

# Horse Stable Case

*Requirements for the acceptance of a warranted quality; requirements for the correction of a public statement*

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|--------------------|-------------------------------------------------------------|
| <b>Court</b>       | <i>Federal Court of Justice, Fifth Civil Division</i>       |
| <b>Date</b>        | <i>25 January 2019</i>                                      |
| <b>Case number</b> | <i>V ZR 38/18</i>                                           |
| <b>Reference</b>   | <i>ZfIR 2019, 559</i>                                       |
| <b>Finality</b>    | <i>Final</i>                                                |
| <b>Provisions</b>  | <i>Sections 434 and 444 of the German Civil Code (BGB)]</i> |

## Official Headnotes

- a) *Public statements made prior to the conclusion of the contract do not determine the quality of an item that the buyer may expect if and to the extent that the contracting parties have agreed on a different quality of the object of sale.*
- b) *If the parties to the contract of sale stipulate that a particular characteristic of the property being sold does not form part of the agreed quality, this does not constitute an agreement on quality within the meaning of section 434 para. 1 first sentence BGB.*
- c) *A general exclusion of liability also covers the characteristics of a plot of land that may be expected on the basis of the seller's public statements within the meaning of Section 434 para. 1 third sentence BGB (confirmation of, inter alia, the Senate's judgment of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 12).*

## Operative Part

*The appeal in cassation brought by the first defendant against the judgment of the 24th Civil Division of the Higher Regional Court of Düsseldorf of 30 January 2018 is dismissed.*

*Upon the appeal in cassation by the third defendant, the aforementioned judgment is set aside in respect of the costs and to the extent that it was decided to the detriment of the third 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 on the costs of the appeal in cassation proceedings.*

*Ipso iure*

## Facts

- 1 *By a notarised contract dated 2 May 2013, the claimant and the (original) third-party counter-defendant, her husband, purchased from the first defendant, subject to the exclusion of liability for material defects, a plot of land on which a residential house was built, for a purchase price of €750,000. Section V no. 1 of the notarised contract of sale reads, in part:*

*'(...) The permissibility of further development or specific use is not part of the agreed nature of the property.'*

- 2 *The sales brochure prepared by the third defendant, who is an estate agent, states, amongst other things:*
- “Permission has been granted to construct two to three horse stables on the rear part of the plot. In addition, there is an adjoining pasture which can be leased.”*
- 3 *The claimant and the third-party counter-defendant took possession of the property in October 2013. After it became apparent that neither a planning permission for the construction of horse stalls existed nor was such development eligible for planning permission, they declared their withdrawal from the contract of sale.*
- 4 *By her claim, the claimant, acting also as a representative for the third counter-defendant, seeks from the first defendant the repayment of the purchase price concurrently with the retransfer of ownership of the plot of land and a declaration of default in acceptance. Furthermore – in so far as this is still relevant – she seeks a declaration against the first and third Defendants that they are obliged to compensate her and the third-party counter-defendant for the losses they have incurred or will incur as a result of the withdrawal from the contract of sale and the retransfer of ownership. The Regional Court – in so far as this is relevant here – upheld the claim. The appeal lodged by the first and third Defendants against this decision was unsuccessful. By means of their appeals on points of law, which were granted by the Higher Regional Court, the first and third Defendants continue to seek the dismissal of the claim. The claimant requests that the appeals be dismissed.*

## Reasons for the decision

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### I.

- 5 *The Court of Appeal considers that the claimant and the third-party counter-defendant are entitled to demand repayment of the purchase price from the first defendant pursuant to Sections 434, 437 para. 2, 323 and 346 para. 1 BGB. On the basis of the information contained in the property brochure, they could have expected, pursuant to Section 434 para. 1 third sentence BGB, that a planning permission for the construction of horse stalls existed or, at any rate, that such development would be eligible for planning permission. Neither of these is the case, which is why the plot of land is defective. The provision in the contract of sale, according to which the permissibility of further development does not form part of the agreed quality of the property, did not preclude the finding of a defect. The latter provision related only to a possible conversion or extension of the residential building and not to the suitability of the property for the construction of horse stalls. The information in the property brochure had not been corrected either by the provision of copies from the planning file or by any explanation given during the site viewings. The first defendant could not rely on the agreed exclusion of liability under Section 444 BGB, as she fraudulently concealed the defect.*
- 6 *The third defendant was liable under Section 823 para 2 BGB in conjunction with Section 263 of the German Criminal Code (StGB). He intentionally had misled the claimant and the third-party counter-defendant through the information provided in the property brochure in order to induce them to conclude the contract of sale. The financial loss suffered by the claimant and the third-party counter-defendant consisted in their inability to use the property in its entirety for the purpose stipulated in the contract.*

