

The Motorcycle-Case

Requirements for assuming a guarantee as to the quality of an item, mileage as statement of quality, handling of a contract of sale simultaneously stipulates a specific quality of the goods and a blanket exclusion of liability for material defects

Court	<i>Federal Court of Justice, Eighth Senate</i>
Date	<i>29 November 2006</i>
Case number	<i>VIII ZR 92/06</i>
Reference	<i>BGHZ 170, 86</i>
Finality	<i>Final</i>
Provisions	<i>Sections 276 para. 1, 323, 326 para. 5, 346 para. 1, Section 348 of the German Civil Code (BGB)</i>

Official Headnotes

- a) *By assuming a guarantee as to the quality of an item within the meaning of Section 444 (alternative) 2 BGB, the seller is deemed – just as when assuming a guarantee within the meaning of Section 276 para. 1 first sentence BGB – to be making, at the very least, an assurance regarding a characteristic of the item under the previous law (Section 459 para. 2 BGB - old version).*

The assumption of a guarantee therefore requires – as the assurance of a characteristic did previously – that the seller, in a manner binding under the contract, guarantees the existence of the agreed quality of the goods sold and thereby indicates their willingness to bear responsibility for all consequences of the absence of that quality.

- b) *The question of whether the seller's statements regarding the mileage of a second-hand motor vehicle are to be regarded merely as a statement of quality (Section 434 para. 1 first sentence BGB) or, alternatively, as a guarantee of quality (Section 444 alternative 2 BGB) must be answered by taking into account the interests typically at stake when concluding a contract of sale for a second-hand vehicle.*

In the case of a private sale of a used vehicle, the statement regarding the mileage is generally to be understood merely as a statement of quality and not as a guarantee of quality.

In the case of a private sale of a second-hand vehicle, an implied warranty may only be presumed in exceptional circumstances where, in addition to the mileage figure, there are specific circumstances which give the buyer a reasonable expectation that the seller intends to vouch for the vehicle's mileage. The specific nature of a purchase made via the internet using a bidding process provided by eBay does not, in itself, justify this assumption.

- c) *Where a contract of sale simultaneously stipulates a specific quality of the goods and a blanket exclusion of liability for material defects, this is generally to be interpreted as meaning that the exclusion of liability does not apply to the absence of the agreed quality (Section 434 para. 1 first sentence BGB), but only to defects consisting in the item is not fit for the purpose specified in the contract (Section 434 para. 1 second sentence no. 1 BGB) or is not fit for its ordinary use and does not possess the qualities customary for items of the same kind and which the buyer may expect given the nature of the item (Section 434 para. 1 second sentence no. 2 BGB).*

Operative Part

Upon the defendant's appeal, the judgment of the 4th Civil Division of the Oldenburg Higher Regional Court of 29 March 2006 is set aside in respect of costs and in so far as it orders the defendant to pay more than 5,900 euros, together with interest at a rate of five percentage points above the base rate thereon since 30 September 2004, in exchange for the return of the S. motorbike (chassis number ...) together with three keys and the vehicle registration document, and it was held that the defendant was in default of acceptance with regard to the return of the motorbike for the period prior to 30 September 2004, and the defendant's appeal against the judgment of the 12th Civil Chamber of the Osnabrück Regional Court of 23 September 2005 was dismissed to that extent.

In so far as the defendant's appeal against his order to pay 363.42 euros, together with interest at a rate of five percentage points above the base rate thereon since 26 April 2004, has been dismissed, the case is referred back to the Court of Appeal for a fresh hearing and decision.

The further appeal is dismissed.

The decision on the costs of the appeal proceedings is reserved to the Court of Appeal.

In so far as it constitutes a judgment in default, the judgment is provisionally enforceable.

Ipso iure.

