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Breedveld-de Voogd, C.G.

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6 | Foreseeable and unforeseeable defects after the transfer of immovable property

Clementine Breedveld-de Voogd [■]

The taps started dripping, the pipes started leaking, the roof tiles started breaking, and green mould started appearing on the walls.¹

1 THE CONFORMITY REQUIREMENT AND THE MANIFESTATION OF HIDDEN DEFECTS

Anyone who has ever bought a house knows one thing for sure: sooner or later, they will be faced with repairs and major and minor defects, and have to make more or less necessary alterations to bring the house into line with modern life.² The battle against the elements, including fire and water, is in the buyer's hands from the time of delivery (article 7:10(1) of the Dutch Civil Code, hereinafter 'DCC'),³ and that is why the date of delivery is the point at which it is necessary to decide whether the seller has sold the buyer a property which conforms to the contract.⁴ The seller is liable for defects which existed before the delivery and which the buyer did not need to expect at that point. It is generally accepted, on the basis of case law established in the lower

■ Clementine Breedveld-de Voogd is professor of private law, Leiden University.

1 Isabel Allende, *The House of the Spirits* (English translation by Magda Bogin, original title: *La casa de los espíritus*), Jonathan Cape, 1982.

2 The conformity requirement of article 7:17 DCC, the provisions regarding the time of the transfer of risk (article 7:10 DCC) and the obligation to notify of article 7:23 DCC apply to the sale of both movable property and immovable property. This article was written from the perspective of the sale of immovable property and does not deal with the rules for consumer sales, in view of the fact that the sale of immovable property is by definition not deemed to be a 'consumer sale' (article 7:5(1) DCC), even if the property was sold to a consumer by a professional seller.

3 The time of delivery is the point at which the buyer is given possession of the property (article 7:9(2) DCC). Opinions differ on the question when this is the case for immovable property. According to Huijgen, this is prior to the transfer, viz. when the keys are handed over, which is usually done when the deed of transfer of title is signed (W.G. Huijgen, *Koop en verkoop van onroerende zaken* (Studiepockets Privaatrecht, no. 58), 3rd edition, Deventer: Kluwer 2008, no. 21), but according to Reehuis this point usually coincides with the registration of the deed of transfer of title in the public registers (Pitlo/Reehuis Heisterkamp, *Goederenrecht*, Deventer: Kluwer 2006, no. 205).

4 Asser-Hijma 5-I, *Koop en Ruil*, 2007, no. 332.

courts,⁵ that when buying an existing property, not every imperfection means that the house fails to conform to the contract. Thus, to a certain extent, a buyer will have to take account of some maintenance or arrears that will need to be performed immediately, even if the need for them was not immediately visible when the contract of sale was signed.⁶ A buyer who fails to perform such maintenance and who lets minor repairs become major arrears cannot hold the seller responsible for this. This does not, however, alter the fact that after the sale, it may be possible to stumble on defects which could not really be considered the kind of problems a buyer could be expected to accept and which therefore fall outside the scope of the conformity requirements of article 7:17 DCC. If such defects manifest themselves, the buyer can exercise against the seller the rights and powers the law confers on him in the event that an obligation under the contract has not been performed (article 7:22(4) DCC): he may, for example, demand repair (article 7:21(1)(b) DCC), set aside the contract of sale in whole or in part (article 6:265 DCC) or claim compensation (article 6:74 DCC). Confirmation that such a defect exists could also, for example, lead to the conclusion that the buyer has been led astray upon the formation of the contract of sale (error), and this offers him the possibility to annul the contract (article 6:257 DCC).

By definition, a 'conformity defect' is one which the buyer should not have been required to *expect* at the time of the delivery. However, does this also mean that the buyer is justified in *waiting* to see whether such a defect manifests itself following delivery? And is it then not too late to go back to the seller with a claim on account of that defect? Article 7:23(1) DCC (which can be classified as a *lex specialis* of article 6:89 DCC) makes it clear that, in legal terms as well, a buyer cannot remain passive following delivery and must give the seller notification of a defect 'within a reasonable period after having discovered or having reasonably been able to discover' that defect. A buyer who fails to comply with this obligation to notify the seller, loses all rights under the claim that the purchased thing does not conform to the contract. According to case law of the Dutch Supreme Court, this sanction not only applies to claims concerning defects in purchased things based on nonconformity to the contract, but also to claims for annulment of the contract on the grounds of error and to claims arising from an unlawful act.⁷ The period

5 District Court of Arnhem 4 December 1997, *Njkort* 1998, 22 and District Court of Utrecht 17 December 1997, *Njkort* 1998, 26.