### II.

- 7 *This stands up to scrutiny under the law of appeal in relation to the first defendant. The appeal by the third defendant, however, is successful.*
- 8 *Appeal by the first defendant*

- 9 1. The Court of Appeal correctly upheld the claim of the claimant and the third-party counter-defendant against the first defendant under section 434 para. 1 third sentence, section 437 para. 2, section 323 and section 346 para. 1 BGB for repayment of the purchase price in exchange for the retransfer of ownership of the purchased plot of land.
- 10 a) The property for sale is subject to a material defect within the meaning of Section 434 para. 1 third sentence BGB, because, contrary to the information provided in the sales brochure, no planning permission had been granted for the construction of up to three horse stalls on the rear part of the plot, and such development is also not eligible for approval under public law.
- 11 aa) Pursuant to Section 434 para. 1 third sentence BGB, the characteristics that the buyer may reasonably expect based on the seller's public statements form part of the intended quality of the purchased item; this also includes information contained in a property brochure (see Senate, judgment of 9 February 2018 – V ZR 274/16, NJW 2018, 1954 marg. no. 17; judgment of 19 January 2018 – V ZR 256/16, NJW-RR 2018, 752 marg. no. 10; judgment of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 7; judgment of 16 March 2012 – V ZR 18/11, NJW-RR 2012, 1078 marg. no. 16). Accordingly, the 'permission' to erect two to three horse stalls on the rear part of the plot formed part of the condition of the property owed by the first defendant. The Court of Appeal's assumption that, from an objective point of view, the claimant and the third-party counter-defendant could have expected the horse stalls to be in accordance with public and thus also permissible under planning law, is not open to challenge on appeal.
- 12 bb) Contrary to the view taken by the Appeal, the finding of a material defect arising from the absence of a characteristic of the purchased item which the buyer may reasonably expect under section 434 para. 1 second and third sentences BGB does not require that this characteristic be mentioned in the notarised contract of sale. The Senate has repeatedly held this to be the case in recent times (see Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 15; judgement of 22 April 2016 – V ZR 23/15, NJW 2017, 150, marg. no. 18; judgement of 19 January 2018 – V ZR 256/16, NJW-RR 2018, 752, marg. no. 10; Judgment of 9 February 2018 – V ZR 274/16, NJW 2018, 1954, marg. no. 21). He stands to this view.
- 13 Contrary to a view held partly in the legal literature (BeckOK BGB/Faust [1 November 2018], § 434 para. 78; Grigoleit/Herresthal, JZ 2003, 233, 239; Herrler, NotBZ 2017, 121, 128; *ibid.*, NJW 2017, 152 et seq.; Weber, RNotZ 2016, 650, 654), the provision of § 434 para. 1 third sentence BGB applies without restriction to contracts for the sale of immovable property; in particular, it must not be reduced, on a teleological basis, to the effect that the quality to be expected following the public statement must be reflected in the contract. The law distinguishes between the quality of the purchased item agreed by the contracting parties and that prescribed by law. The characteristics which the buyer may expect on the basis of the seller's public statements form part of the quality required by law, as can be seen from the fact that § 434 para. 1 third sentence BGB states that these characteristics form part of 'the quality referred to in the second sentence no. 2'. Even within the framework of the legal system, it would therefore be questionable to apply solely the provision of Section 434 para. 1 third sentence BGB to legal transactions requiring notarisation —as regards the required quality under Section 434 para. 1 second sentence nos. 1 and 2 BGB, no one, as far as is apparent, advocates anything to that effect—by way of teleological reduction to the extent that the public statement must have been mentioned in the contract.
- 14 Against this background, the objection that, from an evaluative perspective, it cannot make any difference whether the seller provides information about the subject-matter of the sale in a public statement or, for example during a viewing of the property, only to the buyer (as argued, however, in BeckOK BGB/Faust [1 November 2018], Section 434, marg. o. 78; Grigoleit/Herresthal, JZ 2003, 233, 239; Herrler, NotBZ 2017, 121, 128; *ibid.*, NJW 2017, 152 et seq.; Weber, RNotZ 2016, 650, 654). Admittedly, in both cases — unlike in the case of quality under section 434 para. 1 second sentence BGB — it must be assessed what legal consequences arise from information provided by the seller regarding the item sold (provided that liability for this has not been validly excluded). However, the standard