Facts of the Case

- 1 *The claimant is seeking the rescission of the contract of sale for a motorbike from the defendant. The defendant offered the vehicle for sale in October 2003 via a so-called internet-auction on eBay. In the sales form, under the heading 'Description', he stated: 'Mileage (km): 30,000 km' and declared: 'The bike is, of course, sold without warranty [...]'. The claimant purchased the motorbike for 5,900 euros.*
- 2 *The vehicle's speedometer – which was not visible in the photograph of the motorbike in the sales form – displays the speed in both 'mph' (miles per hour) and 'km/h' (kilometres per hour). The speedometer displays the distance travelled without specifying the unit of measurement. At the time of the inspection by the expert appointed by the Regional Court, the reading was 30,431.1; according to the expert report, which was not contested, this figure was in miles, equivalent to 48,965.25 kilometres.*
- 3 *In his claim – in so far as it is still relevant to the appeal proceedings – the claimant seeks repayment of the purchase price of 5,900 euros and reimbursement of legal costs of 363.42 euros, as well as interest at a rate of five percentage points above the base rate on the sum of 5,900 euros from 5 October 2003 and on the sum of 363.42 euros from 26 April 2004, to be paid concurrently with the handover of the motorbike. Furthermore, he seeks a declaration that the defendant has been in default with regard to the return of the motorbike since 26 April 2004.*
- 4 *The Regional Court upheld the claim. The Court of Appeal dismissed the appeal lodged against this decision. By means of the appeal on points of law authorised by the Court of Appeal, the defendant continues to pursue his application for the claim to be dismissed.*

Reasons for the decision

- 5 *The defendant's appeal on points of law has been successful only to a limited extent. Insofar as the defendant's appeal on points of law is successful, the appeal must be decided by default judgment as requested, since the claimant was not represented by a lawyer at the oral hearing on the appeal on points of law, despite having been duly summoned. However, the substance of the judgment is not based on the claimant's failure to appear, but on an examination of the facts (see BGHZ 37, 79, 81 et seq.). In so far as the defendant's appeal is unsuccessful, the appeal must be dismissed by a judgment after hearing both sides, notwithstanding the plaintiff's failure to appear (see BGH, judgment of 14 July 1967 – V ZR 112/64, NJW 1967, 2162).*

I.

- 6 *In its reasoning for the decision, the Court of Appeal essentially stated:*
- 7 *Taking into account the specific nature of online purchases made via a bidding process provided by eBay, the claimant is entitled to a right of withdrawal and compensation.*
- 8 *The claimant had purchased the motorbike in accordance with the defendant's description, which stated a 'mileage (km): 30,000 km'. The motorbike delivered by the defendant did not correspond to this agreed condition, as it actually had a mileage of over 48,000 km. The motorbike was therefore defective and the claimant was entitled to seek rescission and compensation.*
- 9 *Although the defendant had excluded any warranty in his binding offer, he could not rely on the warranty exclusion agreed accordingly under Section 444 BGB, as he had guaranteed a mileage of 30,000 km or a odometer reading of 30,000. A bidder in an eBay auction might be able to rely on the fact that factors affecting the value of the item for sale – such as the odometer reading of a second-hand vehicle – correspond to the clear description of the offer. A buyer using the internet was more reliant on the seller's descriptions of the offer than one who was able to inspect the item before purchase. In any event, when selling high-value goods and where the factors determining the price were clearly described, it might generally be assumed that the seller intends to guarantee the accuracy of this information.*
- 10 *The claimant had sufficiently substantiated the costs incurred in engaging a solicitor by submitting the bill of costs. By taking back the motorbike, the defendant was now in default.*

II.

