

Residential house with a barn wall

[Brief classification / area of law, e.g. sales law — Section ... of the German Civil Code (BGB)]

Court	<i>Federal Court of Justice, Fifth Civil Senate</i>
Date	<i>22 April 2016</i>
Case number	<i>V ZR 23/15</i>
Reference	<i>ZfIR 2016, 785</i>
Finality	<i>Final</i>
Provisions	<i>Sections 434 para. 1 third sentence, 444 of the German Civil Code (BGB)</i>

Official Headnotes

The comprehensive exclusion of liability for material defects agreed in a property purchase agreement also covers the characteristics of a property or the building standing on it that are to be expected based on the seller's public statements.

Operative Part

On appeal, the judgment of the 9th Civil Division of the Dresden Higher Regional Court of 9 January 2015 is set aside on the issue of costs and in so far as the defendants were ordered, as jointly and severally liable, to pay €13,546.32 plus interest at a rate of five percentage points above the base rate from 11 February 2009, and the application for a declaratory judgement (Operative Part of the Judgment, I. 2.) was granted. To the extent of the annulment, the case is referred back to the Court of Appeal for a fresh hearing and decision, including on the costs of the appeal proceedings.

Ipso iure

Facts

- The defendants sold the claimant a plot of land on which a residential house was built by way of a notarised contract dated 21 October 2008, excluding liability for defects in the property. The building had been erected in 1999/2000 on the site of a former barn. In doing so, a rear wall that had been installed in the barn prior to 1999 was incorporated into the external wall.*
- The defendants had advertised the property on an internet portal and described it, amongst other things, as follows: "This substantial architect-designed house was built in 1999/2000 and extended until 2005." Insofar as is relevant here, the claimant is seeking damages of €18,000 in respect of the existing building fabric incorporated into the property, as well as a declaration that the defendants are obliged to compensate him for any further losses arising in connection with the use of the existing building fabric during the conversion and extension of the residential property.*
- The Regional Court dismissed the claim. On appeal by the claimant, the Higher Regional Court ordered the defendants to pay damages amounting to €13,546.32 plus interest and declared their obligation to compensate for any further losses. By means of the appeal in cassation authorised by the Senate, the defendants are continuing to pursue their application for the action to be dismissed; the claimant applies for the appeal to be dismissed.*

Reasons for the decision

I.

- 4 *The Court of Appeal, having heard expert evidence, holds that the defendants are liable for an inaccurate public statement regarding a characteristic of the goods sold (Section 434 para. 1, third sentence, of the German Civil Code (BGB)). The building deviates from the agreed quality because the external wall was erected before 1999. This deviation is not insignificant. The external wall in question is more susceptible to damage and more permeable to heat than the other walls. The defendants cannot rely on the agreed exclusion of liability, as they fraudulently concealed the defect. This is not negated by the fact that they did not regard the age of the rear wall as a defect. It is sufficient that they were aware of the facts giving rise to the defect and nevertheless made statements to the contrary regarding the date of the building's construction.*

II.

- 5 *This does not stand up to scrutiny on appeal. On the grounds given by the Court of Appeal, the plaintiff's claim under Section 437 [para. 1] no. 3, Section 281 para. 1 and Section 280 para. 1 and 3 BGB cannot be upheld.*
- 6 *1. The findings of the Court of Appeal do not, in any event, support the assumption that the property in question is subject to a material defect on the grounds that it deviates from the year of construction stated by the defendant on the internet portal (Section 434 para. 1, second sentence, No. 2, in conjunction with Section 434 para. 1 third sentence BGB).*
- 7 *a) It is, however, correct that, under Section 434 para. 1 third sentence BGB, the characteristics to which the buyer may reasonably expect the purchased item to conform include those which the buyer may expect based on the seller's public statements; this also includes information contained in a property brochure (see Senate, judgment of 16 March 2012 – V ZR 18/11, NJW- RR 2012, 1078, marg. no. 16).*
- 8 *b) The year of construction of a building is one of the characteristics of a developed plot of land, as it generally influences its value (see Higher Regional Court of Hamm, NJW- RR 2010, 1643 et seq.; Staudinger/Matusche- Beckmann, BGB [2014], § 434 marg. no. 170; Palandt/Weidenkaff, BGB, 75th ed., § 434 marg. no. 63).*
- 9 *c) Whether the year of construction of a house fails to meet the standard of quality required under Section 434 para. 1 third sentence BGB – in this case: construction year 1999/2000 – because an older component was incorporated during construction, depends on whether this gives rise to a reasonable expectation, when viewed objectively (Federal Court of Justice, judgment of 20 May 2009 – VIII ZR 191/07, BGHZ 181, 170 marg. no. 14; judgement of 29 June 2011 – VIII ZR 202/10, WM 2011, 2149 marg. no. 12) that the building was constructed in the stated year of construction. This cannot be determined in general terms, but must be assessed on the basis of whether the older part of the building influences the house to such an extent that it loses the character of having been built in the expected year of construction. The decisive factors here are the extent of the discrepancy in age, as well as the nature, size and significance of the older part incorporated into the building. The older, more extensive and more significant the older part is – for example, because it is a load-bearing wall – the more likely it is that, from the buyer's objective point of view, the house will no longer be regarded as having been built in the year specified.*
- 10 *d) The Court of Appeal makes no distinction in this regard. It assumes a defect without having made any findings as to the age and size of the integrated wall or its significance for the building. For this reason alone, the contested judgment cannot stand.*