6 W.G. Huijgen, *Koop en verkoop van onroerende zaken* (Studiepockets Privaatrecht, no. 58), 3rd edition, Deventer: Kluwer 2008, no. 22a; Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:17 DCC, note 2; Asser-Hijma 5-I, *Koop en Ruil*, 2007, no. 346d.

7 Dutch Supreme Court 29 June 2007, *NJ* 2008, 606, with commentary from Jac. Hijma and Dutch Supreme Court 21 April 2006, *NJ* 2006, 272 (*Inno v Sluis*). For criticism of the application of article 7:23 DCC in case of error, see Jac. Hijma, 'Koop en ruil', *WPNR* 5982 (1990), pp. 738-739.

within which the buyer was permitted to give notification of any defect in purchased things is deemed an expiry period.⁸ This is then followed by a period of limitation, which can be described as fairly brief compared with the general periods of limitation provided for in Book 3 of the Dutch Civil Code. Claims and grounds for defence which are based on nonconformity of the purchased thing expire two years after the buyer gave the seller notification in compliance with the obligation to do so (article 7:17(2) DCC).

The expiry period of article 7:23 DCC was designed to protect a seller against late notifications which are then difficult to dispute.⁹ The principal criticism of this *ratio legis* in legal literature is that article 7:23 DCC offers insufficient justification for the far-reaching sanction which it imposes on the buyer, viz. the expiry of all his rights on the grounds of nonconformity.¹⁰ Tamboer therefore argues in favour of making finer distinctions as to the consequences of overdue notifications. In view of the fact that articles 6:89 and 7:23 DCC are elaborations of the doctrine of the forfeiture of rights and are therefore based on the restrictive effect of the key principle of reasonableness and fairness under Dutch law (*redelijkheid en billijkheid*), Tamboer believes that article 7:23 DCC should also be elaborated in that light. She argues, for example, that, although forfeiture of the right to claim the setting aside of an entire contract is not unfair, it should remain possible to claim partial repayment of the purchase price. She also believes that finer distinctions should be possible as regards which party should be responsible for providing evidence of the allegations and which party has the burden of proof.¹¹

The applicability of the principles of reasonableness and fairness at the end of the route, i.e. to claims that can be filed in the event of a breach of contract, is an opportunity to avoid the unfair outcome of the obligation to notify. The Dutch Supreme Court, however, seems to have opted for a different approach: it has placed the question whether the buyer has notified the seller in time in the 'key context' of contractual good faith and has allocated an important role to the seller's obligation to provide the buyer with information and the buyer's obligation to investigate, as is customary in the formation of a contract.

8 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 543; regarding the question of whether this is an expiry period under the rules of public order, see R.P.J.L. Tjittes, 'De klacht- en onderzoeksplicht bij ondeugdelijke prestaties', *RMThemis* 2007, p. 16.

9 TM, Parliamentary history, *Parl. Gesch. InvW. Boek 7*, p. 146.

10 J.G.H. Meijerink, 'De klachtplicht in Europees perspectief', *NTBR* 2010, para. 3; S. Tamboer, 'De klachtplicht van de koper in het Nederlandse kooprecht', *Tijdschrift voor Consumentenrecht* 2008, p. 225 and p. 227; T. Hartlief, 'De klachtplicht van de teleurgestelde koper', *Ars Aequi* 2008-5, pp. 363, 364 and 368.

11 S. Tamboer, 'De klachtplicht van de koper in het Nederlandse kooprecht', *Tijdschrift voor Consumentenrecht* 2008, pp. 227 and 228.

