Opel Adam with controversial features

Exclusion of liability for public statements regarding the goods sold; requirements for trader status within the meaning of Section 14 of the German Civil Code (BGB)

Court	*Federal Court of Justice (Bundesgerichtshof – BGH), Eighth Civil Senate*
Date	*27 September 2017*
Case number	*VIII ZR 271/16*
Reference	*ZIP 2017, 2153*
Finality	*Final*
Provisions	*Sections 434 para. 1 third sentence (= today: Section 434 para. 3, first sentence no. 2 lit. b), 14 and 474 para. 1 BGB*

Official Headnotes

Section 434 para. 1, third sentence BGB

In view of the legislative assessment set out in Section 434 para. 1 third sentence BGB, the seller may, in principle, exclude liability not only for the absence of a quality that is customary and which the buyer may reasonably expect (Section 434 para. 1, second sentence no. 2 BGB), but also for the absence of characteristics which the buyer may legitimately expect to be present on the basis of public statements made by the seller (following the BGH, judgment of 22 April 2016, V ZR 23/15, NJW 2017, 150 marg. no. 14).

Sections 14 para. 1, 474 para. 1 BGB

The distinction between transactions entered into by consumers and those by traders is, in principle, determined by the purpose of the legal transaction, which must be assessed objectively (following the Federal Court of Justice (BGH), order of 24 February 2005, III ZB 36/04, BGHZ 162, 253, 256 et seq.; judgement of 15 November 2007, III ZR 295/06, NJW 2008, 435, marg. nos. 6 et seq.; ECJ, judgements of 9 November 2016, C-149/15, NJW 2017, 874, marg. no. 32, and of 3 September 2015, C-110/14, ZIP 2015, 1882, marg. nos. 16 et seq., in particular para. 21). In this regard, the specific circumstances of the individual case, in particular the conduct of the parties at the time of conclusion of the contract, are decisive. In certain cases, however, it may also be sufficient that, before or at the time of conclusion of the contract, the buyer is given the impression that he is purchasing the goods from a trader (following the judgment of the Court of Justice of the European Union of 9 November 2016, C-149/15, loc. cit., marg. nos. 34–45).

Operative Part

The Claimant’s appeal against the judgment of the 16th Civil Chamber of the Regional Court at Wuppertal of 8 November 2016 is dismissed.
The Claimant shall bear the costs of the appeal proceedings.
Ipso iure.

Facts

1 *In 2015, the Defendant placed an advertisement on the online platform mobile.de for the sale of a second-hand Opel Adam Slam 1.4 ecoFlex with a mileage of 5,000 kilometres at a price of €10,990. However, the vehicle offered for sale was an Opel Adam Jam 1.4, which had a lower specification than the model advertised. The Slam variant comes as standard with larger alloy wheels, an automatic start-stop system, different seat upholstery and a different engine. Although the engines of both trim levels have the same displacement and power output, the ecoFlex engine in the Slam trim level has a significantly lower standard fuel consumption. When purchasing a new car, there is a price difference of €1,245 between the two trim levels.*

2 *Following an inspection of the vehicle at the Defendant's premises, the Claimant purchased it under a written contract dated 29 July 2015; however, the description of the vehicle in the contract document merely stated the manufacturer's name 'Opel' and the model name 'Adam', without any reference to a specific trim level (Slam or Jam). The contract contains the following provision:*

"The seller hereby sells the used motor vehicle described below to the buyer. The seller gives no warranty as to the condition of the motor vehicle sold."

3 *During a visit to a garage following the purchase and collection of the vehicle, the Claimant was informed that the car was an Opel Adam Jam. A vehicle featuring the 'Slam' trim level, but otherwise corresponding to the vehicle purchased from the Defendant, was offered for sale by another seller on the eBay online platform at a price of €12,990. In a letter from his solicitor dated 5 August 2015, the Claimant unsuccessfully demanded that the Defendant pay a reduction of €2,000.*

4 *The claim seeking (re)payment of this amount plus interest was unsuccessful in the lower courts. By means of the second appeal granted by the Court of Appeal, the Claimant is pursuing his claim further.*

Reasons for the decision

5 *The second appeal on points of law is unsuccessful.*

I.

