CASE IN BRIEF

Whats my duty? Negligence claims against contractors

Ministry of Education v H Construction North Island [2018] NZHC 871

By Michael Taylor & Michelle Mau

Summary: - This case showed the court's willingness to find that builders owe duties of care in negligence as well as contractual duties. This matters because there is often a longer time period within which the client can bring a claim for negligence. A builder wishing to avoid this outcome should use very clear language in the contract.

The plaintiffs sued the defendant contractor, formerly known as Hawkins Construction North Island Limited (Hawkins) in respect of construction defects in Botany Downs Secondary College constructed by Hawkins. The school was built between 2003 and 2009. The plaintiffs were therefore too late to bring claims in contract (such claims must be brought within six-years of the breach). However, the court found that Hawkins owed a duty of care in negligence, which it had breached in various ways, and that less than six years had passed from when the plaintiffs discovered (or could reasonably have discovered) the defects. These claims were in time, and succeeded. The plaintiffs were awarded over $13m.

Duty of care

This case has important implications for builders. It means that the duties they owe to clients will often go beyond those set out in the contract, and include a common law duty in negligence.

The judge, Downs J, found that Hawkins owed a duty in negligence to exercise reasonable skill and care in the buildings' construction, including:

- reasonable care and skill in the design, construction and supervision of building work;
- an obligation to ensure building work was designed, constructed and supervised in accordance with the Building Code, and, that the work complied with the Code;
- an obligation to ensure remedial work was undertaken to a reasonable standard of care and skill, and that the remedial work complied with the Code.

The judge reached this conclusion partly due to other cases dealing with builders' duties of care (including *Bowen v Paramount Builders (Hamilton) Ltd, Invercargill City Council v Hamlin, Spencer on Byron*),

and partly due to the Building Act 2004. In particular, section 14E of the Building Act provides:

> 14E Responsibilities of builder
>
> (1) In subsection (2), builder means any person who carries out building work, whether in trade or not.
>
> (2) A builder is responsible for—
>
> (a) ensuring that the building work complies with the building consent and the plans and specifications to which the building consent relates:
>
> (b) ensuring that building work not covered by a building consent complies with the building code.
>
> (3) A licensed building practitioner who carries out or supervises restricted building work is responsible for—
>
> (a) ensuring that the restricted building work is carried out or supervised in accordance with the requirements of this Act; and
>
> (b) ensuring that he or she is licensed in a class for carrying out or supervising that restricted building work.

Was the duty excluded by contract?

However, the parties' relations were primarily governed by the contract. If the builders had excluded a duty of care in the contract, it would not have owed any such duty.

The judge found that the contract did not exclude the duty including for the following reasons:

- as a large and sophisticated commercial entity, Hawkins could have negotiated express exclusion of tortious liability but chose not to. Instead, it entered a standard form construction contract, with a modest suite of special conditions;
- the fact that the architect assumed either exclusive or primary responsibility for Code compliance, did not show that the builder owed no duty of care;
- other conditions in the contract emphasised Hawkins' responsibility as a builder. For example, it was required to ensure its workmanship complied with "good trade practice", it was responsible for the correctness of the works even if seen or inspected by a clerks of work or inspector and it was required to provide all necessary supervision of the works; and
- the fact that Hawkins was not liable for design (there was an exclusion of design liability), left room for Hawkins to be liable in tort in relation to construction.

In arguing that it did not owe any duty of care in tort, Hawkins had relied on a Court of Appeal case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324. In that case, Carter Holt and Rolls-Royce were at the top and bottom of a chain of contracts, respectively; each had a contract with Electricity Corporation of New Zealand Ltd (ECNZ), but not with each other. The Court of Appeal found that the contractual structure, and the fact that there was no contract between Rolls-Royce and Carter Holt, showed that they did not intend that any duties of care would be owed between them.


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Downs J did not follow *Rolls-Royce*. He thought that the case was different. This was because it concerned a situation in which there was no contract between the parties to the litigation, whereas in this case there was. It was also because the judge thought that the Building Code made it more appropriate to find a tortious duty of care.

Accordingly, Downs J found that Hawkins' duty of care was not excluded by contract.

Betterment

There were also arguments about "betterment" which will be of wider relevance to the construction industry. The point was that after the contract had been entered into, the Building Code changed to require higher standards of construction. Hawkins argued that, even if its original work had been sub-standard, it should not have to pay for achieving those post-contractual higher standards, which were not part of its contractual bargain. It would otherwise be paying for the plaintiff's upgrade.

The judge did not agree. He held that as a matter of principle, remedial work to achieve Building Code compliance should not be considered betterment. It was not the plaintiff's choice to carry out the additional work. The need arose from Hawkins' breach so the costs of complying with the new requirements of the Building Code should be paid for by Hawkins.

Comment

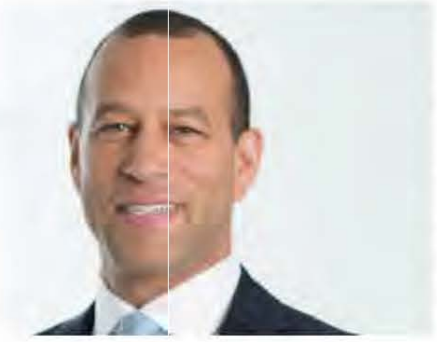
There are three points to emphasise for contractors.

- First, do not overreact. Whether or not there is a concurrent duty in tort is unlikely to affect extent of the work the contractor has to do. It affects the time limit within which the client is able to being a claim. It increases it from six years from the breach of contract, to six years from when the client did or should have become aware of the damage, subject to the ten-year long-stop limitation period for claims relating to building work.

- Second, if they do not intend to adopt duties in (or accept liability for) negligence, contractors should spell this out in clear terms in the contract. This might be done, for example, in an exclusion clause. However, it is done, it is vitally important that the language is clear.

- Third, if contractors do not wish to accept the risk that remedial work (or damages to cover the costs of such work) will be more costly, due to changes in the Building Code, that, too should be addressed in the contract. One way of doing so might be to adapt a clause providing that relevant changes in the Building Code entitle the contractor to a variation, so that it excludes liability to pay for rectification costs arising from such changes.

ABOUT THE AUTHORS



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Michael practices in commercial litigation and advocacy with a particular focus on construction, information communications and technology, and insurance law. He practiced at the London Commercial Bar for over 15 years before joining Russell McVeagh. He ranked as Leading Junior Counsel in The Legal 500 UK and Chambers & Partners UK.

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