2 INVESTIGATION PERIOD AND NOTIFICATION PERIOD

The ‘reasonable period’ within which a buyer is required to notify a seller of a defect commences at any rate at the point at which a buyer becomes aware of the nonconformity. Hijma points out that this is not the point at which the buyer has his first doubts, but the point at which he concludes that the purchased thing does not conform to the contract.¹² An example of a situation in which the buyer’s suspicions hardened into certainty within a few months can be found in the *Fabels v Meenderink* judgment.¹³ The buyer, Meenderink, had applied for subsidy from the Nibag, the agency charged with implementing the Soundproofing Facilities Scheme (*Regeling geluidwerende voorzieningen*), for soundproofing his newly-purchased home. The Nibag, however, ruled that Meenderink did not qualify for subsidy because some of the renovations previously made by the seller, Fabels, did not comply with the soundproofing standards applicable at the time. Meenderink then turned to the Soundproofing Facilities Foundation (*Stichting Geluidwerende Voorzieningen*) to verify whether the Nibag’s refusal to let the house qualify for government subsidy was correct. The Foundation concurred with the Nibag, after which Meenderink turned to Fabels. According to Fabels, the period for notifying him commenced at the point at which Meenderink was informed of the Nibag’s refusal. According to the Dutch Supreme Court, however, the applicable criterion was the point at which Meenderink could or should be assumed to have had sufficient certainty that the house did not conform to the contract. The Dutch Supreme Court agreed with the Court of Appeal’s decision that the Nibag’s letter did not offer sufficient certainty and that the reasonable period did not commence until the point at which Meenderink received the decision from the Soundproofing Facilities Foundation.

Taking into consideration the seller’s interests, it is not unreasonable to require a buyer to notify a seller that the purchased thing does not conform to the contract within a reasonable period once the buyer has sufficient certainty of the nonconformity. Aside from this is the issue of how a ‘reasonable period’ should be interpreted in the case of the purchase of immovable property.¹⁴ When applying article 7:23(1) DCC, the buyer’s problem is that the seller might argue that the ‘reasonable period’ commenced before the actual discovery of the nonconformity, i.e. at the point at which the buyer ought *reasonably* to have discovered the defect. This implies that, after having acquired the property, the buyer is not only required to inform the seller of any defect he discovers, but also to inspect the property.¹⁵

12 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 544.

13 Dutch Supreme Court 25 February 2005, *JOR* 2005, 168 with commentary from J.J. Damingh (*Fabels/Meenderink*).

14 See legal ground [3.3.4] of the *Pouw v Visser* judgment, referred to below.

15 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 544a.

The *Pouw v Visser* judgment demonstrates how the period of time available to the buyer to investigate the property (investigation period) can be determined. It also provides clarity on the length of the period within which the buyer should notify the seller (notification period).¹⁶ Pouw purchased a house from Visser in Onderdijk on 26 May 2000 which house was built in 1987. This property was transferred on 1 December 2000. Pouw moved in shortly afterwards. In late June 2001 (more than six months after the transfer), Pouw discovered that the paint on the wooden top rail on the window on the western side of the house was starting to bubble. The painter called in by Pouw scraped away the paint and discovered mould and wood rot in the entire rail and window frame. Pouw then called in a building consultant to ascertain whether the house had any other defects. The consultant's report, which summed up various other defects, was not made available until 26 September 2001. In a letter dated 27 September 2001, Pouw notified Visser of those defects and claimed compensation for damage on account of the property's nonconformity to the contract. Visser successfully contested this claim before the District Court and based his defence on article 7:23 DCC. The Court of Appeal upheld this defence, finding that Pouw had discovered or ought to have discovered the defects in late June 2001. According to the Court of Appeal, the notification, which was served twelve weeks later, could not be deemed to have been served within a reasonable period. The Dutch Supreme Court subsequently discussed in great detail the length of the investigation period (a) and the notification period (b) (legal ground 3.3.3):

'The length of the period referred to at (a) depends on the circumstances of the case. In view of the seller's interests protected by article 7:23(1) DCC, the buyer must institute and carry out the investigation referred to at (a) with the expeditiousness which could reasonably be expected of him in view of the circumstances of the case. In that respect, the nature and visibility of the defect, the way in which it becomes apparent and the buyer's expertise are some of the relevant factors.'