6 *In support of its decision, in so far as is relevant to the appeal on points of law, the Court of Appeal essentially stated:*

7 *The Claimant was not entitled to the claimed payment, neither on the basis of a reduction in the purchase price pursuant to Sections 434 et seq. BGB nor as compensation for pre-contractual culpable breach of duty pursuant to Section 280 para. 1, Section 241 para. 2 and Section 311 para. 2 BGB.*

8 *By signing the deed of sale dated 29 July 2015, the parties had entered into a valid contract of sale with the terms set out in that deed. The exclusion of liability for warranty claims under the law of sale included in the contract of sale precludes the claimed right to a reduction.*

9 *It was true that, according to the case law of the highest courts, such an exclusion of liability does not apply if the item sold does not possess the agreed quality (Section 434 para. 1 first sentence BGB). In the present case, however, no agreement—whether express or implied—had been made to the effect that an Opel Adam Slam vehicle was to be supplied. An express agreement was ruled out because the written contract of sale contains no details regarding a specific specification variant, but merely identified the object of sale as an Opel Adam with a specific chassis number.*

10 *Nor could an implied agreement as to quality be considered, in accordance with all the criteria established by the courts and legal literature. It had neither been argued nor was it apparent that the Defendant claimed to possess any particular expertise. Furthermore, there was much to suggest that the discrepancies from the vehicle description in the online advertisement would have been recognisable to a layperson with reasonable effort. Not least, there is much to suggest that an agreement on quality must be ruled out simply because it would have been perfectly reasonable for the*

Claimant to ensure that characteristics, he considered significant were included in the written contract of sale.

11 *However, with regard to the absence of the Opel Adam Slam trim level, there as a detrimental deviation from the quality that was customary for goods of the same kind and which the buyer could reasonably expect given the nature of the goods (Section 434 para. 1, second sentence o. 2 BGB). Pursuant to Section 434 para. 1, third sentence BGB, such quality also included characteristics which the buyer could reasonably expect, based on public statements made by the seller or their agents – in particular in advertising or on labelling – regarding certain characteristics, unless the seller was not aware of the statement and was not required to have been aware of it. Liability for the resulting material defect pursuant to Section 434 para. 1, second sentence no. 2, sentence 3 BGB was, however – unlike in the case of the absence of an agreed quality under Section 434 para 1, sentence 1 BGB – excluded on account of the exclusion of liability validly agreed between the parties.*

12 *The Claimant, who bore the burden of proof in this regard, had not sufficiently demonstrated that the transaction concluded constituted a sale of consumer goods, in which an exclusion of the warranty pursuant to Sections 474, 475 para. 1 BGB would be invalid. According to the case law of the highest courts, a commercial activity on the part of the seller within the meaning of Section 14 para. 1 BGB required – at the very least – the independent and systematic offering of services for remuneration on the market over a certain period of time. Although the Claimant alleged that these conditions were met in the Defendant's case, he was unable to substantiate or prove this in view of the Defendant's submission that he had purchased the vehicle in question for his mother, who had rejected it as being too small, and in view of his further statement that he was not a used car dealer but the owner of a snack bar.*

13 *The mere fact that the Defendant had offered a total of three vehicles for sale simultaneously on the mobile.de internet platform did not justify – particularly in view of the Defendant's substantiated denial – the conclusion that he was acting in a commercial capacity. Accordingly, the subject matter of all the advertisements had been private sales (the Defendant's vehicle damaged in a burglary; his mother's defective vehicle; and a replacement vehicle purchased for his mother but rejected by her). As far as the Claimant cited five or six offers for sale, including advertisements in foreign languages, he had not substantiated that these relate to vehicles other than the three mentioned.*

14 *In the absence of a guarantee and of fraudulent conduct, the Defendant was also not precluded under Section 444 BGB from relying on the agreed exclusion of warranty. As far as the Claimant accused the Defendant of fraudulent conduct by alleging that the Defendant apparently deliberately refrained from including the designation of the trim level in the deed of sale, this constitutes an unsubstantiated, baseless allegation which, despite being contested, has not been proven. Furthermore, as the Defendant had denied that he had been positively aware of the absence of the Opel Adam Slam trim level at the time the contract was concluded, and as the Claimant had not offered any evidence in this regard either, the Defendant could not be accused of fraudulent conduct in this respect either.*

