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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 3. The builder's duty to warn the client.

While this book intends to present how various professional parties in the construction sector are bound by a duty to warn towards the client and other professionals in case they noticed or should have noticed a default in the performance of a third party, this chapter focuses on the duty to warn of one professional party only: the builder. The builder is understood broadly in this book. It could be a main contractor of the client but also any of the client's contractors who is responsible for building just a part of the construction. This chapter is the most extensive one in the whole book since in case the builder is the main contractor of the client he is then involved through most of the construction process and has the best chance to notice defaults of other professional parties. This means that the duty to warn of the builder is likely to have the broadest scope in comparison with the duties to warn of other professional parties involved in the construction process.

In this chapter, mostly on the basis of case law, I will try to present the scope of the builder's duty to warn the client. The case law gives us an indication as to what factors may influence the scope of the builder's duty to warn and for whose defaults he might need to warn the client about. On the basis of the presented case law, triggers of the duty to warn will be pointed out. Furthermore, it will be discussed whether the fact that the builder is bound by a duty to warn means that he needs to actively look for the defaults in the construction and if not then how attentive the client may expect the builder to remain. The fact that the client himself might be a competent party will also be taken into account to assess the scope of the builder's duty to warn. It will be also considered whether in case the client prescribes certain materials for the builder to use or recommends or even orders him to work with a specific other professional party this influences the scope of the builder's duty to warn.

3.1. English law.

3.1.1. Contractual duty to warn.

As follows from the chapter on the emergence of the duty to warn in England, the duty to warn of the professional party in the construction sector as to the risk coming out of a contract with a third party is hardly ever recognised in practice if that duty has not been expressly stipulated in the contract. Where it would be recognised without such explicit regulation in the contract, it is most likely to occur when there is an obvious default in the design plans prepared by a designer who had been employed by the client. One might think that the builder should not be liable in such a situation, since it is clearly the designer's mistake that leads to the default in the construction. Indeed, in general the client will have a claim against a designer if the prepared project has been faulty unless the designer has excluded or limited his liability. However, in case the designer has indeed limited or even excluded his liability it would be more beneficial for the client to hold liable the other professional party involved in the construction process – the builder. Some case law might suggest that in case there was a default in the design that the builder could have discovered during his work and could have warned the client and/or the designer about that, the builder

could be held liable for the client's damage in full²³⁸. That would leave the client in a position to claim all of his damages from the builder for the breach of the duty to warn. How much simpler it would have been if the builder had notified the client that he believed there was some incorrectness in the plans according to which he was going to proceed. In most cases, if the builder pays damages in full to the client, he might have recourse on the designer for at least part thereof since the fact that the builder knew of the defect in the design seems not to absolve the designer from his responsibility for this defect²³⁹.

If the duty to warn is recognised, however, how far should the builder's vigilance stretch? Are builders even obliged to search for potential problems, ambiguities or even the slightest uncertainties and warn the client or the designer about their existence? In the JCT Standard Form of 1963 there was a duty placed on the builder to notify the designer about any discrepancies that he might find between the design plans²⁴⁰. However, the courts interpreted that clause as the builder having a duty to warn the designer only about obvious mistakes in the plans and not as a duty to investigate whether there were such discrepancies between these documents²⁴¹. Based on the *Nowlan* case²⁴², the duty to warn would extend to all defects that were obvious to the builder. This means that the scope of the duty to warn depends in a large extent on the skill and judgment of the builder²⁴³. The same follows from the *EDAC v Moss* case²⁴⁴, a case that has been already mentioned in the chapter on the emergence of the duty to warn. Newey J. stated there:

“I think that if on examining the drawings or as a result of experience on site Moss [the builder – JL] formed the opinion that in some respect the design would not work, or would not work satisfactorily, it would have been absurd for them to have carried on implementing it just the same (...).”

The court does not expect the builder to look for the defects and risks in the design but when one should be clear to him, he should have a duty to warn. Could the duty to warn be extended to cases where there was no actual knowledge of the defect?

In *Victoria University of Manchester*²⁴⁵ the client independently employed the designer company and the builder. The builder was obliged to implement the design prepared by the designer company, who in turn specified even the materials, which the builder was supposed to use. One of these materials proved to be insufficient to fulfil its aim, i.e. provide resistance to water. The court adjudicating this case decided that the builder had a duty in tort to warn the designers of the defects in their design, in case he believed them to exist. What should trigger such duty to warn? The court stated:

²³⁸ Baxall Securities Ltd and Norbain SDC Ltd v. Sheard Walshaw Partnership (2001) 1 BLR 36

²³⁹ Pearson Education Ltd v. The Charter Partnership Ltd (2007) 1 BLR 324

²⁴⁰ D. Chappell, *The JCT Design and Build Contract 2005*, London: Wiley-Blackwell, 2007, p. 50

²⁴¹ London Borough of Merton v. Stanley Hugh Leach Ltd. (1985) 32 BLR 51

²⁴² 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

²⁴³ P. Jack, 'Getting back into shape – toning up fitness for purpose', *Construction Law Journal*, 2011, 27 (5), p. 360-368

²⁴⁴ Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131

²⁴⁵ *Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited* (1984) CILL 126; (1985) Con LR 52

“Belief that there were defects required more than mere doubt as to the correctness of the design, but less than actual knowledge of errors”.

The cited sentence creates a very unclear test. However, it can be argued on its basis that also in certain cases where the builder does not have an “actual knowledge of errors” he could be held liable for the breach of his duty to warn. This could mean that there are certain defects and risks that the builder should know about as a reasonable professional²⁴⁶. Still, this test does not seem to extend as far as to place on the builder a duty to find defects and detect risks²⁴⁷. This test was applied in regard of the tortious duty to warn, one might argue though that it could also be applied in regard of the contractual duty to warn. As it has been already mentioned in the introduction, English courts did not clearly differentiate between the tortious and contractual duty to warn. Taking into account that the tortious duty to warn might not be broader than the contractual duty to warn, it seems that the rules that apply to the tortious duty to warn could be also applicable to the contractual one²⁴⁸.

In *Lindenberg v. Canning*²⁴⁹ the same judge stated that the builder should warn the designer, who was seen to be acting as an agent of the client, as to any ‘suspected’ design defects²⁵⁰. Once again, the builder’s duty to warn seems to be limited to the defects that should be easy to discover for the reasonably competent builder.

As it has been mentioned in the previous chapter on the emergence of the contractual duty to warn, the judge who recognised the duty to warn in these cases has not given a clear justification for the existence of the duty to warn under the given circumstances²⁵¹. These cases could not be considered as the only authority for determining the scope of the duty to warn in English law. Fortunately, the point of view presented above could be confirmed by the arguments given in the case *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.*²⁵². The judge adjudicating this case stated that it is:

“A feature of good workmanship for a contractor to point out obvious errors, or if there is doubt or uncertainty in the plans, specification or other instructions, to ask for clarification so that the uncertainty is removed”.

²⁴⁶ O. Hayford, ‘Did you know... A “Construct Only” Contractor Can Be Liable For Design Defects?’, *Mondaq*, 07/07/2009, 2009 WLNR 12902774

²⁴⁷ M. F. James, *Construction Law*, Houndsmills: MacMillan, 2001, 2 ed., p. 17-20; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 301; L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, *Construction Law Journal*, 1994/10, p. 90-99

²⁴⁸ *Robinson v PE Jones (Contractors) Ltd*, [2010], T.C.L.R. 3 (QBD (TCC)), *Construction Law Journal* 2010, 26 (3), p. T79-119

²⁴⁹ *Edward Lindenberg v. Joe Canning and Others* (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71

²⁵⁰ D. Chappell, *The JCT Design and Build Contract 2005*, London: Wiley-Blackwell, 2007, p. 51

²⁵¹ 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

²⁵² *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.* (1997) 80 BLR 131

The builder's contract obligates him in most cases to constructing a building for the client pursuant to the design plans that the client delivers and at the construction site that the client points out. The builder's duty to warn does not only encompass the warnings about risks coming out of the design plans but also associated with the construction site. It is conceivable that the client would be convinced by the developer or by the seller of the land that it is suitable for the construction that the client has in mind while in reality it would have not been so. The builder could then have set the client straight by warning him about the unsuitability of the land for the given construction. By issuing such a warning, the builder would then inform the client of risks involved with e.g. buying a certain piece of land for a given construction and would prevent the client from concluding a contract that would be detrimental to him. Some of the English case law²⁵³ points out that the builder's obligations are not limited only to careful examination of the construction site in order to decide whether the design might be realized there and whether there will not be any impediments thereto. It rather seems that the standard of care put on the builder is higher and that he will be obligated to warn the client not only of any defects that might be observed within the construction site but also of defects that might appear on the adjoining lands or that are related to the subsoil. The builder would have this duty to warn in case any other careful and competent builder would have done so.

In *Batty v. Metropolitan Property Realisations C of A*²⁵⁴ the builder, working together with the developer²⁵⁵, inspected land on one side of the valley and upon that inspection concluded that the construction could take place there. However, on adjoining land and on the other side of the valley there were certain signs that indicated the need for subsoil examination, which would have then proved that the land was susceptible to landslips. The lawyers of the builder tried to argue that the obligation to conduct such an examination would have placed a too heavy burden of care on the professional parties to the contract. If such a duty would bind the builder he might be forced to conduct detailed and complicated investigations in order to ensure himself that every condition for construction has been satisfied and that he will not be held liable for not showing enough professional care and not warning the client of the defect he should have known about. They argued that the builder should have such duty only in case

“He does happen to look at it [the neighbouring land – JL] and sees a possible danger”,

but that he was under no duty to specifically take into consideration adjoining land.

The court decided that, on the basis of the facts of the case, any careful and competent builder would have conducted further land investigations. Two things need to be pointed out. Firstly, the court decided that it does not matter whether the defects could have been observed at the land owned by the builder or not. This means that the builder will not be able to defend himself by claiming that he did not have access to the particular piece of land. As the court stated

²⁵³ E.g. *Batty v. Metropolitan Property Realisations C of A*, [1978] QB 554; [1978] 2 WLR 500; [1978] 2 All ER 445; (1977) 245 EG 43; (1977) 7 BLR 1

²⁵⁴ *Batty v. Metropolitan Property Realisations C of A*, [1978] QB 554; [1978] 2 WLR 500; [1978] 2 All ER 445; (1977) 245 EG 43; (1977) 7 BLR 1

²⁵⁵ In the judgment jointly called ‘the builders’.

“The extent of the builders’ duty to investigate and examine the land before building on it was to be determined by what a careful and, competent builder would have done in the circumstances and therefore, it was not limited to observable defects on land owned by the builders or to which they had a legal right of entry if a careful and competent builder would have observed defects on neighbouring land and would not have built until there had been further investigation of the site and adjoining land or he had received a satisfactory expert’s report on the condition of the subsoil”.

Secondly, the court did not see any reason to limit the builder’s liability. The attorneys of the builder had argued that even if the builder was under a duty to further investigate it was “not a very heavy one”, i.e. the builder was not e.g. obliged to conduct subsoil investigation and should therefore not be held liable. The court did not share this point of view, stating that

“A builder’s liability for defects in the land was not limited to ensuring that the foundations complied with the building regulations”.

Taking into account the defence arguments of the representatives of the builder, the builder had no clause in his contract that would oblige him to investigate the land adjoining to the construction grounds. However, the court deemed the builder to be encumbered with this duty to investigate and then warn even if it was not an explicit contractual duty. The builder might not be employed to investigate the land on which the construction is to take place; however, he needs to do so in practice in order to properly fulfil his construction duties.

This very limited case law still enables us to draft the scope of the builder’s duty to warn. It might be filled in also by the cases on the duty to warn of the sub-contractor, taking into account that the duty to warn of the sub-contractor is based on the duty to warn of the builder²⁵⁶.

The scope of the builder’s duty to warn might be influenced also by the competence or actual knowledge of the quality problems (or possibility to gain such knowledge) of the client or other specialists that the client employs.

As far as the client’s competence and actual knowledge was concerned, one of the first cases, which mentioned the potential relation between the client’s competence and the builder’s duty to warn, was *Lynch v. Thorne*²⁵⁷. There, it was stated that the client was

“No expert himself in the mysteries of architecture and house building”.

Additionally, the Court of Appeal had no doubts whatsoever that the client relied entirely upon the skill and judgement of the builder. However, Lord Evershed M.R., adjudicating this case, stated that:

”For the plaintiff [the client - JL] obviously one cannot help feeling a great deal of sympathy; but a grown adult man is presumably capable of taking

²⁵⁶ Further discussed in chapter 5.

²⁵⁷ *Lynch v. Thorne*, [1956] 1 W.L.R. 303

competent skilled advice if he wants to; and if he elects not to do so but to make a bargain in precise terms with someone else, then, though no doubt he does rely upon the skill of the other party in a sense, he only does so in the sense that he assumes that the other party, as was the fact in this case, will do the job he has promised to do competently and, at best, that he believes that the house he is going to build will be a habitable house. But that is far short of importing into the transaction any such overriding condition or warranty”.

Upon the facts of this case it might be argued that not only if the client had experience with the construction process or employed someone who had such experience, but even if he had just a *possibility* to gain the necessary knowledge – e.g. the possibility to employ a specialist advisor, it would exclude the liability of the builder. This point of view, however, has not been confirmed in more recent case law²⁵⁸.

One might also consider whether the duty to warn, which has been placed on the builder, would alter if the construction concerned was at least partially a novelty, e.g. new materials were used or in a novel composition, the construction concerned some novel design, etc. In such a case, it might be argued that also the builder might not have been able to warn the client of the possible future defects resulting from the previously unknown design or usage of materials chosen by the designer. The courts seem to treat this matter differently, though. Namely, it is considered that the builder has to consider the proposed novel solutions twice as carefully in order to discharge his duty of acting with reasonable skill and care and he needs to bring all the potential risks involved to the attention of the client²⁵⁹. The court decided that the professional party cannot simply make an assumption that a material used in a novel construction would act in the same way as it used to do in different conditions. In respect of a design, which is “at and beyond the frontiers of professional knowledge”, such assumptions are not justified²⁶⁰. Thus if the builder sees that in the design plans novel materials have been prescribed to be used, he should inquire even more as to their suitability for the construction.

3.1.2. Precontractual duty to warn.

Even though the above-presented cases have not always given us a clear view on the scope of the builder’s duty to warn in England, there is at least some case law that I could discuss and analyse in this book. As far as the precontractual duty to warn

²⁵⁸ *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, which will be discussed in chapter 5 since it concerns the influence of the competence of the client on the sub-contractor. In the Canadian case *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 position of the designer and his liability for preparing a negligent project did not influence the judgement on liability of the builder. The client had a possibility to employ an engineer entitled to survey the work done by the builder, but he did not use his right. The court thought this to be a relevant indication that the client was depending solely on the experience and skill of the builder. The absence of the designer or the engineer advising the client during the materialization phase of the construction process seems to place a heavier burden of care on the builder in the Canadian law.

²⁵⁹ J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 287

²⁶⁰ *Independent Broadcasting Authority v. EMI Electronics and BICC Construction*, [1980] 14 BLR 1

of the builder in England is concerned, however, this is not the case. I have not found any cases discussing even a potential precontractual duty of the builder to warn the client. Taking into account the fact that the source for even the contractual duty to warn is not properly established, the lack of case law on the precontractual duty to warn does not come as a surprise.

3.2. German law.

3.2.1. Contractual duty to warn.

In this paragraph I will discuss both cases concerning contracts in which the VOB/B-provisions have been implemented into a building contract, as well as cases in which provisions of the BGB are applied. However, in practice this distinction does not seem to influence the scope of the builder's duty to warn²⁶¹.

Generally it can be stated that the scope of the builder's liability for not warning the client about the mistake in the design plans has been numerously elaborated upon by German courts²⁶². In a judgment of 28 January 2003, the OLG Hamm rightly noticed that the exact scope of the builder's duty to warn could not be defined in general terms and depended on the particularities of each case²⁶³. Such particularities may encompass *inter alia* the specifically prerequisite knowledge of the builder, the form and scope of his contractual obligations, contractual aims, as well as whether his obligations lay within the scope of his standard field of practice. The duty to warn seems to be the broadest when it concerns situations, which would normally lie within the scope of the builder's obligation. For example, if the client ordered pre-fabricated materials, ready to be used by the builder, there is no doubt that the builder would be under a duty to warn the client if there was some default within these materials²⁶⁴. According to the standard practice the builder would have been obligated to take care of the supply of such materials and that was why his competence therein could not give rise to any doubts²⁶⁵. The duty to warn would be as important when it would concern obligations of another builder, also employed at the construction site, on whose work the builder would have to rely to some extent²⁶⁶. The narrowest duty to warn is applied with regard to selecting the planned method of construction, due to

²⁶¹ In Chapter 2 I explained that where the VOB/B are not applicable and therefore no duty to warn is imposed on the builder on the basis of the VOB/B, such a duty is in fact based on § 242 BGB.

²⁶² E.g. OLG Frankfurt, 30.10.1998, 24 U 245/95, NJW-RR 1999, 461; OLG Hamburg, 07.07.2000, 12 U 65/98, NJW-RR 2001, 1534; OLG Naumburg, 07.08.2007, 9 U 59/07, IBR 2009, 451; OLG Karlsruhe, 17.03.2011, 13 U 86/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

²⁶³ OLG Hamm, 28.01.2003, 34 U 37/02, BauR 2003, 7, p. 1052; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 293; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 27

²⁶⁴ E.g. OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550

²⁶⁵ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 306; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 25

²⁶⁶ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 306; 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. 27

the fact that it belongs strictly to the designing phase, in which the client usually employs his own specialists, namely designers or engineers.

