

## How far does the obligation to investigate go when purchasing a home?



**We still have to deal with an overheated housing market in which buyers often feel compelled to decide hastily whether or not to buy. Even in Corona time, the buyers' market is busy. Where it used to be customary to carry out research before buying a property, this is now often skipped. But doesn't a buyer lose any rights if he doesn't do (enough) research? In this blog we look at the duty of investigation of the buyer of a house.**

### Non-conformity

When buying a property one may expect that the property possesses the properties necessary for normal use. If this is not the case, there is non-conformity (Article 7:17 of the Dutch Civil Code). Normal use is understood to mean that it must be possible to live in the home in a sufficiently safe manner, with a reasonable degree of durability, without the enjoyment of living being substantially affected.[1] If this is not the case, then in principle there is non-conformity and the buyer is entitled to have the defects repaired or even dissolution of the purchase agreement can be demanded.

### Purchaser's duty of investigation

Before a buyer can invoke non-conformity, it is checked whether the buyer has fulfilled his obligation to investigate. In principle, a buyer cannot invoke non-conformity in the case of visible or apparent defects[2].

## Visible defects

If, for example, a buyer was able to see with the naked eye that there was a leak in the attic, he cannot invoke non-conformity after the purchase. In that case, he has violated his duty of investigation since he has been able to observe the visible defect himself before the sale.

## Apparent defects

In addition to visible defects, there may also be noticeable defects. These are defects that the buyer knew or should have known were present. If, for example, you buy a 150-year-old farmhouse, which was last renovated in 1950, more defects must be taken into account in advance than when buying a new house. Another example of noticeable defects are defects of which the seller has explicitly notified in advance or when the defects are included in the sales contract. At that time, the defects are known to the buyer. In that case, too, the buyer cannot invoke non-conformity. Obvious defects may also be subjective in nature. For example, a professional party is expected to have more knowledge and will therefore be more likely to become aware of a known defect.

## Seller's duty of notification

The buyer's duty of investigation is offset by the seller's duty to provide information. In most cases, this obligation to provide information outweighs the buyer's obligation to investigate. This means that if the seller is aware of a significant defect, but fails to notify the buyer, the buyer can still invoke non-conformity despite the fact that the buyer has not carried out any or sufficient investigation. Incidentally, if the seller was not aware of a defect, the buyer can still invoke non-conformity if this makes the property unsuitable for normal use.

## Advice

When purchasing a house, it is wise to have an survey carried out. The costs often outweigh the possible misery it saves. But even if the buyer is unable or unwilling to have an architectural survey carried out, he can still do what is necessary to safeguard his rights. In addition to viewing the property, it is wise for the buyer to ask the seller many questions about the property. In this way, the buyer not only meets his obligation to examine the property, but also increases the seller's duty of disclosure. After all, the seller will have to answer all questions truthfully in order to fulfil his duty of disclosure. If possible, it is preferable to record these questions and answers (afterwards) by means of, for example, e-mail correspondence. Real estate agents also often use a standard questionnaire on which many subjects are discussed.

The consequence of these questions is that the buyer can no longer complain about defects that have already been reported by the seller. In that case, it is important for the buyer to take good note of the answers to the questionnaire and to ask if there are any ambiguities. In that case, the defects are deemed to have been taken into account in the purchase price. Therefore, if the investigation shows that there are defects, the buyer will have to negotiate about the price.

Do you have any questions about this blog or would you like advice on a purchase agreement?

Please feel free to contact M2 lawyers.

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1] See e.g. Hof Amsterdam 3 September 2019, ECLI:NL:GHAMS:2019:3226

2] See e.g. HR 7 October 2016, ECLI:NL:HR:2016:2287