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IN THE SUPREME COURT OF NEW ZEALAND SC 98/2022
I TE KŌTI MANA NUI O AOTEAROA [2023] NZSC Trans 1

BETWEEN **STEVEN RICHARD YOUNG**
Appellant

AND **ATTORNEY-GENERAL**
Respondent

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

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CIVIL APPEAL

MR BARKER KC:

E ngā Kaiwhakawā, tēnā koutou. Counsel's name is Barker, appearing with Mr Moss for the appellant.

WINKELMANN CJ:

Tēnā kōrua.

MR STEPHEN:

E te Kaiwhakawā, tēnā koe. Ko Stephen ahau. Kei kōnei māua ko Mr Fong mō te Karauna.

WINKELMANN CJ:

Tēnā kōrua. Mr Barker? Sorry, before you begin. Reading your submissions, the Court has been struck by the fact that you seem to be attacking some factual findings in the lower courts. We would be assisted if you could be very clear in identifying those factual findings you say are wrong. We understand most of the factual findings are concurrent so of course you carry a significant burden in terms of pointing out how they are wrong. So, we'd appreciate if you could be very clear on that and prompt and to the point, but also it would be a wise thing for you to also argue your appeal on the basis that those findings stand, because they're concurrent findings.

MR BARKER KC:

Yes, I was actually going to start, as your Honour will see, and I filed a road map for oral submissions.

WINKELMANN CJ:

Yes.

MR BARKER KC:

And that did address some of the factual findings. There's actually not many factual findings made in the Court of Appeal. One of the key ones is that the hazard existed on both sides of the boundary, which is a crucial finding in this

case, which I do want to take your Honours to, and go to the evidence on that. But I don't think there was actually a finding to that effect in the High Court. So, in the High Court you'll see I've got the references there

WINKELMANN CJ:

If you just slow down. So in terms of the, are you just giving us, at the moment, a recitation of the factual findings you want to challenge?

MR BARKER KC:

Yes, I was just, there's only one really, I thought, that there's one factual finding to challenge, and that is the one about whether or not the hazard existed on both sides of the boundary. I don't think there are other factual findings. There is one in respect of the consent, and whether or not the Kupec design could be consented, but when I'll come to that you'll see that my approach there is slightly different in that while it maybe difficult and face challenges, the law is that that would not usually be enough to deny you relief in respect of that issue as to futility or – the standard really has to be something of futility or something similar to that.

WINKELMANN CJ:

So the finding in the Court of Appeal, can you pinpoint the paragraph for us?

MR BARKER KC:

Yes if you go to the, if you have my oral outline, that first paragraph, so it's 16, 19 and 36.

WILLIAMS J:

Of the Court of Appeal?

MR BARKER KC:

The Court of Appeal.

WINKELMANN CJ:

And you say there's no comparable finding in the High Court?

MR BARKER KC:

No, and in the High Court, so really the effect of those three paragraphs there, so in the High Court, that's at 36 and 110, you'll see that what the Judge does is that she records at 36, so page 35 of the bundle, she records at 36 my submission that it's solely on the Crown land, and then at 110 we have: "While Mr Young says the ongoing nuisance now largely emanates from the Crown-owned land, I cannot ignore the fact that… has been made unstable because… the cliff face which was located largely within his own property." And I don't think when we come to the evidence that that's really a finding that the actual source of this is one that lies on Mr Young's land. I mean I think in my submission the evidence is quite clear that the problem here lies entirely on the Crown land. All you have are cliff faces that sit on Mr Young's land, which are going to fall because of the problem on the Crown land.

WINKELMANN CJ:

So what do you say is the nuisance?

