# Understanding the duty to warn

**STUART JORDAN* points out that project participants must be aware of the implications of 'Duty to Warn', where if they notice something dangerous that could harm the project, other property, or people, they need to warn, even if they're not directly responsible for it.**

**LAST month we looked at the limits of variation orders – a concept that we concluded is easier to recognise than to define. We are on a similar journey this month, examining the extent of a 'Duty to Warn' and again we are assisted by the outcome of a recent dispute.**

A *duty to warn* is more likely to arise in construction than in other areas because there is so much collaboration between project participants: contractors, suppliers, design consultants and managers, as well as the project owner.

Importantly, this isn't the same as an express duty to oversee work; for instance, a contract administrator or lender's technical advisor who is engaged to check and report on design and construction as the project proceeds. Checking and warning of problems is part of their actual job.

In the construction context, the *duty to warn* is an implied obligation on a project participant, to give warning if something for which that party is not itself responsible is a danger – to the project or to other property or to people.

Of course, in order to establish liability based on a breach of such duty, the party who believes it should have been warned, needs to show that it would have acted on that warning.

This doesn't mean that each project participant is expected to give unsolicited warnings about all potential problems. The limits to this duty depend on the circumstances: most importantly, that party's express obligations, the nature (or existence) of their duty of care (either contractual or tortious) to any person needing to be warned, and the seriousness of the danger.

How clear is this? As an example, let's consider the lead designer's role. He/she is not responsible for the design work of the rest of the design team (who will be specialists in design areas beyond that of the lead designer) but the lead designer typically needs to see and to understand the other designers' work product, at least to the extent needed in order to integrate those inputs into a complete design. We can see the obvious difficulty in finding the line between what he/she is, and is not, expected to spot in terms of defective, conflicting or incomplete design from others.

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So how do we find that line? It is best to consider the *duty to warn* as an extension of a person's existing duty of care, rather than as an additional duty. A contractor will typically have, at least, an implied contractual duty to act as a competent and duly experienced contractor. And a design consultant has an implied duty to exercise the skill and care to be expected of a reasonably competent person in his/her stated profession.

A recent dispute has taken us back through these questions. Here, a contractor (Lendlease Construction Limited) was engaged to design and build a new oncology centre, as part of a hospital. It, in turn, appointed Aecom Limited to provide MEP and fire safety services, including the production of a Fire Strategy.

Later, after various defects were found in the completed works, Lendlease faced two separate claims, resulting in one settlement agreement and one court judgment, together requiring Lendlease to pay around $10.1 million. Lendlease sought to recover most of that sum from Aecom, which disputed all such liability.

Part of Lendlease's liability arose from the configuration of a plant room being non-compliant with applicable standards or with good practice. Since Aecom had produced MEP designs and the Fire Strategy, Lendlease argued that Aecom had a continuing obligation to remain appraised of what was being installed in the plant room, and to warn of non-compliance.

The Technology and Construction Court (England) disagreed. They found that delivery of Aecom's designs was not the end point of its obligations, but those obligations did not extend to reviewing the work of others (principally the drawings from Lendlease's MEP subcontractor) or overseeing construction as a whole.

Further, any later obligation on Aecom to review its own completed design would depend on there being a reason to do so, one such as would prompt a reasonably competent professional of the relevant discipline to make that review. There is no general ongoing obligation to keep revisiting completed work.

Also, the court doubted that Lendlease would, in any event, have acted on any such warning and reconfigured the plant room. More than a year after works completion, Lendlease required a final version of the Fire Strategy (the 19th revision) to reflect the as-built configuration of the plant room. However, from the exchanges between the parties, it was clear that Lendlease wanted this in order for practical completion to be certified and it was not, by that time, seeking to rely on Aecom's advice.

One point is clear: different parties can have very different views about the true extent of duties to check and flag problems. So don't leave too much to implied duties: be as clear as possible in the contract. ■

** Stuart Jordan is a partner in the Global Projects group of Baker Botts, a leading international law firm. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. He has extensive experience in the Middle East, Russia and the UK.*