IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 98/2022
[2023] NZSC 142

BETWEEN	STEVEN RICHARD YOUNG Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	14 March 2023
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	A R B Barker KC and J Moss for Appellant K G Stephen and H T N Fong for Respondent
Judgment:	30 October 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs of $25,000 plus usual disbursements.

REASONS
(Given by Ellen France J)

Introduction

[1] This appeal concerns the scope of liability in private nuisance for a naturally occurring hazard.

[2] The issue arises in the following way. The appellant, Mr Young, owns land lying beneath cliffs which were damaged by the 2010/2011 Canterbury earthquakes. The cliffs sit across the boundaries between Mr Young's land and the clifftop properties above. The earthquakes compromised the cliffs, leading to rockfall on Mr Young's land. After the earthquakes, the cliffs remain unstable and at risk of further collapse onto Mr Young's property. The neighbouring clifftop properties were treated as within the red zone under the Canterbury Earthquake Recovery Act 2011.[1] The Crown acquired these properties between 2012 and 2015.

[3] The ongoing instability of the cliffs means Mr Young's land is unsafe. His property was also red zoned. Accordingly, under the Canterbury Earthquake Recovery Act the Crown made an initial red zone offer to buy Mr Young's property and then an

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[1] As noted in *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1, greater Christchurch was categorised into four zones. The "red zone" was where rebuilding may not occur in the short to medium term because of the extent of the damage to the land and the prospects of remediation.

improved red zone offer.[2] This offer was described as a "hybrid" because it was a mix of the types of offers otherwise made.[3] The offers were rejected. Instead, Mr Young brought the present proceeding against the Crown in trespass[4] and nuisance.[5] Initially, the primary remedies sought were, first, a declaration that the Crown should be required to remove existing rockfall and remediate the risk of further rockfall and/or cliff collapse so that Mr Young could return to, reoccupy and restore his property. Second, and alternatively, damages were sought reflecting the value of his lost property. The remedy now sought is confined to damages.

[4] The High Court dismissed the claim.[6] The Court considered the rockfall risk was an actionable nuisance and that accordingly there was, what the Court described as, a "measured" duty on the Crown to do what was reasonable to prevent or minimise that risk. The High Court found that the Crown's later, hybrid offer meant that the Crown had done all it needed to do to meet that duty. There was no obligation to compensate Mr Young fully for his loss. Mr Young appealed to the Court of Appeal but was unsuccessful.[7] The Crown did not cross-appeal in the Court of Appeal from the finding of the High Court that there was an actionable nuisance, and the parties agreed that the duty was a "measured" duty to do what was reasonable. The Court of Appeal agreed with the High Court that the hybrid offer met the measured duty on the Crown.

[5] Mr Young appeals with leave to this Court from the judgment of the Court of Appeal on the question of whether that Court was correct to dismiss his appeal.[8] He argues that the Court of Appeal was wrong to confirm the finding of the High Court that the hybrid offer met the measured duty of care. He says that this Court should make an award of damages for $2 million reflecting his assessment of broadly

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2 See below at [12].

3 Relevantly, there were otherwise two options. The first involved, amongst other matters, an offer by the Crown to purchase 100 per cent of the property and improvements at the 2007 rating valuation and the second involved, in part, an offer to purchase 100 per cent of the land value only at its 2007 rating value.

4 The claim in trespass was not pursued in the Courts below and nor in this Court.

5 A private nuisance is "an unreasonable interference with a person's right to the use or enjoyment of an interest in land": Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 579 at 580.

6 *Young v Attorney-General* [2021] NZHC 463 (Dunningham J) [HC judgment].

7 *Young v Attorney-General* [2022] NZCA 391, [2023] 2 NZLR 24 (Kós P, Cooper and Dobson JJ) [CA judgment].

8 *Young v Attorney-General* [2022] NZSC 148 (O'Regan, Ellen France and Williams JJ).

half of the value of the property he lost because of the instability of the Crown land. Alternatively, he seeks an award of damages of just over $1.2 million. That sum is derived from the figure of $2.08 million attributed to the hybrid offer in the Court of Appeal decision.[9] He says there are options for remediating the property which would enable him to remain on, and use some of, his land. Finally, Mr Young challenges the way costs were dealt with in the High Court.

[6] The Crown says the Courts below were correct. It contends the relief Mr Young now seeks assumes that the Crown is obliged to remediate the cliffs, but it argues that remediation is not reasonable in all the circumstances. Rather, its duty of care was discharged by making the hybrid offer in a situation where the only practical option to reduce the effects of the nuisance is in fact for Mr Young to move away from the property. The duty is simply to facilitate Mr Young's relocation. The hybrid offer does that and, in so doing, discharges the Crown's obligation to take reasonable care.

[7] The way that the case has developed means that the primary issue for us is whether the Crown has met its duty to do what was reasonable to prevent or minimise the harm from the rockfall risk. It is helpful in addressing that issue to say something about the cases that have established this duty and the factors relevant to assessing reasonableness in this context before applying the principles to this case. In terms of the factors that will be considered in assessing reasonableness, we identify one such relevant factor as being whether or not the risk is sourced in the land owned by Mr Young, the Crown, or both, about which there is a factual dispute. We will address this first after providing further background.

Background

[8] We begin by summarising the facts, drawing substantially on the Court of Appeal judgment.[10]

[9] Mr Young has owned the land at 124 Main Road, Redcliffs in Christchurch for over 40 years. He has invested heavily in developing and landscaping the land which

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9 See below at [113].
10 CA judgment, above n 7, at [5]–[15].

is about two hectares in area. The land now includes five houses and appurtenant gardens. The cliffs giving the suburb its name are at the rear of the property and enclose it in a large curve. We attach as Appendix A two photographs which show the existing houses and provide some perspective of the property. The 13 properties acquired by the Crown after the 2010/2011 earthquakes are at the top of the cliffs surrounding Mr Young's property.

[10] Before 2009, only three of the five houses now on Mr Young's land were in existence (Houses 1–3). In 2007, Mr Young obtained subdivision consent (subject to conditions) to establish four new residential lots in addition to the balance lot on which the existing houses, Houses 1–3, stood. Mr Young sold two of the lots to two different families, each of whom built homes on the lots (Houses 4 and 5). The families lived in Houses 4 and 5 anticipating completion of the subdivision and the acquisition of title. Rockfall protection works as part of the subdivision conditions were needed to be completed before that could occur.[11]

[11] The 4 September 2010 earthquake damaged Houses 1–3 but relatively little rock fell from the cliffs. That changed with the 22 February 2011 earthquake, which caused significant rockfall onto Mr Young's land. (The figures used by the Court of Appeal are that over 21,000 m^3, or over 30,000 tonnes, of rock and debris fell onto the land.) Subsequent earthquakes resulted in more rockfall. The Court of Appeal said that:[12]

> Overall, around 72 per cent of the detached rocks and debris came from the cliff face lying *within* Mr Young's own land; 28 per cent came from the neighbours' land above Mr Young's land. Houses 1–3 were damaged and became uninhabitable. Houses 4 and 5 were damaged but were capable of repair.

[12] As we have foreshadowed, the property was designated as a red zone property under the Canterbury Earthquake Recovery Act. That designation was made in June 2012. In March 2013, the Crown made its standard red zone offers for the purchase of the property.[13] A hybrid offer was made in February 2015, and renewed

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11 Discussed further below at [52].

12 CA judgment, above n 7, at [8] (emphasis in original).

13 Two options were given: CA judgment, above n 7, at [9]. The Crown would only deal with Mr Young in respect of all lots, because titles had not yet been issued for the subdivision of his property.

in December 2017, which would be to the value of $733,601.62.[14] The value was reached by deducting the sums already received by Mr Young from the Earthquake Commission (EQC) and private insurance proceeds (in relation to Houses 4 and 5) from a figure reflecting the value of the land as at 2007 and the value of Houses 4 and 5. The deductions totalled close to $1.35 million. Mr Young rejected all offers. In mid-2015 he bought Houses 4 and 5 from the families to whom he had sold the underlying lots. He now owns the entire property and improvements on it.

