

If an individual selling real estate or its agent provides incorrect information about the real estate prior to the conclusion of the purchase agreement, the seller can generally consider itself exposed to a liability for information based on pre-contractual fault as well as a warranty liability on account of a defect of the purchased object. Because the liability for information after the transfer of risk can regularly only be invoked in the case of a willful breach of duty on the part of the seller and it is often difficult for the buyer to prove the willful intent of the seller, a warranty liability is also becoming a focus with respect to any pre-contractual information provided by the seller.

The German Federal Court of Justice (*Bundesgerichtshof*, (BGH)) recently had to decide a case in which a buyer based the warranty liability of the seller on pre-contractual information, namely incorrect information relating to the floor space area specified in the exposé, in an Internet advertisement, and finally in the provided floor plan drawings (BGH, decision of 6 November 2015 – V ZR 78/14). The BGH rejected such liability in normal cases and ruled that a description of characteristics of a property or building provided by the seller prior to concluding a contract, which is not reflected in the notarized purchase agreement, generally does not lead to an agreement on quality.

Those who think that this decision already follows from the fact that real estate purchase agreements, and therefore also any agreements on the owed quality of the purchased object, must be notarized in order to be valid under German law are taught otherwise by the BGH. It is therefore worth taking a closer look at this decision for both the buyer and the seller:

Real Estate Buyers

- For buyers, this decision initially means that the buyer should insist on including any agreements on quality in the notarized deed itself if the buyer wants the seller to be contractually liable for the existence of a certain quality.
- In addition, the buyer should be aware that any agreement on quality that is not notarized can prevent the creation of a valid priority notice of conveyance that serves to secure and protect the buyer, and both parties would be free to thwart the deal.

Real Estate Sellers

For sellers, it is first of particular importance that the BGH made this decision “only” for normal cases, namely, by way of interpreting the contract:

- An agreement on quality generally does not require any explicit declarations of the parties.
- Even the obvious objection that such an agreement on quality is invalid due to the lack of notarization no longer applies after the transfer of ownership has taken place in the land register: This formal deficiency is then remedied by law.
- The seller also cannot invoke an agreed general exclusion of liability in its defense. The seller should instead always observe the BGH’s principle of interpretation that any general exclusion of liability for material defects agreed between the parties does not extend to any quality that has been contractually agreed (explicitly or tacitly) between the parties.

Furthermore, the seller should be aware that according to the further jurisprudence of the BGH, special liability risks continue to exist for pre-contractual information:

- Because information in public statements of the seller or its agents can also become part of the required quality of the purchased object, the information in exposés of real estate agents or advertisements can establish a guarantee liability of the seller (special significance is given to the mandatory disclosures of the seller in energy performance certificates and real estate advertisements according to the German Energy Saving Regulation (EnEV)).
- Finally, it should be recalled that according to the jurisprudence of the BGH, it is possible for the seller to be liable under a consultancy agreement with the buyer that exists in addition to the purchase agreement:
 - A consultancy agreement can be concluded between the seller and the buyer if (a) the seller provides the buyer with explicit advice during extensive contractual negotiations (especially upon questioning) or if (b) the negotiations result in the seller providing the buyer with a sample calculation of the costs and financial advantages of the acquisition, which is intended to enable the conclusion of the purchase agreement.

- The principle that such a consultancy agreement can also be created by a real estate agent or other intermediary on the basis of the tacit authorization of the seller is also thereby particularly relevant for any liability: if the seller makes a real estate agent its procurator from the seller's point of view and the real estate agent is also especially allowed to provide advice and also provides such advice, the seller is liable to the buyer for any incorrect advice.

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