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### The implied duty of a service provider to warn about a risk of construction defects resulting from a contract with a third party, with emphasis on defects resulting from design failures: A case study on the precontractual and contractual duty to warn in English, German and Dutch law and in the Draft Common Frame of Reference

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## Chapter 2. Emergence, source and scope of the duty to warn – in general.

In this chapter I intend to analyse whether in construction law there is a duty to warn about a risk coming out of the contract with a third party, which binds professional parties when they did not have an express contractual obligation to that extent. What would that duty to warn be based on? I will consider whether the duty to warn is regulated in any statutes, or whether it follows from the application of standard forms of contract that parties included in their contract<sup>51</sup> or whether courts have implied it. This chapter presents not only the potential sources of the duty to warn in English, German and Dutch law but also defines the duty to warn and outlines its scope, which will be further elaborated on in the following chapter.

### 2.1. English law.

#### 2.1.1. Contractual duty to warn.

The problem with recognising the duty to warn is not a new one in English construction law. Already in the 19<sup>th</sup> century, it appeared to be problematic to define the contractual obligations of parties and to set up their limits. The duty to warn was never considered as one of the main obligations of the parties. To the contrary, its existence and binding force remains repeatedly put in doubt<sup>52</sup>. The prevailing opinion, which I share, is, however, that despite all the criticism there has always been some evidence of its existence<sup>53</sup>.

One of the problems with the duty to warn relates to the lack of a clear definition thereof. Some authors see the duty to warn as an obligation of a contractual party to inform the other party of his own breach of contract<sup>54</sup>. For others, it is a more general obligation pursuant to which the parties are obliged to warn each other not only of their own breach of the contract, but also of any breaches by any other persons or any other inconsistencies within the contract or related to its performance, which

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<sup>51</sup> In such a case the duty to warn might be seen as an express contractual obligation, however, I will argue that even without the provision on the duty to warn in the standard form of contract the parties would be bound by the duty to warn taking into account the “good faith” rule. This will be the situation in German and Dutch law.

<sup>52</sup> Description of the struggle to recognise the duty to warn may be found e.g. in: R. Wilmot-Smith, *Construction Contracts: law and practice*, Oxford: Oxford University Press, 2006, p. 45; B. Colledge, ‘Good Faith in Construction Contracts – The Hidden Agenda’, *Construction Law Journal*, 1999/15, p. 288-299; L.A. Rutherford, S. Wilson ‘Design Defects in Building Contracts: A Contractor’s Duty to Warn?’, *Construction Law Journal*, 1994/10, p. 90-99; H. Nicholls, ‘Contractor’s “Duty to Warn” Following D&F Estates and University of Glasgow v. Whitfield’, *Construction Law Journal*, 1989/5, p. 175-184

<sup>53</sup> J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 297-299; B. Colledge, ‘Good Faith in Construction Contracts – The Hidden Agenda’, *Construction Law Journal*, 1999/15, p. 288-299; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 283-284; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 542-547; D. L. Cornes, *Design liability in the construction industry*, London: Blackwell, 1994, p. 88; L.A. Rutherford, S. Wilson ‘Design Defects in Building Contracts: A Contractor’s Duty to Warn?’, *Construction Law Journal*, 1994/10, p. 90-99; H. Nicholls, ‘Contractor’s “Duty to Warn” Following D&F Estates and University of Glasgow v. Whitfield’, *Construction Law Journal*, 1989/5, p. 175-184

<sup>54</sup> D. L. Cornes, *Design liability in the construction industry*, London: Blackwell, 1994, p. 88

could result in the unsatisfactory completion of the construction<sup>55</sup>. The scope of this book concerns only the duty to warn about a breach of a contract by the third party or about any other inconsistency within that third parties' contract.

One of the reasons that contribute to the lack of clarity in the English regulation of the duty to warn is the fact that there is no statutory regulation on the duty to warn. Such a duty has not been included in the most popular standard forms of contract that are applied to contracts between service providers and clients in the construction sector<sup>56</sup>. Until the Housing Grants, Construction and Regeneration Act of 1996<sup>57</sup> there had been no statutes regulating the rights of the parties in the construction process. As a result, the detailed rights and obligations of the parties were set out in the standard forms of contract. The tendency in English law had been for major parties in the construction sector to issue their own standard forms of contract. Moreover, builders, designers and engineers use different standard forms of contract. Additionally, most standard forms are regularly and often updated<sup>58</sup>. This means that it is difficult to discuss and evaluate how potentially such standard forms of contract might influence the duty to warn.

Most commonly encountered and applied are the standard forms of contract produced by the Joint Contracts Tribunal ("the JCT"). The JCT was established in 1931 and since then produces standard forms of contracts, guidance notes and other standard documentation for use in the construction sector<sup>59</sup>. It consists of members of various associations representing service providers active in the construction sector, employers, local authorities and sub-contractors. The Standard Building Contract ("the JCT form") is one of the standard forms of contract produced by the JCT that is applied in all types of building work<sup>60</sup>. In the 2005 edition of the JCT form<sup>61</sup> there is no clause on the duty to warn of the builder in case he knows or should have known about the design defects<sup>62</sup>. However, clause 2.1 stipulates that the builder should perform his work 'in a proper and workmanlike manner'<sup>63</sup> that may be understood as with a 'reasonable skill and care'<sup>64</sup>. Since the English courts invoked the duty to warn

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<sup>55</sup> J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 297-299; I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 546; P. Jack, 'Getting back into shape – toning up fitness for purpose', *Construction Law Journal*, 2011, 27 (5), p. 360-368

<sup>56</sup> Further discussed in the following chapter.

<sup>57</sup> Housing Grants, Construction and Regeneration Act 1996, <<[http://www.opsi.gov.uk/acts/acts1996/Ukpga\\_19960053\\_en\\_1](http://www.opsi.gov.uk/acts/acts1996/Ukpga_19960053_en_1)>>, lastly checked on 26.01.2011

<sup>58</sup> J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 333

<sup>59</sup> <<<http://www.jctltd.co.uk>>> lastly checked on 26.01.2011

<sup>60</sup> J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 371

<sup>61</sup> As described by: J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 371-398; S. Lupton, 'JCT Standard Forms of Building Contract, 2005 editions: Part 1' [2006] I.C.L.R. 90

<sup>62</sup> On the lack of recognition of the duty to warn in earlier editions of the JCT forms, see e.g.: L.A. Rutherford, S. Wilson, 'Design Defects in Building Contracts: A Contractor's Duty to Warn?', *Construction Law Journal*, 1994/10, p. 90-99

<sup>63</sup> See more on that clause in: D. Chappell, *The JCT Design and Build Contract 2005*, Oxford: Blackwell Publishing, 2007, p. 52-53, 119; that clause have been also a part of the JCT 98 edition as clause 8.1.3., see: JCT 98 explanation: <<<http://www.scribd.com/doc/24510816/JCT-98-explanation>>> (lastly checked on 26.01.2011) and D. Chappell, *Understanding JCT Standard Building Contracts*, London: E&FN Spon, 2000, p. 14

<sup>64</sup> D. Chappell, *The JCT Design and Build Contract 2005*, Oxford: Blackwell Publishing, 2007, p. 52

from an obligation to act with a ‘reasonable skill and care’<sup>65</sup> it is possible that a duty to warn could be seen as a result of the obligation described in the clause 2.1 of the JCT form. Pursuant to clause 2.3 the builder has an express duty to inform the designer of any discrepancies between the design plans and documents that he receives<sup>66</sup>. This duty is sometimes seen as a source for the express duty to warn of the builder<sup>67</sup>. Moreover, while pursuant to clause 3.10 the builder is obliged to follow instructions given to him by the designer, if

“In the Contractor’s [the builder – JL] opinion compliance with any direction (...) or any instruction issued by the Architect/Contract Administrator [the designer – JL] injuriously affects the efficacy of the design of the Contractor’s Designed Portion (...), he shall within 7 days of receipt of the direction or instruction by notice in writing to the Architect/Contract Administrator specify the injurious effect, and the direction or instruction shall not take effect unless confirmed by the Architect/Contract Administrator”.

The designer would issue these instructions to the builder during the construction process. That does not imply a duty to warn (notify) as to the defects that the builder discovered or should have discovered in the design plans itself, but only as to the risks of specific alterations of the design plans that would be introduced later in the construction. Still, a limited duty to warn could be inferred from this provision<sup>68</sup>. However, it has also been argued<sup>69</sup> that the fact that the JCT form contains certain express obligations of the builder, including a limited duty to warn, does not leave room for the implication of other duties of the builder, such as the duty to warn of defects in design plans. As a general rule, English law does not interfere by imposing more obligations on the contractual parties than those they chose to oblige themselves to, in case those parties conclude a detailed and specific contract<sup>70</sup>. It seems therefore that the standard forms of contract should not be seen as an automatic source for a duty to warn of a professional party in the construction sector.

In the above paragraph it has been stated that the duty to warn, also in its narrower definition, is not imposed on parties by English statutes on construction law. The parties to the contract might choose to regulate the duty to warn explicitly, which then binds them accordingly. If there is no explicit contractual term on the duty to warn, one might think that the duty to warn could be implied, based on the general

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<sup>65</sup> That obligation has also been codified in Section 13 of Supply of Goods and Services Act 1982: ‘there is an implied term that the supplier will carry out the service with reasonable care and skill’.

<sup>66</sup> M. F. James, *Construction Law*, Houndsmills: MacMillan, 2001, 2 ed., p.5-6

<sup>67</sup> further discussed in the chapter on the builder’s duty to warn

<sup>68</sup> A. Williamson, ‘Commentary on JCT Forms of Contract’, in: S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 713

<sup>69</sup> L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

<sup>70</sup> S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 241, 252; R. Wilmot-Smith, *Construction Contracts: law and practice*, Oxford: Oxford University Press, 2006, p. 134, 140-141; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 161-165; L.A. Rutherford, S. Wilson ‘Design Defects in Building Contracts: A Contractor’s Duty to Warn?’, *Construction Law Journal*, 1994/10, p. 90-99; H. Nicholls, ‘Contractor’s “Duty to Warn” Following D&F Estates and University of Glasgow v. Whitfield’, *Construction Law Journal*, 1989/5, p. 175-184

contractual principles, e.g. good faith<sup>71</sup>. The principle of good faith is not recognised in English law *per se*<sup>72</sup>. In certain cases, the application of the good faith principle can be recognised in practice<sup>73</sup>, but these exceptional cases do not lead English doctrine or judges to accept the general application of good faith to contractual (and even less so to precontractual) dealings. The term might be implied into a contract either in law (by statute or at common law) or in fact<sup>74</sup>. A term might be implied *at common law* in case it can be inferred from the actions and intentions of the contractual parties that this term is necessary for the performance of that contract. The test of ‘necessity’ is harsher than the test of ‘reasonability’, since the term might be implied only if the contract would not work without that term<sup>75</sup>. Terms may be implied *in fact* if it can be proven that parties intended to include these terms in the contract, despite not having expressed that intention during contractual negotiations. In practice it is, however, difficult to prove that both parties would have agreed to include a certain clause into a contract. Additionally, in case the contract concluded between the parties is detailed and individually negotiated, it would be more difficult to convince the court that the parties intended to include other clauses therein, taking into account that the parties had a possibility to express their wishes<sup>76</sup>. As has been mentioned before, the duty to warn is not regulated in any statute, which would then demand it were implied in law. Since the parties usually describe the contractual obligations of the builder and the designer in their construction contracts in details, it seems very hard to prove that the duty to warn should be implied in fact by the court if the duty to warn is not mentioned explicitly as one of the express contractual terms. The remaining option is to find the duty to warn implied in common law. Then, the question whether the duty to warn might be implied into a contract should be seen in the light of whether it is ‘necessary’ for the contract to contain that clause. Let us look at English case law to see whether the duty to warn is in practice implied by English courts either in law or in fact.

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<sup>71</sup> O. Hayford, ‘Did you know... A “Construct Only” Contractor Can Be Liable For Design Defects?’, Mondaq, 07/07/2009, 2009 WLNR 12902774

<sup>72</sup> S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, *Construction Law Journal*, 2007/23, p. 420-435; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 153; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 102-104; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 14-16

<sup>73</sup> S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, *Construction Law Journal*, 2007/23, p. 420-435; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 154; B. Colledge, ‘Good Faith in Construction Contracts – The Hidden Agenda’, *Construction Law Journal*, 1999/15, p. 288-299; C. E. C. Jansen, R. Harrison ‘Good faith in construction law: the inaugural King’s College construction law lecture’, *Construction Law Journal*, 1999/15, p. 346-373

<sup>74</sup> R. Wilmot-Smith, *Construction Contracts: law and practice*, Oxford: Oxford University Press, 2006, p. 31; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 178-180; L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

<sup>75</sup> R. Wilmot-Smith, *Construction Contracts: law and practice*, Oxford: Oxford University Press, 2006, p. 36-45; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 181-182; L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

<sup>76</sup> S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 72-73; L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

The duty to warn in its broader scope has been recognised in the English case law, following earlier judgments of the Supreme Court of Canada<sup>77</sup> in which this duty to warn had also been recognised<sup>78</sup>.

In the Canadian case of *Nowlan v. Brunswick Construction Ltd.*<sup>79</sup> the builder's duty to warn the client about the risk coming out of the contract with a designer has been recognised. The facts of the case were as follows. Mr. Nowlan concluded a contract with the company Brunswick Construction Ltd. for the building of his house, which was to be realized according to plans prepared by an independent designer – employed directly by the client prior to concluding any agreement with the builder. Pursuant to Article 11 of the “General Conditions of the Contract” the builder undertook an obligation to

“Give efficient supervision to the work using his best skill and attention”.

Pursuant to Article 9, the client might have had employed an independent engineer who would then have

“General supervision and direction of the work”, but still “the contractor [the builder - JL] shall have complete control, subject to Article 11, of his organization”.

The court stressed that it was clear from the evidence,

“That the Owners [the client - JL] did not engage the architects [the designer - JL] to supervise the construction. They relied entirely upon the experience, judgment and skill of the Contractor [the builder - JL] in this respect”.

Unfortunately, for Mr. Nowlan, the design plans prepared for him contained a serious omission – i.e. they contained no provisions for ventilation of roofs and walls, which upon materialization of the whole project by the builder led to leaks and further to a very serious rotting condition of the structure of the house. The court had no doubt that even though

“The damage might not have occurred but for the poor design of the building”,

the builder and the designer

“Were jointly and severally liable as concurrent wrongdoers”.