[13] Because of the devastating damage caused by the earthquakes, the Christchurch City Council notified a new Christchurch District Plan over various stages in 2014/2015. The new plan relevantly introduced new management areas, to which large parts of Mr Young's land are subject. These areas largely either prohibit, or categorise as non-complying, development activities including building, subdivision and hazard-removal works.

[14] Although the property is not currently accessible from the road because of rockfall at the street front, Mr Young has access over a neighbouring property owned by the Crown. Mr Young would like to salvage the houses, protect them as best is possible from future cliff collapse and rockfall, and return to living in House 1.

[15] It is helpful at this point to say a little about the two remediation plans designed to achieve these objectives, which were put forward in evidence in the High Court because of their relevance to the relief sought. Although here we outline both plans, as we will discuss, the case proceeded before us on the basis that only the second of the plans was in play.

[16] The first of these plans was advanced by Mr Young. This plan, referred to as the Davis Ogilvie plan, would involve scaling of the rock faces, removal of an extensive amount of fallen rock and debris, benching the cliff face (involving further earthworks) and building an extensive bund (or wall) at an estimated cost of around

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[14] In the Court of Appeal the figure given was $2.08 million but the parties accept that is not correct. The figure we have used reflects that in a joint memorandum filed by the parties after the hearing.

$4 million plus GST.[15] There is no dispute that this plan was dependent on obtaining a private plan variation to the Christchurch District Plan.

[17] Although the Crown did not accept it had any obligation to remediate, the Crown asked Dr Kupec, from Aurecon New Zealand Ltd, to advance an alternative proposal. The main features of this plan were described by the High Court as involving the following:[16]

> (a) The construction of two bunds, the first protecting existing houses 4 and 5 from the cliff fall risk to the northwest, and the other running through where Houses 1 and 2 currently exist, but allowing two sections to be created between the second bund and the eastern boundary of the property.
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> (b) The first bund would need to be approximately 94 m long, four metres high and 4.6 m wide at the base. The second bund would need to be approximately 73 m long, 2.5 m high with a base width of 3.5 m and have a two metre high rockfall protection drape fence on top.
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> (c) House 3 could not remain in its present position, as it would lie between the first bund and the cliffs on the north western side.
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> (d) Access would continue via 124A Main Road, but if the original access to the property was to be reinstated the first bund would need to be extended by 35 m, to protect the driveway from rockfall.

[18] This proposal, while less extensive than the Davis Ogilvie one, was estimated as requiring at least $1.6 million plus GST to implement.[17] Aspects of the Kupec plan would require resource consents, as was explained in the evidence before the High Court from Mark Allan, a Resource Management Planner.

[19] Finally, in this narrative of the events, we note that the valuation experts at trial agreed that the effect of the 2010/2011 earthquakes was that the property has no present value.

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15 See HC judgment, above n 6, at [72].
16 At [74].
17 At [76].

The High Court decision

[20] In the High Court there had been no real dispute that the rockfall risk was a substantial and unreasonable interference with Mr Young's right to use and enjoy his land. Applying the line of authority associated with *Leakey v National Trust for Places of Historic Interest or Natural Beauty*, the Court said there was an actionable nuisance.[18] Accordingly, the issue was as to the extent of the Crown's duty to respond to the nuisance.

[21] Before addressing that question, the High Court dealt with and rejected the Crown's argument that it had a common law defence of statutory authority. In an earlier judgment, the High Court dismissed the Crown's claim that s 145 of the Greater Christchurch Regeneration Act 2016 provided the Crown with statutory immunity.[19] That judgment, while rejecting the defence of statutory immunity, did not finally resolve the separate question of the common law defence of statutory authorisation. The High Court in the present case rejected that defence on the basis that the continuation of the nuisance was not the "inevitable consequence of owning and holding land" but, rather, turned largely on the ease of remediation.[20] There was no express or implied authorisation that the Crown held the properties free from liability from the usual responsibilities of ownership. That said, the cost and practicability of mitigation, the relevant statutory framework, and the policy considerations underlying the powers given to the Crown under that Act (and its predecessor) could be taken into account in considering the extent of any duty owed by the Crown.

[22] The High Court then addressed the remediation options. The Judge said that whether it was necessary for the Crown to implement either the Davis Ogilvie plan or the Kupec plan turned on the scope of the duty the Crown owed. As we have indicated, the Court said that the duty was only "a duty to do what is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury".[21] The Judge stated that, in determining

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18 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).
19 *Young v Attorney-General* [2019] NZHC 993, [2019] 3 NZLR 808 (Mander J).
20 HC judgment, above n 6, at [58].
21 At [77] referring to *Leakey*, above n 18, at 524 per Megaw and Cumming-Bruce LJJ.

what is reasonable, the Court had to ask whether it was practicable "to prevent, or to minimise, the happening of any damage" and, if it was practicable, then, "how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works?"[22]

[23] The Court concluded that the Davis Ogilvie plan advanced by Mr Young was not reasonable in all the circumstances. That was because it was neither practicable nor cost effective. The Judge considered that the key barrier was the prohibited status of the works under the Christchurch District Plan. Without a successful plan change, the proposed works would be unlawful and the Judge said there was "no prospect that this Court would impose such an obligation on the Crown".[23] Even if the works were not prohibited, the High Court considered they still were not reasonable.

[24] Nor did the Judge consider that the Kupec plan was one that could reasonably be required of the Crown to prevent or minimise the nuisance. That proposal was a non-complying activity and there could be "no certainty" that resource consents would be granted for the works as proposed.[24] Even on the assumption that the consents would be granted, the works were not reasonable in all the circumstances having regard to their cost and the fact that they would only allow a portion of the site to be used, with any houses suffering from diminished visual amenity.

[25] Given the value of the land which would under this approach be rendered useable (on the expert evidence for the Crown this was some $934,783 plus GST), the cost of remediation and of establishing the new subdivision could well exceed the value of what would be preserved.[25] The Judge did not consider that the cost of the works, and the risks involved, were proportionate to the benefits that could be achieved.

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22 HC judgment, above n 6, at [77] citing *Leakey*, above n 18, at 524 per Megaw and Cumming-Bruce LJJ.

23 HC judgment, above n 6, at [79] citing *Pride of Derby and Derbyshire Angling Assoc Ltd v British Celanese Ltd* [1953] Ch 149 (CA) at 181.

24 HC judgment, above n 6, at [82].

25 This was even if the value of the houses sold to the two families were added. One expert valued the two houses at around $500,000 collectively, while the other valued them as in excess of $1 million.

[26] The Judge then considered whether alternative relief should be awarded in the form of damages for the value of the land that had been lost. The Judge initially made findings as to the value of what was lost. Given the land was currently worthless, the value as at 2010 (assessed at $1.355 million including GST) represented Mr Young's loss.

[27] The High Court found there was no legal obligation to compensate Mr Young for his loss for three key reasons. The first of these was that a claim in nuisance did not "necessarily translate to a duty … to fully compensate a plaintiff for the loss".[26] The Judge thought it unlikely that private owners of the clifftop properties would have been obliged to meet the $1.355 million cost of compensating Mr Young for the lost value. The Judge did not consider the Crown should be required to meet a higher standard than that imposed on private landowners.

[28] Secondly, and of more significance, the Judge said that "the nuisance which caused the current damage did not emanate solely from the clifftop properties owned by the Crown".[27] Placing the entire burden of rectification on the Crown would be inequitable.

[29] The third reason was that in deciding what was reasonable to expect of the Crown, the Judge said it was necessary to have regard to the Crown's broader responsibilities undertaken following the Canterbury earthquakes. In that context, the Court considered the Crown was "entitled to ration its resources to do the greatest good for the greatest number".[28]

[30] The High Court accordingly determined that in making the hybrid offer to Mr Young in 2015 the Crown had discharged its obligations to him appropriately.

