broker fund manager has been selected by the client and even though he is acting under an authorisation from SIB or an SRO, the Department are likely to feel that the life office is responsible for overseeing his management decisions and competence. They will also be interested in seeing that the sale and purchase of units in internal funds operate fairly between all the policyholders concerned. The interest of the Department in these matters seems to be well justified in view of their duty to protect the reasonable expectations of policyholders.

We can expect to see further changes and development of market practice in this area.

IS THERE STILL A DUTY TO WARN?
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Heady days for Underwriters in the Professional Indemnity field! The neighbourhood really does get smaller: one's neighbours fewer and further between.

Often overlooked, however, in all the excitement (and more good news) is the question of duty to warn. Does it, in fact, still exist? Did it ever?

The general rule remains as ever it was. There is no general duty imposed by law on one party to a contract who is in breach of that contract to warn the other of his breach. However, and in early 1984, limited but significant inroads were made into this previously sacrosanct territory.

In *Stag Line Limited .v. Tyne Shiprepair Group Limited and Another* (1984) Mr Justice Staughton held that in the restricted circumstances of that case (ship repairers using the wrong material to re-line a tube which was unlikely to be inspected for 4 years) a duty to warn could exist. Three reasons are given for this finding:-

(a) The tube was unlikely to be examined for 4 years;

(b) The rules of the applicable classification society had been breached; and

(c) There was a possible danger of life and to very valuable property.

A similar point arose in *Equitable Debenture Assets Corporation Limited.v. William Moss Group Limited and Others* (1984) in which large and experienced builders, having decided that part of an Architect's designs would not work, were held to have

an obligation to pass on their concern to the Architect. An implied term was held by his Honour Judge Newey Q.C to exist requiring the contractors to warn of design defects. In addition, the Learned Judge also held there to be a duty of care in tort.

(See also: *Brunswick Construction .v. Nowlan & Ors (1974) Canada*
Victoria University of Manchester .v. Hugh Wilson & Lewis
Womersley & Pochin (Contractors) Limited (1984)
Holland Hannen & Cubitts (Northern) Limited .v. Welsh
Health Technical Services Organisation & Ors (1985)
Imperial College of Science and Technology .v. Norman &
Dawbarn (1986)

All this, however, before *Tai Hing Cotton Mill .v. Liu Chong Hing Bank (1986) and D & F Estates .v. The Church Commissioners* (1988).

Rarely, indeed, can dissenting judgments (that of Lord Brandon in *Anns .v. Merton London Borough Council* (1978) as applied in *D & F* and that of Lord Scarman in *Tai Hing)* have been seized upon with such alacrity by the Courts in order to justify the really gigantic U- turn we have seen these last two years. Lord Scarman's judgment in Tai Hing is of particular importance to the subject matter of this article since it was taken up and developed in the later case of *University of Glasgow .v. Whitfield & Laing* (1988) which case dealt extensively with the concept of duty to warn. In Lord Scarman's words:-

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship."

It follows that, in future, (and, in fact, already) the Courts will be much less willing as between two contracting parties to find the existence of a duty of care going beyond the terms of a contract. It follows, also, that contractual relationships will become more and more important in determining the parties' rights against each other.

In this case Glasgow University alleged negligence by the Defendant Architect in the design of an Art Gallery, Notwithstanding that no complaint was made against the contractor by the University the Architect brought Third Party proceeding against the contractor alleging negligence. The claim was put thus:-

(a) It was alleged that (if the Architect was negligent in the design of the building) the contractor was negligent (inter alia) in failing to warn the employer/University of

errors in the design; and

(b) That the contractor was in breach of a duty of care to the Architect to inform him of defects in the design which the contractor, as builder, knew or ought to have known about.

Both propositions were roundly rejected and, indeed, some contractors have been drawn to the conclusion that, as a result this decision, no duty to warn can now be held to exist. With respect, however - and whilst it is plain that the duty will only be held to exist now in extremely restricted circumstances - it does seem clear from the Judgment of His Honour Judge Bowsher that such conclusion is unwarranted. Indeed, it seems to me that the following conclusions (and only these) may properly be drawn from his Judgment:-

1. That, as between two contracting parties, it will, in the future, be very much harder than heretofore to establish a concurrent liability in tort;

2. That notwithstanding (1) there may be circumstances in which such concurrent liability will be found to exist. Indeed His Honour Judge Bowsher is at some pains to say so:-

> "I accept the submission of Mr Gaitskell in reply to the effect that there can be and very often is concurrent liability both in contract and in tort... but it does not necessarily follow that the concurrent liabilities in tort and in contract are identical, and indeed it is unlikely to be so."

3. That if there be held to be a concurrent duty in tort, it is limited to a duty of care to avoid acts or omissions which are liable to cause damage to persons or to some property other than the defective building created (subject always, of course, to the complex structures argument raised in *D & F*)

4. That where there is a detailed contract - as there was in *University of Glasgow .v. Whitfield* - there is no room for the implication of a duty to warn about possible defects in design (echoes of *Greater Nottingham Co-operative Society Limited .v. Cementation Piling and Foundations Limited* (1988) here!)

5. That as between parties not in a contractual relationship no duty to warn will arise in the absence of a "special relationship" and "reliance".

All in all, therefore, a much weakened duty but nonetheless one which continues to

exist. In the words of His Honour Judge Bowsher:-

> "I wish to make it plain that I am not suggesting that there are no circumstances in which a term may be implied or a duty owed in tort requiring a contractor to warn a building owner of defects in the design. I have already referred to the possibility of a special relationship where the contractor knows that the building owner is relying upon him. In addition, if by his contract the builder undertakes to achieve a particular purpose or function, he will not be relieved of the duty or function by the deficiencies of design which he is also under a duty by the contract to follow".