The Dutch Supreme Court added that if an expert opinion is necessary, the buyer is in principle entitled to wait for the outcome of that investigation. The Dutch Supreme Court (legal ground 3.3.4) also found as follows in connection with the notification period:

'The third sentence of article 7:23(1) provides that notification made within a period of two months of discovery is sufficiently prompt in terms of the length of the period referred to under (b) in case of a consumer sale.

In case of a non-consumer sale, the question whether notification has been given within a reasonable period must be answered by weighing up all the interests concerned, with due consideration of all the relevant circumstances, including whether

16 Dutch Supreme Court 29 June 2007, *NJ* 2008, 606 with commentary from Jac. Hijma (*Pouw v Visser*).

the seller is prejudiced by the length of the notification period. It is not possible to give a fixed period for this, even as a point of departure.’

The lower courts sometimes adhere to a notification period of, in principle, two months for the purchase of immovable property (the same as for consumer sales), but it is clear from the above that the Dutch Supreme Court is not in favour of such standardisation.¹⁷

The buyer must inspect the property after the transfer and must conduct this inspection reasonably expeditiously. Exactly how expeditiously this should be done depends on the circumstances of the case, such as the nature and visibility of the defect, the manner in which it becomes apparent and the buyer’s expertise. The possible influence of acts or omissions by the seller is not yet included in this enumeration of relevant circumstances. These elements are articulated in another judgment: *Ploum v Smeets & Geelen II*, and the facts of this case which gave rise to this judgment give every reason for their inclusion.

This judgment followed on from a judgment delivered by the Dutch Supreme Court on 23 November 2007 on the liability of the seller of a petrol station built on a lot which turned out to be contaminated.¹⁸ These two judgments were the result of the following dispute: Ploum sold a lot in Kerkrade containing a petrol station to Smeets and Geelen Tankstations (hereinafter ‘*Smeets*’). Shortly after the transfer, Smeets discovered that the soil was seriously contaminated and held Ploum liable for the damage it sustained, arguing that Ploum had breached their contract and committed an unlawful act vis-à-vis Smeets. Ploum rejected this claim contending, *inter alia*, that Smeets had not notified Ploum of the property’s nonconformity (articles 6:89 and 7:23 DCC) in due time. In its first judgment, the Dutch Supreme Court reiterated its previous ruling in the *Inno v Sluis* judgment of 21 April 2006, namely that articles 7:23 and 6:89 DCC apply to any legal claim by a buyer which is in fact based on the purchased thing’s nonconformity to the contract, even if the buyer bases his claim on an unlawful act.¹⁹ The Dutch Supreme Court also held that articles 6:89 and 7:23(1) DCC aimed to protect a debtor in the sense that the latter should be able to rely on the fact that a creditor who believes that a performance does not conform to the contract should inform the debtor of that fact expeditiously. A debtor/seller who becomes aware of a defect in any other way therefore continues to have an interest in the creditor actually performing its obligation to notify. In legal proceedings, the buyer is required

17 Asser-Hijma 5-I, *Koop en ruil*, 2007, no. 545a.

18 Court judgment, 23 November 2007, NJ 2008, 552 with commentary from H.J. Snijders to Dutch Supreme Court NJ 2008, 553 (*Ploum v Smeets & Geelen I*) and Dutch Supreme Court 25 March 2011, LjN BP8991 (*Ploum v Smeets & Geelen II*).

19 Dutch Supreme Court 21 April 2006, NJ 2006, 272 (*Inno v Sluis*).

to submit and provide evidence that he notified the seller of the defect in due time, describing the manner in which he did so.

The Dutch Supreme Court referred the case back to the Court of Appeal in Arnhem, which was charged with deciding whether Smeets had notified Ploum in due time. A few months after the transfer it came to Smeets' attention that the lot was included in the provincial decontamination programme, it wrote to BP, the petrol station's tenant, asking why the property had been included in that programme. After a number of reminders to BP, Smeets finally received an answer a year later, the essence of which was that the soil under the petrol station was seriously contaminated. Smeets immediately notified Ploum in writing. This particular investigation had therefore taken one year.

