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## Recent High Court decision is salutary reminder of a builder's duty of care to building owners

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In the case *Minister of Education v H Construction North Island Limited (formerly Hawkins Construction North Island Limited)*, compelling evidence of buckets collecting rainwater in classrooms at Botany Downs Secondary College set the scene for a significant judgment. The Minister alleged that nine buildings leaked due to a raft of construction defects for which the builder was liable. While Hawkins accepted that there were issues with the buildings related to poor workmanship, it contended that the law has not recognised a duty of care in this context and claimed that the building contract precluded any liability in negligence.

The Court found Hawkins liable to pay the cost of remedying over half of the alleged defects, at a total cost of \$13.4 million. The decision confirms a clear trend in recent cases that the scope of a builder's duty of care to building owners is to comply with Building Code standards. Importantly, it confirms that a contractual relationship between well-informed and well-advised parties is unlikely to exclude the builder's tortious duty of care unless the contract expressly says so.

Central to Hawkins' defence was that, under the terms of the contract, the architect assumed either the exclusive or primary obligation to comply with the Building Code, and that it would be wrong to interfere with the agreed allocation of risk and commercial certainty. This argument was unsuccessful, in part because of the notable absence of the architect as a party to the proceedings, but ultimately due to the absence of any express contractual exclusion of Hawkins' tortious liability.

Contractors and claimants should note the following comments on establishing a breach of the Building Code:

- Moisture meter readings should be approached with caution when used for

substantiating a breach. A lack of evidence of moisture damage or a low moisture meter reading will not necessarily be treated as conclusive.

- Proof of widespread “actual damage” is not required to establish a breach. The intention of the Building Code is to prevent damage, and therefore a breach can include “potential damage”.
- A complete lack of damage after an extended period will likely be fatal to a claim. The Court found that, on the basis that the school buildings were now 15 years old, any real risk of damage should have become apparent. Accordingly, a lack of evidence of damage was treated as conclusive.

Another salient point for contractors is the importance of keeping an accurate record of key decisions in the construction process, particularly where the decision is made as a result of a direction from another contractor or consultant. While Hawkins accepted that some of the defects existed due to a construction failure, it argued that Hawkins had been overruled by the architect as to how some items should be installed. The Court rejected this argument in the absence of any documentary evidence of the architect’s alleged directions.

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