15 *Nor was the asserted claim for payment justified as a claim for damages arising from the Defendant's pre-contractual fault under Section 280 para. 1, Section 241 para. 2, and Section 311 para. 2 BGB. A claim for damages by the Claimant – which was not excluded by the provisions on liability for material defects – arising from the Defendant's wilful failure to disclose that the vehicle was only available in the 'Opel Adam Jam' specification would require the Defendant to have had positive knowledge of this fact – which the Claimant has not proven.*

16 *In any event, a claim based on merely negligent provision of incorrect information regarding the actual equipment variant – insofar as such a claim could even be considered alongside (rejected) warranty claims – was precluded by the fact that the Claimant, who bore the burden of proof and presentation in this regard, had failed to prove the causal link between the incorrect information and the occurrence of the loss. He had offered no evidence to support his assertion that, contrary to the Defendant's account – according to which he had already noticed the different tyres on the vehicle during the viewing – it*

only became clear to him after the purchase that the car did not correspond to the 'Opel Adam Slam' specification.

II.

17 *This assessment stands up to legal scrutiny, and the appeal on points of law must therefore be dismissed. The Court of Appeal, without committing any error of law, ruled both on claims for repayment of the sum of €2,000 (plus interest) on the grounds of a reduction in the purchase price pursuant to Section 437 para. 2, Section 441 paras. 1, 3 and 4, Section 346 para. 1 BGB, as well as claims for damages on the grounds of fault at the time of conclusion of the contract (Section 280 para. 1, Section 241 para. 2 and Section 311 para. 2 BGB).*

18 *1. Without any error of law and not challenged on appeal, the Court of Appeal held that the conditions for the formation of an express or implied agreement as to quality under Section 434 para. 1, first sentence BGB had not been met. Strict requirements must be applied to the existence of an agreement on quality under Section 434 para. 1, first sentence BGB. Under the new law of obligations, such an agreement is no longer considered in cases of doubt, but only in unambiguous cases (established case-law; most recently, Senate judgments of 15 June 2016 – VIII ZR 134/15, NJW 2016, 2874 marg. no. 16; of 29 June 2016 – VIII ZR 191/15, NJW 2016, 3015 marg. no. 35; of 26 April 2017 – VIII ZR 80/16, juris marg. no. 13; in each case with further references). Whether, in a particular case, an agreement on quality is to be affirmed is a matter of contract interpretation which falls primarily within the remit of the trial court (Senate judgments of 29 June 2016 – VIII ZR 191/15, loc. cit., marg. no. 18; 26 April 2017 – VIII ZR 80/16, loc. cit.).*

19 *Applying this standard, the Court of Appeal correctly ruled out the existence of both an express and an implied agreement on quality. The contract document contains no details regarding a specific specification variant. Nor did the Court of Appeal identify any specific accompanying circumstances from which at least an implied agreement as to quality could be inferred. Against this background, it falls within the scope of the trial court's assessment that the Court of Appeal did not infer an implied agreement as to quality from the parties' conduct. Nor does the second appeal on points of law challenge this.*

20 *2. Contrary to the view expressed in the appeal on points of law, however, the Court of Appeal's assumption that the Claimant's warranty claims arising from a material defect—which is the sole issue in dispute—would fall under Section 434 para. 1, second sentence no. 2, sentence 3 BGB – unlike in the case of agreements on quality within the meaning of Section 434 para. 1, sentence 1 BGB – would not be applicable in view of the contractually agreed exclusion of liability.*

21 *a) The information contained in the online advertisement placed by the Defendant regarding the availability of the Opel Adam Slam trim level constitutes, as the Court of Appeal correctly held, a public statement within the meaning of Section 434 para. 1, third sentence BGB, which – provided that none of the exceptions specified in the Act apply - gives rise to the seller's liability for material defects (see Higher Regional Court at Düsseldorf, judgment of 26 April 2007 – 12 U 113/06, juris marg. no. 5; see also Higher regional Court at Celle, DAR 2006, 269).*

22 *b) However, as the Court of Appeal correctly held, the exclusion of liability agreed between the parties covers warranty claims arising from the absence of the quality to be expected, in accordance with the Defendant's public statements in the online advertisement (Opel Adam Slam), pursuant to Section 434 para. 1, third sentence, and para. 1, second sentence no. 2 BGB. Contrary to the view taken in the appeal, a general exclusion of the seller's liability for material defects does not necessarily imply that it does not apply to liability for characteristics which the buyer may expect on the basis of the seller's public statements.*