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<sup>77</sup> As has been mentioned in the introduction to this book, Canadian law is still closely bound with English law and the Supreme Court of Canada does not hesitate to base its verdicts on the House of Lords cases (as was the case here). In turn, the House of Lords itself sometimes takes into account the verdicts rendered by the Supreme Court of Canada, as part of the overseas experience, i.e. how the given problem has been looked at and solved in other common law countries. See, for instance, *National Westminster Bank plc v. Spectrum Plus Limited and others and others*, [2005] UKHL 41, <<<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050630/nat-1.htm>>> (lastly checked on 26.01.2011)

<sup>78</sup> *Steel Co of Canada v. Willand Management* (1966) 58 DLR (2nd) 595 at 601; *Brunswick Construction Limitee v. Nowlan* (1974) 49 DLR (3d) 93; 21 BLR 27

<sup>79</sup> *Nowlan v. Brunswick Construction Ltd.*, [1975] 2 S.C.R. 523, 8 N.B.R. (2d) 76, 2 N.R. 164, 49 D.L.R. (3d) 93

The following excerpt from *Hudson's Building and Engineering Contracts*<sup>80</sup> was cited in the justification of the judgment:

“So a contractor [the builder - JL] will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor [the builder - JL] will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty”.<sup>81</sup>

On the basis of that authority, the majority of judges decided that

“The appellant [the builder - JL] was under a duty to warn the respondents [the client - JL] of the danger inherent in executing the architect's [the designer's - JL] plans”.

It could be argued that this case provides an example of the express provision in the contract obliging the builder to warn the client about defects within the design. Yet, it should be noted that the general provisions of the contract were vague and the court did not state that the duty to warn was expressly taken from the written contract. To the contrary, the way the judgment is formulated seems to indicate that the court relied more on the good faith behaviour of the professional party and the fact that the construction should be fit for its purpose<sup>82</sup>. In the legal literature, this basis for a duty to warn is also treated with caution. Clause 2.3 of the JCT Standard Form is given as an example of an express provision in the contract, obliging the builder to inform the client about defaults. Pursuant to this clause, if the builder finds any discrepancy in or divergence between the documents there set out, he must give written notice thereof to the designer. It is simultaneously stressed out that such a provision would not obligate the builder to actively seek for any such differences between documents, and would not even obligate him to draw the attention of the client to obvious errors. In the case at hand it is arguable whether the builder could be seen as having been employed to warn the client about the default of the designer. It seems more likely that the builder's duty to warn could be treated as an implied duty to warn<sup>83</sup>.

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<sup>80</sup> A. Hudson, I. N. D. Wallace (eds.), *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1970, p. 291

<sup>81</sup> The reference to *Hudson* in this case had been criticized in the later edition of this textbook: I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 545. It has been said that this passage was more appropriate to interpretation of contracts containing express performance undertakings. However, the writers of *Hudson* said also: “Nevertheless, whatever may be said of its application to the facts, there is no reason to doubt the correctness of the underlying principle in the majority judgment.”

<sup>82</sup> C. E. C. Jansen, R. Harrison ‘Good faith in construction law: the inaugural King's College construction law lecture’, *Construction Law Journal*, 1999/15, p. 346-373; P. Jack, ‘Getting back into shape – toning up fitness for purpose’, *Construction Law Journal*, 2011, 27 (5), p. 360-368

<sup>83</sup> Seen as such also by: L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor's duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

This case is quoted whenever English courts debate whether in a given case the builder's duty to warn existed or not<sup>84</sup>. In some cases, the exact fulfilment of the builder's express contractual duties would not suffice to indemnify him from any potential faults, which shall occur in the constructed object<sup>85</sup>. However, whether in case the builder noticed or should have noticed any fault within the design, he had an obligation to warn the client of the presence of this default and should not proceed with the construction process as if everything was in order, was still questioned. It has to be pointed out that even in the *Nowlan* case one of the judges – Judge Dickson – dissented. He reasoned, in accordance with the hitherto case law, that the builder was only obliged to perform his contractual obligations and that the duty to warn was not one of them:

“The obligations of the building contractor [the builder - JL] to the owners [the client - JL] are contained within the four corners of the contract and nowhere else. (...) There is nothing in the contract which imposes a duty on the contractor [the builder - JL] to detect faults in the design plans prepared by the owners' architects [the client's designer - JL] or imposes a duty to inform the owners [the client - JL] that the plans are faulty in design”.

Some other courts refusing to recognise the duty to warn in later cases in England shared his view<sup>86</sup>.

Just as in Canada, the duty to warn had been recognised in certain older English case law. In *EDAC v. Moss*<sup>87</sup> the builders believed that part of the design prepared by the designers (independent contractors of the client) was faulty. There was no express contractual obligation on the builder to warn the designers or the client of this default neither was the builder obligated to inspect and assess the design. However, Newey J. who was the Official Referee<sup>88</sup>, that is the judge deciding the case, stated that there was an implied term in the building contract concluded between the client and the builder pursuant to which the builder was obliged to act with the reasonable skill and care of an ordinary competent builder. Moreover, the judge recognised an implied term that the builder was obliged to warn the client of design defects, in as far as he believed they existed.

The same judge confirmed his point of view in another case, *Victoria University of Manchester*<sup>89</sup>, in which he *inter alia* stated that:

“The University alleged that a duty to warn was to be implied. The contractor did not admit the allegation, but the matter was not argued at length because in

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<sup>84</sup> On this case being the foundation of the duty to warn in England see also: K. Barrett, 'Building Defects – an Anglo-Centric Perspective', *Construction Law International*, December 2008.

<sup>85</sup> P. Jack, 'Getting back into shape – toning up fitness for purpose', *Construction Law Journal*, 2011, 27 (5), p. 360-368

<sup>86</sup> E.g. *The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd. (Third Party)* [1989] 5 Const LJ 73; (1988) 42 BLR 66

<sup>87</sup> *Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd* (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131

<sup>88</sup> Since 1998 instead of "Official Referees" these judges are known as "Judges of the Technology and Construction Court".

<sup>89</sup> *Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited* (1984) CILL 126; (1985) Con LR 52



*Equitable Debenture Assets Corporation Limited v. William Moss and Others* [EDAC v. Moss – JL] I had decided that such a term could be implied”.

These judgments have been, however, criticized in the English literature<sup>90</sup> as not fulfilling the ‘necessity’ requirement and therefore not giving grounds for implying a term on the duty to warn in law. Indeed, the judge referring these cases does not give a justification for why the duty to warn should be implied into a contractual relationship aside being convinced that a builder should act with the reasonable skill and care and that it would not make sense for the builder to carry out a construction of which he knows that it would either not work at all or not satisfactorily. Arguments brought up by the judge sound logical from a practical and economical point of view, but could be questioned as to their legal basis. That is why these judgments, while important when analysing the emergence of the duty to warn in English law, are not quoted in more recent judgments that debate whether there is a duty to warn binding a professional party.

A few years after these judgments had been rendered, the more traditional approach to the duty to warn, i.e. reluctance in implying such a duty to a contractual relationship, has been confirmed<sup>91</sup>. The Queen’s Bench Division considered the case *The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd.*<sup>92</sup>, in which the designer claimed that he was supposed to have been warned by the builder about the defects within the design he had prepared himself. Both the designer and the builder were independent contractors employed directly by the client – with no contractual link existing between them. When the client sued the designer, he subpoenaed the builder, claiming that the latter one had a duty to warn either the client or the designer and if that warning had been issued, the default would not have taken place. Based on this reasoning the designer claimed a contribution of damages from the builder. Firstly, the court considered whether the builder had a duty to warn the client or the designer acting as the client’s agent. It stated that

“Where there is a detailed contract of the nature found here, there is no room for the implication of a duty to warn about possible defects in design. (...) If, as I take to be the position in the circumstances of this particular case, there was no room for the implication in the contract of an implied duty to warn the building owner of defects in the architect’s design, it follows (...) that there should be no wider duty in tort”.

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<sup>90</sup> R. Wilmot-Smith, *Construction Contracts: law and practice*, Oxford: Oxford University Press, 2006, p. 45; J. Leech, P. Harris, ‘Are architects and engineers responsible for buildability in design?’, *Construction Law Journal*, 2000/16, p. 3-12; R. Harrison, in: C. E. C. Jansen, R. Harrison ‘Good faith in construction law: the inaugural King’s College construction law lecture’, *Construction Law Journal*, 1999/15, p. 362-365; L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

<sup>91</sup> S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 251

<sup>92</sup> *The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd. (Third Party)* [1989] 5 Const LJ 73; (1988) 42 BLR 66

Furthermore, the court considered the possibility that the builder had the tortious duty to warn<sup>93</sup> the designer himself (and not as an agent of the client) on the facts of the above-cited cases:

“It seems to me that the decisions in *EDAC v. Moss* and *Victoria University of Manchester* can stand with more recent decisions if they are read as cases where there was a special relationship between the parties, but not otherwise, and bearing in mind the difficulties in analyzing the meaning of the words “special relationship” and “reliance” (...) In the present case, the third party [the builder - JL] did not know that the plaintiffs [the client – JL] or the defendant [the designer - JL] were relying on them in matters of design (...) I wish to make it plain that I am not suggesting that there are no circumstances in which a term may be implied or a duty owed in tort requiring a contractor to warn a building owner of defects in the design. I have already referred to the possibility of a special relationship where the contractor knows that the building owner is relying upon him. In addition, if by his contract the builder undertakes to achieve a particular purpose or function, he will not be relieved of the duty to achieve that purpose or function by the deficiency of designs, which he is also under a duty by the contract to follow”.

The court in the last case distinguished its facts from the facts of the previous two mentioned cases. The conclusion in this case was that the builder’s duty to warn the client about the risk coming out of the contract with designer is seldom recognised. The court explicitly mentions that where the contract is formulated in a detailed manner, there is no room left for an implied term on a duty to warn, since the parties had been able to include that clause explicitly in their contract.

Similarly, as far as the duty to warn in tort is concerned, it has been stated that if there is no place in a contract for a duty to warn, it might not be recognised in tort either<sup>94</sup>. However, the door was left open to adjudicate future cases differently if in such future cases there was a special relationship between the parties that made the client and the designer specifically rely on the builder to grant them such a warning. The existence of this special relationship between the client, the designer and the builder does not exclude these cases from the scope of research discussed in this book, since it does not mean that the builder was employed to grant such a warning to the client. To the contrary, it seems that the client would simply trust that the builder would warn him due to the respect that the latter should have for the client’s interests. The existence of this special relationship between the client and the builder seems to be based on a principle similar to the principle of ‘good faith’. Furthermore, if the contract binding between the parties was very explicit and the builder obligated himself therein to achieve particular goals, he would not be able to defend himself in case of non-fulfilment of these goals by claiming that there was a defect in the design. That means that the builder had at least the duty to warn the client about a defect in the design, in case when this defect would or already has impeded his performance of

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<sup>93</sup> Relation between the tortious and contractual duty to warn in English law is further discussed in the introduction.

<sup>94</sup> See also: *Robinson v PE Jones (Contractors) Ltd*, [2010], T.C.L.R. 3 (QBD (TCC)), *Construction Law Journal* 2010, 26 (3), p. T79-119 where it was held that “*in principle a builder can owe a duty of care in tort to his client, concurrent with his duty in contract, in relation to economic loss*”.

the contract. According to Bolton, the builder should also be held liable in case when he has the “actual” knowledge of the defect and still fails to warn the client<sup>95</sup>.

This last judgment was often referred to in the following years when other judges diverted from the *EDAC v. Moss*<sup>96</sup> case. In one of these cases - *Oxford University Press v. Stedman*<sup>97</sup>, for example, the court stated that *EDAC v. Moss* was based *inter alia* on the reasoning of *Duncan v. Blundell*<sup>98</sup>, where it was said:

“Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman’s judgment by using his own”.

Applying this reasoning to the case before it, the court stated that the client obviously did not rely on the builder, because he also employed a designer. In the court’s opinion, it would be highly impractical if the builder were obliged to warn the client about the defects in the design, in case when there was a designer specifically employed to perform such duties. That is why the court did not recognise the builder’s duty to warn the client of any design defects. Another factor, which in the eyes of the court confirmed that there was no duty to warn, was the fact that in this case the parties concluded a very detailed contract. As a result, the court decided that there was no room to imply that the builder had such a duty to warn.

It has to be noted here that if the reasoning of the court was further supported in English law, there could be no talk about the existence of a duty for the builder to warn, at all. Namely, in case the default would originate in the construction process for which the builder would bear responsibility, he would be liable for the damage suffered by the client anyway, regardless of there being a duty to warn or not. In case the builder is not seen as having to warn about the default he noticed or should have noticed in the work of another specialists employed by the client, it seems that there is indeed no default about the existence of which the builder would have to warn.

Based on the cases presented above, it could be stated that English courts are very reluctant to recognise the contractual duty of a professional party in the construction sector to warn about the default or risk coming out of the contract or from a performance of a third party. In case law from that period, however, courts did hold the builders (and sub-contractors) liable for not warning the clients and/or designers about defects in the design<sup>99</sup>. Nevertheless, even if the builder was held to be liable to the client, the court preferred not to (expressly) relate this liability directly

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<sup>95</sup> S. Bolton, ‘The Builder’s Duty to Warn of Defects in Design’, BIA News No. 97; source: the Department’s of Building and Housing (BIA) of New Zealand website – <<www.bia.govt.nz/publicat/news97/duty.html>> (lastly checked on 01.10.2008); at this moment (26<sup>th</sup> of January 2011) available at request only << http://www.dbh.govt.nz/bia-news-index >>

<sup>96</sup> *Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd* (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131

<sup>97</sup> *Chancellor, Masters and Scholars of the University of Oxford (Trading as Oxford University Press) v. John Stedman Design Group (A Firm)* (1991) 7 Const LJ 102

<sup>98</sup> *Duncan v Blundell* (1820) 3 Stark 6, 171 ER 749

<sup>99</sup> C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 289

to the builder's duty to warn, relying instead on his obligation to exercise the due amount of care, it often being recognised as an implied term in the contract – e.g. in *Lindenberg v. Canning*<sup>100</sup>.