applied differs in each case. A public statement by the seller is directed at the general public and shapes expectations regarding the quality of the goods. Consequently, this characteristic is equivalent to the characteristics referred to in section 434 para. 1 second sentence no. 2 of the BGB. By contrast, the question of when a statement by the seller, addressed solely to the (subsequent) buyer, leads to an agreed quality within the meaning of Section 434 para. 1 BGB is a matter of interpretation. In this regard, the Senate has developed the interpretative principle that a description of the characteristics of a plot of land provided by the seller prior to the conclusion of the contract, which is not reflected in the notarial deed, does not, as a general rule, give rise to an agreement on the quality of the property (see Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 15; see also Krüger, ZfIR 2018, 753, 756).

- 15 cc) The Court of Appeal correctly held that the public statement made by the first defendant had not, at the time the contract was concluded, been corrected in an equivalent manner by the handover of copies from the building file within the meaning of section 434 para. 1 third sentence, second clause BGB. Irrespective of what a correction in an equivalent manner requires in detail (see BeckOK BGB/Faust [1 November 2018], Section 434, marg. no. 89; Erman/Grunewald, BGB, 15th ed., Section 434, marg. no. 28; MüKoBGB/Westermann, 7th ed., Section 434, marg. nos. 31 and 34; Staudinger/Matusche-Beckmann, BGB [2013], § 434 marg. no. 111), it in any event requires that the seller clearly indicates that a specific public statement is incorrect. It is not sufficient that – as in this case – documents handed over to the buyer could give rise to doubts as to the accuracy of the seller's public statement.
- 16 dd) Contrary to the view expressed in the appeal, the liability of the first defendant under § 434 para. 1 no. 3 BGB is not excluded by the provision in Section V no. 1 of the notarised contract of sale, according to which the permissibility of further development or a specific use 'does not form part of the agreed quality of the property', . With this provision, the contracting parties did not enter into any agreement on the quality of the property within the meaning of Section 434 para. 1 first sentence BGB that deviates from the information in the property brochure.
- 17 (1) However, the provision of Section 434 para. 1 third sentence BGB applies only subject to the proviso that nothing else has been agreed. This applies both to an agreed exclusion of liability (see Senate, judgment of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 18) and agreements on quality. Public statements made prior to the conclusion of the contract do not determine the quality of an item that the buyer may expect if and to the extent that the contracting parties have agreed on a different quality of the object of sale. This follows from the graduated system inherent in the provision of Section 434 BGB (see Staudinger/Matusche-Beckmann, BGB [2013], § 434, mar. no. 97), as expressed in the reference in Section 434 para. 1 third sentence BGB to Section 434 para. 1 second sentence BGB ('[in] so far as the quality has not been agreed'). If the contracting parties have reached an agreement on the quality of the goods that deviates from the public statement, recourse to the public statement is ruled out.
- 18 (2) An agreement on quality within the meaning of Section 434 para. 1 first sentence BGB requires the agreement of a specific characteristic which is to form part of the contractual quality of the purchased item. In this context, the distinction between 'positive' and 'negative' quality is irrelevant. For it makes no difference whether the characteristic is to be present (e.g. 'listed building') or absent (e.g. 'not a listed building'); nor can a value-reducing ('negative') characteristic be the subject of an agreement on quality (see, regarding groundwater contamination as a possible 'negative' agreement on quality, the Federal Senate, judgment of 30 November 2012 – V ZR 25/12, NJW 2013, 1671, marg. nor. 10 and 12). However, the agreement on quality must be distinguished from a limitation of liability relating to a specific characteristic (see, on questions of distinction in the sale of consumer goods, BeckOK BGB/Faust [1 November 2018], § 476 marg. nos. 15 et seq.; MüKoBGB/Lorenz, 7th ed., § 475 marg. no. 10; Staudinger/Matusche-Beckmann, BGB [2013], § 475 marg. nos. 59 et seq.). If the parties to the contract of sale stipulate that a particular characteristic of the item purchased does not form part of the agreed quality, this does not constitute an agreement on quality within the meaning of Section 434 para. 1 second sentence BGB. This is because no specific (and, where applicable, defective) condition of

