements of a legal relationship, or to clarify the basis for calculating a claim or an obligation to perform (Senate, judgment of 13 May 2016 – V ZR 152/15, WuM 2016, 577 marg. no. 23 with further references). However, individual rights, obligations or consequences of a legal relationship, as well as the content and scope of an obligation to perform, are capable of being the subject of a judicial declaration (see BGH, judgment of 22 January 2015 – VII ZR 353/12, NJW-RR 2015, 398, marg. no. 17 with further references).*

63 *b) Viewed in this light, the application is inadmissible even on the basis of the interpretation underlying the cross-appeal. The declaration sought does not concern the existence of a legal relationship. Rather, the Claimant seeks a judicial determination as to whether there is a material defect within the meaning of Section 434 BGB, for which the Defendant is liable because, under section 444 BGB, it cannot invoke the exclusion of liability. However, these are prerequisites that must be met in every case in order to exercise the rights in respect of defects set out in section 437 BGB, and are thus elements of the rights arising from the legal relationship.*

64 *III. In so far as the Claimant objects to the partial dismissal of the alternative claim, the cross-appeal becomes moot following the setting aside of the ruling on the alternative claim. Since it is directed solely against the restriction imposed by the Court of Appeal on the obligation to remedy the defect to individual pollutants at a specific concentration (0.5 mg/kg BaP), it is (implicitly) subject to the procedural condition that the Defendant's appeal is unsuccessful. This condition has not been met.*

D.

65 *The judgment on appeal must therefore be set aside in respect of the order against the Defendant pursuant to the alternative claim (Section 562 para. 1 ZPO). The matter is not yet ready for a final decision in this respect, as further findings must be made. It must therefore be referred back to the Court of Appeal for a fresh hearing and decision (Section 563 para. 1 first sentence ZPO).*

66 *I. The alternative claim is not ready for dismissal.*

67 1. The exclusion of liability agreed in the contracts of sale does not preclude the claim for subsequent performance asserted by the Claimant.

68 a) Under Section 444 BGB, the seller may not rely on an exclusion of liability agreed in the contract of sale if he has fraudulently concealed the defect. In the context of Section 444 BGB, a person acts fraudulently within the meaning of that provision in the case of deception by concealing a defect subject to disclosure if they consider a material defect to be at least possible and, at the same time, know or anticipate and willingly accept that the other party to the contract is unaware of the material defect and, had it been disclosed, would not have concluded the contract or would not have concluded it on the agreed terms (established case law, see, for example, the Senate's judgment of 25 January 2019 – V ZR 38/18, WM 2019, 2206, marg. no. 22).

69 b) aa) According to the findings of the Court of Appeal, the Defendant was aware, on the basis of the supplementary offer from the Company T. received by the witness W. on 7 March 2013, that the soils under investigation were a backfilled gravel pit. Since the offer, amongst other things, deemed soil analyses for pollutants to be necessary, the Defendant, according to the Court of Appeal's assessment—which cannot be challenged as a matter of law—was also aware of a suspicion of contaminated land. The fact that the witness W. not only advised the Defendant internally but – as the Court of Appeal implicitly assumes – is to be regarded as its representative in matters of knowledge (see, regarding the requirements for this, the Senate's judgment of 19 March 2021 – V ZR 158/19, NJW-RR 2021, 1068 marg. no. 19 with further references) follows, in any event, from the further findings and the annexes specifically referred to by the Court of Appeal. According to these, the witness, as a technical employee of a subsidiary of the Defendant, commissioned the a. commissioned the site investigation and represented the Defendant during site visits and in dealings with the City of Munich.

70 bb) On this basis, the Defendant acted fraudulently towards the purchasers with whom it concluded sales contracts following receipt of the supplementary offer from the Company T. on 7 March 2013, without drawing attention to the issue of contaminated sites. This certainly applies to the contracts of sale concluded between 18 March and 27 March 2013. Whether this also applies to the contract of sale of 7 March 2013 remains open, as it has not been established whether the supplementary offer was already available at the time that contract was concluded. However, this is irrelevant, as the joinder of the claims of the other purchasers is sufficient to establish the Claimant's entitlement. Being aware of the suspected risk, the Defendant simultaneously accepted that the land was in fact contaminated with pollutants to a not inconsiderable extent.