Pursuant to the facts of *Lindenberg v. Canning*, the builder was supposed to carry out the demolition of some walls, which according to the design plans delivered to him were supposed to be non load-bearing walls. It turned out that the designer had made a mistake and the demolition of these walls disturbed the structure of the construction. The client started proceedings against the builder claiming that he had been negligent in performing his obligations. The same judge, who adjudicated the cases *EDAC v. Moss*<sup>101</sup> and *Victoria University of Manchester*<sup>102</sup>, also tried this case. The judge followed his earlier reasoning, notwithstanding the later judgments like *Oxford University Press v. Stedman*<sup>103</sup>. The judge pointed out that the builder was obliged to act with the care to be expected of an ordinary competent builder. He took note of the fact that even the chimneybreast was indicated as non-load bearing on the design, which should have given the builder rise to doubt the design. The judge was convinced that at least the defect regarding the chimney was clear to the builder, because the builder suggested postponing demolition of that chimney.

“In view of the inadequacy of the plan and the likelihood that the 9” walls were supporting the ceiling, Mr Canning [the builder – JL] should I think have proceeded with the very greatest caution. At the very least he should have raised with Mr Carlish [the designer – JL] doubts as to his plan and asked whether Mr Carlish was sure that the 9” walls were not load-bearing. Even if Mr Carlish had given assurances Mr Canning would I think have been prudent to have put up temporary propping, but in the absence of such assurance he should undoubtedly have done so. (...) I think that he behaved with much less care than was to be expected of the ordinary competent builder and that he therefore acted in breach of contract”.

This case reinstates the view on the duty to warn applied in *EDAC v. Moss*<sup>104</sup> and *Victoria University of Manchester*<sup>105</sup>, i.e. application of an implied term to act with reasonable skill and care<sup>106</sup>. From this follows that the builder should have warned of defects caused by a third party, i.e. the designer, which are evident enough that the builder knows or ought to know they exist<sup>107</sup>.

Taking into account that this case has been adjudicated by the same judge, whose reasoning has been so thoroughly criticized, it would be difficult to state just on the basis of this case that the builder has a duty to warn about defects in the design

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<sup>100</sup> Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71

<sup>101</sup> Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131

<sup>102</sup> Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited (1984) CILL 126; (1985) Con LR 52

<sup>103</sup> Chancellor, Masters and Scholars of the University of Oxford (Trading as Oxford University Press) v. John Stedman Design Group (A Firm) (1991) 7 Const LJ 102

<sup>104</sup> Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131

<sup>105</sup> Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited (1984) CILL 126; (1985) Con LR 52

<sup>106</sup> T. Thompson, ‘Refusal to comply: not a good idea’, *Construction Law Journal*, 2005/21, p. 419-430

<sup>107</sup> To be discussed in the following chapters.

in English law<sup>108</sup>. A different judge confirmed the existence of the duty to warn in the case *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.*<sup>109</sup>. This judgment did not focus explicitly on the duty to warn, however.

It is no wonder that while adjudicating one of the recent cases *Plant Construction v. Adams*<sup>110</sup> the Court of Appeal stated:

“There appears to be no authority in this court which considers whether and in what circumstances a contractor or a subcontractor has a duty to give a warning, if he appreciates (or ought to appreciate) that work which he is contractually obliged to perform is inadequate”.

However, this and another newer case<sup>111</sup> confirm that such a warning might nevertheless be expected from the sub-contractor. Since the duty to warn of the sub-contractor reflects the duty to warn of the builder, the same might be induced for the builder’s duty to warn. Nevertheless, it must be noted that in *Plant Construction v. Adams*<sup>112</sup>, the duty to warn has been recognised as a part of another duty:

“JMH [the sub-contractors – JL], with others, had a duty to guard against the risk of personal injury to a potentially large number of people. That duty extended to giving proper warnings about the risk”.

Therefore, once again English courts do not directly imply a term on the duty to warn to the contract but divulge it as a part of another duty that may be implied into a contractual relationship<sup>113</sup>. Still, this case is recognised as the first review of the implied term of the duty to warn by the English Court of Appeal in the doctrine<sup>114</sup>. The argumentation of the Court of Appeal has also been evaluated as allowing for the duty to warn to be recognised in future cases not only where imputed rather than actual knowledge of the professional party was alleged, but also where a design defect was only economic and not dangerous. It is due to these recent judgments that the implied duty to warn may be seen as constituting part of the English construction law.

In a recent case, *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.*<sup>115</sup>, the contractual duty to warn of the structural engineer (who was

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<sup>108</sup> M. F. James, *Construction Law*, Houndsmills: MacMillan, 2001, 2 ed., p. 117-20; D. L. Cornes, *Design liability in the construction industry*, London: Blackwell, 1994, p. 93;

<sup>109</sup> *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.* (1997) 80 BLR 131; discussed also by C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 289; another case mentioning the existence of the duty to warn, albeit precontractual one is: *Department of National Heritage v. Steensen Varming Mulcahy* (1998) C.I.L.L. 1422

<sup>110</sup> *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

<sup>111</sup> *Aurum Investments Limited v. Avonforce Limited (in liquidation)*, [2001] 2 All ER 385; 78 Con. LR 115, (2001) 17 Const. LJ 145, [2001] Lloyd’s Rep. PN 285; (2001) 3 TCLR 21. This case will be further described in chapter 5.

<sup>112</sup> *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

<sup>113</sup> These cases will be further elaborated on in the following chapters on the scope of the duty to warn.

<sup>114</sup> I. N. D. Wallace, *Hudson’s Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 108

<sup>115</sup> *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.* (2007) 1 BLR 526

acting in a competence similar to a designer in this case) towards the builder was recognised explicitly. In that case, the structural engineer had a contractual relationship with both the client and the builder. He was employed to advise and design some temporary works that were conducted at the construction site; however, supervision and inspection of the construction were not mentioned in his contract as one of his obligations. Despite the absence of an express contractual duty to warn for the engineer the court adjudicated that:

“An engineer employed by an owner [the client - JL] in respect of permanent works who observes a state of temporary works which is dangerous and causing immediate peril to the permanent works in respect of which he is employed, is obliged to take such steps as are open to him to obviate that danger. This includes warning of an immediate danger to those works caused by an imperiling act by the contractor [the builder - JL] (...). It seems to me that that follows, partly as a matter of common sense, but also because the engineer is, after all, instructed in relation to the permanent works as a whole. It would appear strange if he is under a duty to take such steps as he can to see that they survive for say, the next 25 years, or whatever the design life for the building is, but is not obliged to take any steps to warn of an immediate danger to those works caused by an imperiling act by the contractor [the builder – JL] (...). It has often been said that the foundations of the common law are (one hopes) based upon common sense. The finding in this case of a duty to warn on the part of a structural engineer in the circumstances of this case, where deep basement excavations are performed without temporary support threatening a collapse of the whole structure (which occurred in fact), fully accord with common sense and the principles applicable to the scope of duty of a professional such as Mr. Fidler [the engineer - JL]”.

Since the contractual duty to warn in this case had not been an express term, the court chose to imply it in common law into the contract. The court confirmed also that next to the contractual duty there was a tortious duty to warn binding the engineer, as well. On the basis of the recent cases it might be argued that the contractual duty to warn is recently more easily implied into a contractual relationship<sup>116</sup>.

### 2.1.2. Precontractual duty to warn.

While there were always problems with defining the contractual duty to warn in English law, at least there were some cases that recognised its existence and on their basis we might discuss the source and the scope of that duty to warn. This is not the case as far as the precontractual duty to warn in English law is concerned.

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<sup>116</sup> See also: K. Barrett, ‘Building Defects – an Anglo-Centric Perspective’, *Construction Law International*, December 2008; P. Jack, ‘Getting back into shape – toning up fitness for purpose’, *Construction Law Journal*, 2011, 27 (5), p. 360-368; on growing tendency to overlay contractual relationships with obligations of mutual trust, co-operation and wider duties of disclosure, see also: S. Jackson, ‘The duty to disclose: a clash of law and morality’, *Construction Law Journal*, 2008, 24 (8), p. 675

The precontractual duty to warn, just like the contractual duty to warn, is not regulated by any statute in English law. The most likely legal basis for the precontractual duty to warn would be its reliance on the good faith principle. However, as it has already been mentioned, in general, the good faith principle is not recognised in English law in either precontractual or contractual dealings<sup>117</sup>. As far as the need to give certain information and warnings to the client during the precontractual negotiations is concerned, English law does not recognise a positive precontractual duty to inform. It is commonly accepted that every party during precontractual negotiations is responsible for gathering information on his own and taking care of his own interests. What is recognised in English law is the negative side of the duty to inform, i.e. precontractual duty not to deceive nor misrepresent, but the parties do not have a general duty to disclose all information<sup>118</sup>. Since mere non-disclosure is not treated as misrepresentation may there be any talk of a duty to warn of e.g. a builder to the client when the builder notices a default in the design plans before he enters into a contract with the client?

This question has been answered in the affirmative as far as tender proceedings were concerned. In the case *Department of National Heritage v. Steensen Varming Mulcahy*<sup>119</sup> the court took into account that the builder might have a duty to warn the design team about a default in the design plans as soon as he notices that default.

“(…) both DNH [the client – JL] and BB [the builder – JL] should have objected to the design at the time of tendering, or in default of such objection being accepted, BB should have refrained from tendering”.

Constructions requiring tender proceedings do not fall within the scope of this research, since they are usually conducted by public entities and big private companies, which do not resemble consumers and could not fall under the protection provided for consumers<sup>120</sup>. However, if even in cases of construction where the client itself is a big construction company the duty to warn might bind one professional party against another professional party in the precontractual phase, it could be assumed that the same would apply in case it would be the consumer who would need to receive a warning.

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<sup>117</sup> S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, *Construction Law Journal*, 2007/23, p. 420-435; J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 153; House of Lord stated in a non-related to the subject of this book case *Walford v. Miles* [1992] 2 AC 128 that: “*The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations.*”; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 102-104; I. N. D. Wallace, *Hudson’s Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 14-16

<sup>118</sup> S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, *Construction Law Journal*, 2007/23, p. 420-435; P. Giliker, *Pre-contractual liability in English and French law*, The Hague: Kluwer Law International, 2002, p. 111-112; P. Legrand Jr., ‘Pre-contractual disclosure and information: English and French law compared’, *Oxford Journal of Legal Studies*, 1986/6/3, p. 349

<sup>119</sup> *Department of National Heritage v. Steensen Varming Mulcahy* (1998) C.I.L.L. 1422

<sup>120</sup> In the mentioned case the client was the British Library.

In general, however, the precontractual duty to warn will not be easily assumed<sup>121</sup>. This is also the reason why in the following chapters the precontractual duty to warn in England will barely be mentioned, since there is no case law to be found to define the scope of the precontractual duties to warn of a professional party in the construction sector in respect of the risk coming from a third party. If any precontractual duty to warn would be found, it would most likely be owed in tort, however, certain conditions would have to be met in order to recognise such a duty to warn.<sup>122</sup> This tortious duty to warn would fall outside the scope of this book, contrary to the contractual setting discussed earlier. Even in case of an independent tort, not related to the precontractual relationship between the parties, certain conditions must be met in order to recognise such a duty to warn.

## 2.2. German law.

### 2.2.1. Contractual duty to warn.

In German construction law parties have a rather wide amount of discretion when concluding building contracts. Generally, such contracts are governed by BGB<sup>123</sup>-provisions on contracts for work<sup>124</sup>. However, it has to be noticed that many of these BGB-provisions are not mandatory and can therefore be substituted by or modified into provisions more acceptable to the contractual parties<sup>125</sup>. That is what the parties to building contracts usually choose to do as the BGB-provisions have been formulated and written down in the BGB in a too general form to be effectively applied in the construction business<sup>126</sup>. As a result, the final outcome – namely, the building contract – while corresponding to the general formal requirement of a contract for work, in practice greatly varies from case to case, both with regard to the specific obligations and to the rights that it establishes<sup>127</sup>.

Attempting to make the process of concluding building contracts easier, the German Committee for Contract Procedures in Building Works (DVA)<sup>128</sup> drew up rules for the contract procedures to be observed in the construction industry: the *Vergabe- und Vertragsordnung für Bauleistungen* (VOB)<sup>129</sup>. These rules have been

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<sup>121</sup> S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 250-251

<sup>122</sup> P. Giliker, *Pre-contractual liability in English and French law*, The Hague: Kluwer Law International, 2002, p. 109-118

<sup>123</sup> Bürgerliches Gesetzbuch, i.e. the German Civil Code

<sup>124</sup> Der Werkvertragsrecht des BGB, regulated in BGB in § 631 and further

<sup>125</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 15-17

<sup>126</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 15-17; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 5

<sup>127</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 300-313

<sup>128</sup> Deutschen Vergabe- und Vertragsausschuss für Bauleistungen.

<sup>129</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 300; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 62-64; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 5-6; for the complex description of provisions of VOB/A and VOB/B see: H. Ingenstau, H. Korbion, H. Locher, K. Vygen, Ch. Döring (eds.), *VOB. Teile A und B. Kommentar*, Düsseldorf: Werner, 2001



divided into three parts<sup>130</sup>: VOB/A contains a general regulation on awarding public building contracts<sup>131</sup>, VOB/B contains general contractual provisions for the performance of building contracts<sup>132</sup> and VOB/C contains general technical contractual provisions of building contracts<sup>133</sup>. In this research we will concentrate on the provisions of VOB/B, which are mainly applied in practice by private parties and which regulate the obligations that the parties need to fulfil during the performance of the contract, including the duty to warn. The general provisions of VOB/B have been changed a few times – the latest amendments having been made in the year 2002<sup>134</sup>, when the whole German legal system on contractual liability was reformed. The parties to the building contract can apply VOB/B-provisions if both parties agree thereon explicitly<sup>135</sup>. In case the construction has been planned by a public law company which then announces a tender for that construction to take place, application of the VOB/B-provisions is compulsory.