The Court of Appeal decision

[31] The Court of Appeal accepted the submission for the Crown that in a case such as this of continuing nuisance there is no liability until and unless a defendant has

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26 HC judgment, above n 6, at [109].
27 At [110].
28 At [113].

breached its measured duty. The Court then considered first whether the Judge was correct as to the extent of the Crown's duty to abate. It is helpful to set out what the Court described as first principles:[29]

> (a) The Crown's liability (if any) to abate the continuing nuisance caused by the properties it acquired is personal in nature. It began no earlier than its acquisition of the land, whereupon it adopted the nuisance, to the extent it continued, and became subject to what has been called a "measured duty" to abate it.
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> (b) The Crown was not of course liable for the earthquakes sequence. Mr Young acknowledges that a claim could have been made against the then-owners of the adjacent land for the immediate damage done to his land at that time by rockfall, or at least the 28 per cent of it that did not come from Mr Young's own land. Counsel for Mr Young seem to have suggested as much to the High Court Judge.
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> (c) It follows that: (1) the Crown's acquisition of the adjacent land between 2012 and 2015 does not render it retrospectively liable for the initial nuisance caused by the rockfall (or for that part attributable to the land it later acquired); (2) the Crown's liability is limited to abatement of the continuing nuisance represented by the instability of the land it acquired, from the time it acquired it; and (3) if damages are in play, they must involve a comparison between the value of Mr Young's land at the time(s) the Crown acquired *its* land and the reasonable costs of remediation. The value of the land *prior* to the earthquakes sequence is not directly relevant to this question.

[32] In expanding on these points of principle, the Court made a number of other points. Having examined the English line of authorities, the Court agreed with the submission for the Crown that the Crown was not liable unless it had failed to meet its measured duty to remove or reduce the hazard.

[33] The Court then considered what the liability of the departing landowners on the clifftops might have been. The neighbouring landowners were not liable for loss caused by the rockfall from Mr Young's own land in the 2010/2011 earthquakes and nor for loss caused by continuing cliff instability on his land. The extent of their liability for what the Court described as "like loss" attributable to rockfall from the neighbouring land and for like loss attributable to the continuing nuisance from the neighbouring land was unclear.[30] The extent of that liability would depend on

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29 CA judgment, above n 7, at [30] (footnotes omitted and emphasis in original).
30 At [40].

evidence enabling attribution and an assessment in light of the evidence as to the extent of the measured duty.

[34] The Court did not think it could be right in any event that the landowners would bear the whole cost of remediation. That was because a substantial part of the loss was caused by matters that were not their responsibility and the evidence did not enable an apportionment of loss. Nor did the Court consider that, by acquiring the land, the Crown's liability in nuisance reached back to encompass loss caused by the rockfall from Mr Young's land or loss caused by continuing cliff instability on his land. When the Crown acquired the clifftop properties, the past events and ongoing hazards along with the Christchurch District Plan changes had already "effected the wholesale loss of value of Mr Young's property".[31]

[35] Turning then to the liability of the Crown, the Court considered that where the liable neighbour is a public authority, the authority's competing resource demands arising from its public purposes may be a relevant consideration in assessing the extent of the measured duty. It was relevant here that the Crown only adopted the nuisance by acquiring the neighbouring land as part of the red zone recovery plan developed for Christchurch following on from the damage caused by the earthquakes.

[36] At most, the Court considered it was "only the continuing nuisance represented by the continued risk of further rockfall from *its* land, after it took ownership, that is being assessed".[32] The Court did not think it was correct to treat the Crown as having taken over the departing landowners' potential liability for nuisance prior to acquisition. In conclusion, the Court said that:

> [52] Given the difficulty of attribution of risk and responsibility, the difficulties of effecting abatement due to the [Christchurch District Plan], and the policy implications of attributing pre-acquisition loss to the Crown as a rescuer, we are not persuaded the Judge erred in assessing that the making of the hybrid offer … adequately met the Crown's measured duty to abate. That offer achieved proportionality between the Crown's limited responsibility and Mr Young's loss in light of the unique factors at work in this case.

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31 At [41].
32 At [50] (emphasis in original).

The primary challenge concerning the facts

[37] There is no challenge here to the finding of the High Court that the risk of rockfall is a nuisance. The Crown did not cross-appeal against that finding. The argument in the Court of Appeal and before us has accordingly proceeded on the basis that the risk of rockfall constitutes a nuisance.

[38] The appellant challenges two aspects of the factual bases on which the Court of Appeal proceeded. The main challenge, which we address now, is that the appellant says that the hazard is primarily on Crown land, so it is not correct to proceed on the basis that the risk of continuing nuisance is a shared risk. The appellant also argues the likelihood the Kupec plan would obtain the necessary resource consent is higher than the Court suggests but, as this aspect is more relevant to the reasonableness of the Kupec plan, we deal with it in that context.[33]

Is the hazard primarily on the Crown land?

[39] The argument advanced by the appellant is that the clifftop properties are inherently unstable. That is because of cracks and fractures running from the cliff edge deep into those properties and the two mass movement areas flowing through the properties in the direction of the cliffs. The resulting instability from these cracks together with the mass movements is the threat to Mr Young's land, and it is this that has led to the planning restrictions applicable to the property.

[40] The appellant also says that while some parts of the cliff faces remain within his property, the primary risk of further cliff collapse comes from the instability in the Crown property. The cause of the nuisance, on this approach, continues to be instability on the Crown land. Finally, contrary to the Crown submission, Mr Young says that the risk was not known before the earthquakes. He also argues that this is not a case where the lower Courts have made concurrent findings of fact against him.

[41] The respondent disputes the claim that the cracked grounds on the clifftop properties are the primary cause of the continuing nuisance. The respondent says that

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[33] See below at [100]–[102].

the instability was a risk already existing on the property and that it is accordingly improbable that the cracks, which formed after the earthquakes, are the primary cause of the ongoing nuisance. Rather, the real reason for the risk is the fact the earthquakes have damaged the fabric of the cliffs. They have shaken some of the materials from the cliffs and, more significantly, the shaking also loosened new material on the cliff face. The respondent's submission is that, as the appellant's own geotechnical evidence shows, the "rockfall source area" is almost entirely on the cliff face. The respondent also relies on the evidence of Russell Benge, the surveyor who gave evidence on behalf of Mr Young in the High Court, that "a good proportion of the cliff face" is owned by Mr Young. In addition, the respondent relies on the finding of the High Court that the talus apron which has formed on Mr Young's land exacerbates the risk of rockfall.[34]

Our assessment

[42] The relevant evidence is summarised by the High Court.[35] As the High Court Judge stated, there is no dispute over the nature and the extent of the natural hazards which are a threat to Mr Young's property. The evidence at trial about this came from Elliot Duke, on behalf of the appellant, and from Dr Kupec, for the respondent. Both witnesses are experienced geotechnical engineers. As the Judge said, they were in agreement "that the key geohazards at the property include cliff collapse, fly rock (as part of cliff collapse), rock fall and mass movement".[36] The Judge then explained the meaning of each of these terms and described the presence of what are termed "mass movement areas". The Judge said this:

> [34] Cliff collapse refers to the mass detachment of large portions of a rockface that results in numerous boulders falling at the same time. Due to the number falling together, there are typically collisions between the boulders which can result in erratic trajectories and create smaller rocks (called fly rocks) which can then fly off further than would otherwise be anticipated. Rock fall hazard occurs when isolated boulders break off the cliff face, as

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34 "Talus" refers to an "outward-sloping and accumulated heap or mass of rock fragments … derived from and lying at the base of a cliff or very steep, rocky slope, and formed chiefly by gravitational falling, rolling, or sliding": C I Massey and others *Canterbury Earthquakes 2010/11 Port Hills Slope Stability: Stage 1 report on the findings from investigations into areas of significant ground damage (mass movements)* (Institute of Geological and Nuclear Sciences Ltd, GNS Science Consultancy Report 2013/317, 1 August 2013) at viii. See also the photographs below in Appendix A.

35 HC judgment, above n 6, at [33]–[36].

36 At [33].

> opposed to cliff collapse where an avalanche of material comes down. Finally, a mass movement hazard refers to the movement of a large area of land, but which may not result in the loss of that land in a way that a cliff collapse will. Typically it is known as a landslide and occurs where the upper mass of land moves relative to the lower part. There are two mass movement areas identified in the Redcliffs area. The Balmoral Lane mass movement area has a projected direction of movement towards the driveway of the property. The Glendevere Terrace mass movement area is located to the southwest of the property and is projected to move towards House 1 and 2 at the back of the property.