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MR BARKER KC:

So the nuisance is the inherent instability on the Crown land, which is made up of two aspects. The first is the risk of cliff collapse, and that's caused by cracks that extend over 50 metres within, into the Crown land, and then mass movements, which are essentially very large slips that occur, which are located on the Crown land as well, and that's really where I wanted to start the appeal by taking your Honours through that evidence and the maps that show that, because I do think it is quite clear that the problem we've got here is located in the Crown land. There are cliff faces on Mr Young's property but they're only going to fall because of what's happening on the Crown land, and the evidence is that those cliff faces are going to extend and extend – oh sorry, recede, recede, recede further into the Crown's land.

ELLEN FRANCE J:

Sorry, Mr Barker, just in terms of actual findings, I did read paragraph 110 as a finding that the hazard, if that's the right word, didn't emanate solely from the clifftop properties?

MR BARKER KC:

I think that, really what her Honour was talking about is just the actual fact of the cliff face. So there's always going to be a hazard in the sense that the initial rockfall will be from Mr Young's land. I mean that's clear because the actual – so the way the geography works, and you can see this in a moment, is roughly the boundary is the top of the cliff, and because cliffs aren't straight up they tend to – so when rock falls, it's going to fall from Mr Young's land initially. As that edge recedes, as the evidence says it will recede, that face will actually be all entirely for the Crown land. But that's the hazard in that sense, but I don't think she's talking about the actual cause, the underlying cause of why those are going to fall. I think that's really what the nuisance issue is.

WINKELMANN CJ:

And what is set against you is, in fact, that most of the hazard is actually just instability in the cliff face itself.

MR BARKER KC:

Yes and I think that is just clearly not the case, and that was the agreed position of the experts at the trial as well. I do wonder whether I might take your Honour through that because I think it's quite instructive to actually understand how that evidence works, because it is such a central point to this entire appeal. So is your Honour happy for me to go from there?

WINKELMANN CJ:

Yes, go ahead.

MR BARKER KC:

So again on that outline the references are there but I'll direct you, Madam Registrar, as to where to take the Court. So the way the expert evidence was given is that the – most of the experts, and particularly the

geotechnical experts, they hot tubbed, and so the start of it was started with Mr Duke, who was the expert for Mr Young, giving a summary as to what was actually going on with these places, and all of this information is taken out of GNS surveys that were done. So in about 2019, GNS came in here and did great surveys of all of this area and large parts of Christchurch, working out where all the instabilities were et cetera et cetera. So they're really just talking about information that came from GNS surveys.

So with Mr Duke's summary at the beginning he prepared a slideshow and what I was going to do is take you to the slideshow and then I'd talk through what Mr Duke actually says because it does explain what's actually going on in this site. So the slideshow is at 307.3116, and if we go through to the –

GLAZEBROOK J:
And when did you say the surveys were done by GMS sorry?

MR BARKER KC:
GNS.

GLAZEBROOK J:
When were they done, sorry?

MR BARKER KC:
July 2014. So if you go through to the next page to .3118, and I'm going to read the – I did try to summarise it but I actually can't get better than what Mr Duke says, but when you talk to this, compare to the slides, you'll see the issue that I think we confront.

So the key issues on the site we're dealing with here are the cliff collapse hazards and the associated clifftop recession and debris flow, debris avalanche that occurs. Now Dr Kupec's, I'm using Mr Duke's words, "Dr Kupec in his evidence put together an excellent slide", and that's the slide we've got here. "The key point shown here in this image is the recession and future risk of clifftop recession being the cracking that's occurred in behind the cliff here.

So the seismic loading on the rock has weakened the rock has weakened the rock structure and caused cracking within that rick to propagate some 50 metres back from the clifftop, sort of 50 metres back within that zone above the site."

WINKELMANN CJ:

So you're reading from someone's evidence?

MR BARKER KC:

Sorry yes, what I'm reading is what Mr Duke says. The reference to that is in the outline.

WINKELMANN CJ:

Yes, great, thanks. Got it.