- 11 2. Ultimately, the Court of Appeal erred in law in assuming that the exclusion of liability contained in the contract did not preclude the claimant's claim for damages because the defendants had fraudulently concealed the age of the incorporated wall (Section 444 BGB).
- 12 a) It is correct to start from the premise that the comprehensive exclusion of liability for material defects agreed in a contract for the sale of land also covers the characteristics of the land or the building standing on it that are to be expected on the basis of the seller's public statements (Section 434 para. 1 third sentence BGB).
- 13 aa) However, this is not self-evident.
- 14 (1) According to the case law of the Federal Court of Justice, an exclusion of liability for material defects agreed between the parties to a contract of sale does not cover the seller's liability for the absence of the characteristics agreed under Section 434 para. 1 first sentence BGB, but only liability for the absence of the characteristics owed under Section 434 para. 1 sentence 2 BGB (Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 9 with further references; Federal Court of Justice, judgment of 29 November 2006 – VIII ZR 92/06, BGHZ 170, 86, marg. no. 31, and judgment of 19 December 2012 – VIII ZR 117/12, NJW 2013, 1733, marg.no. 15). Accordingly, the seller could also exclude liability for the absence of characteristics which the buyer is entitled to expect to be present on the basis of the seller's public statements. This is because, pursuant to Section 434 para. 1 third sentence BGB, such characteristics are equivalent to those owed under Section 434 para. 1 second sentence no. 2 BGB.
- 15 (2) It is, however, doubtful whether, from the buyer's perspective, a general exclusion of liability extends to liability for the absence of such characteristics. The seller's public statement could, in fact, not only shape the buyer's expectations regarding the quality of the goods, but also form part of the accompanying circumstances which may clarify the meaning of the exclusion of liability and which would need to be taken into account in this context when interpreting the clause (see Senate, judgment of 22 April 2016 - V ZR 189/15, Grundeigentum 2016, 968 marg. no. 15 with further references). It cannot be ruled out that an objective observer in the buyer's position, having regard to the seller's public statement, might assume that the general exclusion of liability does not also extend to liability for the absence of the characteristics 'promised' therein. However, there is no need to decide here whether, and under what conditions, such an expectation might be relevant to the interpretation of the exclusion of liability.
- 16 bb) In the case of a contract for the sale of land, such an expectation on the part of the buyer cannot arise.
- 17 (1) Under section 311b para. 1 first sentence BGB, contracts for the sale of land must be notarised. The parties may only validly conclude such a contract if they ensure that the contractual document to be drawn up includes all the declarations intended to form part of the contractual provisions (Senate, judgment of 19 November 1982 – V ZR 161/81, BGHZ 85, 315, 317; judgement of 30 June 2006 – V ZR 148/05, NJW- RR 2006, 1292 marg. no. 12; judgement of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 16). This circumstance shapes its interpretation. In case of doubt, the parties do not wish to enter into a contract that is void due to the failure to have provisions that are intended to form part of its content notarised, particularly as they cannot rely on the remedy for the formal defect, which is possible in principle under section 311b para. 1 second sentence BGB, actually taking effect (Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 17 et seq.).
- 18 (2) The draft sale and purchase agreement, which is to be notarised during the proceedings before the notary, thus marks a turning point. The parties cannot assume that information provided in the run-up to the contract – for example, during a viewing – regarding the land or the building standing on it will form part of the contractual obligations if the required quality is not specified in the contract of sale (see Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 17 et seq.). The same applies to characteristics which the buyer might reasonably expect based on the seller's public statements. The seller was indeed liable for material defects arising from the absence of such

characteristics, because the provision in section 434 para. 1 second and third sentences BGB also applies to contracts for the sale of land (Senate, judgment of 16 March 2012 – V ZR 18/11, ZfIR 2012, 463 marg. no. 16). However, even in such cases, it applies only subject to the proviso that nothing else has been agreed. The provisions set out in the notarial deed are therefore decisive in this respect as well. Only that deed specifies what the seller ultimately wishes to be liable for. If it contains an unrestricted exclusion of liability, this therefore generally means that the seller does not wish to limit their liability to the qualities which the buyer could expect under section 434 para. 1 second and third sentences BGB, but rather wishes to make use of the option to agree otherwise and completely exclude liability for the absence of such qualities.