71 If the seller fraudulently conceals a suspicion of contamination of which he is aware and the suspicion is later confirmed, he generally acts fraudulently – as is the case here – with regard to the actually existing contaminated sites as well. Essentially, this amounts to the same defect. The Senate has proceeded on this basis in connection with the calculation of the commercial reduction in value in the event of the concealment of a suspicion of contamination. The reduction in value is not necessarily limited to the amount by which the value of the land is reduced due to the existing suspicion of contamination. If the buyer proves that the land is in fact contaminated, it is rather this contamination that must be factored into the calculation of the reduction in value. The seller's liability for the material defect arising from a previous hazardous use of a plot of land, which gives rise to a suspicion of contamination, also covers the consequences of the suspicion once it materialises (Senate, judgment of 21 June 2017 – V ZR 250/15, NJW 2018, 389 marg. no. 25). These considerations apply mutatis mutandis to a claim for subsequent performance. Insofar as the Senate's judgement of 8 July 2016 (V ZR 35/15, NJW-RR 2017, 468 marg. no. 6) could be interpreted differently, the Senate does not adhere to it.

72 c) In the contracts of sale concluded from 29 May 2013, the Defendant did indeed draw attention to the issue of contaminated sites. In this respect, too, the Court of Appeal rightly affirms the existence of fraudulent concealment. Where the seller is aware of facts which they are obliged to disclose, fraudulent concealment is also present if the true extent of the fact subject to disclosure is not stated but is instead played down (see, for example, BGH, judgment of 3 December 1986 – VIII ZR 345/85, NJW-RR 1987, 436, 437). This is the case here on the basis of the findings made. This concerns, first of all, the outdoor area, *which was not mentioned either in the contracts of sale or in the RGU's contaminated site report of 21 May 2013, even though levels were detected in this area which, in some cases, exceeded the threshold value set out in the Federal Soil Protection and Contaminated Sites Ordinance; further measures were not taken solely because the area was fenced off to prevent access and special precautions had to be observed during gardening work. This should have been disclosed regardless of the authority's assessment. Nor do the appeal court's further remarks concerning the contamination in the inner courtyard reveal any legal errors. The Defendant's contaminated site declaration does not disclose the extent of the soil contamination known to it, but merely refers to the RGU's contaminated site report. However, this report gives rise only to a general suspicion. The reference to the topsoil analysis in the report, together with the Defendant's contractual undertaking to carry out the replacement of the topsoil alone as ordered by the authorities, gives the impression that the contaminated site issue had been resolved by the safety measures undertaken by the Defendant and that only a residual risk remained. The fact that the deeper soil layers represented the actual – unresolved – problem, the investigation of which was omitted solely in view of the originally planned underground car park, is precisely not disclosed.*

73 2. Contrary to the view expressed in the appeal, the claim under Section 439 para. 1 BGB in the case of the purchase of a second-hand flat and defects in the common property is directed towards full – in this case, the Claimant's claim for – as demanded by the Claimant in this case – and this is the position taken by the Court of Appeal. There is not merely a claim for exemption from the costs of rectifying defects limited to the proportion of the co-ownership share.

74 a) However, the question has not yet been decided by the highest court (see, regarding the state of the dispute, the references in the Senate's judgment of 14 February 2020 - V ZR 11/18, BGHZ 225, 1 marg. no. 44). The Senate has, however, already addressed the comparable issue of the nature and scope of the claim for subsequent performance in the sale of a co-ownership share in a plot of land. In this regard, it ruled that the purchaser is entitled to a full claim for rectification under Section 439 para. 1 BGB, as the transaction constitutes a sale of property rather than a sale of rights (see Senate, judgment of 14 February 2020 – V ZR 11/18, BGHZ 225, 1 marg. nos. 45 et seq.). This applies equally to the purchase of a flat. This is because, in the case of the purchase of a flat in a block of flats – where, pursuant to Section 1 para. 2 WEG, the object of the sale is the separate ownership of a flat in conjunction with a co-ownership share in the common land – the point of reference for the claim for subsequent performance, with regard to the common property, is not the co-ownership share as a right in rem, but the (developed) land (see Senate, judgment of 14 February 2020 – V ZR 11/18, loc. cit., marg. no. 48 with further references). Accordingly, the purchaser of a second-hand flat is also entitled, under section 439 para. 1 BGB, to full subsequent performance in respect of defects in the common property, and not merely to a claim for indemnity against the costs of rectifying defects limited to the proportion of the co-ownership share.