- 11 *The decision of the Court of Appeal does not stand up to review on appeal in all respects. The claimant is indeed entitled to claim repayment of the purchase price of 5,900 euros from the defendant in exchange for the return of the motorbike (1). However, based on the findings made to date, it cannot be conclusively determined whether the claimant is also entitled to claim reimbursement of legal costs amounting to 363.42 euros (2). The claim for interest is only valid from 30 September 2004 (3). Similarly, the defendant has only been in default regarding the return of the motorbike since 30 September 2004 (4).*
- 12 *1. The claimant may claim repayment of the purchase price of 5,900 euros from the defendant pursuant to Section 346 para. 1 and Section 348 BGB, in conjunction with Section 437 no. 2 alternative 1, Section 326 para. 5 and Section 323 BGB, to be paid concurrently with the return of the motorbike.*
- 13 *a) The Court of Appeal correctly held that the parties had concluded a contract of sale for the motorbike within the framework of a so-called 'Internet -' auction on eBay (see Senate, judgment of 3 November 2004 – VIII ZR 375/03, WM 2004, 2457, under II 1 and 2 a)), to which German law applies pursuant to Article 28 para. 1 first sentence, and para. 2 first sentence EGBGB [i.e German Act Implementing the Civil Code]. The contract of sale has the closest connection to German law because the defendant, who was required to perform the obligation characteristic of the contract of sale by delivering the motorbike, had his habitual residence in Germany at the time the contract was concluded with the claimant, who is resident in Austria.*
- 14 *b) The claimant was entitled, under Section 437 no. 2 first alternative BGB, to withdraw from the contract of sale because the motorbike is defective. The discrepancy between the agreed mileage of 30,000 km and the actual mileage of more than 48,000 km constitutes, as the Court of Appeal correctly held, a material defect (Section 434 para. 1 first sentence BGB), which is not insignificant (Section 323 para. 5 second sentence BGB).*
- 15 *Contrary to the view expressed in the appeal, there is no doubt that the parties agreed on a mileage of 30,000 km for the motorbike and not, for example, a speedometer reading of 30,000 km. In the description of the motorbike, the defendant stated 'mileage (km): 30,000 km'. Contrary to the view expressed in the appeal, such a mileage figure is, from the relevant perspective of a prospective buyer,*

to be understood not as a representation of the odometer reading but as an indication of the actual mileage. As is generally known, what matters to a prospective buyer is not the odometer reading but the actual mileage. They can and may therefore assume that a mileage figure given without restriction or a clear indication to the contrary refers to the vehicle's actual mileage, which is the decisive factor for them (Senate, judgment of 25 June 1975 – VIII ZR 244/73, WM 1975, 895, under III 1; Higher Regional Court at Naumburg, MDR 1997, 1026; Higher Regional Court at Cologne, OLGR Köln 1991, 19).

- 16 Contrary to the view expressed in the appeal, the judgment of the Court of Appeal is not contradictory in this respect merely because it refers in one instance to a 'kilometre reading' of 30,000 and in another to a 'mileage' of 30,000 km. Nor did the Court of Appeal, in using the term 'odometer reading', evidently did not mean the speedometer reading, but rather the mileage. This is because it did not regard the material defect as lying in the fact that the speedometer displays miles instead of kilometres, but solely in the fact that the motorbike has a mileage of over 48,000 km instead of 30,000 km.
- 17 c) The further condition for withdrawal under Section 437 no. 2 and Section 326 para. 5 BGB, namely that the seller is not obliged to perform under Section 275 para. 1 to 3 BGB, is fulfilled because the discrepancy between the agreed and actual mileage constitutes an irreparable defect. Although the supply of another, equivalent motorbike is not ruled out simply because the purchase was of a single item, in the case of the purchase of a second-hand vehicle, the supply of an equivalent replacement vehicle is only possible in exceptional circumstances (Senate, judgment of 7 June 2006 – VIII ZR 209/05, WM 2006, 1960, to be published in BGHZ, under II 2 a). It has neither been argued nor is it otherwise apparent that this possibility exists in the present case.
- 18 d) The Court of Appeal was ultimately correct in finding that the defendant cannot successfully rely on the agreed exclusion of warranty.
- 19 aa) Contrary to the view of the Court of Appeal, however, this does not follow from the fact that the defendant had given a guarantee for a mileage of 30,000 km and could therefore not, under section 444 alternative 2 BGB, rely on an agreement which excludes or limits the purchaser's rights in respect of a defect. This is because, contrary to the view of the Court of Appeal, the defendant did not provide a guarantee that the motorbike had a mileage of 30,000 km.
- 20 When the seller assumes a guarantee as to the quality of an item within the meaning of Section 444 alternative 2 BGB, this implies – just as when assuming a guarantee within the meaning of Section 276 para. 1 first sentence BGB – at the very least an assurance as to a characteristic of the item under the previous law (Section 459 para. 2 BGB, old version) (Draft Act on the Modernisation of the Law of Obligations, Bundestag printed paper 14/6040, pp. 132, 240; Dauner-Lieb/Thiessen, ZIP 2002, 108, 112 et seq.; Huber in Huber/Faust, Modernisation of the Law of Obligations, 2002, § 13, marg. no. 164 et seq.; Looschelders in Dauner-Lieb/Konzen/Schmidt, The New Law of Obligations in Practice, 2003, pp. 395, 405 et seq.; Triebel/Hölzle, BB 2002, 521, 530 et seq.; Reinking/Eggert, Der Autokauf, 9th ed., marg.no. 1327; Stöber, DAR 2004, 570; see also Federal Court of Justice, judgment of 16 March 2005 – VIII ZR 130/04, DAR 2006, 143). The provision of a guarantee therefore – as was previously the case with an assurance of a characteristic (Federal Court of Justice, judgment of 17 April 1991 – VIII ZR 114/90, WM 1991, 1224, under II 2 a aa, with further references) – that the seller, in a manner binding under the contract, assumes liability for the existence of the agreed quality of the goods sold and thereby indicates their willingness to bear responsibility for all consequences of the absence of that quality. This obligation to bear liability extends, in the case of the assumption of a guarantee – just as it formerly did in the case of an assurance of quality (Senate, judgment of 13 May 1998 – VIII ZR 292/97, WM 1998, 1590, under II; judgement of 20 March 1996 – VIII ZR 109/95, WM 1996, 1592, under II 1 b) – to the obligation to pay damages, whereby damages must be paid even if the seller is not at fault with regard to the absence of the guaranteed quality (Section 276 para. 1 first sentence BGB) or if the buyer remained unaware of the defect as a result of gross negligence (Section 442 para. 1 second sentence BGB). In view of these far-reaching consequences, caution is called for, particularly when

