

# The Duty to Warn in Construction Projects

The duty of care owed by a contractor in a construct-only project has been expanded in the recent English Court of Appeal decision of *Plant Construction v Clive Adams Associates* (2000) to include a duty to warn an owner of a design defect.

A subcontractor who carried out temporary works to prop up the roof of a building who knew the propping was inadequate and posed a serious safety risk to workers and the owner's property was held liable in damages to the owner. This is despite the fact that the subcontractor did not design the propping, warned the contractor's engineer of the design inadequacy, and suggested a solution which was vetoed by the contractor's engineer as being unacceptable to the owner.

After the works were performed and following heavy rain, the propping works failed causing damage to the owner's property. The contractor in its defence to the action, sought to allege that the subcontractor breached its duty to use due care and skill by failing to warn the contractor of the danger.

The Court held that the subcontractor's contractual obligations to exercise due care in performing its works included an obligation to warn the contractor of the possible danger. Despite the design of the propping works having been imposed by the owner, the contractor having separately engaged a consulting engineer and the suggested alternative solution being rejected, these factors were not considered sufficient to discharge the subcontractor's obligation to use due care and skill.

The fact that a serious risk to workers was involved, and that the subcontractor was aware of the risk, were significant factors in the Court reaching its decision.

The Court left open however what a dangerous design might entail and whether a contractor who did not know, but ought to have known, of the danger, would be found similarly liable. A contractor who on becoming aware of a design defect albeit not dangerous, but which if not corrected will cause an owner rectification costs

or some other form of consequential loss, fails to bring that defect to the attention of the owner may have a case to answer. It is likely to be found that a competent contractor exercising care and skill would do so, unless the contractor expects the owner will not require the design defect to be rectified or will suffer only insignificant loss.

Similarly a contractor who is not aware of the defect, but who ought to have been aware of it, may have failed to exercise the care and skill of an ordinarily competent contractor in failing to notify the owner. The question is whether a competent contractor exercising care and skill would discover the defect in the course of constructing the works. If so, the contractor may breach its contractual duty of care in failing to notify the owner.

The message to contractors therefore is to err on the side of caution: notify the owner of any design defect as soon as it comes to the contractor's attention.

*This article was written by Bryan Thomas, Senior Consultant, Rigby Cooke Lawyers, it has been included in this publication by that firm. MBAV is publishing it as a service to those members who are or may be interested in the topic covered, without any warranty, responsibility or liability as to its contents. It is not – and under no circumstance should it be acted upon as – legal advice. Those members, who wish to find out more about the topic should, in the first instance contact the MBAV legal manager (Stephen Adorjan) on 9411-4580. Those readers who think that anything in the article or its topic may apply or relate to any specific matter with which they are concerned, must consult with Rigby Cooke Lawyers or their own legal advisers and obtain their formal advice before taking any action. Those readers who are MBAV members may also consult the MBAV legal managers.*

**Building disputes**  
 Are payments overdue?  
 Has construction come to a halt?  
 Is VCAT or Court the next step?

**Contract advice**  
 What is your risk allocation?  
 Are you SOP compliant?  
 Will your contract conditions stand up?

**Rigby Cooke Lawyers**  
 Industry leaders  
 Straightforward  
 Cost conscious

Building and Construction Team  
 03 9321 7836  
 awhitelaw@rigbycooke.com.au  
 Level 13, 469 La Trobe Street, Melbourne VIC 3000 Australia  
 www.rigbycooke.com.au

