



THE LONGER THE PARTY LASTS, THE WORSE THE GUESTS BEHAVE

The market for real estate transactions is running at full speed, so it's no surprise that some players are getting easy on morals. It has become quite common to cancel scheduled notarizations on a short term notice even though they were long agreed on because the seller was able to sell at a better price elsewhere. For the buyer, this not only causes the annoyance of a missed deal, there is also the financial expense of due diligence, contract negotiations, futile financing, etc. It is not far-fetched to consider this a breach of duty on the part of the seller. The Federal Court of Justice (BGH) takes a different view. In his opinion, the (potential) buyer alone bears the risk that the seller spontaneously decides otherwise shortly before the notarisation of the purchase contract. The bar for claiming damages from a violation of pre-contractual obligations has thus been raised significantly. Speculative changes of heart of fickle sellers are not sanctioned by the law.

According to the more recent case law of the Federal Court of Justice, a prospective buyer who has suffered a loss in reliance on the imminent notarisation can only assert claims for compensation for this loss if the seller would be accused of a particularly serious, usually intentional breach of pre-contractual obligations. This is the case, for example, when a party to a negotiation was initially willing to sell, but in the course of the negotiations had internally moved away from this willingness without revealing it (judgment of 13 October 2017 – V ZR11/17).

The seller can therefore reserve the right to increase the purchase price until immediately before notarisation, as long as only his willingness to conclude the transaction as such still exists. The seller only becomes liable if he schedules a second notary appointment with bidder 2 despite the specifically scheduled notary appointment with bidder 1, and if he fails to inform bidder 1 of this directly; furthermore, his liability is limited to the further expenditures of the buyer from this point on. All dispositions made by the buyer up to this point in time therefore are made at the risk of the buyer. Only after the ink under the sales contract is dry the buyer can sleep peacefully – no matter how long the party lasts.

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3A opinion

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