assuming – in principle possible – tacit acceptance of such a liability (BGHZ 128, 111, 114; 132, 55, 57 et seq.; Senate, judgment of 13 December 1995 – VIII ZR 328/94, WM 1996, 452, under II 2 a, in each case with further references, on the warranty of quality under previous law).

- 21 *Whether the seller has thereby assumed a guarantee as to the quality of the goods sold is, admittedly, a matter for the trial court to interpret the contract (see Senate, judgment of 4 October 1989 – VIII ZR 233/88, WM 1989, 1894, under II 1 a; BGHZ 128, 111, 114; in each case with further references), which, on appeal, is subject to review only to a limited extent with regard to breaches of rules of interpretation, principles of logic, rules of experience and procedural provisions (BGHZ 135, 269, 273; 131, 136, 138; in each case with further references). Such a review reveals, however, that the Court of Appeal breached the principle of an interpretation that is equitable to both parties (BGHZ 152, 153, 156; BGHZ 131, 136, 138).*

- 22 *The question of whether the statement regarding the mileage is to be regarded merely as a description of the goods (Section 434 para. 1 first sentence BGB) or as a guarantee of quality (Section 444 alternative 2 BGB) must be answered by taking into account the balance of interests typically present when concluding a contract of sale for a second-hand vehicle (see Senate, judgment of 25 June 1975 – VIII ZR 244/73, WM 1975, 895, under III 2). In this regard, according to the Senate's established case law, a distinction must generally be made as to whether the seller is a used car dealer or a private individual.*

- 23 *If the seller is a second-hand car dealer, the balance of interests is typically characterised by the fact that the buyer relies on the dealer's specialised experience and expertise, which the buyer generally lacks. The buyer may therefore rely on the dealer to guarantee the accuracy of any statements regarding the condition of the vehicle which the dealer makes in full knowledge of this circumstance. The Senate has therefore consistently held, under the former law of sale applicable until 31 December 2001, that a prospective buyer can and may place particular trust in the information provided by the used car dealer regarding the vehicle's mileage and assume that the dealer wishes to 'stand by' the mileage figure – in other words, to guarantee – in today's terminology: guarantee – that the actual mileage to date is not significantly higher than that stated (see Senate, judgment of 25 June 1975 – VIII ZR 244/73, WM 1975, 895, under III 2 and 3; judgement of 13 May 1998 – VIII ZR 292/97, WM 1998, 1590, under II; judgment of 15 February 1984 – VIII ZR 327/82, WM 1984, 534, under II 1; judgment of 18 February 1981 – VIII ZR 72/80, WM 1981, 380, under II 1 b aa). If the dealer does not wish to vouch for the mileage stated by him, he must make this sufficiently clear to the buyer, for example by pointing out that he has not checked the mileage (see Senate, judgment of 13 May 1998 – VIII ZR 292/97, WM 1998, 1590, under II).*