23 *aa) It is true that, in cases where a contractual agreement on quality (whether express or implied) has been made within the meaning of Section 434 para. 1, first sentence BGB, a separately agreed exclusion of liability for material defects must, according to established case law of the highest court,*

be interpreted as applying not to the absence of the agreed quality, but only to defects under Section 434 para. 1, second sentence BGB (BGH, judgments of 29 November 2006 – VIII ZR 92/06, BGHZ 170, 86 marg. no. 31; of 19 December 2012 – VIII ZR 96/12, NJW 2013, 1074, marg. no. 19, and VIII ZR 117/12, NJW 2013, 1733, marg. no. 15; of 13 March 2013 – VIII ZR 172/12, NJW 2013, 2749, marg. no. 19; of 6 November 2015 – V ZR 78/14, BGHZ 207, 349 marg. no. 9; of 22 April 2016 – V ZR 23/15, NJW 2017, 150 marg. no. 14; of 26 April 2017 – VIII ZR 233/15, WM 2015, 1225 marg. no. 22). Otherwise, the agreement on quality which ranks on an equal footing with the exclusion of warranty – except in the case of fraudulent misrepresentation on the part of the seller (Section 444, first alternative, BGB) – would be meaningless and of no value to the buyer (Senate judgements of 29 November 2006 – VIII ZR 92/06, loc. cit.; of 26 April 2017 – VIII ZR 233/15, loc. cit.).

24 bb) However, this case law cannot be extended to public statements regarding the characteristics of the purchased item within the meaning of Section 434 para. 1, third sentence BGB. The Act has not equated these statements with an agreement on quality under section 434 para. 1, first sentence BGB, but rather classifies them as falling within the scope of quality under section 434 para. 1, second sentence no. 2 BGB, that is to say, the quality that is customary for goods of the same kind and which the buyer may expect given the nature of the goods (see also Bundestag printed Paper 14/6040, p. 214).

25 However, with regard to a quality (statutorily) owed under section 434 para. 1, second sentence no. 2 BGB, the seller may – as explained above – in principle exclude his liability by means of a contractual agreement. This is because, in such cases, there are not two contractual and thus – at least from the buyer's perspective – equally ranking agreements (agreement on quality; exclusion of warranty) co-exist, the inherent contradiction between which must be resolved by means of an interpretation that takes account of the parties' interests (see Senate judgment of 29 November 2006 – VIII ZR 92/06, loc. cit.). Rather, this is a purely statutory basis for liability. Consequently, it is not a matter of two contractual agreements of equal standing, the contents of which contradict one another, but rather there is only one contractual provision, namely that which is provided for by law outside certain cases (see Section 474 para. 1, Section 475 para. 1, Section 437 BGB; Section 444 BGB; Section 305c para. 1, Section 307 para. 1, Section 309 no. 7 lit. a, b and no. 8 li. b BGB) – an agreement to exclude liability for warranty claims. In view of this hierarchy between the two provisions, a restrictive interpretation of a comprehensive exclusion of warranty in these cases is not warranted.

26 The situation is no different in the case of liability for material defects under Section 434 para. 1, third sentence BGB. This, too, constitutes a statutory basis for liability. Furthermore, the legislature has made it clear that it did not intend to equate liability under Section 434 para. 1, third sentence BGB with the absence of a contractually agreed quality under Section 434 para. 1, first sentence BGB. Rather, it opted to treat the absence of characteristics of the goods specified in the seller's public statements under Section 434 para. 1, third sentence BGB in the same way as the absence of the usual quality owed under Section 434 para. 1, second sentence no. 2 BGB. This legislative assessment suggests that the seller may, in principle, exclude not only liability for the absence of a quality that is customary and which the buyer may expect (Section 434 para. 1, second sentence No. 2 BGB), but also for the absence of characteristics which the buyer is entitled to expect to be present based on the seller's public statements (Section 434 para. 1, third sentence BGB; BGH, judgment of 22 April 2016 – V ZR 23/15, loc. cit.).

27 cc) Nor, for other reasons, can the exclusion of liability agreed in the written contract of sale between the parties be interpreted restrictively in accordance with Sections 133 and 157 BGB to the effect that the agreement on a comprehensive exclusion of liability – which is, in principle, permitted by law – does not relate to a public statement made by the seller.

