QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Holley v Knezovic* [2021] QCAT 422
PARTIES:	**LUKE HOLLEY** (applicant) **V** **ANTUN KNEZOVIC** (respondent)
APPLICATION NO/S:	BDL156-19
MATTER TYPE:	Building matters
DELIVERED ON:	30 November 2021
HEARD AT:	Brisbane
DECISION OF:	Member Lember
ORDERS:	**The application is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – OTHERS – building and construction - whether subsequent homeowner owed a duty of care by owner builder – whether purchaser vulnerable where pre-purchase building inspection identified defects - effect of non-compliance with s 47 of the *Queensland Building and Construction Commission Act* 1991 (Qld) – whether subsequent owner entitled to be reimbursed money paid for building work *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan* [2014] HCA 36 *Bryan v Maloney* (1995) 182 CLR 609 *Canavan v Sutton* [2020] QCAT 374 *Donoghue v Stevenson* [1932] AC 562 *Gilchrist v Ivanovic* [2016] QCAT 56 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 *Hawkins v Clayton* (1988) 164 CLR 539 *Landman v Lauder & Anor* [2018] QCAT 395 *March v E and MH Stramare Pty Ltd* (1991) 171 CLR 506 *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited* [2014] QCA 233 *Olindaridge Pty Ltd & Anor v Tracey & Anor* [2014] QCATA 207 *Paul Bongioletti Homes Pty Ltd v North* [2012] QCATA

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Perre v Apand Pty Limited (1999) 198 CLR 180
Sullivan v Moody (2001) 207 CLR 562
Tracey v Olindaridge Pty Ltd [2013] QCATA 048
Ultramares Corporation v Touche (1931) 174 NE 441
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

Building Act 1975 (Qld), part 5
Civil Liability Act 2003 (Qld), s 9
Limitation of Actions Act 1974 (Qld), s 10
Queensland Building and Construction Commission Act 1991 (Qld), s 43D, s 43E, s 47, s 77(2), schedule 2
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 23(3), 32

APPEARANCES & REPRESENTATION: This application was determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

REASONS FOR DECISION

What is this application about?

[1] Mr Knezovic constructed a two-storey home as an owner builder. The issue in this application is whether he is responsible to Mr Holley, a subsequent owner of the home, for loss arising from defective building works.

[2] By an application for a domestic building dispute filed 6 June 2019,[1] Mr Holley asks the tribunal to order that Mr Knezovic pay him damages in the sum of $104,022 and his costs of the application.

[3] Mr Holley and Mr Knezovic were never parties to a contract and Mr Holley's claim lies only in negligence. Therefore, to succeed in his application, Mr Holley must establish that Mr Knezovic owes him a duty of care, what the scope of that duty is, that Mr Knezovic breached that duty, the loss caused by the breach and prove the loss.[2]

[4] In his response filed on 1 September 2020 Mr Knezovic seeks that the application be dismissed because he owes Mr Holley no duty of care, and because, even if he did, the works were not defective. He also says that the claim is time-barred under the *Limitation of Actions Act* 1974 (Qld).

[5] Directions were made on 26 November 2020 for a decision on the application for a building dispute to be made on the papers after 17 December 2020, with parties to file final submissions (including those in reply) prior to that time.

[6] That decision, and the reasons for it, follow. The questions it addresses include:

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1 As amended, with leave.
2 *Landman v Lauder & Anor* [2018] QCAT 395 at [3].

(a) Is the application a building dispute over which the tribunal has jurisdiction?

(b) If so, is the application time-barred?

(c) If not, has Mr Holley established his claim against Mr Knezovic for damages for negligent building work, and that a duty of care was owed by Mr Knezovic to Mr Holley.

Background to the dispute

[7] Before turning to the issues to be decided, the factual background to the dispute should be explained.

[8] Between 2009 and 2010 Mr Knezovic constructed a two-storey home as an owner builder pursuant to:

(a) an owner builder permit issued by the (then) Queensland Building Services Authority on 12 December 2008; and

(b) a development permit for building works issued by the Redland City Council on 11 March 2009.

[9] Mr Knezovic says he engaged licensed tradespersons to carry out the building works on his behalf, but he did not file any evidence supporting that assertion.

