



The power of lay witnesses

Court confirms builder's duty is to build code-compliant buildings.

THE EVIDENCE OF THOSE DIRECTLY AFFECTED IS OFTEN POWERFUL AND COMPELLING.

In the case *Minister of Education v H Construction North Island Limited (formerly Hawkins Construction North Island Limited)* [2018] NZHC 871, the High Court awarded \$13.4 million worth of damages against the builder. The court said "...The pupils and teachers have not had the benefit of healthy code compliant buildings for eight years; and the award reflects the amount necessary to repair the school".

The builder was sued in negligence, not in contract.

There are four important issues in the judgment as far as councils are concerned, namely:

1. The compelling nature of the lay evidence;
2. The scope of the duty owed by the builder;
3. The circumstances in which a building contract will exclude liability in negligence; and
4. The absence of a key party.

Evidence

The court heard 15 expert witnesses but found the evidence of the school's principal, the senior caretaker and the school's business manager, plus a visit to the school (complete with buckets for corresponding leaks) to be the most illuminating.

The scope of the duty owed by the builder

The court considered *Spencer on Byron* [2013] 2 NZLR 297 (a Supreme Court judgment dealing with council liability for performing regulatory functions under the Building Act) and found that the majority's reasoning was logically referable to builders too.

As with councils, it is "eminently foreseeable that carelessness" on the part of a builder may cause loss to a building owner.

The builder's duty of care to building owners is to ensure that the buildings they build are code compliant.

Excluding liability in negligence

Central to the builder's defence was that under the contract the architect was responsible for the design. It argued it could not be liable for design

defects because the obligation for ensuring compliance with the Building Code fell on the architect.

It also argued that if a duty of care was imposed it would be contrary to what the parties had agreed in the contract.

The court disagreed and gave a number of reasons why a duty of care was not excluded by the terms of the contract.

The primary reason was the absence of any express contractual exclusion for the builder's liability in negligence.

Absence of the architect

The builder maintained throughout the trial that the defects were the architect's fault and were caused by defective design.

The builder elected not to join the architect to the claim nor did it subpoena the architect (or any of its employees) to give evidence.

The court noted that there was no suggestion that the architect was impecunious or unavailable as either a party or a witness.

The court said that such an approach was artificial, and the judgment did not identify the architect or make determinations adverse to it.

The importance

The evidence of those directly affected is often powerful and compelling. Do not underestimate the power of lay witnesses.

The judgment confirms a trend in recent cases that the scope of a builder's duty of care to building owners is to build code-compliant buildings.

This is an analogous duty of care to the one councils owe.

A duty of care will not be excluded by a building contract unless there is a clear, express term.

The court commented on the notable absence of the architect and the artificiality it brings to such a proceeding.

In cases where a council seeks to apportion blame with another building party and that party is solvent, it is prudent to join them to the claim. **LG**