Other parties have of course full discretion to apply VOB/B-provisions in their contract, either in their entirety or just some of them. In practice, most of the building contracts are concluded by usage of standard VOB/B terms<sup>136</sup>. The provisions of VOB/B constitute ‘general terms of building contracts’, substituting the default provisions of the BGB. Due to the character of VOB/B-provisions as preformulated contractual terms in building contracts they are to be considered as standard contract terms (*Allgemeine Geschäftsbedingungen*, AGB<sup>137</sup>)<sup>138</sup>. As such, they have to be in conformity with the legislation on standard contract terms, until 2002 contained in the law on AGB-provisions<sup>139</sup> and since then with the corresponding provisions of the BGB<sup>140</sup>. This implies that the VOB/B-provisions are subject to the substantive judicial control as general contractual terms<sup>141</sup>.

As mentioned in the previous paragraph, in practice the parties to a building contract usually apply the provisions of VOB/B<sup>142</sup>. § 4 No. 3 of VOB/B<sup>143</sup> expressly

<sup>130</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 65-66

<sup>131</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 313

<sup>132</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 314

<sup>133</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 316; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 13-15

<sup>134</sup> Further referred to as presently binding VOB/B provisions.

<sup>135</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 64-65, 66; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 6-7

<sup>136</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 300

<sup>137</sup> Allgemeine Geschäftsbedingungen, i.e. standard contract terms

<sup>138</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 342-344; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 75-77; A. Maser, *Baurecht nach BGB und VOB/B*, IBR Print & Online <<www.ibr-online.de>> (lastly updated on 25.08.2009, 3.1.2), p. 11. Anwendungsbereich der VOB/B

<sup>139</sup> Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen

<sup>140</sup> BGB §§ 305-310

<sup>141</sup> A. Maser, *Baurecht nach BGB und VOB/B*, IBR Print & Online <<www.ibr-online.de>> (lastly updated on 25.08.2009, 3.1.2), p. 10.2 Die Einbeziehung der AGB; C. von Rintelen in: K. Kapellman, B. Messerschmidt, *VOB Teile A und B (Vergabe- und Vertragsordnung für Bauleistungen)*, IBR Print & Online <<www.ibr-online.de>> (lastly checked on 15.12.2009), Einleitung, VOB/B, Rdnr. 47

<sup>142</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 300; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 64-65, 66; T.

obligates the builder or the designer (generally a professional party) to inspect the construction site and to warn the client of any observed inaccuracies. Pursuant to the present version of VOB/B, the professional party has a duty to warn the client immediately, in written form, of any observed inaccuracies as to the future performance of the contract, quality of the materials delivered by the client or performance of other professional parties. The source of this duty is presumed to lie in the general rule of “good faith” (“Treu und Glauben”, § 242 BGB<sup>144</sup>). Therefore, § 4 No. 3 of VOB/B should be interpreted, in accordance with § 242 BGB, as a provision that is supposed to protect the client from excessive damage, which could result from the non-reception of the warning on time<sup>145</sup>. ‘If the service provider had doubts as to (...) the obligations and their performance of another party (...)’ – the text of the provision of the VOB/B clearly indicates that the duty to warn of a builder or a designer in Germany encompasses also a duty to warn about the risk to a client coming out of a contract with a third party<sup>146</sup>.

The duty of a professional party to warn could also arise on the basis of application of other provisions of VOB/B. For example, § 3 No. 3 of VOB/B<sup>147</sup> regulates the duty for the professional party to review the documents received from the client and to warn the client if any inaccuracies are or should have been noticed. The aim of this provision is to discover any inaccuracies that might be found in the construction documents prior to proceeding with the construction itself, which could reduce potential loss to the client<sup>148</sup>. The provision of § 4 No. 1 of VOB/B<sup>149</sup> might also be a source for the duty to warn of the professional party. Namely, if the professional party considers instructions of the client to be unnecessary or pointless, he should inform and warn the client about it. The professional party is obligated to

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Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 6-7

<sup>143</sup> “Hat der Auftragnehmer Bedenken gegen die vorgesehene Art der Ausführung (auch wegen der Sicherung gegen Unfallgefahren), gegen die Güte der vom Auftraggeber gelieferten Stoffe oder Bauteile oder gegen die Leistungen anderer Unternehmer, so hat er sie dem Auftraggeber unverzüglich - möglichst schon vor Beginn der Arbeiten - schriftlich mitzuteilen; der Auftraggeber bleibt jedoch für seine Angaben, Anordnungen oder Lieferungen verantwortlich.”

<sup>144</sup> “Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.”

<sup>145</sup> BGH, 23.10.1986, VII ZR 48/85, NJW 1987, 643; OLG Celle, 11.10.2001, 22 U 6/01, IBR 2004, 12; OLG Celle, 12.12.2001, 7 U 217/00, NJW-RR Zivilrecht 2002, 17, p. 594; OLG Dresden, 20.01.2004, 14 U 1198/03, IBR 2004, 615; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 285; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 100; A. Metzger, ‘Prüfungs- und Hinweispflicht gegenüber einem baukundigen Auftraggeber’, IBR 2006, 88; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 21; also mentioned was its relation to § 241 Abs. 2 BGB – general duty of the professional party to protect, inform and cooperate with the client, e.g. OLG Düsseldorf, 11.10.2007, 5 U 6/07, IBR 2008, 432

<sup>146</sup> T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 21

<sup>147</sup> “Die vom Auftraggeber zur Verfügung gestellten Geländeaufnahmen und Absteckungen und die übrigen für die Ausführung übergebenen Unterlagen sind für den Auftragnehmer maßgebend. Jedoch hat er sie, soweit es zur ordnungsgemäßen Vertragserfüllung gehört, auf etwaige Unstimmigkeiten zu überprüfen und den Auftraggeber auf entdeckte oder vermutete Mängel hinzuweisen.”

<sup>148</sup> T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 12

<sup>149</sup> “Hält der Auftragnehmer die Anordnungen des Auftraggebers für unberechtigt oder unzumutbar, so hat er seine Bedenken geltend zu machen, die Anordnungen jedoch auf Verlangen auszuführen, wenn nicht gesetzliche oder behördliche Bestimmungen entgegenstehen”

follow these instructions, even if he considers them to be unnecessary, unless these instructions contradict any legal or safety regulations. The aim of this duty is to make sure that the construction would be fault-free and would satisfy the client's needs and aims, without the client having to cover costs for unnecessary works<sup>150</sup>. These two mentioned provisions regulate the duty to warn of the professional party in case the documents or instructions come from the client. In my opinion, it is most likely that they also apply in case another party employed at the construction site would give the documents or instructions. In such a case these provisions could be invoked together with the provision of §4 No. 3 VOB/B as the source of the duty to warn of the professional party about a risk coming from a contract with a third party.

In the described situation, when the abovementioned VOB/B-provisions are incorporated into the building contract, the duty to warn is based on an express contractual provision. Such express duties to warn are obviously outside the scope of this book as such. However, in German literature and case law it has been emphasized that the builder does not only have a duty to warn the client about a default in the design plans in the case when the VOB-provisions were implemented in the contract<sup>151</sup>. The question, what character such duty to warn then has, has been debated in German case law<sup>152</sup>. Part of the German case law considers such a duty to warn as an auxiliary contractual duty based on the general rule of "good faith" as well as on BGB-provisions regulating contracts for work<sup>153</sup>. However, it has also been argued that the duty to warn might even be regarded as a main contractual obligation, even if the VOB/B-provisions have not been implemented into the contract concluded between the parties<sup>154</sup> <sup>155</sup>. That the builder is under such a duty to warn is as such not under debate.

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<sup>150</sup> T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 12

<sup>151</sup> BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518; OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10; OLG Karlsruhe, 28.10.2002, 7 U 87/02, BauR 2003, 10, p. 638; OLG Dresden, 20.01.2004, 14 U 1198/03, IBR 2004, 615; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 284; F. Weyer, 'Muss Landschaftsbauer auf fehlenden Feuchtigkeitsschutz des Sockelputzes hinweisen?', IBR 2004, 615; A. Metzger, 'Prüfungs- und Hinweispflicht gegenüber einem baukundigen Auftraggeber', IBR 2006, 88; LG Rottweil, 10.01.2008, 3 O 163/07, IBR 2008, 148; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 18-19

<sup>152</sup> T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 75-77

<sup>153</sup> BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518; *Palandt/Thomas*, München: Beck, 54. Aufl., § 631 Rdnr. 13; OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 291; F. Weyer, 'Muss Landschaftsbauer auf fehlenden Feuchtigkeitsschutz des Sockelputzes hinweisen?', IBR 2004, 615; OLG Düsseldorf, 11.10.2007, 5 U 6/07, IBR 2008, 432; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 76-77

<sup>154</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 99; A. Metzger, 'Prüfungs- und Hinweispflicht gegenüber einem baukundigen Auftraggeber', IBR 2006, 88; P. Oppler in: H. Ingenstau, H. Korbion, H. Locher, K. Vygen, Ch. Döring (eds.), *VOB. Teile A und B. Kommentar*, Düsseldorf: Werner, 2001, B § 4 Nr 3 Rdnr. 4; U. Werner, W. Pastor, *Der Bauprozess*, Köln: Werner, 2008, Rdnr. 1519, p. 948

<sup>155</sup> The qualification of the duty to warn as a main or auxiliary contractual duty has a practical relevance in German law, e.g. the prescription periods are different for these duties; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 107; see also: T.

The OLG Bremen in a judgment of 15 February 2001<sup>156</sup> stated that the only role of the VOB/B-provisions was to specify the duty to warn, which was already applicable under the “good faith” principle<sup>157</sup>. The OLG Karlsruhe in the judgment of 28 October 2002<sup>158</sup> also stated that the duty to warn was applicable due to the application of the “good faith” principle to contractual provisions – in the same manner, as it would have been applied if the VOB/B-provisions had been implemented into the contract. The court based its assumption on the grounds that in both cases, the builder would be obligated to perform his work without any defaults. The OLG Karlsruhe stated explicitly that in case the builder refrained from warning the client of the builder’s own default; he could be held liable for the default of his own work pursuant to BGB-provisions on contractual liability for breach of warranty. The same reasoning could not be applied, in general, according to the court, to justify the builder’s liability for damage resulting from not warning the client about the defaults of other parties involved in the construction process. However, the court considered the importance of the builder’s duty to complete his own contractual obligations without any defaults and saw therein a possible source of his duty to warn about defaults of other parties. The court stated that defaults in the designer’s plans or in the works of other builders employed at the same construction site might have led to the result that the builder would not be able to complete his own obligations in the proper, faultless manner. In such a case, his duty to warn was deemed to be broad enough to encompass defaults made by other parties. However, the court made it clear in this case that the builder had no duty to warn the client about circumstances in which the default in performance of another party would not influence his own work.

This judgment seems to suggest that in case the parties did not conclude a VOB/B-based contract, the builder would not as easily be held liable for not warning about a risk coming out of contract with a third party. It would only be recognised in case the default caused by the other party would influence the performance of the builder’s own obligations. In practice, however, it is likely that almost any default made by the designer in his plans or by another builder or sub-contractor in their works would influence the whole construction and thus also the builder’s own work<sup>159</sup>. That means that the duty to warn about default of another professional party has a broader application than might be expected based on this judgment.

For example, in the case of 20 January 2004<sup>160</sup>, OLG Dresden decided that the builder had a duty to warn based on the § 242 BGB about the default by another professional party in the construction process. Before the builder started his works on the construction site, another professional had cleaned and plastered the building. The plastering had been faulty and did not guarantee the construction would not suffer any damage due to dampness. The question in this case was whether the builder had the duty to warn the client that the other professional performed his work faultily. The court had doubts in this case whether the § 4 No. 3 of VOB/B could put such a duty to warn on the builder in this case, taking into account that it was doubtful whether the builder could be considered as ‘building on’ the work already provided by the

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Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 78-83

<sup>156</sup> OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10

<sup>157</sup> To be discussed in the following chapters.

<sup>158</sup> OLG Karlsruhe, 28.10.2002, 7 U 87/02, BauR 2003, 10, p. 638

<sup>159</sup> This influence has been understood broadly by German courts, see e.g. a case discussed in the chapter on the duty of the builder to warn the client by OLG Hamm, 09.07.2009, 21 U 46/09 (full text found on <<www.ibr-online.de>>, lastly checked on 04.12.2009)

<sup>160</sup> OLG Dresden, 20.01.2004, 14 U 1198/03, IBR 2004, 615

professional who did the plastering. Their tasks were not really interrelated, which meant that it was difficult to see the professional who did the plastering as the builder's predecessor, whose work influenced the performance by the builder of his own obligations. However, the court was adamant that these doubts did not need to be resolved, since the builder had in any way a duty to warn the client based on § 242 BGB. The court decided that aside the duty to warn from § 4 No. 3 of VOB/B, the builder was under a general duty to warn, based on the duty to act with good faith as expressed in § 242 BGB. The builder has to warn the client pursuant to this duty whenever he should have recognised that the previous works at the construction site have been performed faultily, if he should have realized that even if he would perform his tasks fault-free, that performance would not prevent the client from suffering damage. This does not necessarily have to mean that the performance of the builder's obligation was dependent on the performance of the professional who did the plastering.

The reasoning presented in this judgment has been criticized in a commentary to it<sup>161</sup>. The commentator agreed with the outcome of the case, the recognition of the duty to warn of the builder, but he thought that the link between the work of the professional who did the plastering and the builder was and should have been recognised as obvious, which would then mean that the builder had the duty to warn based on the provision of the VOB/B. I agree with his evaluation of the facts in the given case that indicate, especially taken into account other German case law which goes further in assuming the link between two professionals<sup>162</sup>, that the OLG Dresden could have assumed that the builder relied on the previously performed works at the site. The commentator did not see the provision of the BGB as a source of the duty to warn or as a more far-going provision than the provision of the VOB/B but rather argued that both these provisions have the same purpose. According to him the provision of VOB/B is just a specification of the provision of BGB.

From the above, it seems that in German law the professional parties will have a duty to warn the client under either the provisions of VOB/B or under § 242 BGB. However, the circumstances in which the duty to warn arises have been limited by German courts.