[10] During the carrying out of the works Council certifiers issued the following Certificates of Inspection pursuant to part 5 of the *Building Act* 1975 (Qld):

(a) Structural Frame, 28 April 2019;

(b) Setout – Footing and Foundation, 24 March 2019; and

(c) Preparation for Casting of Slab, 21 March 2019.

[11] The building works were completed by 12 October 2010 evidenced by:

(a) A form 16 Licensee Aspect Certificate noting the class 1a new dwelling had been completed dated 12 October 2010; and

(b) A form 21 Final Inspection Certificate issued 12 October 2010.

[12] In October 2012 Mr Knezovic sold the home to Ms Mercier and Mr Cooper ("the intermediate owners"). He says that in doing so he disclosed the owner-built status of the home and supplied all relevant certificates to the intermediate owners. Again, no evidence was produced to the tribunal to support this assertion.

[13] Mr Knezovic also says that the intermediate owners then renovated the house as follows:

(a) replaced windows;

(b) replaced the brick balcony with glass;

(c) cladding and netting of the laundry.

[14] No evidence was produced to the tribunal to verify that the intermediate owners renovated the home, and Mr Holley disputes the fact of the renovations, or, if there were renovations, says they very minor and have no impact on this application.

[15] On 27 May 2016 Mr Holley offered to purchase the property, which the tribunal take to mean he entered into his purchase contract with the intermediate owners.

[16] Mr Holley did not produce to the tribunal his purchase contract from the intermediate owners and, therefore, the tribunal is not able to form a view as to whether it contained disclosure regarding the owner built status of the home. It is notable that Mr Holley did not tender this document in evidence when he understood its potential importance and made assertions that it did not contain the requisite disclosures.

[17] Mr Holley originally gave evidence that he "did not recall" being informed that the property was owner built when he purchased the property.[3] This is also reflected in a report by Absolute Home Builders Pty Ltd who said "at the time of purchase [Mr Holley] does not recall being informed that the property was owner built". This is subtly but notably different to Mr Holley's later evidence that he was "not informed".[4]

[18] In any event, the purchase contract was subject to Mr Holley obtaining a satisfactory building inspection report. He did obtain a building inspection report dated 1 June 2016 from DR Building Services, which included the following comments (my emphasis added):

> Rear roofed patio – needs termite protection system against the house at the patio.
>
> Front patio – mostly all good construction and condition though needs general maintenance to the timber decking and timber post. The floor needs better drainage and has some drummy floor tiles and has rust to the handrail fixings and cracking to the handrail walls.
>
> Pergola/Patio – needs considerable maintenance, repairs and upgrading – needs bracing and a downpipe.
>
> External cladding – mostly all good construction and condition for its age though needs sealant, better fixing and painting to most timber cover strips.
>
> Sub-floor framing – needs a chemical termite protection barrier installed to the perimeter of the house to bring the protection of this property up to date.
>
> Garage – the garage door jamb to one side is coming away.
>
> Internal staircase – mostly all good construction and condition though has some considerable squeaking to the stairs.
>
> Windows and doors – needs a "roll window flashing" installed to the top of all windows.
>
> Kitchen – has a crack to the benchtop at the window.
>
> Overall internal – has some water staining around the air conditioning vent above the stairwell.
>
> Conclusion – based on this visual inspection, the house appears to be structurally well built and sound. Apart from the maintenance items, some

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3 Statement of Mr Holley filed 10 February 2020 at paragraph 5.

4 Applicant's submissions at paragraph 17.

> repairs and upgrading as listed in this report there should be no further problems in the near future.

[19] Mr Holley describes these defects as "some general maintenance issues with the balcony, pergola and external cladding".[5] Both Mr Holley and Absolute Home Builders Pty Ltd say the issues raised in the report "did not outline that the items that required repairs were actually due to sub-standard building works".[6]

[20] Mr Holley says as follows:

(a) Between 27 June 2016 and 3 December 2016 there were a number of rain events during which "water would pour over the door frame of the laundry".

(b) On 3 December 2016 sheets of fibre cement cladding were "ripped off the southern side of the dwelling by the wind during a storm event".