[43] The Judge went on to discuss the sources of the extensive material which fell onto Mr Young's property as a result of the earthquakes. Some 6,100 m^3 of rock and debris fell from the clifftop properties now owned by the Crown. The balance (72 per cent) fell from the cliff face that lies within the appellant's property. In addition, particularly resulting from the 22 February and 13 June 2011 earthquakes, the Court said that:[37]

> … an extensive rock debris apron has formed at the base of the cliff within the property, and this talus slope acts as a ramp over which future debris and rock falls can be conveyed further into the property, exacerbating the extent of the fatality risk within the property.

[44] But, the Judge noted, there were "numerous ground tension cracks on the land at the top of the cliff face" and those cracks "could lead to possible slope failure under either static events (for example, high intensity rainfall), or dynamic conditions (for example, earthquakes)".[38] It is the combination of these cracks and the effect of the mass movement areas on which Mr Young relies as constituting the hazard.

[45] Later, the Judge said this:[39]

> … the nuisance which caused the current damage did not emanate solely from the clifftop properties owned by the Crown. The vast majority of the rock which fell on Mr Young's property during the Canterbury earthquake sequence, emanated from his own land. There has always been a rockfall risk on his property which the Council recognised when it proposed conditions on Mr Young's five lot subdivision. The rockfall which occurred in 2010-2011 created the talus apron on Mr Young's property which exacerbates the ongoing rockfall risk to the land. It also rendered the driveway to the property unusable. While Mr Young says the ongoing nuisance now largely emanates from Crown-owned land, I cannot ignore the fact Mr Young's property has been made unusable because of the collapse of the cliff face which was located

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37 At [35].
38 At [36].
39 At [110].

> largely within his own property. To place the entire burden of rectifying the situation on the Crown would be inequitable.

[46] Reflecting the arguments before the High Court, there is some focus in this excerpt on past events. However, the observation about the talus apron is expressly directed to ongoing risks and, to the extent the cost of remediation sought would involve some removal of existing rocks, that too reflects ongoing risks. Further, in context, it is arguably only because of the concern as to future risk that the Judge makes reference to what has occurred to date. The Court of Appeal certainly expressly identifies the risk, as "split between the plaintiff and the defendant's respective land".[40] That is apparent from the fact that the Court then cites from *Holbeck Hall Hotel Ltd v Scarborough Borough Council* in a passage where the English Court of Appeal is referring to the situation where "the defect existed just as much on the plaintiffs' land as on their own".[41]

[47] We see no basis to interfere with the finding of the Court of Appeal that there is some hazard on both Mr Young's property and on the properties now owned by the Crown. We see the split as sufficient to allow us to proceed on the basis the risk is shared as between the two properties. We explain our approach briefly.

[48] The evidence shows that the tension cracking relied on by Mr Young is primarily on the Crown's land. That cracking is identified as a significant risk in the event of an earthquake or heavy rainfall. Further, a 2012 GNS Science | Te Pū Ao report "recognises that the cracks at the cliff top might evolve into cliff collapses at a later date".[42]

[49] But the mass movement areas exist on both sides of the boundary. The maps in evidence show that part of what is described as the "mainly extensional area" is on Mr Young's land. The 2013 GNS report refers to extensional areas as those where "the ground surface comprised multiple open cracks, indicating that the ground had

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40 CA judgment, above n 7, at [36].

41 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [49].

42 C I Massey and others *Canterbury Earthquakes 2010/11 Port Hills Slope Stability: Pilot study for assessing life-safety risk from cliff collapse* (Institute of Geological and Nuclear Sciences Ltd, GNS Science Consultancy Report 2012/57, March 2012) at 99.

predominantly opened in response to movement".[43] This, in turn, indicates the surface of Mr Young's land in this area is compromised.

[50] It is also relevant that the Davis Ogilvie report prepared for the appellant refers to "[o]ther likely triggering mechanisms". Those mechanisms include progressive weathering of the rock material. We read this as indicating a source of risk separate from the cracking in the properties behind the cliff face. It is apparent that the cliff faces are "very disturbed and fragmented, with many areas of loose rock apparent".[44] As the Crown submitted, the evidence was that Mr Young owns a "good proportion" of the cliff face. The cliff face is clearly a source of rockfall.

[51] Finally, the view that there are hazards on both sides of the boundaries is supported by the fact that there was an existing risk on Mr Young's property. That is apparent from the conditions imposed by the Christchurch City Council on the subdivision consent issued prior to the Christchurch earthquakes:

> In terms of rock fall there is potential for release of small sized debris from localised sources along with potential for some larger blocks to be released. A potentially unstable section of the cliff is located above the southern part of Lot 4. Under direction of a Geotechnical Engineer the visible areas of loosened blocks of rock on the cliff above the southern part of Lot 4 are to be removed and the larger blocks bolted. The Geotechnical Engineer is to design a rock catch/deflection fence across the southern part of Lot 4 to protect an identified building site on the north part of the lot. The protection works are also to include stormwater cutoff drains to intercept and control surface and subsurface flow … .

[52] As the High Court noted, there was some dispute about the extent to which Mr Young had complied with the conditions of the subdivision consent. But, the Judge noted, to meet those conditions it was still necessary "to scale the cliff and remove loose rocks (although some work of this nature had been done) and to bolt the larger rocks".[45] In addition Mr Young was still to construct "a rock catch fence/wall on lot 4".[46] In relation to that, the High Court stated that Mr Young was negotiating the possibility of the subdivision being signed off and titles issued without doing further

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43 Massey and others, above n 34, at 5.

44 Massey and others, above n 42, at 21. Dr Kupec also discussed the damage to the fabric of the cliff and how the cliffs will continue to shed rocks and boulders in an episodic manner.

45 HC judgment, above n 6, at [20].

46 At [20].

work. This was on the basis that the rockfall protection works would be undertaken by the new owner of Lot 4 at the time the section was built on. The Judge noted that such a change would have necessitated an application to vary the consent conditions under s 127 of the Resource Management Act 1991.

[53] The relevance of a pre-existing risk here is simply in establishing the factual position of the possibility of rockfall prior to any earthquake-induced cracking. We accept it was no doubt true that the extent of the risk was not appreciated prior to the earthquake but our conclusion on all of the evidence is that it is plain some risk was, and is, inherent in Mr Young's own property. We accordingly consider the Court of Appeal was correct to proceed on the basis the risk was split. The risk is a shared risk.

The relevant legal principles

[54] This case proceeds on the basis that there can be a liability in private nuisance for "harm originating in some natural condition of [the] land" (here, the instability of the cliffs) as opposed to the effect of human activity.[47] It is also common ground between the parties that the standard imposed on the Crown in terms of abating that nuisance is what is reasonable. We discuss the nature of the liability and duty by reference to the relevant cases.

The application of private nuisance to natural hazards

[55] We preface our discussion of the cases by emphasising we are considering the measured duty that arises in the situation where the nuisance was not caused by the defendant's action or omissions but rather arises from a natural hazard. We are concerned only with the potential for liability in that situation and, as we will come to, within that particular situation, the role the 2010/2011 earthquakes played in bringing about the hazard is important additional context.

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[47] Andrew Tettenborn and others (eds) *Clerk & Lindsell on Torts* (24th ed, Sweet & Maxwell, London, 2023) at [19–19].

[56] We begin with the case of *Sedleigh-Denfield v O'Callaghan*.[48] There, the plaintiff brought a claim in private nuisance against his neighbouring landowner for flooding on the plaintiff's land caused by an overflowing pipe. There was a grating on the pipe which was intended to prevent leaves or other matter blocking the opening of the pipe, but it was not placed correctly. This meant that during a heavy rainstorm the pipe became choked with leaves so that the water overflowed onto the plaintiff's premises causing damage. The defendants claimed that they ought not to be responsible because, even though their employees had been periodically cleaning out the ditch, the pipe itself had been placed by the local authority without the defendants' permission.

