

BGH: Seller's disclosure obligations in the due diligence process

Introduction

In its decision of 15 September 2023 (No. V ZR 77/22), the German Federal Supreme Court ("BGH") decided that a seller of a property has fulfilled its' pre-contractual disclosure obligations *vis-à-vis* a purchaser only if the seller can reasonably expect that the purchaser will become aware of information relevant to the acquisition by inspection of the provided documents. Otherwise, the seller is, among other things, liable for damages due to a breach of its pre-contractual disclosure obligations and the purchase agreement may be terminated and reversed. In detail:

Case

In the case underlying the BGH decision, the defendant (seller) sold to the plaintiff (purchaser) commercial units in a building complex and provided the purchaser with a data room for its due diligence containing documents and information relating to these commercial units before notarization of the asset purchase agreement.

On 22 March 2019, the seller uploaded to the data room the minutes of an owners' meeting held on 1 November 2016, in which it was decided to request payment of EUR 50,000,000 from a former majority owner of the building complex for renovation works of the shared areas which had been approved in 2006. This request was rejected by the former majority owner and another owner enforced such payment request against the former majority owner by way of court proceeding. This proceeding ended with a settlement, according to which all owners of the commercial units were charged a special contribution of initially EUR 750,000 - if necessary up to EUR 50,000,000 - for maintenance and repair measures of the shared areas. On basis of this settlement, the purchaser was later required to pay such special contribution.

In the property purchase agreement notarized on 25 March 2019, the seller stated (i) that there were no resolutions for future special contributions, except for the roof renovation and (ii) that there were no extraordinary costs not

covered by the owner's maintenance reserve and that no further special contributions were foreseeable. Furthermore, the purchaser confirmed in the purchase agreement that it had received the minutes of the owners' meetings of the last three years.

BGH Decision

The BGH decided in this case that the seller breached its pre-contractual disclosure obligation and that the purchaser therefore is entitled to claim damages from the seller on the basis of breach of pre-contractual duties (*culpa in contrahendo*).

In its decision BGH states that the seller has not fulfilled its obligation to disclose information solely by uploading the minutes of the owners' meeting of 1 November 2016 in the data room. The opportunity for the purchaser to obtain information itself does not automatically release the seller from its disclosure obligation. The seller's duty to disclose information is only fulfilled by the time the seller can reasonably expect that the purchaser will review the documents and information provided in a data room in a certain context and the purchaser is able to identify the relevant documents and information. The fulfillment of Seller's disclosure obligation depends on the individual circumstances of each case, in particular on whether and to what extent the purchaser carries out due diligence and how well relevant information can be found in the data room.

According to BGH in this case the seller could not have legitimately expected that the purchaser becomes aware of the minutes of the owners' meeting three days before notarization of the purchase agreement. In this case, even a confirmation by the purchaser in the purchase agreement having received the minutes of the owners' meetings of the last three years does not result in fulfillment of the seller's pre-contractual disclosure obligation according to BGH.

Furthermore, the BGH considers that claims of the purchaser against the seller due to breach of contractual declarations as well as possible incorrect or incomplete answers to questions

of the purchaser during the due diligence process are likely to exist, but BGH does not give a final statement on this.

LPA Conclusion

In order to fulfill its pre-contractual disclosure *obligation vis-à-vis* a purchaser by providing documents and information in a data room, a seller should take into account in particular the following aspects:

- » **Structural aspect:** The data room must be organized and structured in a clear manner so that relevant documents and information can be found easily by the respective purchaser. In particular, documents and information must be uploaded in folders in which a purchaser would normally expect to find these documents and information. According to this BGH decision, the seller does not fulfill its pre-contractual disclosure obligation by uploading documents and information in an unstructured manner in a data room; and
- » **Temporal aspect:** The documents and information must be uploaded in due time before the notarization of the purchase agreement so that the seller can reasonably expect that the purchaser has reviewed the respective documents and information. Uploading documents and information three days before notarization, as in the aforementioned BGH decision, will usually be too short.

In the event doubts as to the fulfillment of the structural and/or temporal aspect with regard to the provision of documents and information in a data room exist, the Seller can only comply with its disclosure obligation by actively and comprehensively notifying the purchaser about circumstances relevant for the decision on the respective purchase prior to the notarization of a purchase agreement. The seller should ensure that proof for such notification of the purchaser can be provided.

Since the BGH has not specified in its decision the exact requirements for compliance of a seller with its' disclosure obligation by uploading documents and information in a data room it will currently be required to comprehensively notify purchasers about circumstances being potentially relevant for the decision of the respective purchase and to document this accordingly.

It has to be assessed on case-by-case basis to which extent pre-contractual disclosure obligations exist and have to be fulfilled by the seller. In this respect, the aforementioned points provide a rough guideline and also further aspects can be relevant. We are looking forward to advise you on the sale of your property, in particular on the fulfillment of your pre-contractual disclosure obligations as well as contractual solutions in this context.