Still, as has been mentioned in the chapter on the emergence and the source of the duty to warn, the builder might have a duty to warn if he noticed or should have noticed a default within the design plans. In general, the builder does not have the duty to inspect the work of the designer and other professionals employed at the construction site²⁶⁷. However, in case they make a mistake that should have been obvious ‘at a glance’ to the builder, he should warn the client about that. According to Digel, the number of cases in which the builder is held liable for not having warned the client about the default in the design plans is increasing²⁶⁸.

For example, in the case of 17 December 1993²⁶⁹ the OLG Düsseldorf considered a case in which the builder was employed to cover the balcony of the client with the top layer of water-resistant materials. The designer in this case did not provide in his design for any water-resistant base materials to cover the balcony’s floor. The top layer itself could not successfully protect the balcony from rainfalls. The client claimed damages from the builder for improper performance. The builder defended himself by saying that his performance was without any defaults and that it was the mistake of the designer that caused the damage. The court decided that the builder, before commencing with his own work, was obliged to check whether the previous state of the balcony’s floor guaranteed sufficient protection against rainfall if used as a base for the top layer that the builder was supposed to place. Pursuant to § 4 No. 3 VOB/B the builder was supposed to warn the client that he saw a risk in performing his work as he had been ordered to do. The builder should have issued the warning also in case he was not nor would have been employed to cover the balcony’s floor with the basecoat.

Also in the more recent case of the OLG Celle of 12 December 2001²⁷⁰ it was stated that if the builder’s performance could be influenced by the preliminary works performed by another entity or even by plans made by a designer, the builder had the duty to inspect such work or such plans in order to establish whether they had been diligently prepared and constituted a solid basis for his future work. If there was a possibility that they might have hindered his performance, the builder had the duty to warn the client thereof. Once again the provision of § 4 No. 3 VOB/B was applied, however, OLG Celle discussed also the scope of the duty to warn. The court stated that the limits of the duty to warn were set by the standard of reasonableness and had to be adjudicated individually and separately for each case, due to the specific circumstances of each case²⁷¹. What will be demanded from the builder in each particular case, depends on the professional knowledge that can be expected of the builder, on his knowledge of the factual situation – of works performed by the previous builders at the construction site – as well as from all other circumstances,

²⁶⁷ See also: C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 295-6

²⁶⁸ A. Digel, ‘Fachunternehmer muss auf fehlerhaftes Lüftungskonzept des Fachplaners hinweisen!’, IBR 2008, 148

²⁶⁹ OLG Düsseldorf, 17.12.1993, 22 U 119/93, OLGR 1994, 159; R. Knychalla, ‘Prüfungs- und Hinweispflicht bei Balkonbelagsarbeiten’, IBR 1994, 156

²⁷⁰ OLG Celle, 12.12.2001, 7 U 217/00, NJW-RR Zivilrecht 2002, 17, p. 594

²⁷¹ See also: BGH, 23.10.1986, VII ZR 48/85, BauR 1987, 79, NJW 1987, 643; OLG Köln, 10.03.1987, 22 U 221/86, BauR 1988, 241

which should be looked upon by the reasonable and diligent builder as significant²⁷². The court noticed also that the builder's duty to inspect and to warn the client could be less significant or that he could be completely released from it, in case the client employed a specialist to perform these other works²⁷³. However, when the default e.g. in the design plans should be obvious to the builder, the sole fact that there was a specialist employed by the client will usually not release the builder from his liability²⁷⁴. In case the builder does not fulfil that duty, his own performance is negligent and he shall be held liable. In the mentioned case the builder was indeed found liable, even though there was a specialist employed by the client, due to the fact that the default should have been obvious to the builder.

In the case of 23 April 2002²⁷⁵ the OLG Dresden further elaborated on the builder's duty to warn the client about a default in the designer's plans. The court stated that generally pursuant to provision § 4 No. 3 VOB/B the builder was obligated to warn the client of the default in the planned method of construction. This obligation encompasses also the duty to inspect whether the designer's plans are appropriately prepared in order to reach the construction aims adopted by the client²⁷⁶. The court stated, however, that the builder should be liable for not fulfilling his duty to inspect and warn only when the default in the designer's plans should have been obvious to him, given the knowledge, which could have been expected from a professional acting in his field of expertise²⁷⁷. That means that, although the builder is expected to assess the designer's plans, he would not be held liable for not warning the client of defaults which could not have been obvious to him as a common builder but which would have been obvious to any other competent designer²⁷⁸.

In the above described case the court decided that the builder should have the duty to inspect whether the designer's plans are sufficient to reach the client's aims. In the case of 8 February 2008²⁷⁹ OLG Düsseldorf confirmed that the builder's contractual obligations are not limited to just performing the agreed tasks, but stretch out to making sure that the construction will be as functional as the client wished for it to be²⁸⁰. This obligation is not diminished when the builder performs exactly as the parties have agreed upon or in accordance with all the technical rules then binding. The construction will be faulty when the end result envisaged by the client will not be achieved, also if it happens due to the faulty design plans or materials delivered by the client. The builder may avoid liability for the faulty construction only if he warns the client about the defaults that he saw or should have seen within the default plans,

²⁷² See also: C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 298-300

²⁷³ OLG Celle, 16.03.2000, 13 U 126/99, IBR 2001, 178; OLG Köln, 10.03.1987, 22 U 221/86, BauR 1988, 241; for the list of old cases on this subject see: ZfBR 1998, 244

²⁷⁴ OLG Celle, 16.03.2000, 13 U 126/99, IBR 2001, 178; OLG Köln 10.03.1987, 22 U 221/86, BauR 1988, 241

²⁷⁵ OLG Dresden, 23.04.2002, 15 U 77/01, BauR 2003, 2, p. 262

²⁷⁶ 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. 203

²⁷⁷ Also upheld in: BGH, 30.04.1992, VII ZR 185/90, BauR 1992, 627; OLG Düsseldorf, 15.04.1997, 21 U 168/96, BauR 1997, 840; OLG Frankfurt, 30.10.1998, 24 U 245/95, NJW-RR 1999, 461

²⁷⁸ The fact that the builder's liability in given circumstances should only be limited to cases in which the builder should have recognised the default in the design (which means when the default had to be obvious to any diligent, reasonable builder) was stressed some years earlier in German literature, see e.g. G. Kaiser, *Das Mängelhaftungsrecht in Baupraxis und Bauprozess*, Heidelberg: Müller, 1992, Rdnr. 328, 330 f., p. 649 ff.

²⁷⁹ OLG Düsseldorf, 08.02.2008, 23 U 58/07, IBR 2008, 665

²⁸⁰ This judgment has been based on a verdict of BGH, 08.11.2007, VII ZR 183/05, NJW 2008, 511.

delivered materials or previously conducted works while checking their fitness for and usefulness to the whole construction. Once again, the court determines that the boundaries of this duty to warn should be set by the expertise that the builder could be expected to have and by all circumstances of the case.

As it has been mentioned in the chapter on the emergence of the duty to warn and signaled in the above paragraph, the builder might not be expected to warn the client of the default in works of a designer or of another builder in case he did not have sufficient knowledge to recognise it²⁸¹. Let us take a closer look at the judgments of German courts, which specify the scope of the builder's duty to inspect and warn in order to see what kind of expertise, and diligence is needed from the builder.

In the case of 19 July 2006²⁸² OLG Köln adjudicated a case in which the client employed an expert builder to conduct some deep foundation works with the use of displacement piles without lost tubes. At the moment of the conclusion of the contract, when the parties agreed on this construction method, the client was not yet in possession of the soil expertise conducted at the construction site. Later, the specialists who prepared it presented the soil expertise to the builder; however, it was incomplete and inaccurate. After the construction had been conducted, certain cracks appeared on the walls due to the use of the displacement piles. It turned out that the construction method used was not suitable for that particular construction site. The specialists who prepared the soil expertise clearly had made a mistake and should not have presented the ground under the construction as allowing this construction method. The question was whether the builder should have noticed the default in the soil expertise and warned the client about that. The court decided that the builder in this case should not have trusted in the soil expertise presented to him. The court stated that, in general, the builder is not required to inspect the soil himself or to order such an inspection and he may trust in the soil expertise presented to him by another specialist. However, the builder needs to review that soil expertise as to its plausibility and to check whether it is complete and if not, he needs to warn the client about that. The scope of the duty to warn should be even broader in case the builder, as in this case, is a specialist in a given construction method and knows what kind of risks to expect. Additionally, the court mentioned that it did not matter that the soil expertise had not been given to the builder before the contract was concluded and before the builder committed himself to a certain construction method. The builder was required to give a warning to the client at the moment that he realized the risk to the construction, whether he realized this during the performance of his works or even afterwards.

In the above case it was decided that the builder should have had the necessary knowledge to suspect a default in the plans delivered to him, especially since he was a specialist in the given construction method and should know what conditions needed to be fulfilled in order to apply it. In the case of 16 September 2008²⁸³ OLG Hamm also found the builder in breach of his duty to warn on the ground that the default in the construction should have been easily noticeable by him due to his competence. The builder was in this case a garden and landscape builder and was employed by the client to build a garden annex next to his newly built house. His work was not in itself

²⁸¹ M. O. Hilgers, 'Einbau einer Klimaprüfkammer: Muss Auftragnehmer klüger sein als ein Fachingenieur?', IBR 2007, 192; OLG Köln, 06.12.2005, 22 U 72/05, IBR 2007, 192

²⁸² OLG Köln, 19.07.2006, 11 U 139/05, IBR 2007, 420

²⁸³ OLG Hamm, 16.09.2008, 26 U 31/06, IBR 2009, 1176

faulty. However, the question was whether he should have noticed that the masonry works conducted previously, which were in direct contact with the soil, were not sufficiently waterproof. The court decided that the builder had such a duty to warn, especially since it was considered the 'daily bread' of the garden and landscape builder to check whether the construction was sufficiently waterproofed. This default was also easily noticeable for the builder. The waterproofing materials were black, thus they should stand out from the construction site. If the builder started his works on material that was not black, that fact should immediately have lit a red lamp with him that the construction was not sufficiently waterproofed. By not warning the client, the builder acted negligently in this case.

In the case of 27 May 2008²⁸⁴ OLG München decided that the builder who was employed to build in a heating system does not have to know whether the materials he was provided with would manage to heat up the whole construction in a way that the client expected it to. The builder would have had to have the knowledge of an electrician to be capable of calculating that. Instead, the court decided that the builder did not have to study the electrical components of the heating system and could trust in the expertise of the company, which delivered the materials and advised the client on choosing them. The court included in its judgment the fact that the expert consulted by the court had stated that it is not, in general, expected from builders to have knowledge about the electrical components of construction.

Therefore, if the default in the plans or the work of previous builders should be visible for the builder, the builder will be held liable for not inspecting the construction site sufficiently and not warning the client about the risk to the whole construction²⁸⁵. However, when the default lies within the area of expertise that the builder is not familiar with nor should be competent in, the builder cannot be held liable if he does not notice and warn the client about that default²⁸⁶.

In certain constructions the builder will have a free choice of the construction materials he would have to use, in others this choice will be taken away from him. The construction materials might be chosen by the designer, who might even order the materials himself and have them delivered to the construction site. Alternatively, the designer could also choose the materials but leave it to the builder to order them. The builder would be then limited to ordering such materials as had been specified by the designer. In the last two cases, the builder might still be liable for not warning the client that the materials were not suitable for the given construction, even though it was the designer who prescribed them. The builder has in such a situation a duty to inspect such materials and warn the client if he considers them faulty or insufficient to reach the aim that the client intends to achieve with his construction.

For example, in the case of 17 March 2011²⁸⁷ the OLG Karlsruhe considered whether the builder should warn the client that the concrete that he was ordered to use by the designer needs a long time to dry. The court decided that since the builder was aware of the construction grounds and knew that after laying down the concrete it

²⁸⁴ OLG München, 27.05.2008, 28 U 4500/04, IBR 2009, 325; IBR 2009, 326; IBR 2009, 1213

²⁸⁵ M. Seibel, 'Schadensersatz- und Vorschusspflicht des Gartenbauers bei unterlassener Aufklärung!', IBR 2009, 1176

²⁸⁶ E.g. LG Wiesbaden, 30.05.2008, 3 O 207/04, IBR 2008, 1141 (upheld by OLG Frankfurt, 03.04.2009, 19 U 148/08, IBR 2009, 324); T. Stritter, 'Parkettverleger muss Restfeuchte des Estrichs, nicht jedoch Konstruktion und Aufbau einer Tiefgarabendecke prüfen!', IBR 2008, 1141

²⁸⁷ OLG Karlsruhe, 17.03.2011, 13 U 86/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011) ; see also: G. Hein-Röder, '2/3 Planungsverschulden bei Ausschreibung ungeeigneten Baumaterials!', last correction: 23.06.2011 (full text found on <<www.ibr-online.de>>)

would be surrounded on three sides with foil, he should have been aware that the drying time of the concrete would be prolonged. This means that the builder should have warned the client about a risk of proceeding with other stages of the construction process before the concrete dries out. The fact that the concrete and the method of its application was chosen by the designer, who had sufficient professional knowledge to know of this risk, did not influence the scope of the builder's duty to warn, according to the court.

This duty to warn has its limits, however, in the professional knowledge that can and should be expected of the average builder. The builder is not obligated to weigh, calculate and thoroughly examine such materials. The builder has a duty to warn only when any other average builder would have noticed and recognised a default in the same circumstances²⁸⁸.

The liability of the builder for not warning the client that materials intended to be used were not suitable for the particular construction was considered in the BGH's judgment of 12 December 2001²⁸⁹. The BGH stated in this case that the builder should be released from his liability in a case when the materials, which were used at the construction site, were a novelty and during the time when the decision was made about their application in the construction there was no common knowledge that their particular characteristics made them unsuitable for that construction. The court recognised that according to the state of knowledge at the time of adjudicating the case there was no doubt that the usage of other materials would have been more beneficial for the construction and would enable the achievement of the client's aims. However, according to the state of knowledge in the year 1991 when the decision was made, which materials to apply, the choice to use that particular brand of materials was perfectly reasonable and could therefore not lead to the builder's liability. The court expressly denied also the possibility of the builder's liability for non-fulfilment of his duty to warn the client that the materials, which would be used in the construction, were novel and that some of their characteristics had not been tried out in practice, yet. Objectively, the court recognised that such a duty to warn existed. However, in this particular case the court did not find that non-fulfilment of such duty resulted in causing the client any loss. The court stated that due to the fact that the builder was not a producer of those materials he could not have had more knowledge thereof than the producer had and so the builder was justified to rely on the producer's assurances that such materials were suitable for the planned construction.

In general, the builder will not be released from this duty to warn as to the default in the materials even if the client is a professional party himself, with an expertise as to these materials. In such a case the builder would still be expected to at least review the materials in order to see whether there are no clearly visible faults²⁹⁰.

The builder's duty to warn is not limited to the defaults in the construction that have been made by the designer. As it has already been mentioned the builder needs to warn the client about any risks that might prevent the client's aim in the

²⁸⁸ OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550; 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. 25-26

²⁸⁹ BGH, 12.12.2001, X ZR 192/00, BauR 2002, 6; the same reasoning was applied in a newer case: OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550

²⁹⁰ S. Bolz, 'Fachkundiger GU: Entfällt Prüfungs- und Hinweispflicht des NU für bauseitige Betonlieferung?', IBR 2008, 24; under all circumstances of the case the builder might be exceptionally released of his duty to warn: OLG Saarbrücken, 21.08.2007, 4 U 448/03, IBR 2008, 24

construction to be achieved, despite the builder performing his work correctly, in case the builder knew of these defaults or should have known about them²⁹¹. Is the builder then obligated to warn the client about the risk coming from the performance of another party than the designer that is working at the construction site, e.g. another builder?