[57] The House of Lords concluded the defendants were liable in private nuisance. In explaining this conclusion, Viscount Maugham said that a landowner could be liable if the landowner adopted or continued the nuisance. To "continue" the nuisance meant "if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so".[49] Similarly, Lord Atkin said that liability could arise where the defendant allowed "an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it … he is continuing [the nuisance]".[50]

[58] Lord Wright observed that where the defendant had not created the nuisance, the defendant was not liable "unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it".[51] Lord Romer referred to the landowner permitting the nuisance to continue if the landowner knew or ought to have known of its existence but failed to take reasonable steps to remedy it despite having time to do so. In that context, the occupier was liable even though the nuisance had been created by another person.[52] Finally, Lord Porter held that where an occupier had knowledge or presumed knowledge of a nuisance, the occupier was liable "to the

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48 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL).
49 At 894.
50 At 897.
51 At 904–905.
52 At 913.

extent that he can reasonably abate it, even though he neither created it nor received any benefit from it".[53]

[59] What is apparent from the decision is the qualified nature of any obligation imposed, a matter we return to in more detail later.[54]

[60] In *Goldman v Hargrave*, an appeal from the High Court of Australia to the Privy Council, lightning had caused a tree on the defendant's land to catch fire.[55] The defendant could have put the fire out with water but chose instead to let it burn out. He was found liable in nuisance for the damage caused when the flames from the tree spread to the neighbour's land.

[61] In terms of the present case, the key point made by Lord Wilberforce (writing for the Board) was to reject the notion there was a distinction between a hazard brought about by human agency, for example the act of a trespasser, and one arising from natural causes, or (like the fire in *Goldman v Hargrave*) an "act of God".[56] Lord Wilberforce referred in this context to the application of the principles in *Sedleigh-Denfield* by the Supreme Court of New Zealand in *Boatswain v Crawford*.[57] That case also involved a fire which could easily have been controlled by the defendant in its initial stages.

[62] Lord Wilberforce said that in addition to the authorities discussed, the commentators also endorsed the development "towards a measured duty of care by occupiers to remove or reduce hazards to their neighbours".[58] Lord Wilberforce reiterated the point made in *Sedleigh-Denfield* that the existence of the duty was based on "knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it".[59]

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53 At 919.
54 See below at [71] onwards.
55 *Goldman v Hargrave* [1967] 1 AC 645 (PC).
56 At 661.
57 *Boatswain v Crawford* [1943] NZLR 109 (SC).
58 *Goldman v Hargrave*, above n 55, at 662.
59 At 663.

[63] We turn then to *Leakey v National Trust for Places of Historic Interest or Natural Beauty*.[60] The case dealt with the issues arising from instability of a hillside on the defendants' land. That instability was a result of natural causes, namely the geological structure and materials, land contours, and the effect on those of natural phenomena such as the rain or wind. The English Court of Appeal held that an occupier of land owed a general duty to the neighbouring occupier in relation to a hazard on its land whether or not the hazard was natural or man-made. The Court in this respect endorsed the judgment in *Goldman v Hargrave*. Megaw LJ (with whom Cumming-Bruce LJ agreed) made it clear that this was not a situation of strict liability.[61] In that respect it was a different position from that in *Rylands v Fletcher*.[62] Rather, as was said in *Sedleigh-Denfield*, the obligation was to use reasonable care and the defendant was "not to be liable as a result of a risk of which he neither was aware nor ought, as a reasonably careful landowner, to have been aware".[63]

[64] Shaw LJ noted that:[64]

> The underlying theory of this approach is the correlation of control and responsibility. As the owner of land is normally in the best position to obviate or to contain or to reduce the effect of nuisances arising naturally on his land, he should be primarily responsible for avoiding the consequences of such nuisances or for compensating those who suffer by their occurring.

[65] Shaw LJ also referred to the old common law duty on landowners in the situation of a nuisance arising from a natural hazard. That duty involved giving the neighbour reasonable warning and such access to the land as reasonable to enable the nuisance to be abated.[65]

[66] Although agreeing that the appeal in *Leakey* should be dismissed, Shaw LJ expressed some concerns about the extension of the concept of nuisance to hazards caused by natural events:[66]

> Why should a nuisance which has its origin in some natural phenomenon and which manifests itself without any human intervention cast a liability upon a

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60 *Leakey*, above n 18.
61 At 517.
62 *Rylands v Fletcher* (1868) 3 LR 330 (HL).
63 *Leakey*, above n 18, at 517.
64 At 528.
65 At 528.
66 At 528.

> person who has no other connection with that nuisance than the title to the land on which it chances to originate? This view is fortified inasmuch as a title to land cannot be discarded or abandoned. Why should the owner of land in such a case be bound to protect his neighbour's property and person rather than that the neighbour should protect his interests against the potential danger?

[67] Finally, we note that Shaw LJ did not consider that narrowing the scope of the reasonableness duty would deal with the concerns he had expressed. Indeed, Shaw LJ suggested that "[t]his formulation may … create fresh problems, and the derivative problems may defy resolution".[67] We interpolate here that we see some force in that observation. The application of the measured duty in the present case is relatively straightforward but the duty may be harder to apply in cases which are not as clear-cut.[68]

Conclusions

[68] This line of cases relevantly shows that there can be liability in private nuisance arising from a natural hazard where the defendant knows or ought to have known of it but does not take reasonable steps to prevent it. In this situation, the defendant is said to continue the nuisance.[69] Where the defendant did not create the private nuisance but rather continues it, that gives rise to fault-based, rather than strict, liability.[70] There is, as the respondent submits, an overlap with negligence in this area.[71]

Factors relevant to reasonableness

What is "reasonable" requires a factual assessment

[69] As a starting point, we agree with the submissions for Mr Young that what will be "reasonable" in this context is to be determined on the facts of the case. Viscount Maugham in *Sedleigh-Denfield* observed that the word "nuisance" as used

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67 At 529.

68 See also C A Hopkins "Slipping into Uncertainty" (2000) 59 (3) CLJ 438 at 439–440 discussing the difficulties apparent in predicting the outcome of litigation in this area by reference to *Holbeck Hall Hotel*, above n 41; and see Allan Beever *The Law of Private Nuisance* (Hart, Oxford, 2013) at 76–79 criticising the failure to adequately explain the basis for liability.

69 See above at [57]–[58].

70 A point made by the Court of Appeal: CA judgment, above n 7, at [31] citing Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 533 at 564–565.

71 See the discussion in Atkin, above n 5, at 628.

in law is "a generic term".[72] It applies to a range of different things: "damage resulting from water, smoke, smell, fumes, gas, noise, heat, electricity, disease-germs, trees, vegetation, and animals, as well as in other matters".[73] As Viscount Maugham said, "very little thought is sufficient to show that the ways in which damage from these things is caused and may be prevented are widely different".[74] His Lordship continued:[75]

> In my opinion the legal duty of the owner of land towards an adjoining owner may be very different in some of these cases, and may depend on very different considerations.

[70] Because of the potential for varying circumstances and the need for a factual assessment, it is not possible to be categorical or prescriptive about what reasonableness requires and the factors relevant in assessing reasonableness. Rather than seek to address the full range of factors that may be relevant, we make some general comments about the nature of the duty and then address factors raised in this case.

The duty is a "measured" one and requires consideration of what is practicable

[71] The concept of reasonableness is used here in determining what is reasonable as "between neighbours (real or figurative)" and it also involves reasonable foreseeability.[76] These are concepts which the House of Lords in *Delaware Mansions Ltd v Westminster City Council* said "underlie much modern tort law and, more particularly, the law of nuisance".[77] We accept the submission for Mr Young that, given these underlying concepts, the inquiry into reasonableness here is a focused one.

[72] Indeed, it can be said that the use of the word "measured" is intended to signal an obligation which is both tailored and restricted. The Privy Council in

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72 *Sedleigh-Denfield*, above n 48, at 888.
73 At 888.
74 At 888.
75 At 888.
76 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321 at [29].
77 At [29]. See also *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2023] 2 WLR 1085 which addressed limitation issues arising with respect to a claim for private nuisance concerning an oil spill. Lord Burrows (writing for the Court) made the point that "[n]early always the undue interference with the use and enjoyment of the claimant's land will be caused by an activity or state of affairs on the defendant's land so that the tort is often described as one dealing with the respective rights of neighbouring landowners or occupiers": at [2].