(c) On 10 December 2016 his home insurer identified the following defective building works following a building inspection:

(i) there were no flashings above windows or doors to prevent water ingress;

(ii) the external cladding detached during the storm due to not being fixed correctly to the framing; and

(iii) cover-strips/mouldings were not fixed correctly and nails were not long enough and were rusting.

(d) The insurer's report, undertaken by AJ Grant Group concludes that:

> …we found that water has been leaking in the tops of windows as they do not have flashings installed to prevent this, which is a building requirement. The external cladding has blown off during the storm winds as this was not correctly fixed as they have used half as many nails as required for fibro and some sheets have no fixing in the middle of the sheet even the mouldings over the joints have rusted nails, which are not long enough length to penetrate into the frame and no signs of sealing to stop water sitting on the edge and leaking into the cavity.

(e) On 8 February 2017 his insurer denied his insurance claim on the grounds that the dwelling had not been constructed properly.

[21] On 21 March 2017 Mr Holley wrote to Mr Knezovic requiring him to rectify defective building work identified as follows:

Study	Door will not shut properly
Garage	Internal door will not shut properly External door has no flashing led to water damage to a door framing The garage roller-door door jam to one side is

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5 Statement of Evidence filed 6 July 2020 at paragraph 4.

6 Introduction to Absolute Home Builders Pty Ltd report dated 25 March 2019 and the Statement of Luke Holley filed 10 February 2020 at paragraph 5.

	coming away
Rear patio	Decking needs termite protection system against the house at timber floor
Front patio	The floor tiling needs better drainage and has some drummy tiles and has rust to the handrail fixings and cracking to the handrail walls.
External cladding	Flat fibro sheeting needs sealant, better fixing, not installed as per the Building Code and sheets are coming away. Timber cover strips need sealant, better fixing as the nails are too short and coming away.
Sub-floor framing	Needs a chemical termite protection barrier installed up to the permitter of the house
Internal staircase	Considerable drumming most likely due to improper construction.
Windows and doors	All windows and doors require flashing. This has led to the timber frames and beading to rot.
Kitchen	The bench has cracked and requires replacement.

[22] Mr Knezovic did not reply to the letter.

[23] On 13 October 2017 Mr Holley engaged Absolute Home Builders Pty Ltd to undertake works to rectify the defective building work, at a cost of $57,720.57. During the course of those works he says additional defects were identified, and therefore, additional works were undertaken, bringing the total of his claim to where it stands today.

[24] A report of Absolute Home Builders Pty Ltd dated 25 March 2019 was tendered by Mr Holley to record their observations and the work undertaken pursuant to the contract they entered into with Mr Holley on 13 October 2017.

[25] In summary, the report identified the defective works and the costs to rectify them as follows (for convenient comparison I adopt the format of the table used by Mr Holley in his letter to Mr Knezovic on 21 March 2017):

Garage	External door has no flashing led to water damage to a door framing Fix sagging jamb per Code $670 plus GST
Rear patio	Deck not built to Code and on pine bearers and joists causing sagging. Inspect $1,500 plus GST Install $1,650 plus GST.
Front patio	Remove old tiles, replace flooring, handrails and wingrails.

	Install $10,300 plus GST Handrails $1,800 plus GST Tiles in the entry of the house had cracked due to movement and incorrect installation. Remove and replace tiles $800 plus GST
External cladding	Fibro sheeting did not meet Code. Electrical cabling was also re-installed in correct conduits to meet Code. Removal $1,550 plus GST Install $27,618.86 plus GST Electrical $5,500 plus GST Painting $18,850 plus GST.
Internal staircase	Blocks and wedges incorrectly installed, as was the handrail. Repair required removal and reaper of gyprock. Repair stairs $790 plus GST Repair gyprock $1,200 plus GST Handrail $500 plus GST
Windows and doors	All windows and doors require flashing. This has led to the timber frames and beading to rot. Install $1,100 plus GST.
Extras: Decking Entry Pergola Plumbing	 Construction made from pine and not hardwood as per Code, Costs Estimate to replace $13,500. Tiles in the entry of the house had cracked due to movement and incorrect installation. Remove and replace tiles $800 plus GST No downpipe was installed and had damaged decking. Install $1,800.40 plus GST. Guttering was overflowing in high rainfall, not enough downpipes installed. Install $1,900.80 plus GST.