As has already been mentioned in the previous chapter, in a judgment of 15 February 2001 OLG Bremen²⁹² recognised the builder's duty to warn in a case where the VOB-provisions had not been implemented into the contract, stating that the principle of "good faith" obligated the builder to protect the client from suffering any loss, which in this case came from a contract with another builder²⁹³. The client was the owner of the land on which he intended to have a house built. To this end he employed two builders: one was supposed to conduct deep excavation works and then fill the hole with sand as a foundation for further works, the other was supposed to build the house thereon. After the construction was completed it turned out that the first builder had performed his work negligently as a result of which cracks appeared on the inside and on the outside of the house. The client claimed damages from both builders, claiming that the second builder should have inspected the works of the first builder before he commenced his own works. The court stated that indeed every builder who commences work at the construction site, which follows some works that have already been performed there and who has to rely to some extent on those previous works, is obligated to inspect their result and even to make some inquiries thereto. Namely, he is obligated to make sure that the previously performed work and used materials constituted a suitable ground for his own work and that they did not have any features that could undermine the quality and effect of his own work. The scope of such duty to warn depends on the characteristics of the particular case, which the court states with reference to an earlier judgment of the German Supreme Court²⁹⁴. What could influence that scope was for example the experience and professional knowledge that could be expected from every builder²⁹⁵, his knowledge of the previous works performed at the construction site and of all circumstances, which a diligent and reasonable builder should acknowledge as bearing some importance during his inspection of the site²⁹⁶. It was then stated that the scope of the builder's duty to warn would be as broad as his inspection of the construction site would be essential for reaching the planned construction effects. On that ground the court recognised that in case of the construction of the whole house from scratch, the duty to warn should be the broadest. In case the builder would not want to or could not properly inspect the works performed by his predecessor, e.g. when he knew he was not experienced enough in that field or did not possess the required knowledge thereof, then he should have employed a specialist in that field to help him perform his duties. It seems, however, that the court did not consider all consequences that its

²⁹¹ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 305

²⁹² OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10

²⁹³ BGH 23.10.1986, VII ZR 48/85, BauR 1987, 79, NJW 1987, 643; OLG Düsseldorf, 10.06.1997, 21 U 188/96, BauR 1998, 126, NJW-RR 1997, 1450, 1451; U. Werner, W. Pastor, *Der Bauprozess*, Köln: Werner, 2008, Rdnr. 1519, p. 948

²⁹⁴ BGH, 4.11.1965, VII ZR 239/63, *Schäfer/Finnern*, Z 2 410 Bl. 29

²⁹⁵ BGH, 4.11.1965, VII ZR 239/63, *Schäfer/Finnern*, Z 2 410 Bl. 31; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 30

²⁹⁶ BGH, 28.02.1956, VI ZR 354/54, NJW 1956, 787; BGH, 28.10.1971, VII ZR 139/70, WM 1972, 76; BGH, 23.10.1986, VII ZR 48/85, BauR 1987, 79

decision might have. For example, the court did not take into account which party would have to pay for the expertise of an additional specialist that the builder would employ and how such a decision would influence the general costs for the construction and for the builder's work²⁹⁷.

In another judgment of 20 July 1994, the OLG Düsseldorf²⁹⁸ elaborated on the duty to warn of the builder about a risk coming from the performance of another builder. In that case the builder was employed to finalize the working space in a newly constructed building. Before he commenced his work, he had noticed that at that particular working space there had already been some construction debris present – as a result of the original construction. The court stated that in such circumstances the builder had the duty to warn the client that there was a danger of damage to the exterior insulation of the cellar by the debris that had been left at the construction site. Once again, it was stressed by the court that as soon as the builder spotted something at the construction site that he knew could endanger the whole project – he should have immediately warned the client thereof.

Indeed, it was stated in the case of 30 November 2005²⁹⁹ by OLG München, that the full and proper performance by the builder of his contractual obligations does not limit itself to just completing all his tasks faultlessly in isolation from other parts of the ongoing construction. In particular, the builder should be concerned and required to check the work of his predecessors at the construction site, on whose work the results of his own performance might rely³⁰⁰. However, even if the builder assumes that his own work will not suffer due to the default in the works of another builder, he still has the general duty to cooperate with other professional parties at the construction site and to act in good faith. This obliges him to warn the client of the risk to the construction as a whole. OLG Düsseldorf in the case of 11 October 2007 has explicitly stated this³⁰¹. This case gives us also one possible explanation why the client would claim damages from the builder who did not warn him about the default in the works of another builder and not directly from the builder who made the default. Namely, in this case the builder who performed faultily was insolvent by the time the damage manifested itself in the construction.

In a decision of 25 May 2011³⁰² the OLG Brandenburg considered a case in which a builder was employed by the client to install a borehole heat exchanger for his house. The house came already equipped with two heat pumps that were installed more than 10 years earlier by another builder. The builder renewed the heating system and integrated the old heat pumps within it. Shortly after the construction was completed it turned out that the new heat exchanger despite working, i.e. processing water, did not emanate any heat. The check-up of the whole construction revealed that the two old heat pumps stopped working at a certain point and disrupted the whole system³⁰³. The client claimed that the builder had a duty to warn him about the risk of

²⁹⁷ More on that in: T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 31-33

²⁹⁸ OLG Düsseldorf, 20.07.1994, 22 U 15/94, NJW-RR Zivilrecht 1995, 214

²⁹⁹ OLG München, 30.11.2005, 27 U 229/05, IBR 2006, 551; IBR 2006, 613

³⁰⁰ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 28

³⁰¹ OLG Düsseldorf, 11.10.2007, 5 U 6/07, IBR 2008, 432

³⁰² OLG Brandenburg, 25.05.2011, 13 U 83/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

³⁰³ The facts of the case do not make it clear whether the pumps stopped working altogether or whether they continue to work but not at a level that would allow the heating system to provide sufficient heat

not exchanging these two old heat pumps. The court agreed that in general the builder has a duty to inspect the previous works conducted at the construction site and see whether they constitute a proper foundation for his own works. The builder is obliged to check whether if he continues upon the work of another builder, his own work will be able to lead to the result that the client aimed at. It did not even matter in this situation that the heat pumps were already installed and hidden within the walls of the house – the builder still needed to make sure that if he integrated them into the heating system he was creating, they would work properly. However, it was proven that at the moment of the client's acceptance of the builder's work these two heat pumps were still working properly. This signified to the court that if the builder had inspected the heat pumps before he commenced his work, he would not have found them lacking, which meant that he would not have had a duty to warn in this case (since there was no default at that moment). Taking into account that the client had failed to prove that the heat pumps had stopped working before he accepted the builder's work, the court could not find the builder at fault for breach of his duty to warn.

It seems reasonable not to hold the builder responsible in this case since if the already installed system that he is building upon works at the moment the builder is performing his construction tasks, he should not be expected to predict its future performance. This is different, of course, if it is obvious to him that there is any risk to future proper functioning of the installation, e.g. if the longevity of the pipes in the mentioned case was ca. 11 years, and the builder would be conducting his tasks 10 years after the pipes were installed, then he should warn the client that these old pipes are likely to need replacing within the coming year. Such a duty to warn could be demanded of the builder, since he is supposed to contribute to giving the client a fully functional construction, which will be discussed here next. In the mentioned case, no one had raised an issue of how long these pipes could be expected to function properly.

A question may be asked as to what kind of defaults the builder needs to warn the client about. In general, the builder has to facilitate the client's aims in the construction and it seems that whatever these aims might be, the builder should warn the client if reaching them becomes doubtful.

In the case of 8 November 2007³⁰⁴ the BGH decided a case in which the builder was employed to install a heating system in the client's forester's lodge. The lodge was not connected to the public electricity network. Before employing the builder the client consulted with another company about designing and purchasing a power station that would sufficiently warm the whole house and provide electricity. The builder installed everything in accordance with the plans prepared by that company and the client. When the construction was finished it turned out that the house was not sufficiently heated by all installations, since the power station did not have sufficient capacity to provide that. The client claimed damages from the builder, claiming that he should have known that the power station would not be sufficient for his needs. Firstly, the German Supreme Court stated that the construction does not fulfill the contractual requirements laid down for it not only when it is technically faulty but also when it does not satisfy the functionality that the client clearly expected of it. Secondly, if the functionality expected by the client has not been reached as a result of faulty work of another specialist – in this case: the company

to the house. The judgment states only that the heating does not work '*weil die Sonden nicht in Ordnung sind*'.

³⁰⁴ BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344

designing and delivering the power station – the builder could escape liability if he warned the client about the risk involved with the contract with that third party. Thirdly, even if the power station was built by another specialist at about the same time that the builder was beginning his construction works, i.e. laying down pipes, the builder could and should still inquire as to what kind of power station was being prepared and whether it was sufficient to provide heat for the whole construction.

In the case of 9 July 2009³⁰⁵ the client employed a builder to construct a glass porch at the front entrance of the building. The client wanted that glass facade to be parallel to the steel construction installed on the inside by another builder that would still be visible through the glass. Despite the glass construction having been performed correctly, the parallelism was not achieved due to the unbalanced steel construction that had been performed if not in a faulty than in an uneven way. The court – OLG Hamm – decided in this case that the builder is not only obliged to warn the client about technical defaults in the construction but also about optical ones, since these may also lead to damage for the client, especially in case the client had a special interest in reaching a certain optical result and that interest was or should have been clear to the builder. Therefore, the builder had the duty to warn that the works performed previously at the site would not make it possible to achieve the optical result wished by the client in combination with the proper performance of contractual obligations by the builder. Of course, the general rule applied according to which the duty to warn would emerge only in case the builder should have known about the default.

The German courts made it clear that the builder would be obligated to warn the client not only about technical defaults in the construction that other builders had made but also about any risks that could endanger the aim and functionality that the client expected from that construction. However, the scope of the duty to warn of the builder does not go as far as to protecting the client from the insolvency of other builders that the client had chosen himself.

For example, in the case of 19 November 2009³⁰⁶ the client claimed that the builder should have warned him during performance of his construction works (installation of heating and electric systems) that the previously employed builder, who constructed the whole house, made a mistake, which would lead to the increase of energy use. The warning was not given and when the client realized himself that the first builder had improperly constructed the ‘low energy house’ ordered by the client, the first builder was already insolvent so the client could not claim his losses from him. Still, the OLG Celle did not find the builder in breach of his duty to warn as far as the losses of the client coming from the first builder’s insolvency were concerned, i.e. for the costs of repair of the house that no longer could be claimed from the first builder. Since the client would need to bear the same costs for repair of the house whether the warning was given during construction of the heating installation or afterwards, there was no causal link between the client’s losses and the lack of a warning. The court stated also that the scope of the duty to warn is to protect the client from the faulty works of one professional party influencing the works of another professional party and, therefore, not giving the client the desired final result. However, the duty to warn does not go as far as to protect the client from insolvency of other professional parties the client chooses to employ³⁰⁷.

³⁰⁵ OLG Hamm, 09.07.2009, 21 U 46/09 (full text found on <<www.ibr-online.de>> lastly checked on 04.12.2009)

³⁰⁶ OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369

³⁰⁷ See chapter 2 for a further discussion of this case.

The builder does not only need to warn the client about the risk coming from the contract with other independent contractors of the client, but, in general, from any risk coming to the construction – also from his own sub-contractors. In the case of 12 November 1999³⁰⁸ the OLG Düsseldorf adjudicated about the builder's duty to warn the client of the sub-contractor's default. The builder had employed another company (the sub-contractor) to perform some work on the basis of which the builder could perform his own work later on. Pursuant to the applicable § 4 No. 3 VOB/B the builder had the duty to inspect and inform the client of any inconsistencies in the construction. If this duty was negligently performed or not performed at all, then pursuant to § 13 No. 3 VOB/B³⁰⁹ the resulting defect would be looked upon as the builder's defect. The court stated, referring to other judgments³¹⁰, that the builder had then an obligation, as any other builder who performed work, which depended on the prior work of another builder, to inspect this prior work and the materials used thereby. The builder needs to make sure, beyond any reasonable doubt, that the so far performed works constitute a solid base for his own work and do not have any characteristics, which could endanger the proper performance of his own work. If the builder had performed his inspecting duties, he would have been able to discover defects in the sub-contractor's work and warn the client thereof. The gross negligence of the builder in not fulfilling this duty made him liable for the sub-contractor's own default.

In most cases the builder would be liable for the performance of his sub-contractor on the basis of his responsibility for persons he employs in order to perform his contract with the client. This liability is based on § 278³¹¹ BGB. However, it is imaginable that in certain cases the builder would contractually try to limit or exclude his liability for the sub-contractors he employs. In such a situation, as this judgment shows, the builder might still be liable for the client's damage. The ground of the builder's liability would then be non-performance of his duty to warn, i.e. of one *of his own* obligations.

There are also cases in which the default clearly came from the designer, however, in case there were two builders employed by the client, one of them could have a duty to warn of the designer's default, whereas the other builder could have a duty to warn of the risk coming from the first builder, who did not warn the client about the designer's default and created a faulty work himself, by building on a faulty design. A good illustration of that is the OLG Hamm's case of 18 July 2002³¹² both builders, which had been employed by the client were found to be solidary liable to him. The case concerned the construction of an indoor tennis centre. According to the design plans the first builder was supposed to include ashes as one of the building materials applied for the creation of one layer of the centre's floor, although these ashes were inappropriate for the intended construction. The court stated that this fact,

³⁰⁸ OLG Düsseldorf, 12.11.1999, 22 U 71/98, BauR 2000, 3, p. 421

³⁰⁹ *“Ist ein Mangel zurückzuführen auf die Leistungsbeschreibung oder auf Anordnungen des Auftraggebers, auf die von diesem gelieferten oder vorgeschriebenen Stoffe oder Bauteile oder die Beschaffenheit der Vorleistung eines anderen Unternehmers, haftet der Auftragnehmer, es sei denn, er hat die ihm nach § 4 Nr. 3 obliegende Mitteilung gemacht.”*

³¹⁰ OLG Düsseldorf 13.11.1992, 22 U 113/92, NJW-RR 1993, 405

³¹¹ *‘Der Schuldner hat ein Verschulden seines gesetzlichen Vertreters und der Personen, deren er sich zur Erfüllung seiner Verbindlichkeit bedient, in gleichem Umfang zu vertreten wie eigenes Verschulden. Die Vorschrift des § 276 Abs. 3 findet keine Anwendung.’*

³¹² OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101

namely the unsuitability of the ashes' usage should have been obvious to both builders – they did not need to possess any special knowledge to recognise this – and therefore they should have suggested to the client to change the construction materials so as to reach the intended aim of the construction. The OLG Hamm stated that both the builder who used the ashes in the floor foundations as well as the builder who followed his work at the construction site and who knew that the first builder had applied ashes were liable for the damage suffered by the client in result thereof.

In the above-presented cases we could see mainly deliberations on the duty to warn of the builder, who performed his work upon the work other builders had done at the construction site. German courts, however, have also considered the opposite situation, i.e. whether the builder who started his work at the construction site had the duty to warn about risk coming from other builders, who would be performing their work when he had already finished his tasks at the construction site. In general, a builder may trust that if he performs his contractual obligations fully and correctly, the following builder will be able to build upon his work without causing any defaults, provided he obeys all the standard technical requirements³¹³. However, in certain cases a duty to warn could arise in regard of the materials and construction techniques the subsequent builders should use so that the construction as a whole would be fully consistent. It seems that this could happen in two types of situations. Firstly, the first builder might have such a duty to warn in case the first builder used unusual materials or techniques himself, that the following builder might not expect to have been used and that could not be built on in a standard way of construction³¹⁴. Secondly, the first builder might have such a duty to warn in case he knows that the following builders are not competent enough to perform their contractual task and guarantee the success of the whole construction³¹⁵.

This duty to warn has been recognised by the OLG Köln in the judgment of 22 December 1993³¹⁶. Pursuant to the facts of this case, the client concluded separate construction contracts with several builders. They were to renovate his balcony and each was directly employed by the client to perform specific partial works within the whole construction process. When the construction was finished, it turned out that the materials used by different builders were together not fully waterproof and the construction suffered some damage. During the proceedings it was proved that each builder diligently performed his own obligations, however, the plans pursuant to which each of them performed his work were made negligently. As a result, the construction as a whole did not fulfil the client's expectations. The client sued all builders and was successful in his claims. The court stated that although each builder performed his own work diligently, if one looked at the effect of only particular phases of the construction, in isolation from the whole project, still a builder, who had known that his work would constitute the basis for future performance of other builders at that site and who had recognised that there were inconsistencies between the tasks assigned to builders but still had not warned the client thereof, should be

³¹³ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 36-37

³¹⁴ S. Büchner, 'Schnittstellen: Wer haftet für Mangel?', *IBR* 2004, 9; H. Merl, 'Prüfungs- und Hinweispflicht hinsichtlich Arbeiten nachfolgender Unternehmer?', *IBR* 2007, 131

³¹⁵ H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 101; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 37

³¹⁶ OLG Köln, 22.12.1993, 16 U 50/93, *NJW-RR Zivilrecht* 1994, 9, p. 1045

liable if the whole construction turned out to be faulty. The court stated that such a builder had the obligation to warn the client, prior to the execution of his contractual obligations, that his contractual obligations were not compliant with the obligations of other builders, who were supposed to perform their work at the construction site upon finalization of his work there. The reason that each individual builder was supposed to warn the other before starting with his own work seems to be that the other builders should not have to be forced to adjust their work to the first builder, only because he performed first. It might have been a better solution to change the materials used by the first builder, instead of the third one, for example. The court stressed that in this case there could be no doubt that all builders employed by the client were liable for the default within the construction.

In the case of 12 May 2000³¹⁷ the builder was employed by the client to construct windows and door lintels. The builder received from the client only the accredited, ready to be performed, construction plans, designed in the scale 1:100, plus plans prepared by the structural engineer. He did not receive any executive plans prepared on the basis of the accredited plans. As a result, the builder constructed lintels on the basis of plans prepared by the structural engineer, not being aware of the fact that they differed from the executive plans. There was no doubt that the lintels were prepared diligently and properly. However, it turned out during the further construction process that builders who performed subsequent works, took as a basis for their work the executive plans and as a result the construction as a whole was inconsistent. The client claimed that the first builder had the duty to compare the accredited construction plans with the plans prepared by the structural engineer and to warn him about the inconsistencies between these plans. The OLG Düsseldorf stated, however, that the accredited construction plans could not constitute the basis for the builder's work. In case the builder did not receive executive plans, he was justified to build on the basis of plans prepared by the structural engineer. The court decided that it was perfectly reasonable for the first builder to rely in such a situation upon plans prepared by the structural engineer. Moreover, the first builder did not have the duty to compare both plans and to warn the client about the inconsistencies therein, due to the fact that pursuant to § 3 No. 3 VOB/B the duty to inspect and warn binds the builder only when the inspection is necessary to properly fulfil his contractual duties³¹⁸. That is why it was concluded that since the first builder was not aware of the difference between the plans, he did not have the duty to warn the client of the fact that the subsequent builders would have to follow his lead and to apply the plans prepared by the structural engineer. The court stressed that under the given circumstances it is the role of the subsequent builders to make sure that they perform their work in such a way that it would be consistent with previously done work at the construction site.