The Arnhem Court of Appeal ruled that once it had become aware of the decontamination programme, Smeets merely needed to conduct a brief investigation by writing to BP enquiring into the reason for inclusion in the programme. This was sufficient because, partly on the basis of the statements made by Ploum, Smeets was entitled to presume that the soil was not contaminated. The fact is that the deed of transfer referred to a previous soil survey and guaranteed that no government agency or public utility had required the seller to make any obligatory amendments to the property at that point.

Ploum lodged a second Supreme Court appeal against this judgment. In the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court rejected the grounds for appeal lodged against the Court of Appeal judgment on the following ground (legal ground 3.3.2):

'(...) The more a buyer is entitled to be confident that a purchased thing conforms to the contract on the basis of the contents of the contract of sale and the other circumstances of the case, the less he can be expected to proceed with an (expeditious) investigation, because, in general, a buyer may rely on the accuracy of the statements made by a seller in this connection, certainly if these statements may be interpreted as reassuring statements regarding the presence or absence of certain characteristics of the purchased thing.'

The Dutch Supreme Court then went on to comment on the requisite degree of expeditiousness of the buyer's obligation to investigate: if it was a simple matter for the buyer to establish whether a suspected defect actually existed, that investigation could be brief. If, however, such certainty could only be obtained after a lengthy or expensive investigation, the buyer would have to be allowed sufficient time to conduct it. In this regard, the Dutch Supreme Court held that in determining the requisite degree of expeditiousness, any third-party assistance required, would also have to be taken into account. The absence of (prompt) assistance from third parties is not always automatically the buyer's responsibility. Finally, the Dutch Supreme Court listed the circumstances to be taken into account in protecting the seller's interests, for which 7:23 DCC was intended:

‘In this connection (...) the extent to which the seller’s interests have or have not been prejudiced is the guiding principle. If those interests have not been prejudiced, there is not likely to be sufficient reason to accuse the buyer of a lack of expeditiousness. The seriousness of the failures could be such that an omission by the buyer cannot be used against him.’

In his commentary on the *Pouw v Visser* judgment, Hartlief carps at the absence of a firm guideline regarding the various factors which could affect the length of the investigation period. This is underlined by the fact that articles 6:89 and 7:23 DCC are placed in the key of the principle of legal certainty.²⁰ At first sight, it would seem that in the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court only exacerbated this vagueness by introducing yet another element into the debate, i.e. ‘all the circumstances’, but on closer consideration it is clear that this does not involve an open and unstructured weighing-up of the parties’ interests in which more and more new factors can be added to the catalogue of circumstances. The debate about the buyer’s obligation to notify the seller of a defect is a contractual debate on the purchased thing’s conformity to the contract. As is the case in the formation of a contract of sale, the buyer’s legitimate expectations and the legal relationship between the parties, which is subject to good faith, play a key role following the delivery of the purchased thing as well.

3 THE OBLIGATION TO PROVIDE INFORMATION AND THE OBLIGATION TO INVESTIGATE UPON THE FORMATION OF A CONTRACT OF SALE

A purchased thing conforms to the contract of sale if it has the characteristics which the buyer is entitled to expect upon its delivery. These expectations regarding the purchased thing are largely formed by what the buyer knows about it. If he has any doubts about the presence of certain characteristics, he must investigate them. To quote the first sentence of article 7:17(5) DCC, ‘The buyer may not invoke nonconformity of the thing to the contract if he was, or reasonably ought to have been, aware of it at the time the contract was concluded.’ When forming these expectations, the buyer may rely on the statements made by the seller about the purchased thing (first sentence, article 7:17(2) DCC). But there is more. In forming his expectations, the buyer is also entitled to expect that the seller will inform him of any defects of which he, the seller, is aware. This implies that the seller is charged with a certain obligation to provide information.