*the object of sale is defined as being in accordance with the contract; rather, such an agreement is intended to exclude liability for a specific quality.*

- 19 *(3) Viewed in this light, the provision in Section V no. 1 of the notarised contract of sale, according to which the permissibility of further development or a specific use does not form part of the agreed quality, does not constitute an agreement on quality within the meaning of Section 434 para. 1 first sentence BGB. No specific characteristic relating to the development or use of the land is in fact agreed. An agreement on quality taking precedence over the information in the property brochure would have had to relate to a specific condition of the land with regard to keeping horses (e.g. 'horse stables may not be erected') . This is lacking.*
- 20 *Contrary to the view taken in the appeal, the provision does not constitute a correction of the information in the property brochure either. As explained, a correction of the information would have been necessary for this. Section V no. 1 of the contract of sale does not contain such a correction; the provision merely expresses that the seller does not wish to assume liability for the possibility of further development. It therefore constitutes an exclusion of liability – which, whilst possible, is effective only within the limits of Section 444 BGB. This interpretation is not precluded by the fact that the parties simultaneously agreed on a general exclusion of liability for material defects. Since, in case of doubt, a general exclusion of liability does not extend to a quality agreed by the parties under Section 434 para. 1 first sentence BGB (see Senate, judgment of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 9 with further references), a provision stating that a particular characteristic does not form part of the agreed quality is, in any event, sensible as a clarification; this also applies even if it ultimately proves to be redundant.*
- 21 *b) aa) The agreed general exclusion of liability also covers – as the Court of Appeal correctly assumes – the characteristics of a plot of land that may be expected on the basis of the seller's public statements within the meaning of Section 434 para. 1 third sentence BGB (see Senate, judgment of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 12; Senate, judgment of 19 January 2018 – V ZR 256/16, NJW-RR 2018, 752 marg. no. 22; judgment of 9 February 2018 – V ZR 274/16, NJW 2018, 1954 marg. no. 22, each with further references; see also Federal Court of Justice, judgment of 27 September 2017 – VIII ZR 271/16, NJW 2018, 146 marg. no. 32). However, the first defendant cannot rely on this under Section 444 BGB because she fraudulently concealed the defect.*
- 22 *bb) Deception by concealment of a defect subject to disclosure is deemed to be fraudulent within the meaning of Section 444 of the German Civil Code (BGB) where a party considers a material defect to be at least a possibility and, at the same time, knows or anticipates and willingly accepts 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 Senate, judgment of 21 July 2017 – V ZR 250/15, NJW 2018, 389 para. 11 with further references). Contrary to the view expressed in the appeal, these conditions are fulfilled.*
- 23 *(1) The duty of disclosure on the part of the first defendant arose simply from the fact that the incorrect statement in the sales brochure regarding the permissibility of erecting horse stalls gave rise to a misconception on the part of the claimant and the third-party counter-defendant (see Senate, judgment of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 19). The first defendant also considered the material defect to be at least a possibility. According to the findings of the Court of Appeal, she agreed that the statement regarding the construction of horse stalls should be included in the sales brochure, even though she knew that there was no certain factual basis for this, given that the official building file merely provided 'circumstantial evidence' that the construction of horse stalls was permissible under building regulations. As the Court of Appeal correctly held, this fulfils the allegation of a statement made 'on a whim' – which constitutes fraudulent misrepresentation (see Senate, judgment of 12 January 2001 – V ZR 322/99, BGHReport 2001, 362, 363).*
- 24 *(2) The first defendant must be held responsible for the third defendant's knowledge (Section 166 BGB by analogy) that keeping horses on the property was important to the claimant and the third-party*

counter-defendant, and that, had the defect been disclosed, they would not have concluded the contract, or would not have concluded it on the agreed terms. It is true that an estate agent is not, as a rule, an agent of the seller (see BGH, judgment of 8 January 2004 – VII ZR 181/02, WM 2004, 1240, 1241 et seq.). However, if the estate agent is at the same time a negotiator or assistant negotiator, the principal must be deemed to have taken on the agent's knowledge (see BGH, judgment of 8 January 2004 – VII ZR 181/02, loc. cit.; MüKoBGB/Schubert, 8th ed., § 166, marg. no. 73). This is the case here. According to the findings of the Court of Appeal, the third defendant was appointed by the first defendant as an assistant negotiator during the contract negotiations and viewings and acted on the first defendant's behalf.