75 b) Contrary to the Defendant's view, supplementary performance is not rendered impossible by a lack of willingness on the part of the flat owners to make the property available to the Defendant, as the seller, for the purpose of carrying out the remedial work. The resolutions on communalisation demonstrate precisely that the majority of the flat owners wish to see supplementary performance carried out. It is an entirely different matter whether the claim for subsequent performance is precluded in view of the solicitor's letter of 23 September 2014, which the Defendant cites as evidence of impossibility, is excluded. However, this is not the case. The letter merely sets a deadline for subsequent performance and, should the deadline pass without result, refuses subsequent performance. Under Section 281 para. 4 BGB, however, the claim for the primary performance is only excluded upon a claim for damages, which is lacking here. In contrast to the previous legal position, the creditor's claim to the (primary) performance does not lapse merely upon the fruitless expiry of the grace period (see, for example, BGH, judgment of 9 November 2017 – IX ZR 305/16, NJW 2018, 786 marg. no. 10).

76 c) It is not necessary to decide whether, and under what conditions, the seller – in this case the Defendant – may be entitled to claims for unjust enrichment on the grounds of saved expenses against those buyers to whom the seller is not obliged to provide a defect-free item, either because no contractual relationship *exists in the first place or because the agreed exclusion of liability remains in force in the absence of fraudulent intent (see, in this regard, the Senate's judgment of 24 July 2015 – V ZR 167/14, NJW 2015, 2874, marg. no. 24).*

77 *3. Finally, the alternative claim cannot be dismissed on the grounds that it is directed towards an overly far-reaching objective, namely restructuring, even though only an assessment of risks can currently be required. With regard to this point, highlighted for the first time by the Senate, the parties must, in order to safeguard their right to a fair hearing (Article 103 para. 1 GG), the parties must be given the opportunity to submit their views and be afforded the possibility, where appropriate, to amend their claims and to offer supplementary evidence.*

78 *II. Should the Court of Appeal reach a decision convicting the Defendant once again, the Senate points out the following:*

79 *As a general rule, the operative part of the judgment must be determinable from the judgment itself or, where necessary, in conjunction with its grounds; this means that the content of the judgment must, in principle, be set out in a single document (see Federal Court of Justice, judgment of 29 July 2021 – I ZR 139/20, GRUR 2021, 1199 marg. no. 13 with further references – Goldhase III). Consequently, it is generally not sufficient to. Yet this is precisely how the Court of Appeal proceeded in the contested judgment. Only in exceptional cases, when assessing the requirements necessary to ensure the certainty of the judgment's operative part, the requirements of ensuring effective legal protection or avoiding undue burden may also need to be weighed up. In such exceptional cases, the court's decision may therefore also refer to annexes that have been filed with the court records (see BGH, judgment of 29 July 2021 - I ZR 139/20, GRUR 2021, 1199 marg. no. 13 with further references – Goldhase III). It is not apparent why Annexes B 4 and B 5, to which the Court of Appeal referred, could not have been attached to the judgment in this case.*

Editor's note

The above judgement provides three key clarifications: despite the introduction of Section 9an para. 2 WEG, the owners' association may still assume liability for warranty claims brought by individual flat owners in respect of defects in the common property and assert these claims on their behalf. The existence of suspected contamination constitutes a defect due to the obligations under the Bundes-Bodenschutzgesetz. However, rectification can only be demanded if this defect is confirmed.