28 (1) It is true that the Fifth Civil Senate of the Federal Court of Justice has considered that, under Section 434 para. 1, third sentence BGB, public statements made by the seller may, under certain circumstances, not only shape the buyer's expectations regarding the characteristics of the purchased item, but may also form part of the accompanying circumstances, which, from the perspective of an *objective observer in the buyer's position, could clarify the meaning of the agreed exclusion of liability and, in this context, would have to be taken into account in its interpretation. However, it expressly left open the question of whether, and under what conditions, such an expectation might be relevant to the interpretation of a disclaimer of liability (BGH, judgment of 22 April 2016 – V ZR 23/15, loc. cit., marg. No. 15).*

29 *(2) On closer examination, however, cases in which, from the buyer's objective point of view, a comprehensive exclusion of liability expressly agreed in the contract of sale pursuant to Sections 133 and 157 BGB must be interpreted as meaning that it does not cover a public statement made by the seller prior to the conclusion of the contract regarding a characteristic of the goods sold within the meaning of Section 434 1, third sentence BGB, but not even remotely mentioned in the contract of sale, such cases are generally – in the absence of special circumstances – not to be considered.*

30 *(a) According to recognised principles of interpretation, the wording of an agreement chosen by the parties and the parties' intention as inferred therefrom form the starting point for an interpretation to be carried out in accordance with Sections 133 and 157 BGB (established case law; see Senate judgments of 13 April 2016 – VIII ZR 198/15, NJW-RR 2016, 1032 marg. no. 21; of 27 April 2016 – VIII ZR 61/15, NJW-RR 2016, 910 marg. no. 27; each with further references). Furthermore, particular attention must be paid to the purpose pursued by the agreement and the interests of the parties, as well as to other accompanying circumstances in so far as they may clarify the meaning of a declaration (established case-law; see, most recently, BGH, judgements of 22 April 2016 – V ZR 189/15, NJW-RR 2017, 210, marg. no. 15; of 27 April 2016 – VIII ZR 61/15, loc. cit.; each with further references). In this context – even in the case of a written agreement – the circumstances surrounding its formation may, under certain circumstances, also be relevant, in particular where preliminary discussions have taken place (see BGH, judgements of 13 March 2003 – IX ZR 199/00, NJW 2003, 2235 under II 1; of 15 January 2004 – IX ZR 152/00, NJW 2004, 2232 at II 2 b; each with further references).*

31 *(b) Judged against these principles of interpretation, the Court of Appeal did not commit any error of law. According to the facts of the case forming the basis of the appeal proceedings (Section 559 of the Code of Civil Procedure [ZPO]) the agreed exclusion of liability constitutes an individual agreement which is subject only to limited review on appeal as to whether statutory or generally recognised rules of interpretation, principles of logic or rules of experience have been infringed, or whether essential elements of interpretation have been disregarded, or whether the interpretation is based on procedural errors complained of in the appeal (established case-law; see the Senate's judgment of 13 April 2016 – VIII ZR 198/15, loc. cit., marg. no. 16 with further references). An examination under appeal law against this standard does not lead to the conclusion that the exclusion of liability, contrary to its comprehensive and comprehensible wording, is to be interpreted as excluding the facts of Section 434 para. 1, third sentence BGB from its scope.*

32 *(aa) The mere fact that the seller made a public statement regarding a specific characteristic of the goods within the meaning of Section 434 para. 1, third sentence BGB prior to the conclusion of the contract does not justify the conclusion that a comprehensively agreed exclusion of liability does not extend to the quality of the goods owed following that statement. This is because, from the perspective of a reasonable and bona fide buyer, a comprehensive exclusion of liability agreed in the contract of sale takes precedence over earlier public statements made by the seller under Section 434 para. 1, third sentence, BGB, which are not even mentioned in the contract of sale. What is decisive is the intention of the parties at the time the contract was concluded. If a comprehensively worded exclusion of liability has been agreed in the contract of sale, which provides for no exceptions and thus, according to its wording, also extends to the warranty cases under Section 434 para. 1, third sentence BGB, the seller's public statement made prior to the conclusion of the contract is generally 'outdated' in terms of both timing and content.*

33 *Unlike in the case where a comprehensive exclusion of liability coincides with an agreement on the quality of the goods, the issue here is not to resolve a contradiction between two equally ranked (contractual) provisions through an interpretation that balances the interests of the parties. Rather,*

there is a hierarchical relationship in this respect between the statutory liability for defects arising from the absence of characteristics of the goods specified in public statements (Section 434 para. 1, third sentence BGB), that in principle can be waived, and the agreed exclusion of liability. Consequently, the mere fact, that such a statement was made, does not in itself justify interpreting a comprehensive exclusion of liability restrictively. The Court of Appeal did not identify any other circumstances that might suggest a different interpretation. The appeal on points of law does not challenge this.