- 24 *Whether this assessment, which has not been without criticism (see Reinking/Eggert, loc. cit., marg. no. 1352 et seq.), is to be upheld without reservation even following the improvement in the legal position of private buyers of second-hand cars brought about by the Law on the Modernisation of the Law of Obligations, or whether stricter requirements must now be imposed on the existence of a guarantee of quality in the second-hand car trade (as, for example, Stöber DAR 2004, 570, 572 et seq.; Reinking/Eggert, op. cit., marg. no. 1329), need not be decided here. This is because these principles, developed for the commercial trade in second-hand cars, cannot in any event be applied to the private direct sale under consideration here.*

- 25 *The principle applicable to commercial sales – namely that the buyer relies on the dealer's particular experience and expertise and therefore regards the dealer's statements as constituting a guarantee – does not generally apply to private sales. Rather, the buyer's interest is balanced here by the seller's interest in being liable for no more than what he is able to assess on the basis of his layman's knowledge (Senate, judgment of 17 April 1991 – VIII ZR 114/90, WM 1991, 1224, under II 2 a cc). The buyer cannot automatically assume that the seller, as a layperson, is able to verify whether the odometer reading accurately reflects the vehicle's mileage. In a private sale of a second-hand vehicle, the buyer cannot therefore conclude, solely on the basis of the stated mileage, that the seller intends to vouch for the accuracy of this information under all circumstances and, where applicable, to be liable*

for damages even without fault. Under these circumstances, the buyer may therefore not, as a matter of principle, assume that a guarantee of quality has been given, even if the seller has not expressly stated that they do not wish to vouch for the mileage stated (KG, NJW-RR 2005, 60, 61; on the legal position prior to the entry into force of the Law on the Modernisation of the Law of Obligations, see KG, KGR Berlin 2001, 10, 11; Higher Regional Court at Nuremberg, NJW-RR 1997, 1212, 1213; Dissenting view: Higher Regional Court at Braunschweig, OLGR Braunschweig 1997, 27, 29; KG, NJW-RR 1996, 173, 174). In so far as the Senate, in an obiter dictum in its judgment of 15 February 1984 (VIII ZR 327/82, WM 1984, 534, under II 1 a) that a private seller (too) generally gives an assurance, by stating the mileage, that the actual mileage is not significantly higher than that stated, this view is not upheld.