And so, OLG Köln has adjudicated it on 16 January 2007<sup>163</sup> that the builder would not have a duty to warn the client about the designer's mistake in case the risk could be seen as having silently passed on to the client. In the given case the builder was supposed to plaster the walls of the building, when he noticed that the walls thereof were covered with salt and damp. The designer, who was also a supervisor of the construction site, knew of these defaults but nevertheless allowed the builder to proceed with his works as originally planned, which led to the end product being faulty. The court decided in this case that in general the builder has a duty to warn the client about such a default, but in special circumstances this duty will not bind the builder. Namely, according to the court's judgment, in case when the client silently takes over the risk, the builder might rely on the fact that the competent client or his representative took the risk upon himself consciously. The court decided that this

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<sup>161</sup> F. Weyer, 'Muss Landschaftsbauer auf fehlenden Feuchtigkeitsschutz des Sockelputzes hinweisen?', IBR 2004, 615

<sup>162</sup> See further in the chapter on the builder's duty to warn to the client.

<sup>163</sup> OLG Köln, 16.01.2007, 3 U 214/05, IBR 2007, 242

situation took place here. The designer's knowledge was attributed to the client in this case based on § 166 BGB<sup>164</sup>.

This case is inconsistent with other German case law and therefore it needs to be stated that one should not infer too much from this case. A rare assumption has been made in this case that since the designer knew about the default in the construction the client was thus deemed to have been informed about it as well and was therefore deemed to have consciously decided to take the risk of the default on himself. However, it is commonly accepted by German courts that the warning about the default should be given directly to the client and not to the designer<sup>165</sup>. This seems to suggest that the knowledge of the designer about the default will not always mean that the client is aware thereof, too, especially if it is the designer's original default that is causing a risk to the whole construction<sup>166</sup>.

OLG Celle decided another exceptional case on 25 September 2003<sup>167</sup>. The builder in this case would have been under a duty to warn since he did notice the designer's mistake in the design plans. However, the builder then addressed the designer, who explained to him why this type of construction was to be used in the given case and how this was not a mistake. These explanations convinced the builder who then proceeded to perform his original tasks. When the construction turned out faulty, the client claimed damages from the builder for his breach of the duty to warn him. The *Oberlandsgericht* ruled that in general, the builder has the duty to warn the client and any warning given to the designer would not release him of his liability. However, in this case the builder was seen as no longer having doubts about the default in the design plans and therefore as no longer having a reason to give a warning to the client. The court stated that the builder has the duty to warn only in a situation where he knew or should have known about the default. When the designer explains to him in a plausible way that the perceived default is in fact not a default, thus convincing him that the design plans are in fact faultless, the builder is released from his obligation to warn the client about it. Under the circumstances of the given case the court convincingly showed that the builder did not have a duty to warn here. However, in most cases the builder who would just convey his warning to the designer and not to the client would most likely still be held partially liable<sup>168</sup>.

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<sup>164</sup> "(1) Soweit die rechtlichen Folgen einer Willenserklärung durch Willensmängel oder durch die Kenntnis oder das Kennenmüssen gewisser Umstände beeinflusst werden, kommt nicht die Person des Vertretenen, sondern die des Vertreters in Betracht.

(2) Hat im Falle einer durch Rechtsgeschäft erteilten Vertretungsmacht (Vollmacht) der Vertreter nach bestimmten Weisungen des Vollmachtgebers gehandelt, so kann sich dieser in Ansehung solcher Umstände, die er selbst kannte, nicht auf die Unkenntnis des Vertreters berufen. Dasselbe gilt von Umständen, die der Vollmachtgeber kennen musste, sofern das Kennenmüssen der Kenntnis gleichsteht."

<sup>165</sup> BGH, 19.12.1996, VII ZR 309/95, BauR 1997, 301; H. Kothe, 'Wem gegenüber muss der Unternehmer Bedenken anmelden?', IBR 1997, 277; BGH, 18.01.2001, VII ZR 457/98, BauR 2001, 622; H. Groß, 'Eigene Fachkunde des Bauherrn befreit nicht von der Pflicht zur Bedenkenanmeldung', IBR 2001, 177; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 312; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 39-40. See further comments on this in chapter 6.

<sup>166</sup> And so, e.g. in case OLG Oldenburg, 24.04.2008, 8 U 4/08 (full text found on <<www.ibr-online.de>> lastly checked on 04.12.2009) the court decided that even if the designer gives a specific instruction to the builder to continue with a task that has been obviously not properly designed, the builder should not rely on that instruction and still warn the client about that default.

<sup>167</sup> OLG Celle, 25.09.2003, 5 U 14/03, IBR 2004, 614

<sup>168</sup> F. Weyer, 'Unternehmer verletzt Hinweispflicht nicht, wenn Architekt seine Bedenken plausible zerstreut!', IBR 2004, 614; see also chapter 6 on the question whether a sole warning suffices.

When it is the client who has the actual knowledge about the default, prior to the builder warning him about it, the court might release the builder from his duty to warn. In the case of 13 March 2003<sup>169</sup> OLG Düsseldorf decided that there is no duty to warn for the builder in case the client has already been fully and extensively informed about the potential risk, although the burden of proof that the client was informed and warned will rest on the builder<sup>170</sup>. The court decided in this case that the function of the duty to warn is to give the client the necessary clarity about risks and problems in the construction and their sources. If the client already has this knowledge before the builder would have approached him, there is no need to provide an additional warning.

However, it needs to be mentioned again that the builder most likely would only be released of his duty to warn in case the client had an actual knowledge of the default himself<sup>171</sup>. In the case of 11 October 2001<sup>172</sup> OLG Celle adjudicated that the fact that the client was competent enough to have recognised the default in the construction, and was assisted by an equally competent designer, did not mean that the builder was released of giving the warning to the client. Any professional builder should have recognised the mistake made by the designer in his plans under the circumstances of this case, which meant that the builder had the duty to warn. The builder's duty to warn did not change due to the mere fact that the client was himself competent and additionally could benefit from the advice of a designer employed by him<sup>173</sup>. However, the court decided, on the basis of the facts of the case, to completely release the builder of his liability for the breach of this duty, due to grossly negligent behaviour of the client and his representatives.

Since the builder needs to know of or should have realized the default, it seems logical that in case the builder was not in a position to discover that default, he could not be held liable for not giving a warning to the client about it<sup>174</sup>. When may the builder claim ignorance of the default with certainty that the default remained outside the scope of what he should have inspected or recognised?<sup>175</sup> Certain boundaries have been placed for the emergence of the duty to warn in case the default was not easily recognisable for the builder<sup>176</sup>.

In the case of 6 December 2005<sup>177</sup> OLG Köln stated that the builder would not have a duty to warn in case of a default that was difficult to recognise. If the default lies within the work prepared by other specialists, who have expertise in the given

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<sup>169</sup> OLG Düsseldorf, 13.03.2003, 5 U 71/01, IBR 2003, 1077

<sup>170</sup> H. Groß, 'Ein informierter Bauherr muss nicht auf Mängelrisiken hingewiesen werden!', IBR 2003, 408; S. Bolz, 'Keine Bedenkenmitteilung, wenn Auftraggeber über Mängelrisiko informiert ist!', IBR 2007, 242

<sup>171</sup> Another exception to this rule will be discussed in the following chapter. See: OLG Bamberg, 14.08.2009, 6 U 39/03, IBR 2011, 76, which will be discussed in chapter 3.

<sup>172</sup> OLG Celle, 11.10.2001, 22 U 6/01, IBR 2004, 12

<sup>173</sup> See also: C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 303

<sup>174</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 100; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 31

<sup>175</sup> The scope of this side of the builder's duty to warn will be further discussed in the following chapter.

<sup>176</sup> M. O. Hilgers, 'Einbau einer Klimaprüfkammer: Muss Auftragnehmer klüger sein als ein Fachingenieur?', IBR 2007, 192; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 23

<sup>177</sup> OLG Köln, 06.12.2005, 22 U 72/05, IBR 2007, 192

field of construction and have not recognised the default themselves, then the client may not expect from the builder that he will be even ‘smarter’<sup>178</sup>. Moreover, the court stated that the builder might rely on the statements of other specialists employed at the construction site, unless they are clearly wrong<sup>179</sup>. The builder in this case was employed to deliver materials and to build an air-conditioned room according to the plans prepared by the specialists in air-conditioning employed by the client. The construction turned out to be faulty – the desired velocity between warming up and cooling off of the complex was not reached – due to a default in the design plans. The client claimed damages from the builder, stating that the builder should have recognised that default and warned him about it. The court confirmed that since the work of the builder had been faultless, the only ground for potential liability of the builder could be his breach of the duty to warn about the default in the design plans. The fact that even specialists employed by the client to prepare the design plans did not see the problem and that the expert appointed by the court admitted that he had had problems in finding the exact default within the plans, meant that it could not be expected from the builder to have such technical knowledge. The court stated additionally that the builder could have assumed that the specialists would explain all technical problems of the installation of the air conditioning.

Finally, it is interesting to mention here already<sup>180</sup> that the builder will not have to warn the client when the losses that the client suffers could not be avoided even if the builder would give the warning. In this case, as there would not be a causal link between the lack of warning and the loss of the client, the builder could not be held liable for client’s losses. For example, in the case of 19 November 2009<sup>181</sup> the OLG Celle considered a case in which the builder was employed by the client to install sanitary, heating and electrical installation in the house. The house was built by another builder specialising in construction of pre-fabricated houses and was supposed to fulfil the requirements for a ‘low energy house’. However, the requirements were not met and as a result the client ended up having to pay high bills for his energy use. Since the first builder constructing the house was insolvent at the time when the construction was finished, the client claimed his losses from the builder employed to install heating installations. The client suffered and claimed compensation for two sorts of losses: the cost of the repair that the house needed and the cost of high energy bills. The second builder claimed that he could not prevent the high use of energy while installing heating systems on an already defectively designed and built house. Therefore, the second builder argued, he should not be held liable for any of the client’s losses. Additionally, it was stressed that it was the client’s obligation to provide a perfect foundation for the second builder to work on. The client claimed that the second builder should have warned him that the first builder had not properly performed his works, as a result of which the air flow in the house was not as tight as it should have been, which would lead to the possibility to order the first builder to repair the house and to decrease energy use within it. The court shared the second builder’s view and declared that even if the second builder had warned the client, then the client would have to make the same costs for the repair of the house and for energy bills as when the warning was not given. According to the

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<sup>178</sup> H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 100

<sup>179</sup> Contrary to the previously described case OLG Celle, 25.09.2003, 5 U 14/03, IBR 2004, 614, here the builder did not express his doubts to the designer and did not receive any reassurances from him.

<sup>180</sup> This matter will be further discussed in chapter 7.1 on causality.

<sup>181</sup> OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369



court it was already too late to prevent these costs, since if the builder had to give a warning it would have been at the moment he started his work at the construction site, and already then the house was defective. Additionally, the court took into account that until the moment the judgment was given it was not proven that the client had tried to repair the construction and the court declared that irrespective of the client's defence (i.e. that he had no financial means to do so), he contributed to his own high energy bills by not remedying the original default in construction when he had found out about it. Taking it all into account the court concluded that the lack of warning did not contribute to the client's damage, both for cost of repair of the house and cost of high energy bills, and the second builder could not be held liable for not performing his duty to warn about the first builder's mistake.

The court in this case did not state explicitly that there was a breach of the duty to warn by the builder. The judgment rather only mentions that in a situation when the warning could not prevent the client's losses, the builder could not be held liable for the damage suffered by the client. Under the circumstances of this case it is clear that normally a warning should be given, since, as the court itself states, the builder needs to warn about any default that would not allow the client to receive a perfect end product. Consequently, it seems clear that there was a breach of the duty to warn in this case, since the second builder did not warn the client about the default that should have been obvious to him. In such a situation, as the judgment shows, the builder may still not be obligated to compensate the client for his damages, when there was no causal link between the lack of a warning and the loss. Yet, in my opinion, the court made a significant mistake in this case by not differentiating between the different losses sustained by the client. I agree that even if the warning had been given the client would not have avoided paying the cost for the repair of the house. Therefore, the lack of warning did not contribute to this loss of the client. However, if the second builder had warned at the moment of starting his work about the default of the first builder then the client would have had a chance to repair the construction as soon as possible and to restrict the high energy costs for himself. Taking this into account it seems wrong that the court claimed a lack of a causal link between these further losses to the client and the lack of warning. In regard of this second sort of damage to the client, the builder had a duty to warn, which he had breached. The court should, therefore, have made it clear that with regard to this second type of loss, despite the fact that the builder had breached his duty to warn and the fact that there was a causal link between the lack of warning and this second loss sustained by the client, this damage would not be compensated by the builder, due to it being apportioned to the client as a result of his own gross negligence in having the building repaired on time once he did become aware of the default<sup>182</sup>. Moreover, the court's reasoning fails to recognise that even if the client would not be able to claim damages in this situation, he is still left with other possible actions as far as breach of the builder's contractual obligations is concerned, e.g. price reduction or termination. I am, however, not aware whether or not these remedies were in fact claimed by the client.

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<sup>182</sup> See further chapter 7 (as to the liability and apportionment).

### 2.2.2. Precontractual duty to warn.

The contract concluded between the client and a professional party involved in the construction is a private law contract, which means that until the moment of its conclusion the parties are free to negotiate its provisions. Already in this precontractual stage it may happen that the professional party has certain duties towards the client, especially information duties that might include a duty to warn the client<sup>183</sup>. In the German legal system it is commonly recognised that the professional party would have precontractual duties of care and precontractual duties to inform towards the client, which if breached would lead to the liability of the professional party on the basis of *culpa in contrahendo*<sup>184</sup>. Specific regulations of these precontractual duties in contracts concluded with consumers are not to be found in the German BGB or even in rules on construction procedures, like VOB<sup>185</sup>. *Culpa in contrahendo* has been, however, recognised in case law on the basis that parties already by initiating business contacts might create a trust relationship that obligates them to care for each other's interests and that puts duties of care and duties to inform, including a duty to advise and a duty to warn, on them<sup>186</sup>. It seems, therefore, that the general source for the precontractual duty to warn would be the same as for the contractual duty to warn – the provision on good faith in the German Civil Code, § 242 BGB<sup>187</sup>.

For example, in the case of 9 July 1987<sup>188</sup> the BGH clearly stated that the builder could have a precontractual duty to warn. The case concerned a builder who was employed to deliver and install a power station at the glass production workshop of the client. Unfortunately, the chosen and installed power station was insufficiently powerful and faulty and could not be used by the client. The client claimed damages from the builder arguing, *inter alia*, that he should have been warned that this particular power station was improper for this construction. The BGH decided that the lower instance court had not properly considered this argument and should revise its judgment. The BGH stated that according to the good faith principle the builder should inform, advise and warn the client who does not have the necessary knowledge about the design and application of the installation prior to the conclusion of the contract. The builder should, therefore, make sure that the installation as ordered by the client could actually fulfil the client's needs and wishes. The BGH pointed out that these precontractual duties should apply especially in a situation when the installation ordered and conducted is innovative and untried, which was the case, and it was the builder who suggested using this particular material and/or method in the first place.