- 19 b) The Court of Appeal's further finding that a seller who, by providing incorrect information about the property for sale, causes the buyer to form a mistaken impression, is under a duty of disclosure, is also free from legal error. If the fact that the older wall of the former barn was incorporated into the new construction of the house gives rise to a material defect, the defendants would have been required to inform the claimant of the incorporation of the older structural element (see, regarding the objective aspect of fraudulent misrepresentation, the Federal Court of Justice, judgment of 27 June 2014 – V ZR 55/13, NJW 2014, 3296 marg. no. 10).
- 20 c) Contrary to the view of the Court of Appeal, however, it is not sufficient for the subjective element of fraudulent misrepresentation if the defendants knew that the wall incorporated into the new building had been erected before 1999 and they refused to accept the conclusion that this was subject to a duty of disclosure.
- 21 aa) According to the established case law of the Federal Court of Justice, fraudulent concealment requires at least conditional intent; reckless or grossly negligent ignorance, on the other hand, is not sufficient. Accordingly, fraudulent concealment is only present if the seller is aware of the defect or at least considers it possible, and at the same time knows, or at least anticipates and willingly accepts, that the buyer is unaware of the defect and, had it been disclosed, would not have concluded the contract or would not have concluded it on the agreed terms. Conversely, it is not sufficient if the existence of facts subject to a duty of disclosure should have been obvious to the seller, because in that case the malice would be separated from the intent and, in substance, replaced by reckless or grossly negligent ignorance. The Senate has already ruled that even a deliberate refusal to take notice does not satisfy the requirements for malice (judgement of 12 April 2013 – V ZR 266/11, NJW 2013, 2182 marg. no. 12 et seq.; judgment of 7 March 2003 – V ZR 437/01, NJW-RR 2003, 989, 990; see also Krüger/Hertel, Der Grundstückskauf, 11th ed., paras. 42 and 1043 et seq.). Knowledge of the circumstances giving rise to the defect is required, at least in the form of conditional intent. This knowledge must be established; it cannot be replaced by evaluative considerations. If such knowledge exists, however, it is irrelevant whether the buyer draws the conclusion from it that there is a defect in the legal sense (Section 434 para- 1 BGB) (Senate, judgment of 12 April 2013 – V ZR 266/11, NJW 2013, 2182, marg. no. 14).
- 22 bb) The defendant's fraudulent intent can therefore only be established if they were aware that the older wall had been incorporated into the residential building and if they knew, or considered it possible, that an average buyer would regard the statement that the house was built in 1999/2000 as inaccurate. No findings have yet been made in this regard.
- 23 3. Nor is the appeal judgment correct on any other grounds (Section 561 of the Code of Civil Procedure (ZPO)).
- 24 a) However, the sold house plot suffers from a defect within the meaning of Section 434 para. 1 second sentence no. 2 BGB, which is independent of the discrepancy in the year of construction. This defect lies in the fact that, according to the findings of the Court of Appeal, which was advised by an expert, the external wall of the house – into which the older wall of the former barn has been incorporated – is more susceptible to damage and more permeable to heat than the other external walls due to the differing materials used.

25 *b) However, the defendants are liable for this defect only if they acted with fraudulent intent (Section 444 BGB). With regard to the defect consisting of the increased susceptibility to damage and thermal permeability of the external wall, it is not sufficient for the presumption of fraudulent intent that the defendants were aware of the age of the incorporated wall. Rather, they must have known, or considered it possible, that the incorporation of the wall would be detrimental from a building physics perspective. There are no findings on this point either.*

III.

26 *1. The judgment of the Court of Appeal cannot therefore stand. The case is not ready for a final decision. It must therefore be remitted to the Court of Appeal for a fresh hearing and decision, with the judgment on appeal set aside (Section 563 para. 1 first sentence ZPO), so that it may make the necessary findings.*

27 *2. With regard to the further proceedings, the Senate draws attention to the following:*

28 *a) The plaintiff bears the burden of proof and the duty to adduce evidence in respect of all the requirements for fraudulent intent and, consequently, also in respect of the defendant's knowledge of the defect (see Senate, judgment of 27 June 2014 – V ZR 55/13, NJW 2014, 3296, marg. no. 13).*

29 *b) If the conditions for the defendant's liability for concealing the incorporation of older building fabric into the new construction are met, the Court of Appeal will have to re-examine the defendant's submission regarding the claimant's knowledge (Section 442 BGB), taking into account the relevant arguments set out in the grounds of appeal. With regard to the consideration of evidence offered by a respondent on appeal at first instance, reference is made to the decision of the Federal Court of Justice of 15 September 2015 (VI ZR 391/14, juris marg. o. 9 et seq.).*

30 *c) In so far as the matter concerns the defendant's knowledge – which must likewise be demonstrated and proved by the claimant – of structural defects arising from the incorporation of the wall, it is noted that a seller who commissions a specialist firm to remedy a defect may, in principle, assume that the firm will act in a proper manner (Senate, judgment of 9 February 2016 – V ZR 216/14, ZNotP 2016, 70 marg. no. 19 et seq.). The same applies to the construction of a house.*

Editor's note

Section 434 BGB, which is cited in the judgment, has got another structure. The former provisions of the old Section 434 para. 1 Sentences 2 and 3 BGB are today – merely changed – content of the new Section 434 para. 3 Sentence 1 no. 2 lit b and sentences 2 and 3 BGB.