

European Society of Construction Law

Copenhagen, 5 October 2023

A Contractor's duty to warn if a design does not meet relevant technical standards: the English law position compared to a civil law approach

Anthony Lavers

Visiting Professor of Law, King's College London
Research Consultant, Crown Office Chambers, Inner Temple

Rebecca Shorter

Partner, White & Case
Solicitor, England & Wales, Member of the Paris Bar

Contractor's duty to warn: position at common law

Traditionally: *“no room for discretion. (Contractor) was not a person of skill... He was a servant employed to do a specific act”*

Gordon v Miller, Scottish Court of Session, 1839

Development of implied contractual term at common law:

- **Canada:** Contractor under a duty to warn owner of danger of executing architect's design

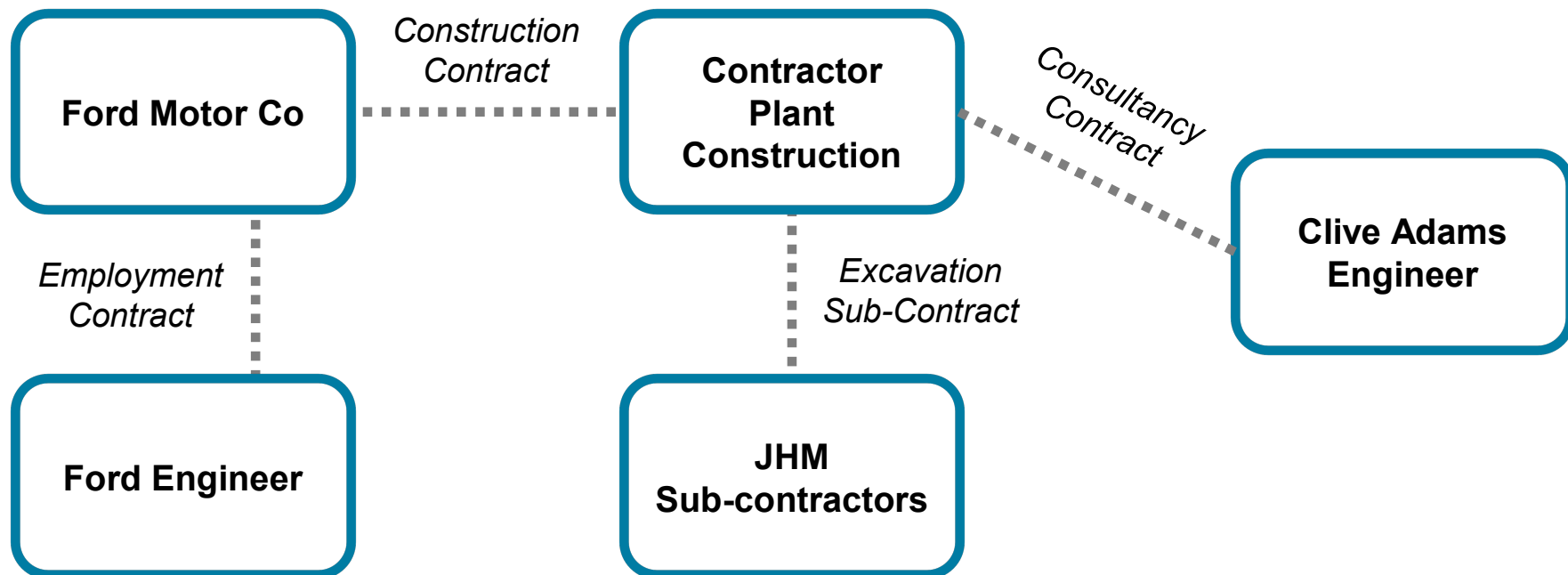
Brunswick v Nowlan Construction, Supreme Court of Canada, 1974

- **England:** Term implied into construction contract requiring contractor to warn of design defects

EDAC v William Moss, Official Referee, 1984

Contractor's duty to warn: position at common law

Plant Construction v Clive Adams and JHM, English Court of Appeal, 2000



Contractor's duty to warn: position at common law

Current position:

- **Express terms:** JCT 2016 SBC
 - Clauses **2.15** Contractor's duty to notify of discrepancies in design documents
 - 2.17** Contractor's duty to notify of divergence of design from statutory requirement e.g. Building Regulations
- **Implied term:** Implication especially likely where design defect concerns ***safety*** or ***buildability***
- **Liability in tort:** Contractor can owe a duty to warn to a third party outside of any contract in certain circumstances, *Cleightonhills v Bembridge Marine*, 2012, English High Court on danger of personal injury

Contractor's duty to warn: civil law position

France

- Duty derived from **Article 1231-1 (previously 1147) of the Civil Code** on a party's liability for failing to perform a duty owed to another: see Court of Cassation, Civ. 3e, 5 May 1982, n° 81-11.505, in which the Court found contractors must share with their employers “all useful recommendations” and “necessary warnings”.
- **Influence of good faith:** Article 1104 of the Civil Code provides that “contracts must be negotiated, formed and executed in good faith”.
- Note also the 2016 contract law reforms in France introduced a new **Article 1112-1** into the Civil Code containing a pre-contractual duty to inform:

“Whichever party is aware of information with decisive importance for the consent of the other must inform that party of the information if said party is legitimately unaware of this information or if it trusts the former party. ...