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<sup>183</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 348

<sup>184</sup> F. Nicklisch, G. Weick, *Verdingungsordnung für Bauleistungen: VOB Teil B*, München: C.H. Beck, 2001, Rdn. 8-12, 46-51; R. Kniffka, *ibr-online-Kommentar Bauvertragsrecht*, § 631, Rn. 180-188

<sup>185</sup> Certain precontractual duties in case a public contract for construction is being awarded have been regulated in VOB/A, but these regulations will be just briefly mentioned in this book since they mostly regulate granting of public law contracts.

<sup>186</sup> BGH 09.07.1987, VII ZR 208/86, BauR 6/87; OLG Jena, 09.12.2001, 7 U 614/98, IBR 2003,122; F. Nicklisch, G. Weick, *Verdingungsordnung für Bauleistungen: VOB Teil B*, München: C.H. Beck, 2001, Rdn. 19-31; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 24

<sup>187</sup> See for the application of the provision of § 242 BGB to precontractual situations: H. Roth in: *Münchener Kommentar BGB*, 2007, § 242, 72, p. 134-135; e.g. applied in OLG Koblenz, 31.03.2010, 1 U 415/08, IBR 2010, 313

<sup>188</sup> BGH, 09.07.1987, VII ZR 208/86, BauR 6/87

In such a case the builder was obliged to fully inform, advise and warn the client of all the disadvantages and risks involved with choosing this innovative installation.

In the above-described case the BGH compared the precontractual duty to warn with that of a designer who would intend to use new, innovative materials in the construction<sup>189</sup>. Therefore, it seems that the BGH would be inclined to apply this duty to warn also to designers. Possibly the precontractual duty to warn would not be limited only to builders: analogically to the text of provision § 4 No. 3 VOB/B it would bind any professional party whom the client would intend to employ and who would find himself in a trust position towards the client.

It is worth mentioning here that provisions of the VOB/A regulate fully the precontractual stage of concluding a construction contract. However, as has been mentioned in the introduction to German construction law, these provisions apply to awarding public contracts and regulate mostly competition procedures for granting public contracts. It is conceivable, however, that private parties would agree to regulate their relationship on the basis of all or some of the provisions of the VOB/A<sup>190</sup>. For example, § 9 of the VOB/A<sup>191</sup> states that the builder needs to receive a full, clear and complete description of what kind of works he will be expected to perform. If during performance of his works he finds out that more is expected of him, he might then claim additional compensation, aside the salary already agreed between the parties. However, in case the plans and descriptions delivered to him were not specific enough, he has a duty to inquire about what exactly he would be expected to do and possibly also a duty to warn the client that due to insufficient information given e.g. by the designer in the design plans, the client might need to pay more for the construction that he assumed would be necessary<sup>192</sup>. In my opinion, this type of provision could possibly be applied also by private parties to a contract, when the builder makes an offer to a client based on design plans delivered to him.

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<sup>189</sup> For the duty to warn of a designer applying novel materials see: BGH, BauR 1976, 66 f.

<sup>190</sup> B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 347

<sup>191</sup> § 9 VOB/A ed. 2006: “*Beschreibung der Leistung. Allgemeines.*”

1. *Die Leistung ist eindeutig und so erschöpfend zu beschreiben, dass alle Bewerber die Beschreibung im gleichen Sinne verstehen müssen und ihre Preise sicher und ohne umfangreiche Vorarbeiten berechnen können. Bedarfspositionen (Eventualpositionen) dürfen nur ausnahmsweise in die Leistungsbeschreibung aufgenommen werden. Angehängte Stundenlohnarbeiten dürfen nur in dem unbedingt erforderlichen Umfang in die Leistungsbeschreibung aufgenommen werden.*
2. *Dem Auftragnehmer darf kein ungewöhnliches Wagnis aufgebürdet werden für Umstände und Ereignisse, auf die er keinen Einfluss hat und deren Einwirkung auf die Preise und Fristen er nicht im Voraus schätzen kann.*
3. (...) (3) *Die für die Ausführung der Leistung wesentlichen Verhältnisse der Baustelle, z.B. Boden- und Wasserverhältnisse, sind so zu beschreiben, dass der Bewerber ihre Auswirkungen auf die bauliche Anlage und die Bauausführung hinreichen beurteilen kann.(...)”*

<sup>192</sup> OLG Rostock, 07.12.2006, 1 U 19/06, IBR Werkstattbeitrag

## 2.3. Dutch law.

### 2.3.1. Contractual duty to warn.

The source of the duty to warn may be found in different places in the Dutch legal system. Since the year 2003, the duty to warn of the builder is clearly defined in the Dutch civil code (“BW”) in the Article 7:754 BW,<sup>193</sup> which is originally based on one of the provisions of the *Uniforme Administratieve Voorwaarden voor de uitvoering van werken* (“UAV 1989”)<sup>194</sup>, namely its Paragraph 6 Sec. 14. It was, however, recognised much earlier in practice by the Dutch courts and doctrine on the basis of the general duty to act in good faith<sup>195</sup>. Furthermore, it may happen that many different standard provisions apply to different building contracts. Usually, these standard provisions also encompass an express contractual provision on the duty to warn. However, it is important to mention that the provisions on the duty to warn in the standard provisions are based on the general duty to act in good faith. This means that the parties to the contract would be seen as having a duty to warn even if the standard provisions were not incorporated into a contract and article 7:754 BW would not apply, as is the case with the designer’s duty to warn. The duty to warn would bind these parties even if there were no express contractual provision on it in the standard contract terms.

Article 7:754 BW provides that the builder must warn the client of inaccuracies in the design of which he is or should have been aware. The same duty applies in case there are defaults or inaccuracies within the materials the builder is provided with by the client. According to this provision, the term “materials” encompasses: the ground on which the builder is supposed to perform his contract, plans and drawings, calculations and other documents, which the builder may receive from the client. This is the main source of the builder’s duty to warn in the Dutch legal system<sup>196</sup>.

On the basis of this article, the builder would be bound by a duty to warn the client of a default by a third party (e.g. when a designer introduces a certain risk with his design or when the land that the client intends to purchase for construction is not suitable for it) even if this duty to warn has not been specifically written down in his contract. The decisive factor seems to be the builder’s knowledge of the risk, taking

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<sup>193</sup> “*De aannemer is bij het aangaan of het uitvoeren van de overeenkomst verplicht de opdrachtgever te waarschuwen voor onjuistheden in de opdracht voor zover hij deze kende of redelijkerwijs behoorde te kennen. Hetzelfde geldt in geval van gebreken en ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop de opdrachtgever een werk laat uitvoeren, alsmede fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.*”

<sup>194</sup> Uniforme Administratieve Voorwaarden voor de uitvoering van werken of 25.08.1989; Uniform Administrative Conditions for the execution of Works 1989, English text available at: <<[http://www.rgd.nl/fileadmin/redactie/Onderwerpen/Diensten/Inkoop/UAV\\_1989\\_English.pdf](http://www.rgd.nl/fileadmin/redactie/Onderwerpen/Diensten/Inkoop/UAV_1989_English.pdf)>>

<sup>195</sup> Asser-Kortmann-de Leede-Thunnissen, 5-III, 1994, nr. 537; Asser-van den Berg, 5-IIIC, 2007, nr. 98; HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt); HR 18.09.1998, NJ 1998, 818 (KPI/Leba); P. C. W. Viëtor, A. Moret, ‘Informatie in de aannemingsovereenkomst’, BR 2006/86, p. 405; M. A. B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitsprobleem’, BR 1991/2, p. 82

<sup>196</sup> Asser-van den Berg, 5-IIIC, 2007, nr. 98; P.C.W. Viëtor, A. Moret, ‘Informatie in de aannemingsovereenkomst’, BR 2006/86, p. 405

into account that the provision prescribes the duty to warn only for situations when the builder *is* or *should have been* aware of the default<sup>197</sup>.

The government set specific general conditions for the construction sector in the above-mentioned UAV 1989. The UAV 1989 contain general conditions for a construction contract. The provisions of the UAV 1989 have been accepted in cooperation with organizations representing different parties from the professional construction sector as well as consumer organizations. These provisions are most often applied when the projects are financed by the state or by local governments. However, many private projects are conducted in accordance with these provisions as well<sup>198</sup>.

Paragraph 6 Sec. 14<sup>199</sup> of the UAV 1989 provides that the builder is liable for any prejudicial consequences suffered by the client if the builder proceeded to execute his performance without pointing out obvious faults or defects with respect to the construction (inadequacy of construction materials, construction methods, client's instructions or directions, etc.) to the client. This way, the builder acts in breach of good faith. While the provision specifically points out that the builder is supposed to warn about the default before he starts his performance<sup>200</sup>, in my opinion this provision should be applied *a fortiori* as to defaults that the builder might find out while performing his obligations.

Another commonly used set of standard contract terms is the *Algemene Voorwaarden voor Aannemingen in het bouwbedrijf 1992* ("AVA 1992"). These standard provisions are usually applied when construction is performed within smaller, already existing buildings (repairs, etc.).

In the AVA 1992, Article 5 Sec. 6<sup>201</sup> provides that the builder is obligated to indicate to the client deficiencies within the construction or construction methods, which the client demanded to be performed, as far as the builder was aware of these deficiencies or should have been aware of them.

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<sup>197</sup> M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 91

<sup>198</sup> M. A. B. Chao-Duivis in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, 's-Gravenhage: IBR, 2010, p. 205-208

<sup>199</sup> "Indien de constructies, werkwijzen, orders en aanwijzingen, bedoeld in § 5, tweede lid, dan wel de bouwstoffen of hulpmiddelen, bedoeld in § 5, derde lid, klaarblijkelijk zodanige fouten bevatten of gebreken vertonen, dat de aannemer in strijd met de goede trouw zou handelen door zonder de directie daarop te wijzen tot uitvoering van het desbetreffende onderdeel van het werk over te gaan, is hij voor de schadelijke gevolgen van zijn verzuim aansprakelijk. Het in dit lid bepaalde is van overeenkomstige toepassing op de in § 5, vierde en vijfde lid, bedoelde gevallen."

<sup>200</sup> M. A. B. Chao-Duivis, E. M. Bruggeman, A. Z. R. Koning, *UAV 1989 Toegelicht*, Zutphen: Paris, 2005, p. 46-49; J. M. Hebly, N. Lorenzo van Rooij, *Aanneming van werk. De parlementaire geschiedenis*, Zutphen: Paris, 2004, p. 48-49; M. A. B. Chao-Duivis, A. Z. R. Koning, *Veranderende rollen. Een inleiding in nieuwe contractvormen in het bouwrecht*, Deventer: Kluwer, 2001, p. 72-73; Asser-van den Berg, 5-IIIC, 2007, nr. 98; P. C. W. Viëtor, A. Moret, 'Informatie in de aannemingsovereenkomst', BR 2006/86, p. 407; P. Vermeij, 'Bouwen in strijd met de voorschriften van het Bouwbesluit, enkele publiek- en privaatrechtelijke aspecten voor de praktijk', BR 2009/39, p. 214-216

<sup>201</sup> "De aannemer is verplicht de opdrachtgever te wijzen op onvolkomenheden in door of namens de opdrachtgever voorgeschreven constructies en werkwijzen (...), voor zover de aannemer deze kende of redelijkerwijs behoorde te kennen."

As far as the duty to warn of the designer is concerned, the main provision that may apply to it is Article 7:401 BW<sup>202</sup>. This article obligates him, as a provider of services covered within the scope of Article 7:400 BW<sup>203</sup>, to act with the care of a good provider of services. The very general duty of care that has been regulated by this article<sup>204</sup>, applies also to design contracts<sup>205</sup>. Further specification of the duty to warn of the designer might be found in case law, but on the basis of this article one might already expect of the designer to act with proper skill and due carefulness. The designer should act in a way that does not endanger the result of the construction, which might mean the necessity for the designer to issue a warning to the client in case he notes such a risk.

The designer's contract with the client used to be subjected to the *Standaardvoorwaarden 1997 Rechtsverhouding Opdrachtgever-Architect* ("SR 1997")<sup>206</sup>. It was standard practice to include these provisions as standard contract terms to the designer's contract. Moreover, a special set of provisions existed, which regulated the relation between the client and the engineers-office ("RVOI")<sup>207</sup>. In the year 2004, a new set of provisions has been agreed upon that applies to both contracts between the client and the designer and contracts between the client and the engineer (*De Nieuwe Regeling 2005* – simply meaning: the new regulation – abbreviates as "DNR 2005")<sup>208</sup>. The DNR 2005, therefore, was to unify the provisions of the SR 1997 as well as those of the RVOI and to enable the client to have the same general provisions applicable to a contract with a designer as well as to a contract with engineers and other consultants. The introduction of the DNR 2005 does not mean, however, that the other regulations may no longer be chosen and applied by the parties to the construction process. To the contrary, although it is advised to apply the provisions of the DNR 2005 in their entirety, the parties to the contract are always free in formulating their contractual terms. Certain organizations to which designers and engineers belong might recommend the contract to be concluded together with the application of e.g. the DNR 2005<sup>209</sup>. They publish and distribute only those standard contract terms to their members making it more likely that the parties will choose to apply these provisions in future contracts upon having become acquainted with them. Finally, in 2006 a new set of standard contract terms has been issued that is intended to apply specifically to contracts concluded by designers with clients who are consumers or consumer-like parties – *De Consumenteregeling 2006*

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<sup>202</sup> "De opdrachtnemer moet bij zijn werkzaamheden de zorg van een goed opdrachtnemer in acht nemen."

<sup>203</sup> "De overeenkomst van opdracht is de overeenkomst waarbij de ene partij, de opdrachtnemer, zich jegens de andere partij, de opdrachtgever, verbindt anders dan op grond van een arbeidsovereenkomst werkzaamheden te verrichten die in iets anders bestaan dan het tot stand brengen van een werk van stoffelijke aard, het bewaren van zaken, het uitgeven van werken of het vervoeren of doen vervoeren van personen of zaken."