It can be stated that there is no general duty to inspect the works of the following builder or to warn the client about the default in them³¹⁹. The duty to warn would bind the builder in case he knows or should have known that on the basis of the works performed by him the following builder might not be able to perform free of

³¹⁷ OLG Düsseldorf, 12.05.2000, 22 U 197/99, BauR 2000, 9, p. 1339

³¹⁸ Ch. Döring in: H. Ingenstau, H. Korbion, H. Locher, K. Vygen, Ch. Döring (eds.), *VOB. Teile A und B. Kommentar*, Düsseldorf: Werner, 2001, B § 3 Nr 3 Rdnr. 33

³¹⁹ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 36

fault³²⁰. In the case of OLG Dresden of 11 December 2002³²¹ it has been stated that in general, the builder has the duty to perform his work in a way that it will be a suitable ground for the following construction works. The builder might assume that the following builders will use the known rules of construction and does not need to inspect their work. This assumption could be safely made when the following builders are professional parties. The builder will fail in performing his contractual obligations if he constructs his part of the building in a way that is not suitable to constitute a basis for the construction works that are yet to come, even if they are performed faultlessly. In such a case the builder might have a duty to warn the client that the following works need to be adjusted. Additionally, the builder might have the duty to warn if he knows that the following builder would perform his works negligently³²².

A factor that might influence the builder's duty to warn is the fact that a professional party is representing the client. Does the knowledge and experience of another specialist employed by the client, e.g. a designer, influence the scope of the builder's duty to warn? In the BGH's case of 18 January 2001³²³ the client employed the builder to perform a number of renovation works in his house. The client hired also a director of the construction, who was supposed to supervise the whole construction and who represented the client. The builder was *inter alia* obligated to secure the basement against the influence of humidity, pursuant to provisions of the original contract. In practice, the builder did not perform this work. The builder claimed that during the construction process the director of the construction amended the contract and released the builder from this particular obligation. The BGH stated that the director of the construction was not empowered to change the original contract. However, it was stated that the builder in any case had the duty to warn the director of the construction of possible consequences of cessation of works on safeguarding the basement from humidity influences. In case the director of the construction would ignore the warning given to him by the builder, the latter was obligated to directly warn the client. The court expressly stated that even if the competence and professional knowledge of the director of the construction could be attributed to the client, this fact in itself did not release the builder from his duty to inspect and warn the client³²⁴.

The OLG Bremen³²⁵ in its judgment of 15 February 2001 also stated explicitly that every builder is in general responsible for the work he is supposed to perform, which encompasses also the responsibility for the inspection of the work performed by that builder's predecessors in order to make sure that his own work would be performed in an appropriate manner. That obligation does not change, according to the court, when the client employs a designer to inspect the construction or to coordinate the builders' different performances. The client needs to be sure that each

³²⁰ S. Büchner, 'Schnittstellen: Wer haftet für Mangel?', IBR 2004, 9; H. Merl, 'Prüfungs- und Hinweispflicht hinsichtlich Arbeiten nachfolgender Unternehmer?', IBR 2007, 131; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 37

³²¹ OLG Dresden, 11.12.2002, 11 U 1142/02, IBR 2004, 9

³²² H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 101; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 37

³²³ BGH, 18.01.2001, VII ZR 457/98, BauR 2001, 4, p. 622

³²⁴ BGH, 30.06.1977, VII ZR 325/74, NJW 1977, 1966, BauR 1977, 420

³²⁵ OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10

builder will diligently perform his own contractual obligations without having to inspect his work on a standing basis or employing other professionals to do that.

Additionally, in the case of 29 April 2005³²⁶ OLG Düsseldorf stated that the builder has the duty to warn especially as to such parts of the construction that are commonly known to often be a source of risks to the construction. The court decided in this case that all the materials and works used to cover parts of the construction in order to protect it from the humidity need to be examined and inspected carefully and more so than other parts of the construction. This obligation of the builder does not change, in general, due to the fact that the client employs another professional party that could advise and warn him against these risks, as well.

This reasoning was further developed e.g. by the OLG Düsseldorf in the case of 15 July 2010³²⁷. In this case the designer made a mistake in his design plans by not providing proper sound insulation of the windows in the client's house. The builder was found by the court as having a duty to warn the client about this default in the design plans. The court stated that the presence of a professional client or of his professional advisors did not liberate the builder from conducting his own tests. He is still liable, even when the professional client or his professional advisors would have tested the design plans and could have discovered the default. Only when the builder has specific grounds to believe that tests conducted by other professional parties are as full and as reliable as his own tests would be, may he withhold from conducting his own tests which would allow him to check whether the design plans will allow him to construct what the client had in his mind. Pursuant to the court, the builder may not be released from his duty to warn if it is clear that if he conducted his tests and shared his doubts about design plans, the client might have avoided his losses. The court concluded that the sole fact that a professional designer provided in his design plans for some noise control measures does not release the builder from his duty to test whether the design plans are faultless. Of course, the builder's scope of liability might be limited under such circumstances³²⁸.

The above-described cases confirm that in German law the fact that the client has the professional knowledge, which could be comparable with that of the builder or the designer, releases neither the builder nor the designer from their duty to warn the client³²⁹. In other words, if the client employs separate parties, like e.g. a director of construction, to supervise the work done by the builder or designer, this does not mean that the latter parties may treat their obligations less seriously.

It must be noticed, though, that in some cases it was decided that if the competence of the client or another person employed by the client was *higher* than that of the builder, then the builder would not be under a duty to warn. Even in case the builder actually knew of the default, he still might be considered to not have to warn the client about that³³⁰.

Namely, the OLG Hamm in the case of 28 January 2003³³¹ stated that in general the builder is not under an obligation to warn when the client employed a designer or a director of the construction site, from whom a higher degree of professional knowledge and experience could be expected than from the builder with

³²⁶ OLG Düsseldorf, 29.04.2005, 23 U 157/04, IBR 2006, 1445

³²⁷ OLG Düsseldorf, 15.07.2010, 5 U 25/09, IBR 2010, 675

³²⁸ This will be further discussed in chapter 7.3.

³²⁹ H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 100

³³⁰ See the case discussed below: OLG Düsseldorf, 13.03.2003, I-5 U 71/01, BauR 2004, 1, p. 99.

³³¹ OLG Hamm, 28.01.2003, 34 U 37/02, BauR 2003, 7, p. 1052

respect to the circumstances in which the default arose³³². That case develops an earlier statement of the same court³³³ that the scope of the duty to warn of the builder could be narrowed when a competent client or specialists employed by him perform the necessary inspections at the construction site themselves. Then, the court also stressed that the abovementioned rule applies only in the case when the builder could rely on the fact that the client had more experience and knowledge therewith than he did.

The OLG Düsseldorf in the case of 13 March 2003³³⁴ stated that in some circumstances in which the client would employ another specialist, the builder would be released from his duty to warn, pursuant to the provision of § 4 Nr. 3 VOB/B. Generally, the court confirmed that the builder had the duty to directly warn the client and to do so in writing³³⁵. However, then the court stated that in some cases the scope of the duty to warn could be reduced, when the client had employed specialists from which fact the builder could conclude that the client had had a possibility to obtain the necessary information and warnings³³⁶. Moreover, in that particular case the court found that the builder could be released from his duty to warn in whole, due to the fact that the client *had* been informed and warned by such a specialist of all the circumstances, which endangered the construction process and due to the fact that the builder had been aware of that warning by the specialist to the client. In such a case, pursuant to the court, the builder was reasonable to assume that the client was in a position to fully estimate the risk related with the proceeding with the construction and was not obligated to repeat the warning.

Also in the decision of 14 August 2009³³⁷ the OLG Bamberg considered a case in which the builder did not warn the client about a designer's default that should have been obvious to him, namely: a lack of proper waterproofing of the wall and the fact that the designer had not followed the DIN-construction norms. The court stated clearly in this case that the scope of the builder's duty to warn is not unlimited. One of the factors on which the existence of the builder's duty to warn depends, is the competence of the client and of other specialists employed by him. That does not mean, of course, that just by employing a professional designer to advise him, the client loses his right to be informed and warned by the builder about potential problems with the design. However, builders may, in general, assume that designers and other specialists employed by the client, who have more professional knowledge than the builder as to the design phase of the construction, would properly perform their contractual obligations. As a result, the builder does not have a duty to warn when he may assume that a competent client (also due to having competent advisors) recognised and consciously undertook certain construction risks. This applies specifically to situations, as in this case, in which the design plans were based on the advice of special experts, who chose a certain method of construction while being

³³² Compare: OLG Karlsruhe, 20.10.1971, 7 U 70/70, BauR 1972, 380; 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. 191

³³³ OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101

³³⁴ OLG Düsseldorf, 13.03.2003, I-5 U 71/01, BauR 2004, 1, p. 99

³³⁵ Exceptionally, though, a warning could be granted orally – see further in the chapter on whether a sole warning suffices

³³⁶ BGH, ZfBR 1998, 244

³³⁷ OLG Bamberg, 14.08.2009, 6 U 39/03, IBR 2011, 76

aware of the risks involved therewith. As the court stated, in such a case the builder does not have to be 'smarter' than the experts employed by the client³³⁸.

3.2.2. Precontractual duty to warn.

As it has been mentioned in the chapter on the emergence of the duty to warn, the precontractual duty to warn has been recognised in German case law. The scope of the precontractual duty to warn can be, therefore, evaluated on the basis of case law.

In the case of 17 February 1993³³⁹ OLG Hamm adjudicated over a case where a builder specialising in underground works was employed to install and connect certain pipe trenches in, what he was assured of, was class 3 to 5 soil. Prior to the conclusion of his contract he received the description of the project and the plans prepared by another specialist, but no soil expertise. Only when the builder started his work, he found out that the soil was definitely class 2 soil, which influenced the performance of his work to the extent that he had to bear additional costs to perform it. The builder claimed damages from the client for performance of this extra work, the client defended himself by claiming that the builder should have inspected the soil before he made a price calculation for his services, on the basis of which the contract was concluded, and should have warned the client that the soil was of a different class than they had thought, which would result in an increase of the costs of construction. In such a case, the client would have the possibility to adjust the contract with the builder and to look for other construction options. The court decided that the builder in this case did not have a duty to warn the client. According to the court, the builder may trust in the correctness of the plans and descriptions of the project delivered to him, when they specifically point out a soil class that is there to be expected. In such a case there is no reason for the builder to ask additional questions and make inquiries as to the soil. The builder's obligations would have been different, however, if the description he had received would have been obviously incomplete.

It has been stated in the report³⁴⁰ of another case of 14 November 1996³⁴¹ adjudicated by OLG Celle that in case the plans and descriptions leave even a small amount of doubt, the builder should warn the client thereof. The circumstances of the case were very similar to the ones described above. However, here in the descriptions received by the builder it was stated that the soil class was "in general" from 3 to 5 and the client had added that he would not take any responsibility for the factual statements in the description. The court decided that the client had made it clear that he had not conducted sufficient soil examination himself nor had hired other professional parties to do so and that he would leave this to the professional party he would be contracting with. The builder should have inquired about that, and warned if necessary, since there was room for doubts left by the terms of the documentation received from the client whether the client knew the consequences of not conducting further soil examination.

In general, the German courts might encumber the builder with the precontractual duty to warn, claiming that already in the stage when the contract offer is being made the builder might need to point out to the builder certain inconsistencies

³³⁸ See also: H. Scheel, 'Entfällt Prüfungs- und Hinweispflicht des Auftragnehmers bei Einschaltung von Sonderfachleuten durch den Auftraggeber?', IBR 2011, 76

³³⁹ OLG Hamm, 17.02.1993, 26 U 40/92, NJW-RR 1994, 406

³⁴⁰ K. Englert, 'Kein Vertrauen auf vorgegebene Baugrundverhältnisse!', IBR 1997, 280

³⁴¹ OLG Celle, 14.11.1996, 14 U 81/94, OLG 1997, 65

in the planned construction³⁴². However, it seems that when the plans that the builder receives are very specific and complete and the builder would not be able to estimate their incorrectness prior to conducting some own research or starting his works, the duty to warn would not bind him. In such a case, the responsibility for the faulty plans would lie fully on the client who delivered incomplete and misleading plans to the builder³⁴³. This seems to suggest that just as with the contractual duty to warn the builder will in these cases not be required to actively look for a default to warn the client about and that his duty to warn would bind him only in cases where he should have seen the default 'at a glance'³⁴⁴.

In the case of 16 July 1993³⁴⁵ OLG Köln adjudicated over such a case. The client wanted to have a special garage door installed in his family house. He picked, together with his designer³⁴⁶, a certain model because it fit together with the front door to his house. He approached a specialist in the installation of garage doors who fulfilled his wish. The chosen model of the garage door had a special construction of windows, which led, upon installation, to decreasing the height of the usable entrance to the garage from 2,01m to 1,73m. As the court stated that meant that if the client wanted to park e.g. a jeep in his garage³⁴⁷, he would not be able to do so. The client refused to pay for the job performed by the builder and the builder raised a claim against the client for payment. The court decided in this case that despite the fact that the garage door was installed faultlessly and despite it fulfilling the aim for which it was installed, i.e. closing the garage, the builder could not claim compensation for the work performed from the client. The court stated that the builder had a duty to inform and warn the client about the disadvantages of choosing this particular model of door. The builder had years of professional experience and as such had to know all the practical risks involved with installing the door chosen by the client and could have pointed out to him that choosing another model of door would be better for him. The duty to warn of the builder was not influenced by the fact that the client had chosen this model on his own and was adamant about having his garage door coordinated with his front door. Even if the builder thought that the optical characteristics were the dominant ones for the client, he still had a duty to inform and warn him about technical peculiarities involved with choosing this door. Additionally, in this case a question arose whether the builder should have his duty to warn limited or even excluded in case a designer, i.e. another professional party represented the client. While the court decided that the designer definitely had more knowledge about garage doors than the client, it could not be said that the designer was more knowledgeable than the builder; moreover, he did not have to know about the technical specifications of this particular model of garage door.

The court was very clear in this case that the builder had a precontractual duty to warn the client that the material chosen by him and the designer might not have

³⁴² K. Englert, 'Baugrunderschwernisse: Folgen der Angabe falscher Bodenklassen', IBR 1993, 417

³⁴³ K. Englert, 'Unternehmer darf auf Angabe von Bodenklassen vertrauen!', IBR 1994, 95

³⁴⁴ T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsungleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 24

³⁴⁵ OLG Köln, 16.07.1993, 19 U 42/93, BauR 1993, 728

³⁴⁶ In general, it is the designer who has a duty to advise and warn the client about the materials to be used in the construction: B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 142; P. Löffelmann, G. Fleischmann, *Architektenrecht. Architektenvertrag und HOAI. Leistungspflichten. Honorar und Haftung. Bausummenüberschreitung.*, Düsseldorf: Werner, 1995, p. 111

³⁴⁷ It might be important to notice that the client did not have a jeep or a SUV at that point of time. The court considered a hypothetical situation here.

been suitable³⁴⁸. Before the contract had been signed the builder should have informed and warned the client about disadvantages involved in choosing a model that the client picked since it was or should have been clear to him that the client was at a risk of following through with an unusable design. It seems also that the fact that the client had a professional advisor who could have chosen a better model of garage door, as well, did not influence the precontractual liability of the builder.

In a recent case of 31 March 2010³⁴⁹ the OLG Koblenz considered the question whether the builder in the precontractual phase had breached the duty to warn the client about the mistake of a designer, but found that no such duty existed in this case. The case concerned construction of a university building. Since the client was not a consumer, this case will not be discussed here in detail. Still, it is interesting to mention here that in this particular case the court, after mentioning the builder's contractual duty to warn on the basis of § 4 Nr. 3 VOB/B, considered also his precontractual duty to warn. The court stated that, in general, in the tender and offer-making phases of the construction process the builder has no precontractual duty to warn the client about the designer's default, since the builder only looks at the design plans from the perspective of conducting necessary calculations to make an offer. This means that the builder is unlikely to notice a design default and should not be held liable for not doing so. However, the court stressed that in exceptional circumstances this precontractual duty to warn will bind the builder, namely when the contract documents (and data in them) are clearly false or incomplete. This means that if the builder should have been aware that the offer he was presenting to the client could not be deemed reliable, due to the obvious mistakes in the design plans that the builder had based his offer upon, then the builder may not demand extra pay for extra work that he had to conduct and that was not included in the design (nor his offer) due to that mistake. The principle of good faith goes against the builder making such a claim³⁵⁰.