Information with a direct and necessary connection with the content of the contract or the capacity of the parties is of decisive importance. ...”

Contractor's duty to warn: civil law position

France (continued)

- Duty to warn is wide-reaching: contractor is considered an expert in its field, with an obligation to provide information and formulate advice / a warning; an 'obligation of result'.
 - Court of Cassation: Civ. 3e, 25 September 2012, Sté Trans Euro c/ SPRL Buttignol, n° 11-21.269
 - Court of Appeal of Rennes: Ch. 4, 10 June 2021, n° 19/03260
- Potential limitations on duty: by reference to the scope of works being performed under contract; where Employer has expertise or knowledge itself; where Employer deliberately conceals information
- Duty to warn as a tortious liability to all involved in a project pursuant to Article 1240 (formerly 1382) of the Civil Code: Court of Cassation, Civ. 3e, 31 January 2007, Ste Schuco international c/ EMGEPE, n° 05-18.311

Contractor's duty to warn: civil law position

France (continued)

- Standard Form Contract: **AFNOR (French Standardisation Association) NF P03-001:2017-10 General Conditions of Contract for Works under Private Contracts 2017**
 - Condition 7.7: The Contractor is obliged to warn the Employer of any errors or omissions in documents which may lead to defects in the works
 - Condition 8.1.3: The Contractor shall check that the products selected for the Works meet the specifications of the standards applicable to the works
 - Condition 8.2: The Contractor may reject materials supplied by the Employer if they do not meet the standards applicable to the works

Contractor's duty to warn: civil law position

Italy

- Duty derived from **Article 1663 of the Civil Code** on a Contractor's duty to notify the Employer of any defects concerning the materials supplied by the Employer.
- 'Materials' may include design documentation: Court of Cassation, 5 May 2003, n° 6754.
- **Influence of good faith**: duty also derived from obligation to act in good faith during the pre-contractual phase (Article 1337 of the Civil Code) and in the performance of the contract (Articles 1375 and 1175 of the Civil Code).
- Pursuant to **Article 1176(2) of the Civil Code**, the contractor may be considered an expert in its field: Court of Cassation, 24 October 2022, n° 31273.
- Impact of Article 1176(2) may be limited by terms of contract between parties: Court of Cassation, 7 February 1992, n° 1391.

Contractor's duty to warn: civil law position

Italy (continued)

- Standard Form Contract: **ANCE (Italian Association of Construction Companies)'s model construction contract for projects between private parties (2020)**
 - Article 1.4: duty on Contractor to warn Employer and/or the Clerks of Works in writing of any problems or critical issues arising from the implementation of the design drawings
 - Article 1.5: Contractor warrants that all works described in the documents annexed to the contract will be performed in full and to the “state of the art”:
 - FN 8: the Contractor is an expert in their field per Article 1176(2) of the Civil Code;
 - FN 9: if the Contractor is to perform work with material supplied by the Employer, the parties may provide that the Contractor shall ensure those materials are appropriate for “state of the art” works, notifying in writing any objections. The parties may also specify that the Contractor is not liable for defects in materials supplied by the Employer.

Conclusions: 1

Comparison between France and Italy

- In both France and Italy:
 - the Contractor is considered an expert in its field;
 - Pursuant to their Civil Codes and the influence of good faith in contracting, the Contractor has a duty to warn the Employer where the works will be defective / not meet standards;
 - This is reflected in domestic standard forms in both jurisdictions.
- In France, the duty is arguably more extensive:
 - Obligation of result;
 - New obligation to inform pre-contract;
 - Duty to warn third parties.

Conclusions: 2

Comparison between English and Civil Law Jurisdictions

- Civil law jurisdictions accord contractors 'expert' status, whereas design expertise is only implied in limited circumstances at common law
- Both civil law and common law jurisdictions typically provide for a duty to warn in standard form construction contracts
- The obligation of good faith is an important component of the duty to warn in civil law jurisdictions, whereas there is no such general duty in common law contracts

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