<sup>204</sup> Asser-Kortmann-De Leede-Thunissen, 5-III, 1994, nr. 60

<sup>205</sup> See also: S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 46

<sup>206</sup> *Standaardvoorwaarden 1997 Rechtsverhouding Opdrachtgever-Architect*

<sup>207</sup> Regeling van de verhouding tussen opdrachtgever en adviserend ingenieurs-bureau

<sup>208</sup> *De Nieuwe Regeling 2005, Rechtsverhouding opdrachtgever-architect, ingenieur en adviseur, DNR 2005*; The New Rules 2005, English text available at: <<[http://www.groupa.nl/cms/upload\\_pdf/upload\\_11.pdf](http://www.groupa.nl/cms/upload_pdf/upload_11.pdf)>>

<sup>209</sup> E.g. KIVI-NIRIA (Het Koninklijk Instituut van Ingenieurs KIVI NIRIA), i.e. The Royal Institution of Engineers in the Netherlands, << <http://www.bna.nl/binaries/bna-downloads/dnr-en-cr/toelichting-dnr.pdf>>>

*Rechtsverhouding consument-architect* (“CR 2006”)<sup>210</sup>. This regulation is based on the DNR 2005 but it is significantly more limited in its scope. Namely, the practical application of DNR 2005 to consumer contracts had been questioned since its provisions are often very detailed and technical and not always necessary in smaller contracts. That is why the CR 2006 has been created as a lighter version of the DNR 2005 in order to be more consumer-friendly. It applies only to contracts concluded by consumers with the designer, and not with engineers<sup>211</sup>. While the simplification of the provisions that are to apply to consumer contracts is definitely beneficial for consumers, the standard set of provisions of the CR 2006 does not contain a provision on the designer’s duty to warn or the duty to inform the client, contrary to the provisions of the SR 1997 and the DNR 2005, which will be discussed in the following paragraph. The consumer still possibly could claim that the designer had such a duty to warn based on his obligation to inspect the construction site and coordinate the construction process, which may be given to him according to the standard description of the designer’s task (*CR 2006 Taakbeschrijving*) that is attached to the standard contract terms. The client could also make use of the provision of the Article 7 Sec. 2 of the set of standard contract terms of the CR 2006, where it has been said that the designer should be held liable for any ‘professional mistake’<sup>212</sup>. The professional mistake is defined as any default that would not have been made in given circumstances by any careful designer who acts with normal diligence, with experience needed to perform his tasks and who uses right materials<sup>213</sup>. It is feasible that when, in the circumstances of the given case, any careful designer should have recognised the default in the builder’s work the lack of warning about it to the client could be seen as a professional mistake of the designer leading to his liability.

Article 11 Sec. 5 of the SR 1997<sup>214</sup> says that the designer is obligated to inform the client timely of any risks. These risks encompass the alteration of construction costs as well as costs for assistance, which are related to the change of already made requirements, the making of new ones, the changing or postponing of making decisions or the making of savings on construction, which influence the design. In case the designer does not have an express contractual obligation to warn the client, e.g. due to his supervisory task during the performance of the construction, he might still be obligated to warn the client of certain risks involved with the construction on the basis of this provision. As an example may serve a case when the client approaches the designer after the design has been already prepared and informs him that he intends to employ a different builder than they previously agreed upon. The new builder might not be as highly specialised in similar constructions but is less expensive to hire. In such a situation, the designer may be expected to warn the client

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<sup>210</sup> De Consumentenregeling 2006 *Rechtsverhouding consument-architect*

<sup>211</sup> W. Th. Post, ‘Nieuwe voorwaarden voor architectenopdrachten: de Consumentenregeling 2006’, BR 2007/220, p. 940

<sup>212</sup> F. W. K. Rameau, ‘Nog een nieuwe regeling: de rechtsverhouding consument-architect CR 2006’, *Vastgoedrecht* 2006/5, p. 135

<sup>213</sup> “*een tekortkoming die een goed en zorgvuldig handelend architect onder de desbetreffende omstandigheden en met inachtneming van normale oplettendheid en met de voor de opdracht vereiste vakkennis en middelen uitgerust, heeft kunnen en behoren te vermijden*”

<sup>214</sup> “*De architect licht de opdrachtgever tijdig in over de gevolgen en eventuele risico’s, - wijziging van de bouwkosten en de advieskosten daaronder begrepen – die zijn verbonden aan het veranderen of vermeerderen van de gestelde eisen, aan het veranderen of uitstellen van beslissingen en aan het doorvoeren van bezuinigingen of andere wijzigingen met betrekking tot de opdracht.*”

of the risk involved with cutting costs versus preserving quality of the construction<sup>215</sup>. This duty is clearly related to the duty of care from Article 7:401 BW since the designer would need to act with the care of a good designer in order to make the client aware of the potential risk to the contract.

Another source of the designer's liability may be found in the regulation of Article 16 of the SR 1997, pursuant to which the designer is sometimes liable for acts of third parties. This provision shall be interpreted as pointing out that the designer has the duty to warn the client of "obvious" defaults in the work of third parties. The "obviousness" shall be such that the designer as a professional party should not have any doubt as to its existence. If the designer forsakes to grant the warning to the client, he shall be then found liable for the default of the third party based on article 16 of the SR 1997<sup>216</sup>.

Article 11 Sec. 10 of the DNR 2005<sup>217</sup> states that the advisor (i.e. not only the designer or the engineer, but also the builder or the sub-contractor if their contracts include a provision on giving advice to the client as far as the design or some part of it is concerned) is obligated to warn the client in case the information or data given by the client or in his name, or decisions made by the client or in his name, manifestly contain such shortcomings or show such deficiencies that the advisor would have acted in defiance of standards of reasonableness and fairness if he did not warn the client and just continued with the construction process.

Whether the duty to warn emerges in a certain case might be dependent on the competence of the builder and the competence of other professional parties employed by the client<sup>218</sup>. For example, the mistake may originate from the actions of the designer but the builder might not be the only other professional party involved in the construction that could warn the client about that mistake. The client may employ another specialist who may be more competent than the builder in the field in which the mistake is made. Should that influence the existence of the builder's duty to warn? The arbitral courts used to, in most cases, declare the builder not liable when the client employed a professional advisor who was responsible for the part of construction within which the default originated<sup>219</sup>. In such cases it was most often

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<sup>215</sup> Similarly, on cutting costs vs. preserving quality by using a different construction material: M. A. M. C. van den Berg, 'Verdeling van aansprakelijkheden en risico's bij moderne bouwcontractvormen', in: M. A. M. C. van den Berg, C. E. C. Jansen, *De ontwerpende bouwer*, Deventer: W.E.J. Tjeenk Willink, 1996, p. 79-80; RvA 17.12.1992, nr. 15.644, BR 1993, p. 737

<sup>216</sup> M. A. M. C. van den Berg in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, Deventer: Kluwer, 2007, p. 280; this article has not been discussed by S. van Gulijk in the same paragraph of the 2010 edition of this book.

<sup>217</sup> "De adviseur is verplicht de opdrachtgever te waarschuwen indien inlichtingen en/of gegevens verstrekt door of namens de opdrachtgever of beslissingen genomen door of namens de opdrachtgever klaarblijkelijk zodanige fouten bevatten of gebreken vertonen, dat hij in strijd met de eisen van redelijkheid en billijkheid zou handelen als hij zonder waarschuwing bij de vervulling van de opdracht daarop zou voortbouwen."

<sup>218</sup> On the complications that might arise if this criterium is used, read further: M.A.B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 82-86

<sup>219</sup> It is worth to note here that the position of the arbitral court seems to be in contradiction with the decision of the Dutch Supreme Court in the landmark case of 18.09.1998, NJ 1998, 818 (KPI/Leba): in that case the Dutch Supreme Court recognised that the knowledge or competence on the side of the client does not influence the existence of the duty to warn of the builder. This matter will be further discussed in the following chapter and not elaborated on here, taking into account that it concerns the duty to warn about the professional parties own mistake. See more on this matter in: N. E.



decided that the builder might have relied on the professionalism of the advisor and believed that the advisor would give the warning to the client if need be. For example, in the case of 15 November 2002<sup>220</sup> the client claimed that the builder had the duty to warn him about insufficient thickness of the coating. In the given case before choosing which coating to use the client, the designer, the builder and the sub-contractor together all visited a manufacturer of the coatings and observed the production process of the coating that they eventually decided on. The client thought it was decisive in this case that the builder observed the same production process as the designer and the sub-contractor (a specialist in this case), claiming that the builder had to have had enough knowledge to have a duty to warn about the unsuitability of this coating for the given construction. The court adjudicated that the sole fact that the builder followed the same course on the production process as the designer and the sub-contractor did not make him competent as far as coating was concerned. As a result, the court ruled that the builder did not have a duty to warn in this case. The court specifically took into account that the designer and the sub-contractor, who was a specialist in this particular production process, of which fact the builder was aware, approved the given production process.

In the case of 3 March 2006<sup>221</sup>, the arbitral court found the builder liable for the breach of the duty to warn in case the client employed separate professional advisors: the designer and the director of the construction. It has been stated in this verdict that the fact that professional advisors support the client does not influence (the existence or emergence of) the builder's duty to warn. However, in that case the arbitral court considered that the default should have been obvious to the builder and therefore his breach of the duty to warn was grossly negligent. In case of gross negligence of the builder, the arbitral court tends to hold the builder liable for breach of the duty to warn even though an advisor with special competence assisted the client<sup>222</sup>.

Recently, Dutch arbitration courts seem to follow the Dutch Supreme Court's position more often in this matter<sup>223</sup>. For example, in the RvA-case of 18 November 2009<sup>224</sup> the client expected the builder to warn him about a risk coming from a method of construction that was chosen in the design. The designer planned to lay a pile of turfs in a pyramid form that could lead to sagging of the ground as a result. However, this design method was not faulty, it only increased the risk of sagging of the ground after performance of the construction. One of the questions raised in this case was whether the builder had a duty to warn in case the client was a competent one. The arbitration court stated clearly that in order to determine whether the builder had a duty to warn on the basis of Paragraph 6 Sec. 14 of the UAV 1989, it needed to look only whether the default was a clear one and what kind of competence did the

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Tijssens, 'De betekenis van de deskundigheid van de opdrachtgever voor de waarschuwingsplicht van de aannemer naar Nederlands en Duits recht', TBR 2009/138

<sup>220</sup> RvA 15.11.2002, nr. 21.733, not published; confirmed in appeal as RvA 28.09.2005, nr. 70.750, BR 2006, p. 60; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 69 (No. 784)

<sup>221</sup> RvA 03.03.2006, nr. 25.856, BR 2007, p. 255; further discussed in 3.3.1

<sup>222</sup> M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 76; N. E. Tijssens, 'De betekenis van de deskundigheid van de opdrachtgever voor de waarschuwingsplicht van de aannemer naar Nederlands en Duits recht', TBR 2009/138

<sup>223</sup> HR 18.09.1998, NJ 1998, 818 (KPI/Leba)

<sup>224</sup> RvA 18.11.2009, nr. 30.728, TBR 2011/49

builder have. It was therefore not relevant, whether the client was competent himself<sup>225</sup>.

It might be interesting to observe here that the implied duty to warn of a professional party that is being analysed in this book might differ significantly from an explicit duty to warn. When the parties to a contract agree on its terms and conditions and choose to have a specific duty to warn as one of the contractual obligations they might decide together on the scope of this duty, as well as on the consequences of its breach. This means that the parties might, for example, agree that the professional party would be seen as aware of any default made by a third party in the construction process, regardless whether this default was obvious or not, whether it should have been noticed by that party or not<sup>226</sup>. At the same time, the parties might also decide to expressly limit (or broaden) the liability of the professional party in case the warning is not given, or to exclude the application of the contributory negligence defence. Taking into account the fact that one of the parties to this contract is a consumer, the contractual clause will of course have to comply with the fairness requirements, e.g. the professional party may not exclude his liability for breach of a duty to warn the client in all circumstances, since that clause would be considered unfair. In this respect, the implied duty to warn might be seen as a more standard one, since specific parties' intentions as to its scope will be difficult to prove, which means that the courts and arbiters would see its scope through general rules.

### 2.3.2. Precontractual duty to warn.

There is no doubt in the literature that the new article 7:754 BW encumbers the builder also with a precontractual duty to warn<sup>227</sup>. The text of this article makes it clear that the builder has the duty to warn the client at the moment of conclusion of his contract as well as while performing it. Since the warning is to be given when the builder is concluding a contract with the client, the text of the article suggests that the builder has a duty to warn also in the precontractual phase, when the contract has not yet been signed<sup>228</sup>. It does not, however, imply that the builder is obliged to actively look for defaults and risks that he could warn the client about. The builder has a duty to warn as far as he had the knowledge or should have been aware of such risks. Since the builder's role before the conclusion of the contract is limited, mainly to the estimation whether he can perform the design presented to him by the client and at

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<sup>225</sup> Other aspects of this case will be further described in the following chapters. The same sentiment has been expressed in the following recent cases: RvA 19.11.2009, nr. 29.623, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 29.07.2010, nr. 31.139, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

<sup>226</sup> See e.g. RvA 31.03.2010, nr. 29.444, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

<sup>227</sup> Asser-van den Berg, 5-IIIC, 2007, nr. 107; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. B. Chao-Duivis, 'De (on)wenselijkheid van informatieuitwisseling tijdens het aanbestedingsproces: een voorbeeld in de verte', BR 2005/129, p. 577; J. M. Hebly, N. Lorenzo van Rooij, *Aanneming van werk. De parlementaire geschiedenis*, Zutphen: Paris, 2004, p. 49; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 64

<sup>228</sup> This could mean that the builder is obliged to warn the client about defaults he should have noticed even if the client decided to conclude a contract with someone else. The potential builder's liability for the breach of the duty to warn could then only be tortious.

what cost, only risks that are or should have been evident to the builder in the process of making such estimations would give rise to his duty to warn<sup>229</sup>.

