Building contracts and negligence – does one exclude the other?

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'...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'.

So said Justice Downs in a recent decision[1] in which His Honour found a large New Zealand construction company, H Construction North Island Ltd (formerly Hawkins North Island Ltd) (Hawkins) liable in negligence for its role in the defective construction of Botany Downs Secondary College (the school) in Auckland.

The judgment is a lengthy read but within it is a tidy restatement of the legal principles governing a building contractor's liability to building owners in New Zealand.

The judgment also provides helpful guidance on whether the terms of a building contract are sufficient to exclude liability in negligence and highlights the importance of ensuring that all parties that can be joined to a building dispute are joined to the claim.

The facts

The school opened in 2004. Between 2003 and 2009, Hawkins built the school buildings that now occupy the school site in three stages. The school comprised a series of interlinked two-storey buildings with interconnecting roofs.

The older buildings (built in stage 1) had no cavity whereas the buildings constructed under stages 2 and 3 had cavities.

The Ministry of Education (the owner of the school buildings) claimed that the school buildings built by Hawkins leaked and had done so periodically since 2010. The cost to repair the school buildings was in the region of $17 million. Faced with this repair bill, the Minister of Education issued proceedings alleging Hawkins was liable in negligence to meet this cost.

The claim

It was alleged that Hawkins, as building contractor, owed various duties to exercise reasonable skill and care in the buildings' construction including in the design, construction and supervision of building work.

Hawkins suggested that the law in New Zealand has not recognised a duty of care in this context and it also contended that any liability in negligence was excluded by the terms of the contract agreed between Hawkins and the Ministry.

The claim in negligence

In determining whether a duty of care is owed by building contractors, the Court considered historic building defect cases including the 1977 Court of Appeal decision in *Bowen*[2] through to the 2012 Supreme Court decision in Spencer on *Byron*[3] .

The Court held that the *'overall trend is clear'* that *'a builder owes a...duty of care to owners...irrespective of whether the building is residential or otherwise'*[4]. The court found that the scope of the duty was to ensure compliance with the Building Code and the Building Act.

This finding means that a building contractor responsible for undertaking building work in respect of a residential or commercial building in New Zealand *can* be held liable in negligence if the building work was not undertaken 1) with reasonable skill and care and 2) in accordance with the Building Code.

Negligence excluded by contract?

The stage 1 contract was a construction only contract. The architect was responsible for design. Hawkins contended that it could not be liable for design defects because the design of the buildings was the responsibility of the architect.

Hawkins argued that the terms of the contract put the obligation of ensuring compliance with the Building Code on the architect and not Hawkins. Hawkins stated that imposing a duty of care in the circumstances would be contrary to what the parties had agreed in the contract.

The Court disagreed. The Court gave a number of reasons[5] why a duty of care could not be excluded by the terms of the contract. The primary reason was that that there was no clear, express term in the construction contract that excluded Hawkins' liability in negligence.

Given Hawkins was a *'large and sophisticated commercial entity'* it could have negotiated an express exclusion of liability in negligence. It did not do so.

This is an important lesson. If one party to a construction contract wishes for its liability to be limited in the event that things go wrong, then it needs to ensure that clear and express terms are included in the contract.

Other parties?

As noted above, Hawkins maintained throughout the trial that fault ought to lie with the architect because of design failings. Hawkins elected not to join the architect to the claim nor did it subpoena the architect or any of its personnel to give evidence.

There was also no suggestion that the architect was insolvent. It is fair to say Justice Downs was slightly perplexed at the architect's non-participation in the claim especially when the architect's liability was a key feature of Hawkins' defence.

In any case where a party seeks to apportion blame to another building party, and that other party is solvent, it is prudent to join that party to the claim.

[1] Minister of Education v H Construction North Island Ltd (formerly Hawkins Construction North Island Ltd) [2018] NZHC 871 [1 May 2018] at [336]
[2] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA)
[3] *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2013] 2 NZLR 297
[4] *Minister of Education v H Construction North Island Ltd at [37]*
[5] Six reasons were given by Justice Downs in paragraphs [41] – [49] of the judgment.