MR BARKER KC:

But I think it's easier if I read it and you look at the map. So again, I'm reading Mr Duke again. So I thought this is a really key image and I'll probably keep coming back to it because the next image, if we go over the page, has come from GNS work, and at a glance, they look a little complex because there's a fair bit going on.

What they've done in this here, is really just shown in the black the outline of Mr Young's property. So we can see the black outline. That's Mr Young's property. It's not exactly like that when we get to the proper survey maps, but that's roughly his property, and really, if we work our way through the colour scheme, the red line there is the top of the cliff. So there's a red line representing the top of the cliff. Also coupled with that red line is a dotted red line which shows where the cliff was. So the figure here shows the recession of that clifftop that occurred as a result of the Canterbury earthquake sequence, which is sort of seven to eight metres the cliff proceeded inland.

The pink area here, this big pink band, shows the rockfall source area, and the yellow band shows the extent of the mapped cracking. So I don't know if we can go back on this. You'll see the cracks on the top here propagate as far

back as the yellow line that's shown here on the GNS works, and that's the extent of the clifftop cracking here.

So me now interposing, so when you see, you've got the cliff edge, you've then got the yellow line. That's where the cracks extend back to. So from the cliff edge all the way back to that yellow line you've got at the top there.

So the pink band here, that's where we call the rockfall source area, and that obviously came down and inundated further parts of Mr Young's land. The yellow lines at the toe, so we're now looking at the bottom of the map, show the extent to which the talus or rock progressed into Mr Young's property. So that's where the talus was. So again, that's the extent of the rockfall that happened as a result of the earthquake.

Now, the talus, you know, has extended 20 to 30 metres into the property here. The other thing to note on this image, so we've got this sort of cliff collapse hazard here, so we've talked about cliff collapse hazard, he's talking about the cracking, and obviously with that rockfall and talus, but separate to that, this map shows these two areas either side of Mr Young's property, which are known as these mass movement zones, and you'll see there mass movement zones are the Glendevere Terrace mass movement zone, and here to the north, we've got the Balmoral mass movement zone, and just note with the Balmoral, the arrow's actually pointing the wrong way. Dr Kupec clarified the arrow should in fact be pointing towards the cliff edge.

So you'll see you've got those two – you've got the cracking going up the yellow line, then you've got the two mass movement events, and the mass movements are going to be large slips. Returning to Mr Duke –

WILLIAMS J:

Before you do, you say that Mr Kupec accepted the theory that the rockfall, the cliff rockfall, was solely attributable to what's going on in the properties behind it, and nothing to do with the properties of the cliff itself. I looked at that. I think

your reference is 201.0178 and that's not the reference. Can you just get your junior to tell me what it is supposed to be?

MR BARKER KC:

Dr Kupec's statement is – so what happens it that Mr Duke outlined these risks and then Dr Kupec says: "Look, I agree with his analysis of what the risks are."

WILLIAMS J:

So can you just point me to that?

MR BARKER KC:

Yes. That is –

WILLIAMS J:

While you're talking, I'm going to flick through that, that's all.

WINKELMANN CJ:

Well, we'd all like to see it.

MR BARKER KC:

Yes, so that's at the very beginning. There's two references. The first is 178.

WILLIAMS J:

That's 201.0178?

MR BARKER KC:

201.0178.

WILLIAMS J:

Yes, the problem is it's not.

MR BARKER KC:

Oh, he says there at line 10: "The key geotechnic hazards of the property are identified correctly, you are right, probably one core change I have, one of the run-out areas" –

WILLIAMS J:

Oh, I see. That's the tail end of his evidence? Right, I see.

MR BARKER KC:

So it's the very start, and then there's a slightly more – so it's page 43 of the transcript. Then there's a slightly more general reference later on at 201.0188.

WILLIAMS J:

But does that – all right, no, you carry on and do your thing and then I'll ask you.

GLAZEBROOK J:

What did you say, .0188?

MR BARKER KC:

.0188. Now, I'll just start –

GLAZEBROOK J:

Exactly where on that page?