3.3. Dutch law.

3.3.1. Contractual duty to warn.

In Dutch law a regular builder, who is employed by the client to perform the construction based on the project delivered to him by the client, is obligated to perform it in compliance with all the professional requirements. It has to be taken into account, though, that such a builder does not control every part of the construction process and the complete success thereof would depend not only on his skills and competence. In general, the builder should then not be liable for the defaults, which would result from the faulty design or wrong directions given to him. However, in case the faults in the design or wrong directions were of such a nature that the builder

³⁴⁸ A. Schulze-Hagen, 'Beratungspflicht im Spezialbau', IBR 1992, 378

³⁴⁹ OLG Koblenz, 31.03.2010, 1 U 415/08, IBR 2010, 313

³⁵⁰ D. Merkens in: K. Kapellman, B. Messerschmidt, *VOB Teile A und B (Vergabe- und Vertragsordnung für Bauleistungen mit Vergabeordnung)*, 3 Aufl., München: C.H. Beck, 2010, VOB/B, § 4, Rdnr. 66; J. Kuffer, A. Wirth, *Handbuch des Fachanwalts. Bau- und Architektenrecht*, Köln: Werner Verlag, 2011, p. 506; BGH, 25.06.1987, VII ZR 107/86, NJW-RR 1987, 237; OLG Köln, 04.04.1990, 17 U 34/89, BauR 1991, 615

as a professional party knew them or should have recognised them, he would be liable for these defaults under article 7:754 BW³⁵¹.

Therefore, in Dutch law there is nowadays a statutory obligation for the builder to warn the client of a risk that comes from the contract that the client has with the designer, as long as the default in the design was or should have been recognised by the builder. Also in case the client employs directly other contractors aside the builder and the builder is or should be aware of the risk coming out of that contract or its performance, he should warn the client about that.

In general, the Dutch doctrine and courts³⁵² agree that it can be expected from a regular builder to recognise defaults within construction plans and within the construction itself, which he should have noticed as a professional. Whenever he recognises such a default, he has the duty to warn the client thereof. Where he, as a professional, need not have noticed the default and indeed did not notice it, the builder would not be liable even if the final construction were faulty due to the defaults in the design or in the directions given to him³⁵³. The duty to warn the client does not imply a duty to investigate and supervise for the builder, since he is only liable for not warning the client of the defaults or risks that he knew or should have known about. In performance of his contractual obligations, he will have a duty to investigate the design and, e.g., the work of other contractors, but only in so far as such is needed for him to perform his work. In this process, he might find out risks and defaults that are not related to his own work, but if he recognises or should have recognised these risks and defaults at that moment he would be expected to issue a warning thereof to the client. This has been recognised in Dutch law in practice³⁵⁴ even before the appropriate provision has been added to the Dutch civil code³⁵⁵. The case mentioned below did not involve a client who was a consumer, however, the ruling in this case

³⁵¹ Also under the old Dutch Civil Code in which the duty to warn had not been explicitly worded, it had been widely recognised in practice, e.g. 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; see also paragraph 2.3.1.

³⁵² Asser-van den Berg, 5-IIIC, 2007, nr. 101; 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*, 's-Gravenhage: IBR, 2010, p. 309; HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt); HR 18.09.1998, NJ 1998, 818 (KPI/Leba); M. A. B. Chao-Duivis, A. Z. R. Koning, *Veranderende rollen. Een inleiding in nieuwe contractvormen in het bouwrecht*, Deventer: Kluwer, 2001, p. 73; M. A. B. Chao-Duivis, 'Aspecten van de waarschuwingsplicht van de aannemer', BR 2007/46, p. 234; C. E. C. Jansen, 'Waarschuwingsplicht en 'eigen schuld'', BR 2000/565, p. 569; 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; e.g. RvA, 30.03.2009, nr. 29.876, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 20.01.2010, nr. 30.890, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 23.06.2010, nr. 32.421, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 21.04.2011, nr. 32.584, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011);

³⁵³ E.g. RvA 2.03.2009, nr. 28.924, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 15.07.2009, nr. 30.139, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 10.08.2010, nr. 30.624, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); Hof Leeuwarden, 23.11.2010, 200.024.006/01, LJN: BO4942

³⁵⁴ E.g. HR 18.03.1932, NJ 1932, p. 925 (Mook/Sap III); RvA 23.02.2009, nr. 29.963, TBR 2009/133; see also the footnote above

³⁵⁵ Art. 7:760 sec. 2 and 3 BW plus art. 7:754 BW

would surely be upheld also for a consumer-client, which means that it retains its relevance for this research.

For example, in the case *Stokkers/Vegt*³⁵⁶, Stokkers (the client) employed construction company Vegt (the builder) to lay a special floor on Stokker's factory premises. Some time after the job was done, Stokkers noted some cracks appearing in the floor as well as that the floor was laid out unevenly. Vegt defended himself by saying that the foundation, which was already laid out on the floor when he started his work, prevented the next layer from being laid out evenly. The Dutch Supreme Court stated that one might expect the builder in such a situation to inform the client before the construction takes place exactly what requirements the foundation of the floor is supposed to fulfil. In that way the further works could be performed diligently. Moreover, the builder might even be obligated to inspect the foundation of the floor in order to estimate the scope of these requirements. The Dutch Supreme Court clearly said that the builder has the duty to warn the client timely about the incorrectness in the design, which he knew or should have known about. The builder's duty to warn encompasses also the obligation to warn the client about defaults and inadequacy in materials provided to the builder by the client, which means also the foundation for the builder's work.

In this case, that was adjudicated before the addition of Article 7:754 to the Dutch Civil Code, it has been clearly stated that the builder is not expected to just perform his contractual task, but that a situation might require him to protect the interests of the client by giving a warning to him. The builder clearly had to warn in this case about the risk associated with following the client's instructions. This obligation bound the builder even when it was not his performance that would have been faulty. This risk came from the faulty performance of a third party, but the builder still needed to issue a warning to the client. It had either been the designer's mistake to not properly plan the foundation or the previous contractor's mistake that had laid out that foundation in a faulty manner. Perhaps it was too late for the builder to warn the client that the foundation should be laid out in a different way, but he still could have prevented further damage and unnecessary costs to the client by pointing out that the foundation needed adjustment before starting his own work. The Dutch Supreme Court did not have any doubt that in case the builder knew or should have realized that the foundation was insufficient for the prescribed construction, he should have warned the client about that.

The builder's duty to warn has its roots in one of his main obligations, namely the duty to carefully perform his contractual obligations³⁵⁷. However, it has been repeatedly recognised by the Dutch courts that the builder is not obligated to a meticulous examination of the design plans delivered to him. He shall only conduct a marginal check and is obligated to warn the client only of defaults, which should be evident to him upon such loose control check³⁵⁸. This means, for instance, that the

³⁵⁶ HR 25.11.1994, NJ 1995, 154 (*Stokkers/Vegt*)

³⁵⁷ M. A. M. C. van den Berg, *Samenwerkingsvormen in de bouw*, Deventer: Kluwer, 1990, nr. 100; 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*, 's-Gravenhage: IBR, 2010, p. 309; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 292; 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

³⁵⁸ M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 48-51 (No. 778); ; P. Vermeij, 'Bouwen in strijd met de

builder does not have to re-check calculations of the designer as far as the planned construction is concerned in order to discover whether these calculations are correct³⁵⁹.

For example, in the case of 24 June 2010³⁶⁰ the client claimed that the builder should have warned him that the wall that he was building around a parking ground would be at a risk of sagging and crumbling. The designer had incorrectly planned the wall, without taking into account the wind load that it would have to withstand, as well as its general loadbearing function. The RvA decided in this case that the builder did not have a duty to warn the client about these mistakes in the design plans since the incorrect relation between the height and thickness of the wall was not an easily noticeable default therein. To the contrary, the builder would have had to re-calculate the design plans in order to be able to state that there was a default in them. This was seen as a too far-going duty to be placed on the builder.

It differs from case to case, whether in the given situation the builder should have recognised the default. Different factors are taken into account when answering the question of the builder's liability, e.g. how evident the default was and what level of professionalism could be expected from the builder³⁶¹. The test is subjective: whether it could have been expected from the builder under the given circumstances to recognise the default³⁶².

For example, in the case of 12 December 1978³⁶³ the designer neglected to conduct appropriate examinations of the ground and as a result did not warn the client nor the builder that the planned construction would not hold at the designed construction terrain. The client claimed that the builder should also be liable for the resulting default in the construction (cracking) due to the fact that he did not warn the client of the default in the design. The court stated, however, that it was the responsibility of the designer³⁶⁴ and not of the builder to conduct the necessary soil examination and that without it, and only on the basis of the design plans, the builder could not have known that the construction would be faulty. The need for conducting the soil examination could have been evident only for a party who was preparing the

voorschriften van het Bouwbesluit, enkele publiek- en privaatrechtelijke aspecten voor de praktijk', BR 2009/39, p. 214-216

³⁵⁹ See e.g. RvA 17.07.2009, nr. 31.151, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 22.03.2010, nr. 30.236 and 71.556, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 24.06.2010, nr. 31.160, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA, 19.07.2010, nr. 31.577, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 30.12.2010, nr. 71.448 and 29.914, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 12.05.2011, nr. 32.522, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

³⁶⁰ RvA 24.06.2010, nr. 31.160, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

³⁶¹ Asser-Kortmann-de Leede-Thunnissen, 5-III, 1994, nr. 538; Asser-van den Berg, 5-IIIC, 2007, nr. 99; M. A. van Wijngaarden, *Handleiding tot de UAV*, Deventer: Kluwer, 1974, p. 159; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 303-306; M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 52 (No. 779); 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

³⁶² 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

³⁶³ AIBk/RvA 12.12.1978, BR 1979, p. 230

³⁶⁴ See more on that in: S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 57-58

design and conducted the ground's probing. The builder was presented only with the design plans, which had already been accepted by the governmental construction inspection, thus the court was convinced that the builder had no reason to doubt the soundness of these plans. In this case the builder was not found to be obliged to warn the client about the risk that the designer was putting the client at due to the fact that this risk was not nor should have been obvious to the builder.

It is important to point out at this point that the client often claims damages from both the designer and the builder, due to the fact that he might not get the full compensation for the damage he suffered from only one of them. The contracts, which the client concludes, often contain a clause on exclusion or limitation of liability³⁶⁵. Such a situation also occurred in the case described above. The court declared the designer liable for not conducting the soil examination; however, the designer's liability had been contractually limited. For that reason the client tried to claim damages from the builder as well, which, in this case, has been denied. This case may serve as an example as to cases in which the designer invokes an exemption clause in his contract, which leaves the client only with an option to seek damages with the builder, though his error is often less serious than the designer's³⁶⁶.

In the case of 16 November 1990³⁶⁷ it was claimed that the default should have been evident to the builder even upon a marginal check. The court had no doubts that the difference between the colour or the structure of the boarding, which was applied by the builder, and the boarding, which was previously applied, was very obvious. The court adjudicated that the builder should either have warned the designer or the client itself before he started his work. The need of issuing the warning should in this case have been even more apparent to the builder since it was him who had previously been employed to apply the boarding at this construction site. As a consequence thereof, it was clear that the builder knew of the differences in colour. Since the builder had the knowledge necessary to recognise the default, he was under a duty to warn; consequentially, he should have warned the client about the discrepancies in the design.

Also in a more recent case of 3 March 2006³⁶⁸ there was no doubt that the builder should have warned the client about the default in the design. The builder was employed to renovate the existing installations according to design plans delivered by the client. Upon performance of the builder's work there were complaints as to insufficient ventilation as well as to too hot temperatures in the rooms and of the cold water from the tap. The defaults were the result of the incorrect design provided to the builder. However, the arbitral court stated that the builder should have realized that the prolongation of the ventilation pipes in the floor would lead to the increase in the temperature in the room. It should have been equally obvious to the builder that the distance provided for in the design between the pipes with the cold tap water and the ventilation pipes was too small and would result in the cold tap water not being as

³⁶⁵ To be discussed in the following chapters; Asser-van den Berg, 5-IIIC, 2007, nr. 102-106

³⁶⁶ It should be noted that the possibility for a designer to limit his liability towards a consumer by an exemption clause in standard contract terms is restricted by the fact that such a clause is presumed to be unfair under article 6:237 under f of the Dutch Civil Code. Nevertheless, where under the circumstances of the case it would be proven that the clause is in fact not unfair, the designer may still invoke the clause, and the client would still be forced to seek damages with the builder.

³⁶⁷ RvA 16.11.1990, nr. 14.214, BR 1994, p. 606

³⁶⁸ RvA 03.03.2006, nr. 25.856, BR 2007, p. 255

cold as it should have been. Due to the obviousness of the mistakes in the design it had been adjudicated that the builder should have recognised them and warned the client about them. The builder in this case was deemed to be professional enough to realize the mistakes in the design plans and thus had a duty to warn the client about them instead of just blindly following the design plans.

A recent case of 21 June 2010³⁶⁹ concerned a construction for which a designer planned to use a specific Wiehag-facade. The builder had never installed such a facade before, but upon ordering the materials he had received them together with specific handling instructions. However, the handling instructions from the producer of the material contradicted the design plans prepared by the designer: in the instructions it was for instance said not to put the facade on the southern side of the building, whereas the design prescribed exactly that construction. Instead of warning the designer and/or the client about these discrepancies, the builder ignored the handling instructions and followed the design to the letter. That resulted in damage to the construction. The arbitration court stated that such a clear difference between the handling instructions and the design should have been obvious to the builder and therefore, he had a duty to warn the client about the fact that performance of the design plans would not lead to proper construction.

In some cases, the client precisely specifies the materials and the construction method the builder was supposed to use during the construction or even points out to him which manufacturers and retailers to use. Of course, with the client, in the contracts included within the scope of this book, being either a consumer or a consumer-like party, in most cases the client would not choose construction materials on his own. Most often, the client would prescribe these materials upon recommendation of the designer. Therefore, the builder might have a duty to warn that the designer made a mistake in choosing these materials. That constitutes clearly a part of the builder's duty to warn about a risk coming out of a contract with a third party. By such an action, the client limits the builder's freedom of choice. The question is whether the builder should be liable for the breach of his duty to warn when there was a default in the materials used by him, which had been specified by the client and used specifically on the client's demand. The risk to the construction comes here from the materials that the client procures from the third party, or orders the builder to procure from that party.

The Dutch Supreme Court considered this question in the *Moffenkit* case³⁷⁰. In this case, the Dutch Supreme Court decided that the client could not hold the builder liable for the construction defaults, which had originated exclusively from the use of the unsuitable materials, which the builder had procured from the third person only on the client's demand.

In this judgment, no difference was made between cases in which the material to be used was not suitable in general for the particular construction and those in which the material in itself should have been good, but this specific batch of it did not fulfil the necessary requirements³⁷¹. The RvA, however, did make this distinction in

³⁶⁹ RvA 21.06.2010, nr. 29.886, << <http://www.raadvanarbitrage.info/default.aspx> >> (lastly checked on 15 July 2011)

³⁷⁰ HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (*Moffenkit*)

³⁷¹ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 444

later judgments. The RvA mentioned for the first time in the *Monoliet*³⁷² case that while the builder should not bear liability in case the materials were not suitable to be used in general in the construction (and the builder did not breach a duty to warn thereof)³⁷³, he should be held liable for the defaults in the specific batch of materials, which were used in the client's construction.

In a later case of the RvA³⁷⁴ it has been adjudicated that the client should also not bear the manufacturer's risk for the construction materials that have been prescribed by the client, and thus the arbitral court made a further distinction from the ruling of the Dutch Supreme Court. This broadens the scope of the builder's liability since pursuant to the arbitral court if it is not known publicly that the construction material chosen by the client or the designer on his behalf is not suitable for that construction, the builder would be held liable for any defaults resulting from the use of this material. The proposed solution takes into account that the builder would have a right of redress towards the supplier of the faulty construction material and the supplier towards the manufacturer. However, this case has been criticised as leading to an unfair risk division in case the client prescribed the material³⁷⁵, since the whole risk of the development of technology is placed on the builder while it is the client who chooses the faulty material. It is not just the batch of the material that has been delivered to the client that has been inappropriate for the given construction, but the material itself. The fact that the builder is a professional does not matter in the circumstances of the given case, since even to professionals the defaults of this material have not been known at that time. That means that it does not matter either that the client might have been advised by a designer, another professional party who would still not be able to determine that the material was faulty. This puts the builder and the client in the same position as to the knowledge of that material. That fact, in my opinion, should be decisive as to why the builder should not be held liable for such a default. The reasoning presented in this case has not been repeated anymore in any further case³⁷⁶. On the contrary, in the recent case of 29 July 2010³⁷⁷ the client chose a specially laminated pinewood for window frames. This material started decaying some time upon conclusion of the construction. The arbitration court decided that the builder had no duty to warn the client about the wrong choice of construction material since at the time the choice was made specially laminated pinewood was (from the professional point of view) an acceptable choice for window frames. The fact that the window frames were placed outside the elements of the house's facade did not change this situation. This meant only that the client would need to give special attention to the maintenance of the frames and the builder still did not need to warn the client about the risk of using pinewood as a construction material. The RvA in this case clearly expressed modern views on the risk division in case of a default that can only be seen when the construction technology improves. In

³⁷² RvA 10.11.1977, nr. 8464, BR 1978, p. 72

³⁷³ J. M. van Dunné, BR 1984, p. 650-652; 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*, 's-Gravenhage: IBR, 2010, p. 320; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 441

³⁷⁴ RvA 13.01.1984, nr. 11.458, BR 1984, p. 750

³⁷⁵ Commentary of H. O. Thunnissen to RvA 13.01.1984, nr. 11.458, BR 1984, p. 750; Asser-van den Berg, 5-IIIC, 2007, nr. 92

³⁷⁶ 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*, 's-Gravenhage: IBR, 2010, p. 320

³⁷⁷ RvA 29.07.2010, nr. 31.139, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

general, it is the designer and the client who are responsible for the choices they make while designing the construction. Only in case the builder should have noticed their mistake, i.e. when it was an obvious default in the design plans, the builder has the duty to warn about it. When the loss that the client suffers is caused by a decision that can be seen as a ‘mistake’ only with hindsight, and at the moment when the construction choice was made it was one of the professionally acceptable choices to be made, then clearly the builder should not bear liability for it.