- 25 c) The further conditions for rescission are met. It was not necessary to set a time limit for subsequent performance (Section 437 para. 2, Section 323 para. 1 BGB), as the first Defendant is guilty of fraudulent misrepresentation (see Senate, judgment of 8 December 2006 – V ZR 249/05, NJW 2007, 835, marg. nos. 12 et seq.).
- 26 d) As a consequence of the validly declared rescission, the performance received must be returned in accordance with Section 346 para. 1 BGB, concurrently with the return of the consideration (Section 348 first sentence BGB). No legal errors are apparent with regard to the ancillary claims and the finding of default in acceptance, nor are any such errors raised in the appeal.
- 27 2. Nor does the assessment by the Court of Appeal reveal any error of law in holding that the claimant may seek the declaration sought regarding the liability of the first defendant in respect of further damages arising from the rescission of the contract of sale. The interest in a declaratory judgement required under Section 256 para. 1 of the Code of Civil Procedure (ZPO) arises from the fact that the claimant is currently unable to quantify definitively the damage incurred and to be incurred in the future by herself and the third-party counter-defendant (see, in this regard, the Senate, judgment of 17 October 2003 – V ZR 84/02, NJW-RR 2004, 79, 82; BGH, judgment of 19 April 2016 – VI ZR 506/14, MDR 2016, 786, marg. nos. 6 and 8 with further references).
- 28 Appeal by the third defendant
- 29 The appeal by the third defendant is successful and, in this respect, leads to the setting aside of the contested judgment and its referral back to the Court of Appeal.
- 30 1. The appeal by the third defendant is admissible. The Court of Appeal expressly granted leave to appeal in the operative part of its judgment for third Defendant as well; the appeal against refusal of leave to appeal, lodged as a precautionary measure, is therefore without merit. Admittedly, the Court of Appeal based its decision to allow the appeal on the legal issues it deemed to require clarification: namely, the liability of the seller of immovable property for public statements regarding the characteristics of goods, and the relationship between an expectation as to quality aroused by the seller's public statements (Section 434 para. 1 second sentence no. 2, sentence 3 BGB) to a negative agreement on quality (Section 434 para. 1 sentence 1 BGB). However, it expressly related the legal issues deemed relevant to the granting of leave to appeal to both the first defendant and the third defendant.
- 31 2. The appeal lodged by the third defendant is also successful on the merits. On the basis of the findings of the Court of Appeal to date, there is no claim by the claimant and the third counter-defendant under Section 823 para. 2 BGB in conjunction with Section 263 StGB.
- 32 a) The Court of Appeal is, however, correct in finding that third Defendant was obliged to inform the Plaintiff and the Third-Party Counter-Defendant that there was merely circumstantial evidence regarding a planning permission or the eligibility for planning permission for the horse stalls. His failure to do so constitutes deception by omission to the detriment of the claimant and the third-party counter-defendant within the meaning of Section 263 para. 1 StGB.