[26] Mr Knezovic says in seeking dismissal of the application that:

(a) the home was built to plans by licensed tradespersons engaged by the respondent;

(b) the local authority certified the property as compliant;

(c) he lived in the home until 2012 when it was sold to the intermediate owners, who received the required disclosures from Mr Knezovic, and who undertook building inspections and other due diligence inquiries prior to purchase;

(d) Mr Holley purchased the home from the intermediate owners, and undertook his own building inspection and due diligence inquiries; and

(e) the intermediate owners undertook some works and caused some damage to the home during their tenure including failing to maintain drainage, changing the windows, altering the property, and breaking the benchtop.

[27] Mr Knezovic submits in those circumstances that he does not owe Mr Holley a duty of care and, if he did, raises a number of defences to the claim for damages.

Is the application a "building dispute" over which the tribunal has jurisdiction?

[28] Section 77 of the *Queensland Building and Construction Commission Act* 1991 (Qld) ("QBCC Act) confers jurisdiction on the tribunal to hear building disputes.

[29] A building dispute includes a "domestic building dispute"[7] which, in turn, includes (among other things) a claim or dispute in negligence, nuisance or trespass related to the performance of reviewable domestic work other than a claim for personal injuries.[8]

[30] 'Reviewable domestic work' means 'domestic building work',[9] which includes work comprising the renovation, alteration, extension, improvement or repair of a home.

[31] As it is clear from the material filed, and not disputed by either party that the owner builder work was domestic building work, and that the claim against Mr Knezovic lies in allegations of negligence with respect to that work. Therefore, I am satisfied that the dispute the subject of the application is a 'domestic building dispute'.

[32] Section 77(2) qualifies the tribunal's jurisdiction to hear building disputes by stipulating that an application cannot be made to the tribunal unless the applicant "has complied with a process established by the commission to attempt to resolve the dispute".

[33] Mr Holley filed a letter from the Queensland Building and Construction Commission ("QBCC") dated 4 April 2017 confirming that he had participated in dispute resolution processes and I am therefore satisfied that the requirements of section 77(2) have been met and that the tribunal has jurisdiction to hear this dispute.

Is the application time-barred?

[34] Section 10 of the *Limitation of Actions Act* 1974 (Qld) provides that an action in tort (excluding personal injury actions) cannot be brought "after the expiration of 6 years from the date on which the cause of action arose".

[35] A cause of action arising from negligence accrues when the person suffers damage as a result of the breach of duty.

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7 QBCC Act, Schedule 2 (Definition of "building dispute").
8 Ibid, Schedule 2 (Definition of "domestic building dispute").
9 Ibid, Schedule 2 ("Definition of "reviewable domestic work").

[36] The Queensland Court of Appeal in *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Limited*[10] considered, and diverged in opinion on, when the cause of action accrues in a claim for negligence against a builder, negligence having been alleged in that case in respect of the design and engineering of a concrete slab and surrounds. The effect of the decision in *Melisavon* is that the limitation period for a claim for breach of duty in a building construction claim may arise when the applicant it had actual knowledge of the defect giving rise to the damage or, alternatively, when the damage was sustained irrespective of whether the applicant had (or ought to have had) knowledge of the defect, which, in this case, means Mr Holley's cause of action accrued:

(a) as early as 1 June 2016 when, arguably Mr Holley could have discovered by reasonable diligence, that the work undertaken by Mr Knezovic was undertaken by him as an owner builder (for example, by undertaking a Council records search in the conveyancing process) or could have noted the defects identified in his building inspection report dated 1 June 2016; or

(b) as late as 3 December 2016, at the latest, when the inadequacy of fixation of sheeting became manifest and the sheets were "ripped off" the home during a storm event.

[37] Proceedings should have been commenced by 1 June 2022 or 3 December 2022. They were commenced on 6 June 2019. Therefore, on either interpretation, the claim for damages for negligent building work was commenced within time.