It is interesting to note that in different sets of standard terms this problem has been solved differently. Provisions of the AVA 1992³⁷⁸ support the view of the Dutch Supreme Court in the *Moffenkit*³⁷⁹ case, while provisions of the UAV³⁸⁰ after its revision in 1989 support the view expressed in the *Monoliet*³⁸¹ case. Since the introduction of article 7:760 BW³⁸² in the Dutch Civil Code, in 2003, the regular Dutch courts will more often heed the line expressed in the *Monoliet*³⁸³ case than the one from the *Moffenkit*³⁸⁴ case³⁸⁵. Section 2 *in fine* of this Article is interpreted as implying that the risk of the default in the material, which has been prescribed by the client and, which in general should be sufficiently fit to be used in the construction, should stay with the builder. It has been pointed out in the comments³⁸⁶ to these cases that if the client had not prescribed a specific material to be used by the builder, the builder might still have purchased defective material, even when he would have ordered it personally. In this case, it seems fair that the risk should stay with the builder. The client chooses a material, which is, in general, fit to be applied in the given construction and it is just the delivered batch of this material that does not fulfil all the necessary requirements. The builder’s liability in this case is based on a risk that every professional faces while doing business and that risk should not be transferred to the client.

In the RvA-case of 22 December 2009³⁸⁷ the builder was renovating apartments in a building complex, including the balconies of these apartments. After the construction had been completed, it turned out that some balconies had leak water running down their sides, which led to the forming of limestone stalactite at the bottom of the balconies. Moreover, some of the balconies had cracks running across

³⁷⁸ AVA 1992, afd. A/B, art. 4 Sec. 2; criticised by M. A. van Wijngaarden, BR 1993, p. 284

³⁷⁹ HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (*Moffenkit*)

³⁸⁰ UAV Art. 5 Sec. 4

³⁸¹ RvA 10.11.1977, nr. 8464, BR 1978, p. 72

³⁸² ‘7:760 BW: (...)’

2. *Is de ondeugdelijke uitvoering echter te wijten aan gebreken of ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop hij een werk laat uitvoeren, dan komen de gevolgen voor zijn rekening, voor zover de aannemer niet zijn in artikel 754 bedoelde waarschuwingsplicht heeft geschonden of anderszins met betrekking tot deze gebreken in deskundigheid of zorgvuldigheid tekort is geschoten.*

3. *Lid 2 is van overeenkomstige toepassing in geval van fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.’*

³⁸³ *ibidem*

³⁸⁴ HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (*Moffenkit*)

³⁸⁵ C. E. C. Jansen, J. H. Duyvensz, ‘Productenaansprakelijkheid en voorgeschreven ondeugdelijk materiaal sinds het *Moffenkit*arrest’, NTBR 2001, 8, p. 411; Asser-van den Berg, 5-IIIC, 2007, nr. 91; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 444-445 and 458-459

³⁸⁶ 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*, 's-Gravenhage: IBR, 2010, p. 321

³⁸⁷ RvA 22.12.2009, nr. 30.958, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

their entire width. The arbitration court, after inspecting the construction site, decided that the design should have provided for counter flushing on all floors of the building. The builder claimed that he had renovated the building according to the design plans, which had not provided for such counter flushing and according to the builder counter flushing should have been included as the specified method of construction. The RvA did not share the view of the builder and declared that he had a duty to warn the client about the clear lacks in the design plans. The arbitration court stated that the balconies are on the west side of the building complex, which means they receive the heaviest rainfalls. The builder should have known the consequences of this position and therefore had a duty to warn about the necessity to undertake measures to counter potential risks involved therewith. This case shows that sometimes the builder will try to avoid liability for the damage to the construction by claiming that he was not instructed to use a certain material or a method of construction that if it had been applied could have prevented the loss. However, if the omission on the side of the client should have been obvious to the builder or he should have been aware of the risk that it could bring about, he had a duty to warn the client thereabout.

It is important to repeat here that this does not mean that the builder will need to look for these omission and inconsistencies in the design plans. In the RvA-case of 10 December 2010³⁸⁸ the client suffered leakages in his cellar. The client claimed that it was the ground water that leaked over the construction of his cellar and that there was a mistake in the design in describing the level of the ground water; a mistake that the builder should have warned him about. The design plans had been made over a year before the construction began, which justified to the client the necessity and obligation of the builder to re-check the level of the ground water. Moreover, the client claimed that the builder should have had doubts as to the design when during the construction he needed to pump out more ground water than he had expected, as well as when he discovered that the floor of the cellar was positioned higher than planned. The arbitration court did not follow the reasoning of the client. The RvA decided that just on the basis of the availability of the design plans that specified the level of the ground water that the builder did not need to inspect whether it had been correctly noted down. The builder could have trusted in the competence of the designer and the data noted by him. The fact that there was more ground water pumped out during the construction than expected could have resulted from other reasons than incorrect calculation of the ground water level in the design plans and the higher level of the cellar's floor also did not make the performance of the design plans impossible.

In this verdict the arbitration court seems to create a rather wide exception for the builder's duty to warn. From the facts mentioned by the client it seems that the builder should have had some doubts as to the correctness of the design plans, especially since circumstances could have changed during one year that passed between preparing the design plans and starting construction works. However, the RvA decided that it was not enough to justify placing on the builder an obligation to actually re-check the data mentioned in the design plan.

Similarly, the client may mention specific sub-contractors or suppliers to the builder, and demand that the builder use their services. This leads to the builder having to work with a third party in performance of his own contract on the request or

³⁸⁸ RvA 10.12.2010, nr. 71.487 and nr. 29.953, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

demand of the client. Most authors think that in this case the liability for the non-performance or improper performance of such a sub-contractor should be borne by the client³⁸⁹. However, some authors also think that the builder's duty to warn remains intact in this situation. This would mean that the builder still has a duty to warn with regard to both the initial choice of a specific sub-contractor made by the client and the eventual later non-performance or improper performance by such a sub-contractor when the sub-contractor performs his own contract in a faulty way³⁹⁰. The builder should then remain liable for the defaults in the work performed by the sub-contractors regardless of whether they were employed on his own initiative or due to the client's order.

There is no specific provision in the Dutch civil code regulating this matter in the construction sector. However, pursuant to the general provision of Article 6:76³⁹¹ BW the builder should bear the liability for the improper performance of other persons who he employed, like sub-contractors. The Dutch Supreme Court³⁹² points out that the rule is clear in the Article 6:76 BW and, in general, does not provide for an exception when it was the client who ordered the builder to work with specific sub-contractors. One of the reasons for lack of such an exception might be that the client could have contracted himself with the sub-contractors and included them directly in the construction process. This suggests that there had to be reasons for the client to have the builder conclude contracts with sub-contractors in his own name in such cases – e.g. the client did not want to coordinate works of various sub-contractors with each other. However, according to the Dutch Supreme Court, the application of this provision might be restricted by the 'good faith' rule. In certain circumstances the facts of the case might make it unjust for the client to claim damages from the builder for the default of the sub-contractor that the client had chosen himself, e.g., if the builder was opposed to cooperation with the sub-contractor chosen by the client, but was more or less forced to accept the client's wish. This exception of the rule has been accepted in the Dutch doctrine, as well³⁹³. It needs to be interpreted restrictively.

For example, in the case of 18 October 1983³⁹⁴, the builder was ordered by the client to employ a particular sub-contractor for the construction and the sub-contractor performed his work under direct supervision of the client and had not been in touch with the builder. Then it was decided that the builder should not be liable for the sub-contractor's mistakes³⁹⁵. Since the sub-contractor had only been in direct contact with the client in this case, it would seem that the 'good faith' rule could intervene with the general liability rule of Article 6:76 BW. Other factors, e.g. whether the client encumbered the builder with the duty to coordinate the works of the sub-contractors and whether the builder tried getting in touch with that sub-contractor, may also play a role in answering this question.

³⁸⁹ Asser-Kortmann-de Leede-Thunnissen, 5-III, 1994, nr. 502; Asser-van den Berg, 5-IIIC, 2007, nr. 94; to be discussed in the following chapters.

³⁹⁰ E.g. note of N. J. M. Donders to: Kantongerecht Zaandam, 29.09.1994, no. 1351.94, BR 1996, p. 443-444

³⁹¹ "*Maakt de schuldenaar bij de uitvoering van een verbintenis gebruik van de hulp van andere personen, dan is hij voor hun gedragingen op gelijke wijze als voor eigen gedragingen aansprakelijk.*"

³⁹² HR 21.05.1999, NJ 1999, 733 (B./W. also known as 'The fraudulent co-worker')

³⁹³ Asser-Hartkamp, 4-I, 2004, nr. 328

³⁹⁴ RvA 18.10.1983, nr. 10.653, BR 1984, p. 172

³⁹⁵ However, the arbitral court adjudicated the case before the abovementioned verdict HR 21.05.1999, NJ 1999, 733 (B./W. also known as 'The fraudulent co-worker') has been made, which means that it cannot be said with certainty that this arbitral verdict would be upheld nowadays.

When the client appointed or ordered the builder to appoint a specific sub-contractor, only in case the improper performance of the sub-contractor's duties originated in his insufficient skills and experience and constituted so called "structural inadequacy", this could lead to the exclusion of the builder's liability, according to Dutch legal literature³⁹⁶. Otherwise, i.e. when a sub-contractor that is sufficiently qualified for the job makes an incidental mistake, the builder should remain liable, even in case when he did not choose the sub-contractor himself, as this risk is a normal entrepreneur's risk he could have encountered also with a person he would have chosen himself³⁹⁷.

The provisions of the UAV 1989 similarly deal with the improper performance of sub-contractors and suppliers (that is a professional party supplying construction materials), with one significant difference. In case of an improper performance by a sub-contractor chosen by the client, it is the client who is liable for the additional costs of the construction, which could have been avoided if not for the default. However, it is the builder who is liable for the results of an improper performance of the supplier. This difference does not find any proper explanation in the Dutch legal system, it is argued in literature³⁹⁸.

The scope of the builder's duty to warn for a mistake of a third party, usually the designer's, is influenced by both his competence and that of the third party³⁹⁹. The RvA used to, most often, not find the builder liable for not performing his duty to warn in case the client (or the director of the construction employed by the client) had more actual or professional knowledge with respect to the default than the builder did. For example, in the case no. 7698 from 1977⁴⁰⁰ the RvA decided that the builder had no duty to warn about the water resistance aspect of the basement walls and the swimming pool walls due to the fact that it fell under the typical responsibilities of the director of the construction, for whose actions the client bore responsibility himself. This case seems to suggest that the builder had no duty to warn since the designer/director of the construction was more qualified than the builder to recognise the mistake. However, if the mistake originated from the design and therefore was already apparent from the design plans, like the improper provision of water resistance of the swimming pool, it is not likely that the designer, while performing his duties as a director of construction, would discover that mistake and warn about it. It is after all the same person and it may be difficult to notice mistakes in one's own work. That is also the reason why the duty to warn of the builder about the mistakes of a third party is so important. Of course, it is understandable that the builder would have the duty to warn only about the defaults that he could or should have noticed, as

³⁹⁶ 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*, 's-Gravenhage: IBR, 2010, p. 322-323

³⁹⁷ The reasoning is here quite similar as to whether the builder is liable for defective materials that were provided by the client.

³⁹⁸ 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*, 's-Gravenhage: IBR, 2010, p. 324-325

³⁹⁹ 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; on problems that arise while this criterium is used see: M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 82-86

⁴⁰⁰ RvA 1977, nr. 7698, Bloemlezing 1976-1981, p. 71

a professional party. If the competence of the builder does not allow him to spot certain mistakes, it could not be expected of him that he would warn about them⁴⁰¹.

In my opinion, the sole fact that there is a competent third party employed by the client should not release the builder from his duty to warn about that third party's mistake⁴⁰². This is substantiated by the decision of the Dutch Supreme Court in the landmark case of 18 September 1998⁴⁰³, which will not be discussed here at length taking into account that it concerned a duty to warn about the client's mistake and not a mistake by a third party. In that case, however, the Dutch Supreme Court recognised that the mere knowledge or competence on the side of the client could not be sufficient to release the builder from his duty to warn the client. There is no reason to think that this judgment would be any different in case it concerned not a professional client but a client who employed a professional advisor, e.g. designer.

There is a clear discrepancy between the view of the Dutch Supreme Court and the RvA here. Tijssens conducted research on the verdicts of the RvA from the date of publication of the KPI/Leba judgment until the year 2008 to see whether the RvA changed its point of view. Out of sixteen verdicts that were of relevance for this subject, only five⁴⁰⁴ followed the new line of the Dutch Supreme Court and the rest confirmed the 'old' point of view that the competence of the client should release the builder from his duty to warn. Tijssens did not find any justification for the inconsistency in the RvA verdicts, namely: why in some of the RvA verdicts the line of reasoning of the Dutch Supreme Court is followed and why in others it is not⁴⁰⁵.

However, more recent cases⁴⁰⁶ of the RvA seem to suggest that the arbitration court is nowadays following the verdict of the Dutch Supreme Court more often. In these cases the RvA states that the builder's liability should, 'in principle', be evaluated on its own, without taking into account other parties that were involved in the construction process. This means that, in general, the arbitration court would not take into account the competence of the other parties advising the client. However, if circumstances of the given case would require it, this factor would also be taken under consideration. This reasoning follows the one given in the judgment of the Dutch Supreme Court. However, it might be interesting to trace future development on this subject, since the arbitration court left the possibility open to still take into account the competence of the client's advisors. How the arbitration court will use this leeway, e.g. whether it will tend to take into account the client's competence as often as

⁴⁰¹ See the case described below: RvA 16.02.1999, nr. 19.582, not published; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 63 (No. 782)

⁴⁰² Not only in case the builder acted with gross negligence by not warning the client, see the case described previously in this paragraph: RvA 03.03.2006, nr. 25.856, BR 2007, p. 255, but also in other situations that have been recognised in the case law of the Dutch Supreme Court, e.g. HR 18.09.1998, NJ 1998, 818 (KPI/Leba), HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt); 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

⁴⁰³ HR 18.09.1998, NJ 1998, 818 (KPI/Leba)

⁴⁰⁴ E.g. RvA 03.03.2006, nr. 25.856, BR 2007, p. 255; discussed in previous paragraphs and in the previous chapter

⁴⁰⁵ 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

⁴⁰⁶ RvA 18.11.2009, nr. 30.728, TBR 2011/49; 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); RvA 24.03.2011, nr. 30.921 and 71.681, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

before, just by claiming it necessary based on the circumstances of the case, remains to be seen.

One other option that remains is for the RvA to find the builder liable for breach of his duty to warn even if the client has a competent advisor, but then the arbitration court might limit the amount for which the builder is liable. For example, in the case of 18 May 2011⁴⁰⁷ the RvA found that the builder had a duty to warn the client despite the client had employed also a professional construction specialist as his advisor. However, due to the presence and competence of the client's advisor the RvA decided to limit the builder's liability to 60% of the client's loss based on the client's contributory negligence⁴⁰⁸.

It might be interesting to mention one other case on this subject, which does not fit within the discussed trend. In this case⁴⁰⁹ the RvA seems to go even further than the Dutch Supreme Court did. Namely, the RvA clearly states that the competence of the client should never release the builder from his duty to warn. The Dutch Supreme Court, has only stated that the competence of the client is not the only factor determining the builder's liability for his breach of the duty to warn and that the court should take into account all circumstances of the given case in order to estimate whether the builder breached his duty to warn or not⁴¹⁰. Its commentator, Chao-Duivis has criticized the verdict of the RvA since the arbitral court upon stating that the builder has a duty to warn did not consider whether in the circumstances of the given case the warning actually had to be given. It seems unlikely that this case will be followed in the future.

Previously, the influence of the competence of a party who is seen as a client's representative and who makes a mistake on the scope of the duty to warn of the builder was discussed. Sometimes the client employs more than one builder within the same construction. In case the designer makes a mistake within the design plans it is interesting to discuss whether the scope of the duty to warn of a builder about this mistake will be influenced by the fact that there were other builders who also could have warned the client. In the RvA-case of 20 September 2010⁴¹¹ the client indeed employed two builders to work on his roof, and additionally he performed a significant part of the works himself. This meant that there were three parties involved in the construction of the roof. Ultimately, the roof ended up not having the necessary damp-resistant insulation layer. The builder, who was then sued for not performing his duty to warn the client about the missing insulation, had mounted the basic foundation for the roof. Then another builder put a zinc layer directly on this

⁴⁰⁷ RvA 18.05.2011, nr. 32.198, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁴⁰⁸ Division of liability will be further considered in chapter 7.