Much has been and will continue to be written about the relationship between the seller’s obligation to provide information and the buyer’s obliga-

20 T. Hartlief, ‘De klachtplicht van de teleurgestelde koper’, *Ars Aequi* 2008-5, p. 367.

tion to investigate.²¹ Current case law would seem to be clear: the seller's obligation to provide information prevails over the buyer's obligation to investigate. This rule became a standard criterion when the Dutch Supreme Court addressed the buyer's right to invoke error. Subsequently, in the *Van Daltsen v Kampen* judgment, the Dutch Supreme Court ruled that this principle can also be used as point of departure in the test against the conformity requirement of article 7:17 DCC. This judgment, however, emphasised that this principle is subject to exceptions in certain special circumstances. In its role as seller of an old building, the municipality of Kampen had breached its obligation to provide information to the buyer, by failing to give the buyer, Van Daltsen, a calculation of the load-bearing capacity, which was still in the archives of the council's buildings inspection department. Van Daltsen, who wished to convert the old building into a restaurant with a functions room on the first floor, had however been warned by others that the load-bearing capacity on the first floor was going to be a problem. Given his plans, he had also called in an architect with whom he had viewed the building on a number of occasions. It was furthermore clearly visible that the timber beams on the first floor were sagging. This fact and the nature and age of the building could have been reason to conclude that the load-bearing capacity of this floor would be inadequate. For this reason, the Dutch Supreme Court upheld the decision by the Court of Appeal that, despite the fact that the municipality had breached its obligation to provide information, it could nevertheless invoke the buyer's own obligation to investigate.

Valk has rightly criticised the Dutch Supreme Court's formulation of this judgment, which created the impression it was an exception to the main rule – an exception in which the buyer's obligation to investigate should suddenly prevail on account of the special circumstances. He points out that in the doctrine of nonconformity, as well as in other doctrines of contract law, the obligation to provide information goes hand in hand with the principle that parties to a contract should be protected in their legitimate expectations.²² Within the scope of article 7:17 DCC, the position of the seller's obligation to provide information vis-à-vis the buyer's own obligation to investigate must

21 See *inter alia* A.G. Castermans, *De mededelingsplicht in de onderhandelingsfase*, PhD thesis Leiden, Deventer: Kluwer 1992; J.H. Nieuwenhuis, 'Wat mogen koper en verkoper van elkaar verwachten? Digitale en analoge werking van redelijkheid en billijkheid', *WPNR* 6304 (1998); P. Klik, 'De verhouding tussen spreek- en onderzoeksplicht', *NTBR* 1998, pp. 295-300, no. 8; J. Dammingsh, 'De mededelingsplicht van de verkoper en de onderzoeksplicht van de koper', *WPNR* 6327 (1998); W.L. Valk, 'De rol van de mededelingsplicht in gevallen van non-conformiteit', *NTBR* 2009-18, pp. 137-144; T.H.M. van Wechem, 'Gelijkschakeling van mededelingsplichten en onderzoeksplichten bij vraagstukken van non-conformiteit en dwaling?', *WPNR* 6790 (2009), p. 222-226; Kasper Jansen, 'De gulden middenweg', in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, pp. 337-351.

22 W.L. Valk, 'De rol van de mededelingsplicht in gevallen van non-conformiteit', *NTBR* 2009-18, no. 9.

always be determined on the basis of the following criterion (of which the obligation to provide information is ‘merely a corollary’): did the purchased thing conform to what the buyer was entitled to expect? If the buyer was aware of a possible defect, as in the *Van Dalzen v Kampen* judgment, he cannot insist that he was entitled to expect the purchased thing not to have this defect. In such a case the court would not even consider the issue of the seller’s obligation to provide information. In these circumstances, I doubt even whether the municipality could have been assumed to have been required to provide the information in question at all.

4 THE OBLIGATION TO PROVIDE INFORMATION AND THE OBLIGATION TO INVESTIGATE; FROM A PRE-CONTRACTUAL TO A POST-CONTRACTUAL PERSPECTIVE

To what extent can the various theories on the obligation to provide information and the obligation to investigate during the formation of a contract play a part in answering the question whether, after a purchased thing is delivered, a buyer can be required to inspect a property and, if so, with what degree of expeditiousness he must conduct this investigation. The point of departure must be the purchased thing’s nonconformity to the contract, because otherwise the notification obligation and the obligation to investigate would not require any consideration. A purchased thing does not conform to a contract if it does not have the characteristics which the buyer is entitled to expect on the basis of that contract. Logically, this means that, from the time of delivery, the buyer is entitled to expect that the purchased thing has the agreed characteristics. It seems illogical that as of the point at which the buyer is entitled to have these expectations, he is charged with an obligation to investigate the existence of any defects. A distinction ought to be made here. The buyer’s legitimate expectations determine the substance of the contract and therefore the seller’s contractual obligations. This does not imply that the buyer should close his eyes to the possibility that the purchased thing does not conform to the contract and that the seller has defaulted in complying with the contract. If he wishes to exercise his contractual rights vis-à-vis the seller, the buyer must, from the outset, take account of the possibility that compliance (or proper compliance) with contracts is not always a given. The inspection of a newly-acquired thing has since time immemorial been the concern of a new buyer.²³