34 Whether, and under what conditions, a different assessment may be appropriate in individual cases – for example, where the buyer – demonstrably – informs the seller of specific requirements regarding the object of sale as being decisive for the purchase, and the seller raises no objections to this, is a matter that may be left open. In such cases, an implied agreement as to quality under Section 434 para. 1, first sentence BGB will frequently be relevant (see, regarding the requirements, the Senate's judgments of 19 December 2012 – VIII ZR 96/12, NJW 2013, 1074, marg. no. 16; of 29 June 2016 – VIII ZR 191/15, loc. cit.; each with further references), so that the question of liability for material defects under Section 434 para. 1, third sentence BGB is in any event irrelevant (see also Bundestag printed paper 14/6040, loc. cit.).

35 (bb) Nor does the buyer's need for protection require a restrictive interpretation of a broadly worded exclusion of liability in the cases covered by Section 434 papa. 1, third sentence BGB. In those areas of the law of sale where the protection of the buyer takes precedence over the seller's interest in disclaiming liability, has ruled out the validity of agreements on exclusions of liability for material defects. Thus, the seller is precluded from relying on an agreed exclusion of liability both, in the case of the sale of consumer goods (Section 475 para. 1 BGB) and in the case of an undertaking of a guarantee or fraudulent conduct on the part of the seller (Section 444 BGB). Pre-formulated disclaimers of liability are invalid in the case of a surprise clause (Section 305c para 1 BGB), in the case of the purchase of new goods (Section 309 para. 8 lit. b; Section 307 para. 1 BGB) and in certain scenarios involving damage and fault (Section 309 para. 7 lit. a, b BGB, Section 307 para. 1 BGB; see also the Senate's judgment of 9 October 2013 – VIII ZR 224/12, NJW 2013, 3570, marg. nos. 15 et seq.) are invalid. The buyer enjoys further protection under the case-law of the Bundesgerichtshof, according to which – as outlined above – a comprehensive exclusion of liability does not apply to a quality (agreed either expressly or impliedly) within the meaning of Section 434 para. 1, first sentence BGB (established case-law; most recently, the Senate's judgment of 26 April 2017 – VIII ZR 233/15, loc. cit.). A buyer whose decision to purchase is significantly influenced by a public statement made within the meaning of Section 434 para. 1, third sentence BGB by having that statement incorporated into the contract or, at the very least, by reaching – in a verifiable manner – a tacit agreement with the seller regarding the presence of characteristics decisive to the purchase.

36 (cc) The appeal unsuccessfully argues that there is a need for a restrictive interpretation of a broadly worded disclaimer of liability (at least) to the effect that it extended to liability for the seller's public statements – based on the manufacturer's specifications – under Section 434 para. 1, third sentence BGB only where a specific addition was made. It seeks to derive this from the fact that the aforementioned provision covered public statements by both the seller and the manufacturer in equal measure, and that the latter, particularly in the context of the sale of consumer goods, shaped the buyer's perception of the characteristics of the goods purchased. It argues that, viewed objectively, the public did not assume that the goods lack a characteristic which, at the time of dispatch from the manufacturer, was inherent in them by virtue of the labelling chosen by the manufacturer. Therefore, a general exclusion of liability required a specific addition if the seller also wishes to exclude liability for the characteristics which, according to the manufacturer's labelling, define the goods.