⁴⁰⁹ RvA 15.04.2008, nr. 71.193, TBR 2008/132 with note of M. A. B. Chao-Duivis. This case will not be further discussed in the main text here since it concerns the duty to warn of a sub-contractor (considered as a builder) to the builder (professional client). The mistake referred to the construction of a steel plate being supported only on one corner by a pole, which support turned out to be insufficient. This mistake in the design plans should have been obvious to the sub-contractor who should have warned the builder (his client) about it and the scope of that duty to warn is not influenced by the possibility that a professional client, the builder, could have noticed that mistake himself.

⁴¹⁰ Also discussed in the note of M. A. M. C. van den Berg to: Rechtbank Den Haag, 22.10.2008, 306268/HA ZA 08-784, LJN: BG4175 (Hartol/Global Stone), TBR 2009/130

⁴¹¹ RvA 20.09.2010, nr. 31.537, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

underlayment. Finally, the client finished off the roof with the last necessary layers. The arbitration court decided that the builder could not be held liable here for not warning the client, since he could have assumed that the following builder, before laying down the zinc, would install the insulation. The client did not ask the builder to coordinate the construction and therefore he had no duty to inquire whether his works were in accordance with the works of other specialists employed by the client.

The situation in this case required the builder to warn about a risk that might have happened in case other parties involved in the construction did not continue this process in a specific way. The builder is, however, not required to foresee what risks might appear in the future works at the construction site, unless he is specifically encumbered with supervision and coordination duties of the whole construction.

As it has already been mentioned, the builder must have enough competence to recognise the mistake in the designer's plan in order for him to have a duty to warn the client about that mistake⁴¹². In a case of 16 February 1999⁴¹³, the builder was held not to be liable for the damage suffered by the client as a result of improper use of the lime mortar. The client demanded the use of that kind of mortar and the designer was aware that it would be the first time the builder would have to use that mortar in his career, that he had no prior experience therewith. That is why the RvA adjudicated that the client could not have expected a warning from the builder about the insufficient solidity of that mortar.

The arbitral court did not recognise the builder's duty to warn either in the case of 20 June 2000⁴¹⁴. The court adjudicated that in the given cases the circumstances were such that neither the builder nor the client was competent to spot the default within the construction before it was finalized. Namely, the client hired a separate party to perform some works on the floors. The builder was aware of that fact. As the builder was no specialist in the tasks performed by the separate party he would be able to estimate whether the works were performed, but not whether they were duly performed. The court stated that the builder had no duty to warn in this situation since he had no idea what to warn about. The client could not have expected the builder to have such expertise as the separate advisor whom he (the client) employed to perform this specific work.

In the case of 3 November 2010⁴¹⁵ the RvA stated that the design, which provided for the construction of eaves made of untreated oak was risky and not very common. The client could not expect the builder in such a case to warn him about a potential damage that might result from following this design, since the builder did not have and could not be expected to have the specific knowledge that would allow him to see the risk.

However, when the builder is aware of the lower competence of the designer employed by the client, he should pay more attention to the design plans and warn the client of any faults therein. The scope of the builder's duty to warn about the mistake of a third party could be broadened, in such a situation. In the case of 7 April 1986⁴¹⁶,

⁴¹² M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 91

⁴¹³ RvA 16.02.1999, nr. 19.582, not published; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 63 (No. 782)

⁴¹⁴ RvA 20.06.2000, nr. 21.692, BR 2001, p. 67

⁴¹⁵ RvA 03.11.2010, nr. 27.398, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁴¹⁶ RvA 7.04.1986, nr. 12.253, BR 1986, p. 548

the builder was aware that the designer was an acquaintance of the client and was not a specialist in construction. The court adjudicated that the builder should have realized that the designer had not conducted any construction calculations. Furthermore, though it has not been decisively estimated whether the designer excluded his liability towards the builder in tort, there was no doubt that he has done so towards the client in contract. The builder was at least aware of the fact that the designer was not a professional party, that there had been no calculations made and in the end he took responsibility himself for the design plans while applying for a construction permit, by signing it. As the result, the court placed full liability for the faulty design and thus for the defaults within the construction on the builder.

Moreover, if the builder works with other specialist constructors that were not chosen by the client, but who were employed by the builder himself, then the knowledge of such constructors would be attributed to the builder. For example, in the case of 9 February 2010⁴¹⁷ the Court of Appeal Leeuwarden had to decide whether the builder could be held liable towards the client for sub-contractor's breach of the duty to warn. The builder in this case employed a sub-contractor to install the roof at the client's house. Unfortunately, the bricks on the outer walls of the house were laid too high which led to extra pressure on the roof construction and the roof was faulty. The client claimed that the builder, since he was the professional party the client had a contract with for performance of this roof with, should have warned him that the walls were built too high. The builder argued against this, claiming that it was his sub-contractor who performed the works and that the sub-contractor did not warn the builder about this risk nor that he had to warn about it. However, the builder acknowledged himself that *any* builder knows that walls should be brought to their full height only after the roof had been set in place. The court agreed with that and therefore had no doubts that the sub-contractor had a duty to warn the builder about this default and that this mistake was attributable to the builder based on Article 6:76 BW.

In the arbitrational case of 24 March 2011⁴¹⁸ the builder employed a sub-contractor to lay down the floors in the house of the client. The material chosen by the designer for these floors was natural stone. The sub-constructor, as a professional in handling of natural stones, should have been aware that natural stones are functionally not suitable to be used as a building material on the outside of the house, which was what the designer had planned for. Since the knowledge of the sub-constructor was attributed to the builder, who had hired him, the builder was seen as having the duty to warn the client about the risk of using prescribed construction materials. Of course, the builder may then have a recourse claim towards the sub-contractor, which the arbitration court in this case considered, as well⁴¹⁹. Of course, if the builder should have recognised this default himself, the builder and the sub-contractor might share the liability for the damage of the client. In that case the builder would not be able to reclaim the full amount of the damages he would have to pay the client⁴²⁰.

Certain cases of the arbitration court point to the fact that not only competence of the client and his advisors might influence the existence and scope of the builder's

⁴¹⁷ Hof Leeuwarden, 9.02.2010, 200.014.649/01, LJN: BN3873

⁴¹⁸ RvA 24.03.2011, nr. 30.921 and 71.681, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁴¹⁹ This will be further discussed in chapter 5 on the duty to warn of the sub-contractor.

⁴²⁰ See more in chapter 5 on the duty to warn of the sub-contractor as well as in chapter 7 on the liability.

duty to warn, but also the actual knowledge of the client of the risk. Whenever the builder can prove that the client knew of the default, then he might expect not to be held liable for not having warned about it.

In the case of 6 December 2006⁴²¹, upon completion of the construction, some leakages were discovered. The client claimed that the builder had a duty to warn him about the improper way the previous builders performed their work, as well as about the fact that the layer of putty at the windows would not always be thick enough to prevent leakages due to the incorrect sizes of the windows that have been ordered for that construction. The builder defended himself by claiming that the client was aware of both facts and did not need an additional warning about that. The arbitrational court accepted the builder's defence. It has been stated that the client as well as his director of the construction had expressed doubts about the work of the other builders, before the builder commenced his own work. Both the client and the director of the construction were also aware during the construction works that it would not always be possible to maintain the required layer of putty due to the incorrect sizes of the windows. Nevertheless, they still insisted on the builder installing these windows without any delay. Therefore, the client was seen as having consciously taken the risk of the improper design⁴²². In case the client together with the designer, who also acted as a director of the construction, not only is aware of the default in the construction but rather consciously chooses for the construction to be carried out as originally planned, the builder would not be seen as still having a duty to warn towards such a client. This could, of course, be different if new risks come to light that the builder knows or should realise the client had not taken into consideration when choosing to have the construction to be carried out as planned.

Also in the case of 29 November 2004⁴²³ the client was seen as having accepted the risk himself. The builder in this case was employed to rebuild an old school into two apartments. When the construction had been completed it turned out that the apartments did not fulfil the necessary legal norms. The client claimed that the builder should have warned him about that discrepancy, pursuant to Article 5 of the AVA. The question may be raised here whether it should be the builder who would be liable for the default in the construction, taking into account that he performed the contract pursuant to the design plans he had received. The designer was as aware as the builder of the legal norms that had to be observed in this construction project. The arbitrational court adjudicated that the client could not be seen as an amateur in the construction field, taking into account that he employed a professional designer to assist him in his choices. As a consequence, the knowledge of the designer should be attributed to him. Furthermore, the client together with the designer and the builder discussed the plans for the construction in details, many times mentioning the legal norms that the construction had to fulfil, as well. The court adjudicated that in such a case the builder did not have to additionally warn the client about the necessity to comply with the legal norms and warn him that the designer's plan is faulty. In the circumstances of the case it can be assumed that the client accepted the risk that the potential buyers of the apartments might not accept the way in which the construction had been performed.

⁴²¹ RvA 6.12.2006, nr. 27.433, BR 2007, p. 266

⁴²² This decision is in line with the Supreme Court's decision in NSC/Pongers, HR 08.10.2004, NJ 2005, 52, BR 2005, p. 634, with casenote by M. A. M. C. van den Berg. This case will not be discussed here taking into account that it concerned a duty to warn about the client's mistake and not a third party's mistake.

⁴²³ RvA 29.11.2004, nr. 24.637, BR 2007, p. 527

In the case of 18 November 2009⁴²⁴ the arbitration court had to decide whether the builder had a duty to warn about risks coming from the design. The client in this case requested a particularly risky method of construction to be used, which had been included in the design, i.e. laying a pile of turfs in a pyramid that could lead to sagging of the ground as a result. The RvA stated in this case that the design itself was not faulty, only risky. The design itself was not malfunctioning; it just increased the chance of sagging of the ground after the construction was finished. Other professional parties who inspected the grounds after the loss had been suffered stated as well that the construction method used was one of the acceptable options, even if it was a risky one. Since the client was aware of the increased risk from the beginning of the construction the builder was seen as not having a duty to warn in this case.

It seems understandable not to expect of the builder to warn the client about a risk that the client already knows about. However, one might wonder whether the client, while being familiar with the possibility of the risk itself, knows how grave the risk is and basically whether he is fully informed about it. It seems a bit hasty to completely release the builder from his duty to warn whenever the client has any information about the potential risk. That is what the RvA did in the case of 19 July 2010⁴²⁵. The builder in this case was not seen as having any duty to warn based on two facts. Firstly, he did not have sufficient technical knowledge to discover the mistake in the designer's construction calculations. Secondly, the client while trying to prove that the builder had a duty to warn him about the designer's mistake mentioned that another constructor had asked him whether the design calculations were correct. The arbitration court did not think that because one constructor notices the possibility of a default in the design, it should have automatically been apparent to the other builder as well. Moreover, the RvA stated that apparently the client had received a warning from one professional party and it had not influenced him. The RvA did not see the need for a more explicit warning to the client. While it might be reasonable to expect of the client to show some initiative in protecting his own interests and upon receiving any warning to conduct some inquiries of his own, I do not believe that this fact should be a decisive one in determining whether the builder should warn the client or not. Of course, in combination with the first argument of the RvA, i.e. the lack of competence of the builder to notice the default, it makes sense that under the circumstances of this case the builder had no duty to warn.

It is interesting to note that in the case of 23 October 1996⁴²⁶, despite seeing the need for a warning the court decided that the builder should not be held liable for not issuing it, since there was no causal link between the lack of warning and the damage. The case pertained to the construction of a basement. The court stated that in general everyone ordering such construction expects to have a dry basement built. According to the court, the builder failed in his duty to warn the client that the design, which was chosen by the client did not guarantee such result, i.e. the basement would not remain dry in all circumstances. However, the court came to the conclusion that even if the builder would have issued such a warning to the client, the client still would have chosen for the same method of construction, due to the fact that it was relatively cheap and technically correct. Thus, the direction would not have been changed and the defect would have appeared anyway. The court decided that the

⁴²⁴ RvA 18.11.2009, nr. 30.728, TBR 2011/49

⁴²⁵ RvA, 19.07.2010, nr. 31.577, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁴²⁶ Hof's-Hertogenbosch 23.10.1996, BR 1997, p. 149

builder should not be held liable in such a situation for not issuing the warning to the client.

The RvA in the case of 30 December 2010 also stated the lack of a causal link⁴²⁷. In this case there was a default in the design plans, which led to the floors not being pervious to the water flow, which the builder should have warned the client about in the first place. However, the arbitration court decided in this case that if the builder had warned the client, then, at the most, he would have received an additional instruction to install a submerged pump with a float valve. The client would, of course, have to pay the builder for this extra work since it had not been provided for in the original contract. This means that there is no difference between the situation that would result from the builder having given the warning to the client and having breached his duty to warn, since in the second case the client still has to pay for installation of this pump and the costs would not have been lower if the warning had been given, according to the RvA. Since there is no causal link between the lack of warning and the damage, the client could not claim any damages from the builder.

These cases seem to suggest that the builder will be held liable for the breach of his duty to warn only in cases when the warning could have influenced the client in changing his mind as to making a potentially risky decision, or when the warning would lead to the client choosing another construction method than the one that would be used after the risk materializes. In other words, when there would not be a causal link between the lack of warning and the damage that the client would suffer subsequently, there would not be a ground to hold the builder liable for the breach of the duty to warn.

3.3.2. Precontractual duty to warn.

While the introduction of the article 7:754 to the Dutch Civil Code took away most doubts as to the matter whether the builder has a precontractual duty to warn towards the client, it had in fact been recognised in Dutch law significantly earlier⁴²⁸.

In the case of 26 June 1974⁴²⁹ the client complained about the sewer system that the builder created on the basis of the design provided to him. The sewer system was not functioning properly since it had not been connected to proper pipes. The court stated that the builder should have realized from the design plans that he was given that the sewer system would be faulty and should have warned the client and the designer about that. The builder was deemed to have sufficient knowledge to realize that the construction would not be functioning correctly if realized according to the design plans. According to the court the builder should have expressed his doubts during the precontractual discussions that he had with the client and the designer on the planned construction. Instead, he gave assurances to the client that the construction would function properly. As a result of this behaviour the builder failed to fulfil his duty to warn towards the client and was held liable in this case.

Another case of 21 April 1978⁴³⁰ concerned a construction which turned out not to be water resistant. The client had demanded in this case that his construction

⁴²⁷ RvA 30.12.2010, nr. 71.448 and 29.914, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁴²⁸ see case law described in this paragraph

⁴²⁹ RvA 26.06.1974, nr. 7143, BR 1974, p. 760

⁴³⁰ RvA 21.04.1978, nr. 8411, BR 1978, p. 697

was water resistant and that the builder had given a guarantee for at least 5 years for water resistance of the construction. A paragraph to this effect was added to the contract between the builder and the client. At the same time, the design plans provided for such design and use of such construction materials that did not guarantee the water resistance of the construction. The court decided that there was a clear contradiction between the design plans and the provisions of the builder's contract. The design plans did not provide for a water resistant construction, while at the same time the builder was expected to give a guarantee for water resistance thereof. The builder accepted the contract together with its provision on a guarantee for water resistance. The court decided that the builder had a duty to warn the client even before he entered into a contract with him, but at the latest during the performance of his work, that there is a contradiction between these two documents. The builder had then a duty to inquire what the client's intentions are: whether he expects the builder to proceed according to the design plans or whether he wants him to deliver a construction, which is guaranteed to be water resistant. If he performed his duty then, if the client demanded from him a water resistance construction, the builder might have demanded extra payment for the extra work he would have to perform. In the case, the builder claimed that he had informed the designer that for the given construction he cannot give a guarantee of water resistance and that the designer agreed therewith. There was no written evidence thereof. In the end, the court decided that the builder had a duty to warn the client and that he accepted the terms of the contract as they were, which meant that the builder should be encumbered with the costs of extra construction measures that he needed to take in order to guarantee that the construction would be water resistant for the coming 5 years. As in the previous case, the builder had or at least should have had enough knowledge to recognise the default in the design plans and thus should have warned the client that there was a risk in the contract between him and the designer.

Also in the case of 8 March 2001,⁴³¹ the precontractual duty to warn of the builder has been established. The client together with the designer demanded from the builder to drain water of the ground by using a certain drainage method that was not correct in the given circumstances. The court of first instance decided that while in general it is the client who is responsible for the correctness of the design that has been prepared in accordance with his wishes, there could be important reasons to place some of that responsibility on the builder. In the given case, the court stated, the builder as an experienced professional had to realize that the prescribed drainage method had not been the right one and should have warned the client about that. The court made it clear in this case, that it is not expected from the builder to study the design plans in detail in order to make sure that there is no default or risk involved with performing them. One of the reasons that this is not expected from the builder is the fact that the builder often has a very short time to look through this material before coming up with an offer to the client, while the designer can take his time and plan everything meticulously. However, the court reasoned that every builder should at least globally study the design plans even if only to responsibly prepare his offer for the client. In the given case, the default was significant enough that the builder should have noticed it even by such a global study of the design plans. The court stated that the builder had the duty to warn the client and to request certain clarifications, since even before entering into the contract with the client the builder should have take into

⁴³¹ RvA 08.03.2001, nr. 21.407, BR 2001, p. 122

account the client's interest. The fact that the client had an independent advisor to help him make construction choices did not influence the builder's duty to warn in the view of the court. The only factor that was decisive for establishing the duty to warn was the builder's knowledge as to the default in the design plans, which he should have had.