Goldman v Hargrave considered that the law had to take account of the fact that the occupier on whom the duty was imposed had the hazard "thrust upon him through no seeking or fault of his own".[78] Lord Wilberforce continued:[79]

> His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust.

[73] Lord Wilberforce noted that in many cases, as in that case, the hazard could be removed with "little effort and no expenditure" so that "no problem arises".[80] But it was acknowledged that other cases may not be so straightforward. Lord Wilberforce said:[81]

> In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more.

[74] We come back shortly to say a little more about the extent to which a defendant's resources may be relevant. At this point it is relevant also to note what Megaw LJ in *Leakey* said about the scope of the duty, namely, that it is one:[82]

> … to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable,

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78 *Goldman v Hargrave*, above n 55, at 663.
79 At 663.
80 At 663.
81 At 663.
82 *Leakey*, above n 18, at 524.

> how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred?

[75] We see the emphasis in this passage on what is practicable and whether the remedy is a simple one as particularly relevant in the present case. The scale of the problems caused by the earthquakes is such that even the Kupec proposal, which will still not allow full use of Mr Young's land, would involve considerable expense.

[76] By contrast, a feature of a number of the leading cases in this area is that they do not deal with a continuing nuisance of anything like the scale of the present case. As the respondent says, it is a common theme of the cases, like *Sedleigh-Denfield* and *Goldman v Hargrave*, that the relevant nuisance could have been abated with ease. In *Sedleigh-Denfield*, for example, the nuisance came from an open ditch nearly 40 inches deep and 20 inches wide which carried water and at its lower end led into the culvert which was some 15 inches in diameter. As Viscount Maugham said, what the owners had neglected to do was "to take the very simple step of placing a grid in the proper place".[83] Instead, they had adopted the nuisance because they continued to use the water course for getting rid of water from their property without taking the necessary means for making it safe. The respondent correctly emphasises that a feature of the cases in this area has often been the modest scope of required remediation.

[77] Mr Young accepts that the extent of what is required to avoid the risk is relevant. If what is required is comparatively little, then the failure may be obvious. By contrast, if significant works are required it may be unreasonable to impose that burden entirely on the defendant (costs may more appropriately be shared) and in other circumstances it may be unreasonable to require the defendant to do more than provide the plaintiff with information and access to facilitate remediation at their own cost.[84] We accept that this is not to say the court cannot order significant abatement but while circumstances may justify such an order, it will not be appropriate when remediation

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83 *Sedleigh-Denfield*, above n 48, at 895.
84 See also below at [83].

imposes too onerous or disproportionate a burden. That would not be a measured response. The ease or otherwise with which the risk may be avoided, and the practicability or otherwise of the proposed remedial action, are relevant factors.

[78] We see some force in the point made by Professor Richard Buckley in discussing the observation of Megaw LJ in *Leakey* that there is "no valid distinction" between an encroachment by fire spreading from a tree on fire on the land "and, on the other hand, of a slip of soil or rock resulting from the instability of the land itself".[85] Professor Buckley suggests that this comment has to be read in the context in which Megaw LJ made it, noting that:[86]

> Although the area in question in the *Leakey* case, near to Bridgwater in Somerset, is a rural one it is in no sense remote or thinly populated. It is with respect to regions of the latter type that the apparent generality of the principle expressed in the case might in future require qualification.

[79] We interpolate here that Professor Buckley notes that the type of "locality" will hardly ever avail a defendant whose own activities caused physical damage to the neighbouring property. However, Professor Buckley says, where the issue is an omission "to control or limit the operation of the forces of nature … in extreme cases the principle [that locality is relevant] should be applicable".[87] Professor Buckley refers to the New Zealand case of *French v Auckland City Corporation*, which was approved in *Leakey*.[88] In *French*, the defendant was held liable for not preventing the spread of weeds onto the neighbouring property. Professor Buckley refers to this observation of McMullin J:[89]

> I think it … proper to point out the limit of this decision. It is not to be thought that I am intending to lay down as a rule of law the proposition that an occupier of land will always be liable for the escape from it of weeds or weed seeds onto the property of another. Circumstances must always be relevant. The occupier of a weed-infested area in an urban or intensely farmed area may be liable, but the occupier of a property in a more remote area may be under no liability at all.

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85 Richard A Buckley *Buckley: The Law of Negligence and Nuisance* (6th ed, LexisNexis, London, 2017) at [13.18] citing *Leakey*, above n 18, at 514.

86 At [13.18].

87 At [13.16].

88 *French v Auckland City Corporation* [1974] 1 NZLR 340 (SC). See *Leakey*, above n 18, at 523 per Megaw and Cumming-Bruce LJJ.

89 Buckley, above n 85, at [13.16] citing *French*, above n 88, at 351.

[80] The question of "locality" is not something we need to consider to resolve the present dispute, but we simply note that considerations of locality may come into play in determining the impact of scale and accordingly the reasonableness of what is required to prevent or remediate.

The impact of the risk arising from both properties?

[81] Whether the hazard was solely on the defendant's property or whether it is a feature of the plaintiff's property is likely to be relevant to what is required to meet the duty. If the risk arises from both properties, remediation costs may be shared.

[82] This aspect is discussed in *Holbeck Hall Hotel*. The plaintiffs were the owners and lessees of a hotel on a clifftop overlooking the North Sea. The defendants, a local authority, owned the land which formed the undercliff between the hotel grounds and the sea. The cliff slopes were inherently unstable. In 1993 there was a massive landslip which damaged the hotel and led to its demolition. The local authority was found not liable for the damage.

[83] After reviewing the authorities, Stuart-Smith LJ (with whom the other two members of the Court agreed) saw the case as one of "non-feasance".[90] The defendant had done nothing to create the danger which had arisen by the operation of nature. The scope of the duty was therefore "much more restricted".[91] In these types of situations, Stuart-Smith LJ envisaged that it may be that all that was required was a duty to warn the plaintiffs of such risk as they did appreciate and share with them the information contained in the expert report.[92]

[84] In that case, Stuart-Smith LJ concluded it was not just to impose liability for damage where the damage was "vastly more extensive than that which was foreseen

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90 *Holbeck Hall Hotel*, above n 41, at [46].

91 At [46].

92 In the New Zealand context, s 44A of the Local Government Official Information and Meetings Act 1987 is relevant. A person may apply to a territorial authority for the issue of a land information memorandum (LIM). Section 44A(2) states that this must include information relating to "potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that … is known to the territorial authority" but not apparent under the relevant district plan. We also note that from 1 July 2025, ss 44B–44D require that LIMs include natural hazard information affecting the land, including the potential cumulative effects of such hazards.

or could have been foreseen … and this is particularly so where the defect existed just as much on the plaintiffs' land as" on that of the defendants.[93] Issues of foreseeability do not arise in the present case as the parties know of the ongoing risk of instability. At issue now is the continuing nuisance arising from events that have already occurred. But the comments concerning the defect existing on both parties' land are apposite.

The comparative financial position of the parties

[85] Mr Young says that the comparative financial position of the parties is a relevant factor. The way in which we have resolved the case means we do not need to determine whether this is so. We accept that the leading authorities such as *Goldman v Hargrave* and *Leakey* do envisage a subjective test in the context of which financial means may be relevant.[94] Consideration of proportionality and practicalities, which may reflect resources, are certainly treated as relevant in this area.

[86] In expanding on the nature of the duty in *Leakey*, Megaw LJ said that the reasonableness criteria included what a particular person, rather than the average person, "can be expected to do, having regard, amongst other things, where a serious expenditure of money is required to eliminate or reduce the danger, to [their] means".[95] Megaw LJ said that this assessment could only be "in the way of a broad, and not a detailed, assessment".[96] Megaw LJ continued that in:[97]

> … arriving at a judgment on reasonableness, a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect [themselves] from damage, whether by way of some form of barrier on [their] own land or by way of providing funds for expenditure on agreed works on the land of the defendant.

[87] The case of *Page Motors Ltd v Epsom and Ewell Borough Council* dealt with the position of a local authority defendant.[98] Ackner LJ and Fox LJ both envisaged consideration of the resources of the defendant, amongst other circumstances.[99] Both

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93 *Holbeck Hall Hotel*, above n 41, at [49]. We add that we do not see *Ward v Coope* [2015] EWCA Civ 30, [2015] 1 WLR 4081, relied on by Mr Young as a contrast to *Holbeck Hall Hotel*, as assisting. It reflects an application of the principles discussed earlier.