- 26 If a buyer wishes to have a guarantee regarding the mileage of a vehicle when purchasing a second-hand car from a private seller, they must ensure that the seller expressly provides this guarantee on a regular basis. An implied warranty may only be assumed in exceptional cases in the private sale of a second-hand vehicle if, in addition to the mileage figure, there are special circumstances which give the buyer a legitimate expectation that the seller intends to vouch for the vehicle's mileage. This may be the case, for example, if, during pre-contractual negotiations, the seller states, in response to an explicit enquiry, that the vehicle's total mileage corresponds to the odometer reading (Higher Regional Court at Koblenz, NJW 2004, 1670, 1671), or if the seller describes themselves as the first owner, since the buyer may, as a general rule, rely on the mileage figure provided by a seller who has known the vehicle's mileage from 'zero' (Reinking/Eggert, op. cit., para. 1358; Higher Regional Court at Cologne, NJW 1999, 2601, 2602). In the present case, however, none of these circumstances apply. In particular, contrary to the view of the Court of Appeal, the specific features of a purchase made via the internet using a bidding process provided by eBay do not justify the assumption that the seller intends, in any event, to guarantee a clear description of the factors determining the price of high-value goods – such as the mileage of a second-hand vehicle.
- 27 However, an online buyer – who, due to the often considerable distance from the seller, can at best view a photograph or video of the item for sale posted on the internet – is more reliant on the seller's description of the item than a buyer who is able to view and inspect the item before concluding the contract. However, this is not a feature unique to online purchases. In any case, when entering into a contract of sale without first inspecting the item, the buyer must frequently rely on the information provided by the seller. This is the case, for example, with contracts of sale concluded using means of distance communication (see Section 312b para. 2 BGB), such as catalogues. Furthermore, the buyer must rely on the seller's information if they themselves lack the necessary expertise to verify its accuracy. For instance, a private prospective buyer is generally unable to determine, even during a viewing or test drive, whether the mileage corresponds to the odometer reading of the vehicle on offer. The mere fact that the buyer – as is often the case – lacks the opportunity or ability to verify the seller's information before concluding the contract of sale does not entitle the buyer to assume that the seller, even without having expressly stated so, intends to accept responsibility for incorrect information under all circumstances and thus, where applicable, to be liable for damages even without fault.
- 28 bb) However, the Court of Appeal's finding that the defendant cannot successfully rely on the agreed exclusion of warranty is correct for other reasons. The exclusion of warranty agreed by the parties does not extend to the agreed mileage.
- 29 Furthermore, even if the agreement 'The motorbike is, of course, sold without warranty [...]' constitutes an individual agreement, the Court of Appeal's interpretation of the contractual warranty exclusion is, in any event, subject to a (limited) review as to whether statutory or generally recognised rules of interpretation, principles of logic or rules of experience have been infringed, or whether essential interpretative factors have been disregarded (Senate, judgment of 6 July 2005 – VIII ZR 136/04, WM 2005, 1895, under II 2 a; Federal Court of Justice, judgment of 7 December 2004 – XI ZR 366/03, WM 2005, 339, under B II 2 a bb (2) with further references). That is the case here.
- 30 The question of whether an agreed exclusion of liability is to be interpreted in an unrestricted sense must be assessed not only on the basis of the wording of the exclusion clause, but also on the basis of

the entire text of the contract (see Federal Court of Justice, judgment of 14 October 1966 – V ZR 188/63, WM 1966, 1183, under III). In this context, the Court of Appeal overlooked the fact that, in their contract of sale, the parties not only excluded the warranty for the motorbike but also agreed on a specific target condition for the vehicle, namely a mileage of 30,000 km.