‘But one by one they started making excuses. The first said, “I have just bought a field which I need to inspect; I regret I cannot accept the invitation.”. And another

23 Luke 14:18 and 19 (The Holy Bible, revised standard version, Wm. Collins Sons & Co. Ltd, 1971).

said: "I have bought five yoke of oxen and I go to examine them; I regret I cannot accept the invitation."

In the first instance, a buyer will look at and inspect a property out of a sense of self-interest, but, when safeguarding his own contractual rights, he will also have to take into account the other party's interests. Even when exercising these rights, the buyer and seller remain locked in a legal relationship which is governed by good faith and which entails that their behaviour must, in part, be governed by the other party's legitimate interests.²⁴ Hijma believes that this rule forms the basis for the obligation to notify the seller in the case of nonconformity: the seller has an interest in the fact being established that the purchased and delivered thing indeed does conform to the contract within a reasonable period following delivery.²⁵ And that is the more understandable in case of the sale of immovable property. The passage of time can mean that minor defects, which would not have amounted to nonconformity upon transfer, might become major defects which could impede the property's normal use in the course of time. The *Ploum v Smeets & Geelen II* judgment demonstrates that the seller's interests play a key role when determining the investigation period, as in this judgment the Dutch Supreme Court finds that the question whether the seller's interests have been prejudiced is a decisive factor.

What is the relationship between the obligation to provide information and the obligation to investigate in the post-contractual period – the period in which the buyer is obliged to notify the seller of any defects? Are these obligations also an elaboration of the buyer's legitimate expectations? The *Pouw v Visser* judgment makes it clear that it is reasonable to expect a buyer to conduct the investigation with the expeditiousness which could reasonably be expected of him in the light of the circumstances of the case. The following factors are relevant: the nature and visibility of the defect, the manner in which it became apparent and the buyer's expertise. In the *Ploum v Smeets & Geelen II* judgment, the Dutch Supreme Court posed the question whether and how the buyer should conduct an investigation within the framework of his expectations that the purchased thing complies with the contract (see the legal ground cited in para. 2). This is a matter of greater or lesser expectations: the more the buyer is entitled to rely on the property's conformity, the less quickly he

24 Dutch Supreme Court 15 November 1957, *NJ* 1958, 67 with commentary from L.E.H.R. (*Baris Riezenkamp*).

25 Asser Hijma 5-I, *Koop en Ruil*, 2007, no. 541; see also Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:23 DCC, note 2, in which reference is made to the 'pre-contractual' *Baris/Riezenkamp* and *Booy/Wisman* judgements (Dutch Supreme Court 21 January 1966, *NJ* 1966, 183) also in connection with post-contractual obligations to notify the seller of defects in order to determine the relationship between the buyer's own obligation to investigate on the one hand and incorrect information provided by the seller or the breach of the seller's obligation to provide information on the other.

can be expected to conduct an (expeditious) investigation'. This does not mean, however, that the outcome of this weighing-up cannot yield a 'digital' result.²⁶ Once it has been decided what investigation period is reasonable in the given case, the outcome of a breach of that period will be all or nothing: the loss of rights and powers based on the property's nonconformity. As in the pre-contractual period, the statements made by the seller determine to a large extent the degree to which expectations are legitimate. As to these statements, the Dutch Supreme Court finds that the buyer is in general entitled to rely on their accuracy. As far as the obligation to notify the seller of defects is concerned, this presents nothing new. After all, article 7:23(1), second sentence DCC states:

'Where, however, it is established that the thing lacks a characteristic which according to the seller it possessed, or where the variance pertains to facts of which the seller was or ought to have been aware but has not communicated, the notification must take place promptly after the discovery.'