Did Mr Knezovic owe Mr Holley a duty of care and, if so, what was the scope of that duty?

Builders as opposed to owner builders

[38] At common law a duty of care will generally arise when the defendant should have foreseen that their conduct could result in injury to the plaintiff[11].

[39] The *Civil Liability Act* 2003 (Qld) ("CLA") must be applied in determining Mr Holley's claim. Schedule 2 of the CLA defines relevant terms as follows:

(a) "Duty" includes a duty of care in tort;

(b) "Duty of care" means a duty to take reasonable care or to exercise reasonable skill (or both duties); and

(c) "Harm" means harm of any kind, including damage to property and economic loss.

[40] It is well-established that the relationship of a professional licensed builder to a homeowner client is a category of relationship where a duty of care is owed because it is reasonably foreseeable that if care is not taken by the builder the client is likely to suffer loss and damage.[12]

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10 [2014] QCA 233.

11 *Donoghue v Stevenson* [1932] AC 562.

12 *Canavan v Sutton* [2020] QCAT 374 at paragraph [44].

[41] However, whilst the High Court of Australia in *Bryan and Maloney*[13] established the principle that a "builder owed the first owner a duty of care to avoid economic loss of [defects in construction]",[14] and that it *may* be liable in negligence for damages to a subsequent purchaser, the tribunal has expressed the view that it is not certain that an *owner builder* owes a duty of care at law to any subsequent owner.[15]

Economic Loss

[42] There is a distinction at common law, and a reluctance to allow the recovery of pure economic loss (as opposed to property damage claims) in negligence and the circumstances where courts have allowed the recovery of economic loss have been limited, however they are not excluded purely because only economic loss is suffered.[16]

[43] Mr Holley argues that his claim is for property damage as well as economic loss because the building defects caused property damage. He cites a decision of *Perre v Apand Pty Limited*[17] wherein it was said that:

> Where a defendant knows or ought reasonably to know that its conduct is likely to cause harm to the person or tangible property of the plaintiff unless it takes reasonable care to avoid that harm, the law will prima facie impose a duty on the defendant to take reasonable care to avoid the harm. Where the person or tangible property of the plaintiff is likely to be harmed by the conduct of the defendant, the common law has usually treated knowledge or reasonable foresight of harm as enough to impose a duty of care on the defendant. Where a person suffers pure economic loss, however, the law has not been so willing to impose a duty of care on the defendant.

[44] I am not convinced of this because any such damage has been rectified and does not need to be assessed. His claim is for the out-of-pocket costs to rectify defective building work and is, therefore, a claim for pure economic loss.

[45] Mr Holley submits that the distinction is not fatal to his claim, as a duty of care can be owed to subsequent owners, even in economic loss cases.[18] I agree with this submission. The question for the tribunal is whether a duty of care arose in these particular circumstances.

[46] The current approach of the High Court begins with the test of reasonable foreseeability of harm, followed by a consideration of salient factors[19] including the nature of the relationship between the parties, the harm suffered, known reliance, assumption of responsibility and vulnerability, to determine whether or not a duty of care arises.

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13 (1995) 182 CLR 609.

14 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [14] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

15 Noted by Member Howard (as she then was) in *Gilchrist v Ivanovic* [2016] QCAT 56, citing *Paul Bongioletti Homes Pty Ltd v North* [2012] QCATA 175 especially at [36-37] and *Tracey v Olindaridge Pty Ltd* [2013] QCATA 048 at [15-19].

16 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [92].

17 (1999) 198 CLR 180 at paragraphs 70-72.

18 Applicant's submissions, paragraph 14.

19 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [149].

Was the harm reasonably foreseeable?

[47] The need to rectify defective building work is a reasonably foreseeable consequence of defective building work, therefore, the out-of-pocket costs of undertaking those rectification works is a reasonably foreseeable economic loss arising from such works. This does not appear to be disputed.

[48] Where building defects are non-latent, and where the purchaser under a contract of sale can exercise a contractual right to protect itself from potential loss under the terms of the contract with the seller, it is difficult to see how a likelihood of economic harm to the purchaser, caused by the actions of the original owner builder, can arise.