94 See the passage from *Goldman v Hargrave*, above n 55, discussed above at [72]–[73].

95 *Leakey*, above n 18, at 526.

96 At 526.

97 At 526.

98 *Page Motors Ltd v Epsom and Ewell Borough Council* (1981) 80 LGR 337 (EWCA Civ).

99 At 350 per Ackner LJ and 354 per Fox LJ.

Judges also referred to the fact that the local authority had a range of calls on its resources, including obligations to other ratepayers.[100]

[88] In *Abbahall Ltd v Smee*, by contrast, the English Court of Appeal indicated that "the nature of the duties governing neighbours in a case such as this simply cannot depend on such transient matters as their means".[101] That case involved a dispute over who should bear the costs to repair the roof of a three-storey building which had been allowed to fall into disrepair. The plaintiff owned the ground floor, the defendant the top two floors. The plaintiff had obtained an injunction enabling it to conduct repairs and sought recovery of the cost of that along with the cost of further necessary repairs. The Court said that, as counsel for the claimant had submitted, there would:[102]

> … be something extremely odd in a situation such as this if the proportions in which the various owners of a building are required to contribute to the common task of maintaining the roof should depend upon—and so fluctuate with—their respective financial means. Why should the claimant's share depend upon whether the defendant is an idle drone who has long since squandered his inheritance or a hard working upwardly mobile professional with a large income and carefully garnered savings? Why should the claimant's share suddenly be increased—as on [the defendant's] approach it would be—if the yuppie moves out and the drone moves in? Why should the irresponsible drone be able for that very reason to get away with contributing less to the common good than the hard working yuppie? Can it really be suggested that [the defendant's] liability should be increased—and if so to what percentage?—if she were to win the lottery jackpot tomorrow?

[89] That said, the Court ultimately reserved the position on the relevance of means where the "cost of the necessary repairs [were] of a wholly different and very much greater order of magnitude than is in fact the case".[103]

Relevance of the fact that the activity is for the public benefit

[90] To explain how this aspect arises in this case, the Court of Appeal took the view that it was important that the Crown acquired the properties above Mr Young's land not to occupy or develop them, but essentially as a rescuer so that the former owners of that unstable land could "retrieve some value from their now valueless land

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100 At 351 per Ackner LJ and 354 per Fox LJ.
101 *Abbahall Ltd v Smee* [2002] EWCA Civ 1831, [2003] 1 WLR 1472 at [57].
102 At [56].
103 At [77].

and move on with their lives".[104] In deciding the Crown had met its measured duty, the Court took into account the "policy implications of attributing pre-acquisition loss to the Crown as a rescuer".[105]

[91] Mr Young challenges the relevance of this factor to reasonableness. He says that the Court of Appeal has in this way incorrectly taken into account public benefit. His submission is that the traditional approach was that benefits to third parties and, particularly, public benefit from the nuisance were not relevant.[106] The submission is that in relation to remedies there has been some loosening of that approach in *Lawrence v Fen Tigers Ltd*[107] and *Fearn v Board of Trustees of the Tate Gallery*.[108] In particular, Mr Young says that in those two cases the United Kingdom Supreme Court held that the public interest may only be relevant to the type of remedy, that is, whether the relief took the form of an injunction or damages.[109]

[92] *Lawrence v Fen Tigers* dealt with a stadium which was built for various motor sports. Planning permission was received to use land near to the rear of the stadium for motocross racing. Some 30 years later, the plaintiffs bought a house near the stadium and the track and objected to the noise from the track. After works carried out to reduce the noise did not satisfactorily resolve matters from the claimants' perspective, they brought proceedings in nuisance. The matters of public interest referred to by the Court in that case included the effect of an injunction on the viability of the defendant's business and the public enjoyment of the sporting activities carried on by the defendant.

[93] In *Fearn v Tate Gallery*, the plaintiffs brought a claim in nuisance against the Tate Gallery, contending that its use of a viewing gallery that overlooked the plaintiffs' flats unreasonably interfered with their enjoyment of the flats.

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104 CA judgment, above n 7, at [49] (footnote omitted).
105 At [52].
106 Citing *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (Ch).
107 *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.
108 *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 WLR 339.
109 See, for example, *Lawrence v Fen Tigers*, above n 107, at [125] per Lord Neuberger P, [222] per Lord Carnwath SCJ; and *Fearn v Tate Gallery*, above n 108, at [126] per Lord Reed P, Lord Leggatt SCJ and Lord Lloyd-Jones SCJ.

[94] We see the situations under consideration in both of those cases as different in kind to the public interest aspects of this case. We will develop this further but the short point is that the Crown acted here against a statutory framework which imposed various obligations on it arising out of the earthquakes. The regionwide impact of the earthquakes was so significant that legislation was enacted to effectively socialise to a national level much of the cost of recovery. The public benefit was in enabling the private landowners to be able to move away from the land on which it was no longer safe for them to live and to re-establish their lives. The Court of Appeal's characterisation of the Crown as "rescuer" more aptly captures what occurred here than the "public benefits" under consideration in either *Lawrence v Fen Tigers* or *Fearn v Tate Gallery*.[110]

[95] It is also arguable that the appellant's submission conflates the acquisition of the land with the nuisance, which is the ongoing risk of rockfall.

Whether the remedial work benefits both plaintiff and defendant

[96] In *Abbahall Ltd v Smee*, outlined above, the defendant accepted she owed a duty of care but on the plaintiff's appeal sought to maintain the assessment of the Court below that she was only exposed to a quarter of the repair costs. In addressing that question, the Court accepted the scope of the duty was "restricted" to the "measured" duty.[111] The authorities were clear that costs may in some cases be shared. The Court considered that it was fair, just, and reasonable to require those who benefitted from the works to also bear the burden of paying for them. Having considered matters such as the respective floor space owned by each of the parties, the Court concluded an order that the parties share equally in the costs was appropriate.

[97] We accept that in the type of situation in issue in *Abbahall Ltd v Smee* it is relevant to reasonableness that both of the owners of floors in the building would benefit from the remediation work. We see this as one of the factual matters a court may need to consider.

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110 We express no view on the correctness of the approach in either of those cases.
111 *Abbahall Ltd v Smee*, above n 101, at [22] and [26].

Conclusion

[98] In conclusion on the factors, we emphasise the factual nature of the inquiry. So, while it is possible to identify some factors of obvious relevance in this case, the factual context will be important.

Application of the principles to the present case

[99] We consider that to impose an obligation on the Crown to effectively implement the Kupec proposal goes beyond what is reasonable in these circumstances, largely for the points made by the High Court about practicability of that proposal in terms of both cost and difficulties of implementation; the disproportionality between the cost of remediation and the value of the land; the location of the hazard; and the broader context in which the Crown acquired the land. However, departing from the Court of Appeal in this respect, we see the hybrid offer as unrelated to the question of whether the Crown has met its measured duty.

[100] Taking first the practicalities, we reiterate that the Kupec proposal was estimated to cost at least $1.6 million plus GST. As we have said, it would not enable full use of the land or restore the prior visual amenity. The Courts below also identified difficulties in implementation. In relation to those difficulties, the appellant maintains that the expert evidence on whether resource consent could be given was equivocal. He challenges the finding that it was unlikely that resource consent would be given to enable implementation of the Kupec proposal.

[101] In his evidence in chief the planning expert, Mr Allan, said that resource consents were not likely to be granted in relation to the non-complying activities. In challenging the finding on this aspect of the evidence, the appellant relies on an answer given by Mr Allan in cross-examination, namely, that he was reserving his position "as to the extent of the likelihood or not that that wall [the bunds in the Kupec plan will] ultimately receive consent".