There is, however, a notable difference between the Dutch Supreme Court's legal ground and the second sentence of article 7:23(1) DCC: according to the statutory provision, the seller is not under any obligation to investigate the existence of defects, and therefore no investigation period applies, if the seller has informed the buyer that the property had a certain characteristic. In that case, the notification period does not commence until the buyer discovers that such characteristic is in fact lacking. The Dutch Supreme Court's ground thus offers more scope for applying certain qualifications, and that is, in my view, rightly so. Suppose that when the contract of sale was concluded the seller informed the buyer that there was no damp in the cellar, but that, three years after the transfer, when clearing out his tools, the buyer discovers that there is half a centimetre of water under the linoleum. This explains the rust on his hammers, saws and drills. A subsequent investigation shows that the damp was caused because, after the formation of the contract of sale, but two months before the transfer, the drainage authority had decided to permanently raise the ground water level. Was the buyer exempt from the obligation to investigate the property after the transfer, on account of the seller's statement before the formation of the contract? This question about the buyer's own obligation to investigate is even more pressing in view of the fact that in article 7:23 DCC not only the seller's factual statements seem to rule out the buyer's own obligation to investigate, but also any failure to report characteristics of which the seller was aware (or even unaware), but of which he *ought to* have been

26 Regarding 'digital' and 'analogue' patterns in questions on nonconformity, see Kasper Jansen, 'De gulden middenweg', in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009, pp. 339-341.

aware. In my opinion, the information which the buyer should have about the property increases with the passage of time and, at a certain point, he can no longer claim that the seller ought to have been aware of a defect while believing that he should not have been required to discover it himself.

The criticism of the second sentence of article 7:23 DCC is essentially the same as the criticism of the *Van Dalfsen v Kampen* judgment: the rule that the obligation to provide information prevails over the obligation to investigate is not a main rule to which exceptions are permitted, but merely a rule of thumb which must be applied within a certain context. But it is important not to lose sight of the main principle: to what extent was the buyer entitled to expect that the immovable property had certain characteristics? In the post-contractual phase, these expectations are in the first place established on the basis of the substance of the contract (see also the first sentence of legal ground 3.3.2 of the *Ploum v Smeets & Geelen II* judgment), but, as time passes, these expectations will be increasingly influenced by the facts of which the buyer becomes aware in the course of time.²⁷ Not only the statements made by the seller, but also the factors which the Dutch Supreme Court previously summed up in the *Pouw v Visser* judgment (the nature and visibility of the defect, the manner in which it becomes apparent and the buyer's expertise) can be placed within the contractual framework sketched in the *Ploum v Smeets & Geelen II* judgment: what was the buyer entitled to expect?

5 CONCLUSION

A contract of sale is not a continuing performance contract. This applies to the sale of immovable property as well. Upon transfer the buyer has paid the purchase price and the seller has transferred the property. They go their separate ways, each having performed his part of the contract. However, the post-contractual period will prove whether the seller has indeed transferred a property which conforms to the contract, and this applies in particular to any hidden physical defects which manifest themselves after the transfer. The legal relationship, which is governed by good faith and which commenced when the parties started negotiating, has not ended. More than that, that relationship will truly be put to the test in this post-contractual phase if the property does not entirely satisfy the buyer's expectations. It is clear from the *Ploum v Smeets & Geelen II* judgment that, with regard to the post-contractual requirements which may be imposed on a buyer, the buyer's perspective of the property is decisive. As with the formation of the contract, everything eventually turns on the question what the buyer was entitled to expect. In this post-contractual period, these expectations are readjusted by the manifestation

²⁷ Castermans & Krans 2009 (Text and Commentary on the Dutch Civil Code), article 7:23, note 2.

of major and minor defects, which require further investigation. There is no other party that can be charged with this responsibility: at this point the buyer is, after all, the owner of the property. The relationship between the seller's obligation to provide information and the buyer's post-contractual obligation to investigate, can only be understood in terms of the buyer's expectations. Both in the pre-contractual and in the post-contractual phase, the rule that the obligation to provide information prevails over the obligation to investigate must be used as a rule of thumb only: a rule which can be a useful aid when establishing the buyer's legitimate expectations. Presumably, even more so than in the pre-contractual phase, the buyer will have to attach greater importance to his own findings and observations.