- 33 *b) The fact-finding assessment by the Court of Appeal (Section 286 para. first sentence ZPO) that the third defendant acted intentionally also stands up to review on appeal; it is only subject to review as to whether the trial judge dealt comprehensively and consistently with the facts of the case and the findings of evidence; in other words, whether the assessment is complete and legally permissible and does not contravene the laws of logic or principles of experience (see BGH, judgment of 19 December 2017 – VI ZR 128/16, NJW 2018, 1751 marg. no. 15, with further references). No such errors of law are present. According to the assessment of the Court of Appeal, the third defendant acted with conditional intent because he at least considered it possible, and accepted as a matter of fact, that horse stalls were not permitted to be erected on the property and that a permit had in fact not been granted (on conditional intent, see BGH, judgment of 20 December 2011 – VI ZR 309/10, NJW-RR 2012, 404 marg. no. 10; judgment of 14 May 2013 – VI ZR 255/11, BGHZ 197, 225 marg. no. 17; judgement of 15 October 2013 – VI ZR 124/12, NJW 2014, 1380 marg. no. 12; judgement of 19 December 2017 – VI ZR 128/16, NJW 2018, 1751 marg. no. 13). The assertion made ‘on a whim’ in the property prospectus that a planning permission had been granted therefore constitutes grounds for an allegation of conditional intent (see, in this regard, BGH, judgment of 22 January 2015 – III ZR 10/14, K&R 2015, 258 et seq.; Fischer, StGB, 66th ed., § 263 para. 180; Satzger in Satzger/Schluckebier/Widmaier, StGB, 4th ed., § 263 para. 304).*
- 34 *c) However, the findings of the Court of Appeal do not support the assumption that the Claimant and the third-party Counter-Defendant suffered financial loss as a result of the conclusion of the contract of sale due to error; for this reason, there are also no corresponding findings regarding the relevant intent on the part of the third Defendant.*
- 35 *aa) Financial loss within the meaning of the offence of fraud (Section 263 StGB) does not exist merely because the claimant and the third-party counter-defendant would not have purchased the property had they known that, contrary to the information in the property brochure, the construction of horse stalls was not permitted and the property was therefore not fully suitable for the purpose stipulated in the contract – namely, keeping horses on the property. Rather, the decisive factor is whether, from an economic point of view, the property corresponded to the consideration provided by the claimant and the third-party counter-defendant. It is true that the total performance of the aggrieved party may be regarded as damage if the consideration is not, or not to the full extent, suitable for the contractually intended purpose; even if the market value of the consideration corresponds to the performance of the deceived party. However, this further presupposes that the deceived party is also unable to use it in any other reasonable manner, namely to resell it without particular difficulty (see BGH, order of 12 June 2018 – 3 StR 171/17, NStZ-RR 2018, 283 with further references).*
- 36 *bb) The Court of Appeal did not determine the circumstances of this case. It left open the question of whether the land was worth the agreed price even without being suitable for development with horse stalls. For the purposes of the appeal proceedings, it must therefore be assumed, in favour of the third defendant, that the purchase price corresponded to the value of the land. There are no findings as to whether the claimant and the third counter-defendant can use the land in any other reasonable manner, in particular whether they can resell it without particular difficulty.*

### III.

- 37 *The appeal judgment cannot therefore stand and must be set aside pursuant to Section 562 para. 1 ZPO, in so far as it was decided to the detriment of the third defendant. The matter must be referred back to the Court of Appeal for a fresh hearing and decision, as it is not ready for a final decision (Section 563 para. 1 and 3 ZPO).*
- 38 *With regard to the further proceedings, the Senate draws attention to the following:*
- 39 *The claimant bears the burden of proof and the onus of presentation with regard to all factual circumstances giving rise to a claim for damages against the third defendant on the grounds of fraud committed with intent (Section 263 StGB).*

- 40 *The Court of Appeal will have to determine whether the value of the property, even without the horse stalls, corresponded to the agreed purchase price. For the purposes of comparing financial circumstances, the date of the disposal of assets must be taken as the relevant point in time (see BGH, order of 9 March 1999 – 1 StR 50/99, NStZ 1999, 555, 556). If no financial loss is found to have resulted from this, it will be necessary to determine whether the claimant and the third-party counter-defendant can use the property in any other reasonable manner, in particular whether they can resell it without any particular difficulty.*
- 41 *For the offence of fraud to be established, the third defendant must have included the intention to cause harm to the claimant and the third counter-defendant in his criminal intent. For this, it is sufficient that he was aware of the circumstances giving rise to the damage (see BGH, order of 4 December 2002 – 2 StR 332/02, NStZ 2003, 264).*
- 42 *Should the third defendant therefore be obliged to pay damages, he and the first defendant are jointly and severally liable (Section 421 BGB), contrary to the view expressed by the third Defendant's representative during the oral hearing before the Senate. Both defendants would be required to make full performance, whilst the claimant would be entitled to claim performance only once (Section 421 first sentence BGB). The purchaser's interest in performance, in the case of a claim for damages following a valid withdrawal from the contract of sale under Section 437 para. 3, Section 280 para. 1 and 3, Section 281 Para. 1 and Section 284 BGB and a claim for damages arising from the conclusion of a contract of sale based on fraud under section 823 para. 2 BGB in conjunction with § 263 StGB. There is no requirement for a single basis of liability (see BGH, judgment of 5 July 2016 – XI ZR 254/15, BGHZ 2011, 189, marg. no. 44).*

## Editor's note

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*The judgement serves as a stark reminder that contractual clauses – particularly in contracts drawn up by a notary – must be clear and unambiguous if protracted and costly legal disputes are to be avoided.*