- 31 Both provisions, at least from the buyer's perspective, are of equal standing and cannot therefore be interpreted as meaning that the comprehensive exclusion of warranty is intended to render the agreement on the condition of the vehicle non-binding (contrary view: Emmert, NJW 2006, 1765, 1768). For if this were the case, the latter would be meaningless and of no value to the buyer – except in the event of fraudulent misrepresentation on the part of the seller (Section 440 alternative 1 BGB). An interpretation of the combination of the agreement on quality and the exclusion of warranty that is fair to both parties can therefore only be made to the effect that the exclusion of liability does not apply to the absence of the agreed quality (Section 434 para. 1 first sentence BGB), but only to defects consisting in the item is not fit for the use envisaged under the contract (Section 434 para. 1 second sentence no. 1 BGB) or is not fit for its ordinary use and does not possess the quality that is customary for items of the same kind and which the buyer may expect given the nature of the item (Section 434 para 1 second sentence no. 2 BGB). Whether the seller's liability for the agreed quality of the goods can also be excluded or limited by express agreement does not need to be decided in the present case, as the parties have not entered into any such agreement.
- 32 2. On the basis of the findings made so far, it cannot be conclusively determined whether the claimant is entitled to reimbursement of the costs of 363.42 euros incurred in engaging a solicitor.
- 33 a) The claimant cannot claim reimbursement of the lawyer's fees as damages for delay (Section 280 para. 2, Section 286 para. 1 first sentence BGB). The bill for costs amounting to €363.42 covers services provided by the lawyer up to 4 May 2004. These costs had already been incurred before the defendant fell into default with his obligation to repay the purchase price pursuant to Section 437 no. 2 alternative 1, Section 326 para. 5, Sections 323, 346 para. 1 and Section 348 BGB.
- 34 As the appeal rightly points out, the defendant was not already in default as a result of the registered letter from the claimant's solicitor dated 7 April 2004. This is because the letter was not delivered to the defendant, as he failed to collect the item left at the post office; since there is no evidence to suggest that the defendant refused to accept the letter without good reason or fraudulently prevented its delivery, he need not be treated as though the letter had been received by him (see Senate, judgment of 26 November 1997 – VIII ZR 22/97, WM 1998, 459, under II with further references). The defendant was therefore, as the appeal correctly argues, only put in default by the letter from the claimant's solicitor dated 28 September 2004, which was served on him on 30 September 2004. At that time, the solicitors' fees claimed had already been incurred.
- 35 b) Whether the claimant can claim reimbursement of the legal fees as damages 'in addition to performance' pursuant to Section 437 no. 3 and Section 280 para. BGB cannot be conclusively assessed at the present stage of the proceedings. Pursuant to Section 280 para. 1 second sentence BGB, there is no liability for damages if the defendant is not responsible for the 'breach of duty' inherent in the delivery of the defective motorbike (see S. Lorenz, NJW 2002, 2497, 2500; Palandt/Heinrichs, BGB, 65th ed., § 280, marg. no. 13). This is the case under Section 276 para. 1 BGB if, at the time of delivery of the motorbike, the defendant was unaware that the motorbike's mileage exceeded 30,000 km, and his lack of knowledge was not due to negligence. The Court of Appeal has not yet made any findings on this point.
- 36 3. The appeal rightly challenges the fact that the Court of Appeal ordered the defendant to pay interest on 5,900 euros from 5 October 2003 and on a further 363.42 euros from 26 April 2004.
- 37 Since – as set out in paragraph 2 a) – the defendant was not put in default until the letter from the solicitor dated 28 September 2004, served on him on 30 September 2004, he was not entitled, under Sections 286 and 288 para. 1 BGB, he is only required to pay default interest at a rate of five

percentage points above the base rate on the purchase price to be repaid and – where applicable – on the legal costs to be reimbursed from 30 September 2004 onwards.

- 38 Nor can the claimant derive any further claim for interest on the purchase price of 5,900 euros to be refunded from the provisions governing withdrawal. The reformed right of rescission does not contain any provision on interest corresponding to Section 347, third sentence, of the BGB (old version), under which a sum of money would accrue interest from the time of receipt in the event of rescission (see Staudinger/Kaiser, BGB, revised edition 2004, Section 346, marg. no. 218). The claimant has not argued that the defendant derived corresponding benefits from the purchase price (Section 346 para. 1 second alternative BGB) or, contrary to the rules of sound business practice, failed to do so even though he would have been able to (Section 347 para. 1 first sentence BGB).
- 39 4. Finally, the declaratory ruling of the lower courts – in line with the comments in paragraph 2(a) – must also be corrected to state that the defendant has only been in default regarding the return of the motorbike since 30 September 2004 – and not since 26 April 2004.

III.

- 40 In view of the foregoing, the appeal judgment is upheld in so far as the Court of Appeal ordered the defendant to repay the purchase price of 5,900 euros to the claimant, concurrently with the handover of the motorbike together with three keys and the vehicle registration document. In this respect, the appeal on points of law is dismissed. In all other respects, the appeal judgment is to be set aside. In so far as the Court of Appeal awarded the claimant interest for the period prior to 30 September 2004 and in so far as it found that the defendant was in default of taking back the motorbike prior to 30 September 2004, the claim is to be dismissed, thereby overturning the judgment of the Regional Court. In so far as the Court of Appeal ordered the defendant to pay the claimant's legal costs of 363.42 euros plus interest, further findings by the Court of Appeal are required; consequently, the matter must be referred back to the Court of Appeal for a fresh hearing and decision in this respect.

Editor's note

Two aspects of this judgment are fundamental: the definition of a statement of quality on the one hand and a guarantee of such quality on the other hand and the interpretation of a general exclusion of liability in case of a quality specifically stipulated in the contract.