What is more uncertain is whether the builder has the duty to warn if parties to the contract choose the application of the UAV 1989 to it? Since in Paragraph 6 Section 14 UAV there is no mention of the duty to warn binding the builder at the moment of conclusion of the contract, it could be argued that in the system of the UAV 1989 there is no place for a precontractual duty to warn<sup>230</sup>. However, taking into account article 7:754 BW and the fact that the UAV 1989 does not regulate the duty to warn in the precontractual phase, it is argued that the precontractual duty to warn, defined by article 7:754 BW, would be applicable also in cases in which provisions of the UAV 1989 are used by the parties<sup>231</sup>.

Does that mean that without the introduction of article 7:754 into the Dutch Civil Code and based only on the provision of the Paragraph 6 Section 14 of the UAV 1989 the precontractual duty to warn would not be recognised? Also before the introduction of the article 7:754 BW the Dutch courts recognised the precontractual duty to warn in certain cases when the default in the design plans had been obvious and the builder was deemed to have known or to should have known about that default<sup>232</sup>. The legal basis for that precontractual duty to warn could be found then in the good faith and the principle of fair dealing that have been recognised in the precontractual phase in Dutch law<sup>233</sup>. In accordance with these principles, a party has to act with respect to the justified interests of the other party that it is aware of. The financial interest of the client in finding out that there are defaults in the design before the construction commences definitely belongs to the justified interests that the builder should take into account. If the builder warns the client in the precontractual phase the client still has the chance to adjust his construction plans appropriately to his budget, without having to rectify mistakes already made and make the necessary corrections conform to what has already been erected. In the gravest cases, the client could even give up on his construction plans. After the performance of the construction has started, however, the measures that the client would have at his

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<sup>229</sup> Asser-van den Berg, 5-IIIC, 2007, nr. 107; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; C. E. C. Jansen, H. W. R. A. M. Janssen, 'De precontractuele waarschuwingsplicht van de aannemer', BR 2004/363, p. 364-366; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 64

<sup>230</sup> Some not very clear reasoning as to this effect may be found e.g. in: RvA 07.07.2004, no. 25.119, BR 2005, p. 732, in which the arbiter rejects the duty to warn based on the UAV 1989, while at the same time recognising that in certain cases the professional party might have the duty to warn in the precontractual phase – without giving any legal basis for that

<sup>231</sup> Asser-van den Berg, 5-IIIC, 2007, nr. 108; RvA 8.03.2001, no. 21.407, BR 2001, p. 534; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. B. Chao-Duivis, 'De (on)wenselijkheid van informatieuitwisseling tijdens het aanbestedingsproces: een voorbeeld in de verte', BR 2005/129, p. 577; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingsplicht van de aannemer', BR 2007/46, p. 233; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 63-64

<sup>232</sup> as discussed in the following paragraph, e.g. RvA 26.06.1974, nr. 7143, BR 1974, p. 760; RvA 21.04.1978, nr. 8411, BR 1978, p. 697; RvA 08.03.2001, nr. 21.407, BR 2001, p. 122; RvA 19.12.2002, nr. 70.582, BR 2003, p. 59

<sup>233</sup> HR 15.11.1957, NJ 1958, 67 (Baris/Riezenkamp)

disposal to rectify the situation would be seriously limited. Thus, the precontractual duty to warn follows from the basic principles of the Dutch law and even if it had not been codified, the Dutch courts would have recognised it<sup>234</sup>.

The above-mentioned Article 5 Sec. 6 of the AVA 1992 does not regulate the duty to warn of the builder in the precontractual phase specifically, either. However, since it seems that according to this provision the builder will be liable in any case if he knew or should have known of the deficiency in the plans, it seems as if that provision would apply regardless of whether the builder realized the default before or upon concluding a contract with the client.

Two other sections in this Article 5 indicate the application of the builder's duty to warn in the precontractual phase. Firstly, Article 5 Sec. 4<sup>235</sup> states that in case of certain constructions, if it is necessary, the builder needs to acquire information as to the position of the wiring prior to commencing his work. Then, Article 5 Sec. 5<sup>236</sup> makes it clear that the builder is considered as knowledgeable as to the construction laws that had been in force at the moment he presented his offer to the client. This points to a certain duty to gather information on the side of the builder, which might increase the scope of his duty to warn, since it could be more easily assumed that he had or should have had the knowledge necessary to warn the client.

The provisions of the SR 1997 and the DNR 2005 that have been discussed above also do not exclude their application to the precontractual phase. It is imaginable that before the design contract will be signed, the client will share his ideas and demands with the designer and if the latter knows that some of them are risky or not feasible he should warn the client thereof immediately and not only after the contract has been signed, which could increase the costs of the client since he would already be stuck with the contract he committed to<sup>237</sup>. However, as has been already mentioned in the introduction, the scope of this research concerns the duty to warn of a professional party as to the risk coming out of a contract with a third party. The designer is normally the first party that would be employed by the client in the construction process, since only upon having design plans the client might go looking for someone who will agree to work with them. That means that the designer's duty to warn for defects in the construction process stemming from a contract with a third party almost inevitably can only be a *contractual* duty to warn. Situations in which the designer's duty to warn as to the risk coming out of a contract with a third party would be *precontractual* – i.e. a duty that applies *before* the contract with the designer is concluded – are hardly feasible, at least in traditional construction contracts where

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<sup>234</sup> Asser-van den Berg, 5-IIIC, 2007, nr. 107; W. G. Huijgen, 'Aanvulling Boek 7 nieuw BW met koop en huurkoop van onroerende zaken en aanneming van werk', BR 2002/1003, p. 1016; M. A. M. C. van den Berg, 'Bouwcontractenrecht in beweging' in: *40 Jaar Instituut voor Bouwrecht*, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 62-64; J. M. Hebly, N. Lorenzo van Rooij, *Aanneming van werk. De parlementaire geschiedenis*, Zutphen: Paris, 2004, p. 49

<sup>235</sup> "Indien de aard van het werk hiertoe aanleiding geeft, stelt de aannemer zich voor aanvang van het werk op de hoogte van de ligging van de kabels en leidingen."

<sup>236</sup> "De aannemer wordt geacht bekend te zijn met de voor de uitvoering van het werk van belang zijnde wettelijke voorschriften en beschikkingen van overheidswege, voor zover deze op de dag van de offerte gelden. De aan de naleving van deze voorschriften en beschikkingen verbonden gevolgen zijn voor zijn rekening."

<sup>237</sup> Similarly, on the increased costs for the client in case the builder warns him only after the contract has been signed: C. E. C. Jansen, H. W. R. A. M. Janssen, 'De precontractuele waarschuwingsplicht van de aannemer', BR 2004/363, p. 371

the client is a consumer or consumer-like party. In the following chapters, the precontractual duty to warn of the designer will therefore not be discussed.

#### 2.4. Comparison.

This chapter was focused on finding an answer to the question what are the legal grounds for the existence of the duty to warn in the three analysed legal systems. It seems that the contractual duty to warn about a risk coming from a third party has various legal sources in all three analysed legal systems. In England it is the least regulated and the least developed, *inter alia* due to the fact that it is not put in any statute or standard contract provisions, but mostly because of a lack of an established authority in English case law. The English cases presented in this chapter suggest that even though there is a tendency to see the need for the recognition of the duty to warn of a professional party in the construction sector as to a risk coming from a third party, the courts have a problem finding a legal source for that duty to warn. This is definitely a result of the principle of good faith not having been specifically recognised in English law. Still, as we could have seen, despite the courts struggling to find the legal basis for the duty to warn, it is being recognised in practice. The English courts have recognised that when such a duty of a builder or a designer binds them, it may have its source in the implied contractual terms, but only in two situations. Firstly, it is presumed to originate from the general obligation of the professional party to fulfil its explicit contractual duties, i.e. when the default shall impede or influence other explicit obligations of a builder or a designer, he is obligated to warn the client thereof. Secondly, it is presumed to have its source in the special relationship binding the professional party with the client – i.e. reliance by the client on the knowledge that the professional party is supposed to possess. These seemed to be the main prerequisites to claim that there was a duty to warn binding the professional party in the given case. However, this implied duty to warn would most likely be then recognised in tort. As I have already mentioned, the courts seemed reluctant to recognise either the contractual or the tortious duty to warn and it depended on the circumstances of each case whether or not a builder or a designer was bound by that obligation. For example in case the building contract was formulated in a very detailed manner, it was often decided by the English courts that there was no room left to imply either in fact or in law that the professional party was bound by a contractual duty to warn.

Although in recent years we could observe a tendency to more frequent recognition of the duty to warn in English case law, it must be stressed that it still has not been recognised as one of the main or more important obligations of the parties. As a rule the English courts recognised a duty to warn as part of another obligation of the professional party. The most common duty of the professional party to be considered as encompassing the duty to warn is the duty to act with proper and due care. However, in a few cases the duty to warn was observed as constituting part of another duty, e.g. a duty to guard against the risk of personal injury.

Already on the basis of the presented arguments it seems that the legal position of the client in England is the weakest of all three systems mentioned. Not only there is no clarity whether the duty to warn may be recognised in contract or in tort by the English courts, but also consumers will not even be able to assess what other obligation of the professional party the duty to warn falls under. This means that parties to a construction contract are far from being in a legally certain position when

they try to estimate whether there was a duty to warn binding the professional party and what consequences may be implied from its breach.

The duty to warn seems to have the most solid legal grounds in the Netherlands. It has been explicitly introduced to the Dutch civil code and thus its legal source is the strongest possible in a civil law country. In the Dutch legal system the duty to warn is explicitly implied by law. This provision has been added to the BW for the contract between the client and the builder after the duty to warn having been repeatedly recognised in practice – by courts and in various general conditions that are applied in the construction sector. Whether the duty to warn would bind the professional party in the construction sector on the basis of the statutory provision, standard contract terms or interpretation of older case law, it always has its roots in the application of the principle of good faith. This means that if no set of standard contract provisions is being used, the general provision of the Dutch civil code will still apply and give protection to the clients. Therefore it seems that the clients in the Netherlands have the most legal certainty that the professional party is bound by his duty to warn.

In Germany the duty to warn has been expressly established in the standard contract provisions that are being used as commonly as the ones binding in the Netherlands. And also similar to the situation in the Netherlands, if the parties to a contract do not apply the standard contract provisions, that does not mean that there would not be a duty to warn binding a professional party. To the contrary, it has been established both in case law and in German literature that the duty to warn in the standard contract provisions is just a specification of the duty to warn which was already applicable under the principle of good faith. Therefore, both the Dutch and German legal systems are clear in basing the duty to warn of a professional party acting in the construction sector to the principle of good faith and an obligation of that party to act in accordance therewith. The scope of the duty to warn will be discussed in the following chapters, but it is worth to note already that the scope of the duty to warn is not influenced whether a building contract incorporated the VOB/B-provisions or whether the provisions of the German Civil Code are applicable to it.

The dispute in the German legal literature concerns the character of the duty to warn. Namely it has been questioned whether the duty to warn, when it is not expressly regulated in contractual provisions, should be treated as an individual, main obligation, explicitly implied by law on the basis of the “good faith” rule. It’s important to note that when the duty to warn is not considered to form a main obligation of the professional parties, it may constitute a part of another main obligation of such parties. The most common situation in German law is the combination of a duty to warn and a duty to inspect. For example, when a builder is obligated to inspect the construction site and the work of his predecessors, then he also has a duty to warn the client of defaults that he encountered during his inspection. A negligent behaviour of the builder, i.e. an omission to conduct an inspection, results in the breach of not only his duty to inspect but also of his duty to warn. Contrary to the situation in the English legal system, this uncertainty as to the character of a duty to warn does not decrease legal certainty for consumers. They may remain certain that they will be able to claim damages for a breach of a duty to warn, regardless whether this duty is seen as an individual obligation of the professional party or whether it constitutes a part of another obligation.

The source of the precontractual duty to warn is correlated to the source of the contractual duty to warn in all three countries that have been analysed. Since in England there is no clear source for the contractual duty to warn, the same applies to the precontractual duty to warn. The principle of good faith is even less likely to apply in England to the precontractual phase of negotiations, since in English doctrine it is assumed that the future contractual partners might only have negative precontractual obligations towards each other, e.g. a duty not to deceive nor misrepresent. That assumption does not seem to leave space for the application of the positive precontractual obligation to warn. However, it might happen in practice that a need would arise for the recognition of such an obligation as it has been presented on the basis of the case described above.

In the Netherlands the statutory provision on the contractual duty to warn applies also to the precontractual dealings between the parties. It has been recognised in the literature that also the regulation of the duty to warn in standard contract provisions could be used in the precontractual phase, despite it not containing a clear phrasing on that.

In Germany precontractual duties to warn are not regulated explicitly, contrary to the contractual duties to warn which have been regulated in VOB/B. However, the literature and case law make it clear that the precontractual duty to warn should also be recognised in practice on the basis of the application of the principle of good faith. This could be claimed since the existence of a trust relationship is being recognised in the precontractual phase which obligated parties to act with due care towards each other.

From the above summary it can be concluded that there are vast differences between the sources of the duty to warn in English, German and Dutch legal systems. However, it must be observed that to some extent the differences seem to be more theoretical than practical. In all three countries the duty to warn mostly stems from a more general obligation. In English law, in recent years the courts have recognised more and more cases where the contractual parties were obligated to warn each other for the defects because of the general duty to act with proper and due care. In German case law it can be said that the duty to warn is a part of the general duty of the professional party to act with good faith. Only in the Netherlands the duty to warn is considered to constitute a main contractual obligation between the parties. It developed over time from the application of the 'good faith' principle. Ultimately then, the duty to warn in these three legal systems would have the same source – proper performance of its obligations by the professional party, whether it would be on the basis of good faith or of due care. However, the clear legal framework adopted in the Netherlands as far as the duty to warn the client is concerned provides the consumers with the most legal certainty. A Dutch consumer does not need to consider how likely it is that his claim damages for breach of a duty to warn will be recognised by Dutch courts, and if not whether he needs to sue for breach of another, more general obligation encompassing a duty to warn.

According to the definitions of the contractual and precontractual duty to warn both in Germany and in the Netherlands it seems that the professional party will be obliged to warn the client whenever he would be aware or should have been aware of the risk coming from the contract that the client concluded or was about to conclude with a third party. Since in England the duty to warn is not clearly defined it is difficult to estimate whether such an assumption of the scope of the duty to warn

would apply also to an English professional party. The following chapters should give us answers as to the scope of the duty to warn binding builders, designers, engineers and sub-contractors in these three legal systems.