37 In these considerations, the appeal confuses two levels of assessment. Firstly, the question arises as to what quality a buyer may expect to be owed on the basis of a public statement by the manufacturer, the seller or their agents (Section 434 para. 1, third sentence BGB). This must be distinguished from the subsequent question of how a comprehensively worded contractual disclaimer of liability should be interpreted. The mere fact that the buyer (justifiably) harbours certain expectations regarding the goods purchased does not necessarily mean that these also constitute the accompanying *circumstances which could clarify the meaning of the exclusion of liability (see BGH, judgment of 22 April 2016 – V ZR 23/15, loc. cit.). Rather, corresponding findings of fact are required to establish that the buyer's expectation regarding the quality of the goods, triggered by the seller's statements, is also relevant to the interpretation of the exclusion of liability at issue. The Court of Appeal did not make such findings. The appeal does not identify any facts that were overlooked by the lower courts, nor is this apparent.*

38 c) Nor is the exclusion of liability invalid under Section 309 para. 7 lit. a and b BGB, based on the facts to be taken as a basis in the appeal proceedings (Section 559 ZPO). It is true that a comprehensive disclaimer by the seller in general terms and conditions, under which the liability of the party using the clause is excluded even for personal injury and damage to health as well as for other damages, even in cases of gross negligence, does not withstand a substantive review against the standard of the aforementioned provisions (Senate judgments of 22 November 2006 – VIII ZR 72/06, BGHZ 170, 67, arg. o. 10; of 19 September 2007 – VIII ZR 141/06, BGHZ 174, 1, marg. nos. 10, 13; of 9 October 2013 – VIII ZR 224/12, ibid., marg. no. 16; of 6 November 2013 – VIII ZR 353/12, NJW 2014, 454, marg. no. 10; of 4 February 2015 – VIII ZR 26/14, NJW-RR 2015, 738, para. 16). However, it has neither been established by the Court of Appeal nor – not even in the appeal proceedings – been argued that a general term and condition within the meaning of Section 305 BGB is present. Nor can this be inferred from the deed of sale contained in the case file. It is true that this shows that the contract was concluded using a standard form contract. However, this alone does not allow for any sound conclusions to be drawn either that the Defendant, as the drafter, included the exclusion of warranty, or that the clause was not negotiated.

39 3. The Court of Appeal was also correct in finding that, at the time of concluding the contract of sale, the Defendant did not act as a trader (Section 14 para. 1 BGB), meaning that the transaction does not constitute a sale of consumer goods under Section 474 para. 1 BGB and that the Defendant is therefore not precluded, pursuant to Section 475 para. 1 BGB, from relying on the agreed exclusion of warranty.

40 a) According to the legal definition in Section 14 para. 1 BGB, a trader is a natural or legal person, or a partnership with legal capacity, who, when concluding a legal transaction, is acting in the course of their commercial or self-employed professional activity. By contrast, according to Section 13 BGB in the version applicable from 13 June 2014 (BGBl. [Bundesgesetzblatt – Federal Official Law Journal] 2013 I p. 3643), a 'consumer' is any natural person who enters into a legal transaction for purposes that are predominantly neither attributable to their commercial nor to their self-employed professional activity. A commercial activity presupposes – at any rate – the independent and systematic offering of services for remuneration on the market over a certain period of time, whereby the intention to make a profit is not required (Senate judgments of 29 March 2006 – VIII ZR 173/05, BGHZ 167, 40 marg. nos. 14 et seq.; of 13 March 2013 – VIII ZR 186/12, NJW 2013, 2107 marg. no. 18).

41 The distinction between consumer and business transactions is, in principle, determined by the purpose of the legal transaction, which must be assessed objectively (BGH, order of 24 February 2005 – III ZB 36/04, BGHZ 162, 253, 256 et seq.; judgment of 15 November 2007 – III ZR 295/06, NJW 2008, 435 marg. nos. 6 et seq.; see also ECJ, judgments of 9 November 2016 – C-149/15, NJW 2017, 874 marg. no. 32 [on the interpretation of the term 'seller' within the meaning of Article 1 para. 2 lit. c of Directive 1999/44/EC]; of 3 September 2015 – C-110/14, ZIP 2015, 1882 marg. nos. 16 et seq., in particular marg. no. 21 [on the interpretation of the terms 'consumer' and 'trader' within the meaning of Article 2 lit. b and c of Directive 93/13/EEC]). In this regard, the decisive factor is the specific circumstances of the individual case, in particular the conduct of the parties (or any intermediaries) at the time the contract was concluded (see ECJ, judgment of 9 November 2016 – C-149/15, loc. cit., marg. nos. 34, 44 et seq. [on Article 1 para. 2 lit. c of Directive 1999/44/EC]). In certain cases, however, it may also be sufficient that the buyer is given the impression, before or at the time of concluding the contract, that they are purchasing the goods from a trader (see ECJ, judgment of 9 November 2016 – C-149/15, ibid., marg. nos. 34–45).