[49] In any event, reasonable foreseeability is necessary but not of itself sufficient to establish a duty of care,[20] particularly where the posited duty is a novel one. Novel relationships require a close analysis of the facts bearing on the relationship between the parties and the importance of, or weight to be given to what is known as those salient factors depends upon the circumstances of each case.

[50] I am satisfied that Mr Knezovic's role as an owner builder (as opposed to a builder) and Mr Holley's position as a subsequent owner (as opposed to a builder's client) renders their relationship a novel one requiring close analysis in order to identify whether a duty of care exists.

Mr Holley's vulnerability

[51] In the High Court of Australia, the two most recent decisions on latent building defects required the claimant to prove that it could not have protected itself from economic loss in another way (for example by relying on contractual warranties). If the claimant fails to produce evidence on point, the claimant will not establish vulnerability, and this will defeat a claim in tort[21].

[52] Vulnerability considers not what the person who suffers harm actually did, but what they could have done, to protect themselves, with a balance to be struck between "the traditional cornerstone of foreseeability and commercial realities".[22]

[53] Mr Holley enjoyed a number of protections and had control over a number of steps that were available to him prior to settling on his purchase of the home that would have enabled him to avoid harm.

[54] Those protections/controls included:

(a) statutory protections under the QBCC Act; and

(b) contractual protections under his purchase contract;

(c) the opportunity to search public records including a title search and Council building records; and

(d) a pre-purchase building inspection.

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20 *Sullivan v Moody* (2001) 207 CLR 562.

21 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan* [2014] HCA 36 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

22 *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117 at [267].

[55] Owner builders have a number of statutory duties. If a person wishes to construct their own home or carry out major renovations as an owner builder, they must obtain an owner builder permit from the Queensland Building and Construction Commission ("QBCC").[23]

[56] It is the responsibility of an owner builder under the permit issued by the QBCC to ensure that the building work is properly carried out, even if the owner builder's role is only directing licensed contractors to carry out the work. This obligation could of course give rise to a duty of care and the expectation that future owners of the property might rely on the owner builder ensuring that works are properly carried out.

[57] "Owner builder work" means building work for a building that is to be used for residential purposes carried out on the owner's land.[24]

[58] The Home Warranty insurance scheme operated by the QBCC and which otherwise protects owners against incomplete or defective work, is not available to owner builders.

[59] To put subsequent purchasers on notice of the fact of owner builder work on a property and of the absence of warranty protection, several protective measures are included in the QBCC Act.

[60] Section 46 of the QBCC Act provides for the QBCC to notify the registrar of titles of the granting of an owner builder permit, for the registrar of titles to enter the notification in the freehold land register, and for the notification not to be removed until seven years after the notification.

[61] Unfortunately, Mr Knezovic's permit *ought to have been* recorded on the freehold land register in December 2008, in which case it *may have been* removed from December 2015, namely, before Mr Holley purchased the property. Mr Holley did not tender the title search, or any searches undertaken in his conveyancing process to enable the tribunal to form a definitive view on this.

[62] Having said that, under section 47 of the QBCC Act provides that if:

(a) building work is carried out on land by a person who is not licensed to carry out that building work; and

(b) the land is offered for sale within 6 years after completion of the building work,

the prospective buyer must be given a notice before the contract of sale is signed. The notice must contain details of the building work and a warning that it is not covered by insurance under the Home Warranty insurance scheme. Failure to give the prospective buyer the required notice will result in the seller giving the buyer a contractual warranty (which cannot be excluded by the contract) that the building work was properly carried out.

[63] The obligations under section 47 extend to resellers of the property within six years of the owner builder work being completed.

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23 Section 43E of the QBCC Act.

24 Section 43D of the QBCC Act.

[64] Prospective buyers can, and usually do, conduct a search of the records of the QBCC when purchasing to check whether an owner builder permit is current against a property.

[65] Certainly, the intermediate owners, via title and QBCC license searches would have had actual knowledge of the fact of the owner builder work having been undertaken even if Mr Knezovic did not disclose it.

[66] As the owner builder works completed in October 2010, the obligation to notify under section 47 would have existed when the intermediate owners sold to Mr Holley in June 2016 even if the notification on title had been removed from the freehold land register by that time.