[102] When Mr Allan's evidence is read as a whole, we accept the Court of Appeal's assessment of this evidence, that is, the view that resource consents were unlikely to

be granted was "not significantly adjusted" in cross-examination.[112] The High Court had also accepted Mr Allan's evidence that, given the objectives and policies of the Christchurch District Plan contained "quite directive avoidance policies" in relation to natural hazards, "this would make it difficult" to satisfy the requirements for a resource consent.[113] The Judge also said there could be "no certainty" resource consents would be granted.[114]

[103] Mr Young's argument is that, in any event, the significance of the planning restrictions discussed by Mr Allan is relevant to the availability of a remedy rather than to liability. That is because, he argues, it would be his responsibility to sort out an alternative arrangement if the necessary consents were not forthcoming for the Kupec proposal. Further, he says that there were opportunities for the Crown to remediate prior to the implementation of the Christchurch District Plan.

[104] The latter point was not dealt with in the Courts below so the necessary factual findings have not been made. In our view, in a case such as this, where the Kupec proposal is the only option under consideration and where the appellant will not recover the full value of his land, we consider it is fair to conclude that the practicalities and proportionality tell against the appellant's case. Moreover, the duty is a tailored one — and it would be odd in this case in our view to assess the responsibility of the Crown in some abstract way.

[105] Questions of proportionality in this case are being assessed in the context where the nuisance was created by a natural disaster.[115] It is also relevant to note that remediation, even in terms of the Kupec proposal, requires a significant engineering solution at considerable cost. In contrast, as noted above, the Crown's witnesses valued the land which would be rendered usable by undertaking the Kupec proposal at just over $930,000 plus GST. We agree with the High Court that even if the value of Houses 4 and 5 were added in, "the cost of remediation and of creating the new

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112 CA judgment, above n 7, at [14].

113 HC judgment, above n 6, at [32] citing s 104D of the Resource Management Act 1991. Section 104D(1)(b) relevantly requires that the proposed activity is not "contrary to the objectives and policies of … the relevant plan".

114 At [82].

115 The observation by Lord Wilberforce in *Goldman v Hargrave*, above n 55, cited at [72] above, that the duty is cast upon the occupier in these circumstances, is apposite.

subdivision, could well exceed the value of what would be preserved".[116] That would be a disproportionate outcome in the circumstances of this case.

[106] Turning then to the location of the nuisance, as we have discussed, we agree with the Courts below that the hazard was on both properties. Although contending this was the case, the Crown nevertheless questioned the relevance of the source of the risk. This was on the ground that, in any event, the appellant's case was not put on the basis that the Crown could have abated the nuisance simply by addressing the cracks on its property. Neither remedial proposal advanced at trial proceeded on that assumption. However, it seems to us that what was required to meet the measured duty here must incorporate some consideration of the location of the nuisance.

[107] The appellant maintains that both parties will benefit from the remediation. This factor is coloured by the reason for the Crown's intervention to acquire the clifftop properties, namely, to allow the former owners the opportunity to re-establish themselves in areas where it is safe to live. And, as the Court of Appeal said, it is important not to discourage such initiatives. These factors are more relevant than the fact, relied on by the appellant, that the Crown is entitled to EQC payments in relation to the clifftop properties. What the position was in terms of whether or not the Crown would take up its entitlements was not known at the time of trial. But, in any event, the EQC sum operated as a set-off taken into account in setting the red zone offer to be made for the clifftop properties.

[108] Turning then to matters of broader context. As we have indicated, we do not see this as a case of public benefit in the sense discussed in cases such as *Lawrence v Fen Tigers*. But it is relevant in assessing what is reasonable here that the Crown acquired the properties in issue because they were unsafe to live on. It did so in the context of a natural disaster, and in order to ensure equitable and safe outcomes, in a situation of some complexity, and where it had a number of calls on its resources.[117] The requirements to address the situation in which Mr Young has unfortunately found himself are reflective of obligations that more naturally are seen

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116 HC judgment, above n 6, at [84].

117 The latter point is one recognised by this Court in *Quake Outcasts*, above n 1, at [145] per McGrath, Glazebrook and Arnold JJ.

as public law obligations. Given that, we do not see tort law as a very good means of allocating responsibility for a fix between these parties.

[109] These contextual matters underlie our view that the hybrid offer is not related to the measured duty. The making of that offer is not something that would be required of a private landowner.

[110] When the relevant matters are considered, we see this case as one where nothing further is required than to warn of the risks and assist with access to the property. The Crown has done both of these things. For these reasons, we consider the Crown has met its measured duty. Nothing further was required.

Damages

[111] As we have said, Mr Young is not now seeking to have the Crown undertake remediation in the manner set out in the Kupec proposal but, rather, seeks damages. The preferred measure of damages is approximately 50 per cent of $4.3 million, being roughly the value Mr Young ascribes to property lost as a result of the cliff instability.[118] The essence of his case is that the damages sought would provide him with a measure of justice for the loss of the value to his property.

[112] Although advanced as compensation for diminution in value, the quantum of damages sought is linked to remediation. The damages are essentially sought as a proxy for the cost of a contribution to implementing remediation and enabling Mr Young to remain on the land. In the approach we have taken to the measured duty, we have essentially accepted the Crown submission that it is not reasonable to impose a legal obligation on the Crown to remediate. The reasons for reaching that conclusion apply equally to dispose of the submission that damages should be imposed as compensation for the loss of the value of the property. It follows that, in the circumstances, there can be no obligation on the Crown to compensate Mr Young for his loss in the manner now sought.

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[118] The $4.3 million figure is comprised of approximately $2.1 million for the value of his land; $500,000 for the value of Houses 4 and 5; and $1.7 million for external improvements.

[113] The alternative damages claim is the claim for around $1.2 million. As we have said, that figure was derived from the $2.08 million recorded in the Court of Appeal judgment as the hybrid offer.[119] We accept the submissions for the Crown that it would not be appropriate to convert that offer into damages. That is because the offer was designed to allow, and in fact would require, Mr Young to relocate. If the offer were accepted, the Crown would acquire the property — as it has done with respect to the clifftop properties — and in this way eliminate the risk of future harm to landowners.

[114] We add that while the red zone offer, in our view, is unrelated to whether the Crown met its measured duty, we should record our understanding that the hybrid offer remains on the table. That was the position taken by the Crown in this Court. We envisage that, as a matter of fairness, the offer will remain open for a reasonable period of time to allow Mr Young to decide whether to accept it.

Conclusion

[115] In conclusion, although for differing reasons in some respects, we agree with the Court of Appeal that the Crown has met its measured duty in this case. We see no basis to make an award of damages on either basis sought by Mr Young. This disposes of the principal ground of appeal.

[116] There is a final question about costs.

Costs

[117] There are two issues as to costs. First, if unsuccessful on this appeal, the appellant challenges the award of costs to the Crown in the High Court. Second, we need to address costs in this Court.

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[119] This is calculated as $2.08 million (although rounded up) less the EQC payments for House 4 and less the EQC land payment.

Costs in the High Court

[118] In the High Court, costs were awarded to the Crown in the sum of $329,092.80.[120] That figure comprised just over $69,000 in scale costs and close to $260,000 in disbursements. If the appeal is unsuccessful, Mr Young appeals that costs award. The submission made in this respect is that he was ultimately successful in the High Court. Although that was for a lesser remedy than he sought (the Davis Ogilvie plan), the Court still held that the Crown was liable in nuisance and, in order to discharge that duty, the Crown effectively had to remake its hybrid offer. On Mr Young's analysis that implied a purchase price of just over $1.2 million plus interest. In addition, it is argued that the economic effect of the judgment is analogous to a successful claim for damages.

[119] The respondent says that this submission misunderstands the High Court judgment. The High Court found that the Crown had discharged its duty of care by making the hybrid offer in 2015 and was therefore not liable. On this approach, the Crown was the successful party and is entitled to costs. We accept the latter submission.

Costs in this Court

[120] The parties agree costs should follow the event. The respondent is entitled to costs of $25,000 plus usual disbursements.

Result

[121] The appeal is dismissed. The appellant must pay the respondent costs of $25,000 plus usual disbursements.

Solicitors:
Summit Law Ltd, Christchurch for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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120 *Young v Attorney-General* [2021] NZHC 1359.

Appendix A: Photographs of Mr Young's property[121]

[121] The first photograph (provided by the Crown) was taken in 24 February 2011. The second photograph (from an Aurecon/Land Information New Zealand diagram) was taken in Summer 2018–2019.