42 *b) On the basis of these principles, the Defendant is not to be regarded as a trader, in accordance with the Court of Appeal and contrary to the view expressed in the appeal. The Court of Appeal was unable to identify any credible evidence of commercial or self-employed professional activity on the part of the Defendant at the time the contract was concluded.*

43 *The deed of sale contains no indication that the Defendant was acting as a second-hand car dealer or as any other kind of trader (see also, on this point, ECJ, judgment of 3 September 2015 – C-110/14, loc. cit., marg. nos. 22 et seq.). Neither the designation of the parties nor the agreed purchase price – payment of value added tax was not agreed – points to commercial activity. Nor was the Claimant able to cite any other reliable evidence that would permit a sound conclusion as to the Defendant's commercial (or self-employed professional) capacity.*

44 *The mere fact that the Defendant, in addition to the vehicle sold to the Claimant, indisputably offered two further cars for sale on the internet is not sufficient – contrary to the view taken in the appeal – to assume that the Defendant was carrying on a commercial activity. For the decisive factor is not the offering of three vehicles (it is not apparent that the foreign-language advertisements further cited in the appeal relate to other vehicles). Rather, the decisive factor is the purpose for which the vehicles offered for sale have been used to date and the reason for which they were to be sold. The sale by a seller of vehicles used for private purposes is not normally to be classified as a commercial transaction (see Senate judgement of 13 March 2013 – VIII ZR 186/12, loc. cit., with further references). Whether this would be assessed differently in the case of a larger number of sales can be left open in the present case.*

45 *This is because, according to the findings of the Court of Appeal, the Defendant has substantiated that the three second-hand cars offered for sale had been used privately by him and his mother, or had been intended for private use by his mother or his partner, and had been offered for sale on the internet for various reasons – each of which was privately motivated (the Defendant's private car, which had been damaged in a burglary [Audi A4]; his mother's faulty vehicle [Ford Fiesta]; a newly purchased vehicle for his mother or partner, which neither of them took to [Opel Adam]) . These circumstances, which militate against a commercial sales activity, have not been refuted by the Claimant, who bears the burden of proof in this regard and who seeks to infer the Defendant's status as a trader solely from the ultimately inconclusive result of an internet search carried out retrospectively at an unspecified time has not been rebutted. It must therefore be assumed, in line with the Court of Appeal, that the subject matter of the sales contract in question was the sale of a car between private individuals.*

46 *4. Even under section 444 BGB, the Defendant is not precluded from relying on the agreed exclusion of warranty. According to the findings of the Court of Appeal, which were made without any procedural error, the Defendant neither gave a guarantee nor acted fraudulently with regard to the incorrect specification of the equipment variant (see, in this regard, BGH, judgment of 22 April 2016 - V ZR 23/15, loc. cit., marg. no. 21 with further references). The appeal does not raise any objections to this.*

47 *5. Finally, the Court of Appeal correctly ruled out claims for damages under Section 280 para. 1, Section 241 para. 2 and Section 311 para. 2 BGB on the grounds of an incorrect description of the equipment variant. According to the case-law of the highest court, a claim for damages by the buyer against the seller on the grounds of fault at the time of conclusion of the contract is precluded by the fundamental priority of the warranty rights governed by Sections 434 et seq. BGB, unless the seller can be accused of fraudulent conduct in relation to the material defect (established case-law; see the Senate's judgment of 29 June 2016 – VIII ZR 191/15, loc. cit., marg. no. 63 with further references). According to the findings of the Court of Appeal, which were reached without any procedural errors, and which are not challenged by the appeal on points of law, this is not the case.*

Editor's note

In its judgement of 22 April 2026 (V ZR 23/15, ZfIR 2016, 785), the Fifth Civil Senate of the Federal Court of Justice (BGH) responsible for the law governing the purchase of land had already ruled that liability arising from a public statement may be excluded. This is followed by the Eighth Civil Senate, which is responsible for the law governing the sale of other goods and rights. This division imposes further strict requirements for the presumption that a seller is a trader.