This case has been appealed from and in the verdict of 19 December 2002⁴³², the appellate court overturned the initial ruling. However, the *possibility* of recognising a precontractual duty to warn was not questioned in this new ruling. Instead, it has been decided that the builder in the given case could not have known that the designed drainage system would not be appropriate for the given construction. It has been confirmed in this judgment that in certain cases, in which the risk coming out of the design should be obvious to the builder, the builder would be expected to warn the client about that. Under the circumstances of the case the builder did not recognise the risk nor should have he done so, thus he was released of his liability towards the client.

The above-mentioned cases clearly illustrate that a precontractual duty to warn is recognised by the Dutch courts and the precondition for that is that the builder knew or should have known of the default in the design plans. Since the builder does not have a duty to research the design plans in detail, he would not be considered to have to know of the default unless it is an obvious mistake that he could not have missed during his general review of the design plans⁴³³. In the contractual phase the builder does not have to look for defaults in the design plans either, however, it is expected that the builder would work based on the design plans which means he would use them on a daily basis. During his work with the design plans the builder might be expected to notice defaults in the design plans. As far as the precontractual phase is concerned, the builder would most likely take the design plans into consideration only in so far as it helps him to estimate the costs of the construction. This means that the builder would be expected to warn the client only about really obvious and gross defaults in the design plans.

For example, in the RvA-case of 9 December 2009⁴³⁴ the builder was employed by the client to renovate 2 out of 23 houses that at that time were being renovated on the same street. Only after the renovation was completed it turned out that the foundations of the houses needed reparation, which undermined the whole purpose of the previous renovation. The client claimed that the builder should have been aware of the need to repair the foundations and should have warned him about it. According to the client, the builder should have noticed, before he even had made his offer to the client, that the facades of the houses had cracks in them and he should have realized that these cracks were caused by the instability of the houses' foundation. However, the arbitration court shared the opinion of the builder in this case that the cracks in the façade and on the roof that he could have noticed during his short visit in order to prepare his offer, were not that serious. Since the defaults were

⁴³² RvA 19.12.2002, nr. 70.582, BR 2003, p. 59

⁴³³ See above described cases; 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 waarschuwingplicht 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

⁴³⁴ RvA 9.12.2009, nr. 71.355 and 28.747, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

not obvious enough for the builder to discover them without a thorough inspection, and such inspection was not required of him at the moment of preparing the offer, the builder was seen as not having a precontractual duty to warn the client. This means that the builder could not be held liable for the damage suffered by the client as a result with proceeding with construction. Also, if the client wanted the builder to repair existing defaults, the builder could claim additional compensation for these repairs.

3.4. Comparison.

This chapter analysed the scope of the builder's duty to warn, paying close attention to what triggers such a duty to warn and how attentive the builder should be in performance of his obligations as to mistakes and risks coming from other parties to the construction. It has also been considered whether the competence of the client or the fact that a professional party is assisting him could influence the scope of the builder's duty to warn. Finally, it was discussed whether the fact that the client prescribes certain materials for the builder to use or recommends him to work with a specific other professional party influence the scope of the builder's duty to warn.

The analysis of English case law, as mentioned in the part on emergence of the duty to warn in England, leaves us with much confusion regarding the builder's duty to warn and its scope, especially when it concerns the designer's mistakes. Initially, the courts took the view that the explicit contract terms prevail. This meant that when the building contract stated that the builder was obligated to follow the design plans to the letter, his duty was to do precisely and only that. Even if he would notice that the design plans deviated from what the client was aiming to reach, the builder had no duty to warn the client thereof. The courts assumed that an opposite situation would constitute a too burdensome obligation for the builder and that he was supposed to only perform his contractual duties. This solution, however, put a heavy burden on the client's side, because usually he was capable of noticing the default only after the construction was completed. Then the client was encumbered to conduct the necessary repairs and readjustments of the building. In more recent years, however, the English courts, albeit reluctantly, began to change their line of thinking. Nowadays, it seems, the builder would not be released from his liability just by claiming that he was fulfilling his contractual obligations and performing his work according to the design plans delivered to him, since it would be taken into account whether the builder noticed or should have noticed the default in the plans. The builder does not have to possess an actual knowledge of the error in the design plans; it is sufficient when he believes in its existence. However, such belief still does not obligate the builder to actively search for discrepancies in the design plans. The builder needs to warn the client about the defaults that he could have spotted without having to conduct thorough inspections. Basically, the English courts apply the test of the careful and competent builder to assess whether in the particular circumstances of the case the builder should have noticed and then have warned the client of the default. Additionally, the builder might be obligated to warn not only about the default in the design but also about a risk coming from another professional party involved in the construction process. For example, the builder's duty to warn might encompass the need to examine the land adjoining the land on which the construction was supposed to take place in order to warn the client that he should not be purchasing a particular land for a given construction. Again, one might draw a

tentative conclusion that the test that the court will use to assess the scope of the builder's duty to warn would be that of a competent and careful builder. This conclusion is only a tentative one, since there is not much case law in English law to base it on. Taking into account the conclusions of the previous chapter, i.e. the absence of a clear source for the duty to warn in the English legal system and the reluctance of English courts to recognise a duty to warn, this does not come as a surprise. It leads, however, to certain difficulties in determining the scope of the duty to warn in England, which are sure to have a negative effect on the clarity and legal certainty of these rules to the consumers.

The analysis of German and Dutch law leads to the opposite conclusion. The richness of case law and decisions on the builder's duty to warn clearly shows certain limitations of its scope.

And so, in German law the builder's duty to warn seems to be very broad, which corresponds to the broad scope of duties of the builder during the construction. The builder's duty to warn has been considered separately with regard to the fact about whose defaults he was obligated to give warning to the client. Basically, it can be argued that a builder is obligated to warn the client of the defaults in work of a designer as well as in that of other builders or his own sub-contractors even. It is worth to note at this point that in German law a default does not only encompass a factual defect, which could endanger the construction, but also an inaccuracy, which would lead to a non-fulfilment of the client's aims regarding the construction.

In the first case, when the default appears within the design plans, the builder's liability in Germany could be diminished or he could be completely released thereof due to the fact that the plans were prepared by a specialist – a designer. Still, in case a builder should have noticed the default, the German courts consider him to be concurrently liable for the damage resulting thereof, together with the designer. In such a case, the fact that the client employs another specialist who could also advise him and warn him as to the default will not limit the builder's liability. The builder does not have in such a case a duty to inspect the design prepared by the designer but his duty to warn encompasses any mistakes that should have been obvious to him 'at a glance'. That means that the duty to warn has limits in the professional knowledge that could be expected from an average builder.

Dutch law establishes liability of the builder for such defaults in the design that should have been obvious to him without conducting any special research as to that. The Dutch builder has to conduct only a marginal check of the design plans and if on the basis thereof he should have noticed the default, it is assumed that he should have warned the client. The obviousness of the default in the design plans and the level of experience of the builder are taken into account to estimate whether he was under a duty to warn the client in the given case or not.

When there is more than one builder working at the construction site and one of them causes the defect, the courts consider the scope of the builder's duty to warn from a different point of view. Then the question appears as to the scope of the duty to warn of the other builder – the one who did not cause the defect but maybe should have noticed it and should have warned the client thereof. The German courts concluded that the other builder should be obligated to warn the client of such defect only when it could be expected of him to inspect the work of the builder who caused the defect. This point of view takes into account that the builder who would be starting to work at the construction site where previously some construction work had

been done, would have to rely on the previously performed works. Then it is reasonable to expect him to inspect such earlier works in order to make sure whether they constitute a sound ground for his future work and to warn the client of any defaults therein.

There is less case law on this subject matter in the Netherlands, but just like in Germany a builder starting work at the construction site will as a rule not have a duty to warn about defaults resulting from works of other builders that perform their work after him. The builder is not required to foresee what risks might appear in the future works at the construction site, unless he has coordination obligations, as well. However, we could also observe in German case law that the first builder starting the work at the construction site could also be found liable for defaults resulting from the construction in case the future works performed there were based on his performance and he should have noticed that either the following builders would not be able to build upon his own work due to lack of competence or due to unexpected materials or techniques used by him. This qualification has not yet been considered in Dutch law.

Additionally, the Dutch builder should warn the client of the defaults he should have noticed in the works of other builders who performed on the construction site before him. The rule that the builder is liable for the materials delivered by the client is broadened here to encompass also the construction site. That means that when the builder enters a construction site he should carefully examine it and either accept it or not.

The Dutch builder shall also be liable for incidental mistakes made by sub-contractors employed by him upon the demand of the client. Such mistakes might have happened also in cases when the builder hired these sub-contractors of his own will. However, in certain situations the liability of the builder for structural inadequacy of the sub-contractors work might be limited or even excluded when the 'good faith' principle would oppose the assumption of the builder's liability for such a default. This would, for instance, be the case if the builder objected to the employment of the given sub-contractor, but relented in doing so due to the pressure of the client and the default caused was of the nature the builder warned the client about.

Generally, we could see that the scope of the builder's duty to warn in German law relies to a huge extent on the particularities of the case, such as what professional knowledge is expected from the builder or what were his contractual obligations. The fact, however, that the client employed another specialist whose competence and professional knowledge could be attributed to the client, may not on itself release the builder from his duty to warn the client. This would change in case the client's or his representative's professional knowledge would be higher than that one of the builder. In case the default lies in the area of expertise that is more familiar to the client than the builder, the builder would not be under a duty to warn the client. Otherwise, it is only when the builder has *specific* grounds to believe that the tests and inspections conducted by other specialists employed by the client were as full and as reliable as the ones he could conduct himself, may he forego conducting these tests.

In the Netherlands the general rule is that the client's competence or actual knowledge should not influence the builder's scope of the duty to warn. If the builder recognised or had sufficient experience that he should have recognised the default in the construction, he had a duty to warn the client thereof. If the client or another party employed by the client is found to have a higher degree of expertise than the builder in respect of the area where the default appeared or had employed a specialist in that

area, the builder might not have a duty to warn the client about such default. It should be noted, however, that the most recent case law tends to evaluate the builder's duty to warn independently of obligations and competence of other parties involved in the construction process. On the other hand, when the builder should have realized that the specialist employed by the client had less competence than an average specialist, he should inspect e.g. design plans delivered to him more carefully since the scope of his duty to warn might be broadened then. The builder was considered to be completely released of his duty to warn in case the client not only had an actual knowledge of the default but rather consciously decided to take upon himself risks associated therewith.

In English law it might be interesting to note that in case the builder might have a duty to warn about a default in the design that arises due to the designer planning on using novel materials, the fact that the materials to be used are novel does not limit or exclude the duty to warn of the builder. To the contrary, English courts considered that in such a case the builder might have to be even more careful than usual in his assessment of the applicability of the material prescribed by the designer.

The German courts assessed the matter of the necessity of the builder giving a warning to the client about the novelty of the materials used in the construction. It was decided that although objectively such warning should have been issued by the builder, the non-fulfilment of the duty to warn did not cause the client any damage – due to the fact that the client would turn for advice to the producer of the new material, who would pass on to him the same information the builder already received. That was the court's decision, however, in my opinion it seems that it was made rather presumptuously. The court did not take into account that the client might have responded to a warning given by the builder by asking the builder to use other materials, which had already been successfully used in previous works, instead of asking the producer for information on it. In that case the causal link between the lack of warning and the damage might not have been broken.

It is worth to note that there used to be no consensus in Dutch literature and case law as to who should bear liability for faulty materials chosen or recommended by the client, when the materials used were suitable for the construction in general, but the specific, delivered batch of them had been faulty – the client or the builder, as the arbitral courts followed a different interpretation of the law than the ordinary courts. Today there is little doubt that it is the builder's liability that will prevail, as the arbitral court's opinion has been laid down in the statutory provision of article 7:754 BW.

Taking into account how few English cases there are that establish the contractual duty to warn of the builder, it is no surprise that no cases or legislation could be found pertaining to the *precontractual* duty to warn. As it has been mentioned in the previous chapters, it is feasible that such a duty to warn would be recognised in practice at one point. However, without any case law nor regulation thereof the only thing that could be said about its potential scope is that it would certainly not be broader than the scope of the contractual duty to warn.

There have been a few German cases in which the precontractual duty to warn has been specifically mentioned. In these cases, the German courts recognised the builder's duty to warn in case the builder should have noticed the risk to the contract without having to conduct specific inquiries and inspections. It seems that just as with the contractual duty to warn, the builder will have a precontractual duty to warn only

when the default should have been clearly obvious to him. The difference between the scope of the contractual and the precontractual duty to warn is that in the case of the precontractual duty the obviousness of the default should have been even more easily noticeable to the builder. That means that in the precontractual phase the builder should be able to spot the default 'at a glance', already when just browsing through the plans in order to prepare his offer to the client. Whereas in the case of the contractual duty, the builder would need to pay more attention to the plans in order to be able to perform the construction which means that he will take more 'glances' at them and will have an opportunity to discover more defects. As a result, defaults that may have escaped the builder's attention at the precontractual stage due to no fault of his may become obvious at the contractual stage and give him a contractual duty to warn. Just as with the contractual duty to warn, the fact that the client might employ a professional advisor does not seem to be influencing the scope of the precontractual duty to warn of the builder.

Dutch case law clearly recognised the precontractual duty to warn of the builder as to a risk coming from a third party even before it was regulated in the Dutch Civil Code. The scope of the precontractual duty to warn of the builder is similar to his contractual obligations, since only when the builder knew or should have known of the default he would have been under a duty to warn about it. The scope of the precontractual duty to warn is a bit narrower since the builder would not be expected to know about the default unless it was a really obvious mistake, e.g. in the design plans. The builder does not have to study and inspect the design plans fully in the precontractual phase, nor does he work upon them daily, as is the case in the contractual stage of the construction. The builder would need to examine the design plans only in so far as he needs to estimate the costs and the feasibility of him performing the given construction and he would be bound by the duty to warn in as far as during that examination he should have noticed the risk.

As far as the builder's *contractual* duty to warn about the designer's default is being compared, it is necessary to mention that nowadays the situation of the builder in all three legal systems does not differ significantly. In all of them it is considered that the builder's duty to warn about the defects in the design plans should not be understood too broadly, due to the fact that the client employs specialists whose task is to evaluate the design plans and that the builder usually does not possess the knowledge, which is needed for such an evaluation. Since the English courts stopped giving priority to the builder's contractual obligation to simply follow the design plans to the letter, all systems recognise the builder's duty to warn the client if there is a default within the design that the builder should have been aware of. In all systems the concurrent liability of the builder and the designer is recognised⁴³⁵. Still, English law does not provide us with an established authority as to the recognition of the builder's duty to warn, which points to a weaker position of English clients, leaving them less legal certainty as to the claims they may successfully bring against the builder. The lack of clear case law on this matter may leave consumers without sufficient clarity on the scope of the builder's duty to warn in England, preventing them from claiming damages for breach of such a duty. As far as the scope of the German and Dutch builder's duty to warn is concerned, the case law gives us plenty of indications when the builder might be expected to be held liable if he does not warn the client about the default in the design. However, even in the Dutch system, where

⁴³⁵ To be discussed in the following chapters.

the duty to warn is codified, there is no possibility to give precise specifications as to the scope of the builder's duty to warn, since certain requirements for that can be evaluated only on a case by case basis. Still, there is no doubt that one of the most important indications as to whether the builder should have a duty to warn is the level of professional knowledge and expertise that could be expected of him in the area where the default had manifested itself. Analysis of the above-discussed German and Dutch case law shows that consumers have been given certain guidelines there as to which requirements need to be fulfilled for them to be able to claim damages for breach of a duty to warn.

All three legal systems that have been analysed recognise also the builder's duty to warn as to the risk coming from parties in the construction process other than a designer. The scope of that duty to warn is also dependent on the knowledge and expertise of the builder acting as a careful average builder.

Finally, the scope of the precontractual duty to warn is in all three systems not specified in as many details as the scope of the contractual duty to warn. In Germany and the Netherlands the main conclusion coming out of the comparison of the scope of the contractual and precontractual duty to warn is that they are alike, but that the scope of the precontractual duty to warn does not stretch as far as the contractual one's. It may be assumed that if the precontractual duty to warn would be accepted at all in England – so far there is no case law where such a duty is accepted in the first place – the scope thereof would certainly not stretch further than the scope of the contractual duty to warn.

In sum, while there is clear evidence that the precontractual duty to warn of the builder is recognised in at least Germany and the Netherlands, it will almost certainly have a more limited scope than the contractual duty to warn has. That the builder may be under a contractual duty to warn is undisputed in Germany and the Netherlands and seems to be accepted nowadays also in England. The lack of clear case law on the duty to warn in England still constitutes an obstacle to consumers having legal certainty as to their rights in case a builder breaches his duty to warn. Contrary, while Dutch and German laws leave assessment of certain requirements of the scope of the builder's duty to warn to be dependent on the circumstances of a given case, they set certain guidelines that give consumers more clarity as to when there might have been a breach of a duty to warn.