[67] If section 47 was complied with, Mr Holley was on notice when he purchased that the works were owner built and were not protected by statutory warranties or insurance.

[68] If section 47 was not complied with, it was the intermediate owners who gave a warranty with respect to the building works to Mr Holley, not Mr Knezovic.

[69] Mr Holley also had the benefit of Council records searches undertaken in the usual conveyancing process and a building inspection. The Council records searches were not produced to the tribunal in evidence.

[70] As to the building inspection report, Mr Holley submits that:

(a) the fact of having the inspection did not protect him from damage;

(b) the obtaining of the report is merely evidence that he did all he could to reasonably protect himself;

(c) he and his inspector "could not reasonably have known what was concealed behind the building fabric";[25] and

(d) the issues with the property were concealed and damage did not manifest until the storms occurred some six months after he had settled on the purchase of the home.

[71] The evidence does not support these submissions. Unlike cases like *Bryan* where the defect was latent and undiscoverable by inspection, the evidence before the tribunal in these proceedings suggests that the defects identified as defective building works were not latent and that Mr Holley purchased the property with actual notice of the defects because:

(a) The pre-purchase building inspection report identified the defects that Mr Holley seeks to have Mr Knezovic rectify (lacking termite barrier to perimeter of house, timber decking and posts and joins and corners and handrails to patios needing work, cracked and drummy tiles, cracked walls and loose cornice and weather damage to garage, cladding needing fixing sealing and painting, considerable squeaking to the internal stairs, all windows requiring flashing, downpipes required, evidence of water leaks/ingress) albeit in summary format, and a recommendation was given to Mr Holley by his

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[25] Submissions of Mr Holley at paragraph 58.

inspector to have the identified maintenance, repairs and upgrading attended to;

(b) The report also included the statement that apart from the defects identified and that needed maintenance, repair and upgrading, "there should be no further problems in the near future". This suggests that if those identified items were not attended to by Mr Holley, he could expect some problems "in the near future"; and

(c) As stated, Mr Holley and Absolute Home Builders Pty Ltd both concede that report *did* outline the items that required repairs, they simply note that the report failed to identify to Mr Holley that the items needed repair due to sub-standard building works.

[72] It is not known what Mr Holley did with those recommendations to hand (other than that he did not act on them by getting works done). Mr Holley might have negotiated the contract price down to reflect the diminution in value that the defects represented, or to reflect the cost of doing the works. Mr Holley may also have exercised, if the defects were serious enough, a right to terminate the contract, which, clearly, he did not. It is simply not known what action, if any, was taken by Mr Holley upon his receipt of the report, other than to settle the contract, but it is the action he could have taken, not the action that he did take that is relevant.

[73] Regardless, where a pre-purchase building inspection identified the defects before Mr Holley was unconditionally committed to purchasing the property, where the owner-built nature of the property (and the limited warranties that came with that) were discoverable by searches ordinarily undertaken in the conveyancing process, and where Mr Holley either:

(a) bought the property on notice (by way of disclosure) that it was owner-built; or

(b) was protected by warranties from the intermediate owners (in the absence of disclosure),

Mr Holley has not established that he was vulnerable to harm from defective building work by Mr Knezovic, that he could not take steps to protect himself and that he had no control over whether or not those steps were taken.

[74] These factors weigh heavily against a finding that Mr Knezovic owed Mr Holley a duty of care.

Mr Knezovic's assumption of liability and the known reliance upon his skills

[75] In *Bryan v Maloney* it was noted that "by virtue of superior knowledge, skill and experience in the construction of houses, it is likely that a builder will be better qualified and positioned to avoid, evaluate and guard against the financial risk posted by latent defects in the structure of a house".[26]

[76] Importantly, the current circumstances are distinguished in (at least) three respects:

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[26] Ibid at [19] per Mason CJ, Deane and Gaudron JJ.

(a) The defects were not latent – Mr Holley purchased with actual knowledge of defects as identified in the pre-purchase building inspection report (discussed above);

(b) Mr Holley was not committed to complete the purchase transaction once the defects were made known to him in the building inspection report; and

(c) Mr Knezovic is an owner builder with a reasonable expectation that section 47 of the QBCC Act operated to relieve him, to a certain extent of liability, and to disclose that he was an owner builder rather than a builder with a different standard of skills, qualifications and experience.

[77] Having regard to the statutory protection afforded to subsequent purchasers under section 47 of the QBCC Act, and Mr Knezovic's complete lack of control over whether that section is complied with by those who own and sell the property after him, I find that he is entitled to assume that parties – and in particular the intermediate owners – will comply with those obligations and, further, that purchasers will take reasonable steps, namely make the usual and reasonable pre-purchase inquiries such as title and Council records search and building inspections, and to negotiate or use the benefit of contractual terms to protect themselves from harm.

[78] These factors weigh against a finding that Mr Knezovic assumed liability to or knowledge that subsequent owners would rely upon his skills as a supervising owner builder.

What is the relationship of proximity of Mr Holley to Mr Knezovic?

[79] The Court in *Bryan v Maloney* were satisfied that the connection between a builder and a subsequent owner of a property – whilst it may be limited only to the "house itself"[27] – nonetheless was marked by proximity in a number of respects, noting that:

> The connecting link of the house is a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime.
>
> When…economic loss is eventually sustained and there is no intervening negligence or other causative event, the causal proximity between the loss and the builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership.[28]

[80] There appears, on that basis, to be a relationship of proximity between Mr Holley and Mr Knezovic that weighs in favour of a finding of duty of care.

Indeterminacy of liability

[81] As suggested in *Bryan v Maloney,*[29] a number of policy considerations may mitigate against the finding of a duty of care where the loss is economic and in particular:

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27 Ibid at [16] per Mason CJ, Deane and Gaudron JJ.
28 Ibid.
29 [1995] HCA 17.

> …the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class".[30]

[82] It was also noted by Justice Toohey that:

> ..particularly in the area of non-dangerous defects...as time goes on it may be more difficult to show that the defect was the result of negligence and not of wear and tear or factors not associated with the standard of construction.[31]

[83] Section 47 of the QBCC Act affords protection to subsequent purchasers of an owner-built property but only for a limited period and where disclosure is not complied with, it is the intermediate owners rather than the original builder who are charged with liability. It cannot be said in those circumstance that it was intended under the owner builder regime that owner builders should be liable to an indeterminate number of owners for an indeterminate period. There is statutory recognition that they lack control over the compliance with section 47 by those who own and sell the property after them.

[84] Further, six years had passed between when Mr Knezovic completed construction of the home and when Mr Holley bought it. It is not known to what extent the intermediate owners undertook renovations to the home, although Mr Holley suggests they were minor and inconsequential. Certainly, the pre-purchase building inspection report identifies some items of wear and tear. A cracked kitchen bench top, for example, would not normally be evidence of defective building work but, rather, is more likely to be accidental damage or wear and tear.

[85] These factors weight against a finding that Mr Holley is owned a duty of care by Mr Knezovic.

Coherence of the law

[86] Again, section 47 of the QBCC Act recognises the lack of a control that an original owner builder has over disclosure to subsequent owners by imposing the disclosure obligation, and the warranty if that obligation is not met, upon subsequent sellers rather than the original owner builder.

[87] It would be inconsistent with the intent of section 47 to go behind that section and find Mr Knezovic responsible for the warranties that arise from any non-compliance by the intermediate owners in circumstances where I have found that Mr Holley had actual knowledge of the building defects, advice to repair them and the opportunity to avoid harm by terminating his purchase contract or negotiating the price.

Decision

[88] I am not satisfied, having regard to the novel relationship between an owner builder and a subsequent homeowner and to the salient factors relevant to these parties – placing particular weight on the issue of vulnerability (or lack thereof) and to policy considerations that arise from the statutory regulation of owner builders, that a duty of care existed in this case. As this is a necessary cornerstone to a finding of negligence, the application must fail.

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30 Ibid, at [7] per Mason CJ, Deane and Gaudron JJ citing *Ultramares Corporation v Touche* (1931) 174 NE 441 at 444 per Cardozo CJ.

31 Ibid at [28].

[89] For all of the above reasons, the application is dismissed.