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MR BARKER KC:

So line 25: "Dr Kupec, I wonder, because we can probably short-circuit a lot of this because I think that a lot of this disagreement is on quite technical issues, but I take it we're all agreed that these cliffs present a real present and obvious danger to Mr Young?" "Yes, and as Dr Duke explained, that hazard extends far back from the actual cliff edge into the land?" "That's correct, yes."

GLAZEBROOK J:

Can we scroll down one page.

WILLIAMS J:

Do you say that's his acceptance that in fact it's the back properties and not the cliff face that's the problem?

MR BARKER KC:

Yes, well coupled with the –

WILLIAMS J:

Really?

MR BARKER KC:

The early part at the beginning. I think, so what –

WILLIAMS J:

If you'd asked him, to what extent does the cliff comprise a component of the risk, as compared with the cracking in the properties behind, he would have probably not said none, it's all in the properties behind, because the cliff is a cliff.

MR BARKER KC:

But I think –

WILLIAMS J:

It's inherent in the nature of cliffs that they're problematic.

MR BARKER KC:

I think the cliff, my submission is that it's a reflection of the underlying hazard that lies behind and what Mr Duke does –

WILLIAMS J:

Yes, well us lawyers might think that, but I don't think the geotechnicians are saying that. They're saying the problem is something inherent in both structures.

MR BARKER KC:

Well I think what, I think when we go through the explanation of the evidence you'll see that Mr Duke says, what's really going on here is these cliff, these cracks, and what he says in the evidence, just to cut it short, is that that cliff edge will recede all the way back along those cracks to, you can sit here today and say that, sure, because of the angle, part of that cliff face lies on Mr Young's

land. 20 years from now, it isn't going to. 30 years from now, it won't, et cetera et cetera, so that's a receding cliff edge. The other problem is you've got these two big mass movements, and they are going to come down one day as mammoth slips, and they're not coming from Mr Young's property, they are large slips that will come from the Crown-owned properties. Now it might be obvious as part of that they're going to take out the cliff edges as they currently sit, but that's not really the cause of what's going on. The cause of it is actually what's happened over on the Crown's land, and so when I –

WILLIAMS J:

I'm not sure that that's right. Isn't it that it's what's going on over the Crown's land, and the fact that this is a cliff. It's the combination of the properties inherent in both of those things. Because if it wasn't a cliff it wouldn't be happening, at least not in this way.

WINKELMANN CJ:

Because there would be a whole lot of land stopping it moving that way.

WILLIAMS J:

Exactly.

MR BARKER KC:

Yes, but I suppose it still may not be happening if it's a cliff that doesn't, isn't subject to these inherent fallibilities, if you like, or inherent weaknesses in its structure.

WILLIAMS J:

I guess your best argument is an eggshell cliff argument.

MR BARKER KC:

Well you can have – I suppose another way to look at it is that prior to this earthquake no one had any thought that these cliffs were as, or these areas up here were as bad as they were. People were building houses freely up against them. Sure you had to get up there as with Mr Young and scale off a few bits

of loose rock et cetera et cetera. Now that we know what the real problem is here, these are now very, very unstable areas, and it's caused by the huge instability that lies back past the cliff edge, these cracks, these mass movements, which is really the cause of this change in appreciation and understanding of what these cliffs are all about. It's not that people have now realised that when we bolt rocks we should bolt ones that are 50 centimetres, not ones that are 100 centimetres or something like that. It's that you've got cliffs that because of these cracks et cetera the cliff line is going to recede and we now understand that there are these two large mass movements that are going to either under a seismic stress or a waterlog stress, slip potentially into Mr Young's land, and that's what's led to the council coming along and saying, well, you can't do anything in these areas because they are, the risk presented by these movements are so extreme that we're not going to allow you to do anything in these areas. So really the structure of my –

GLAZEBROOK J:

Well one might suggest that's a very sensible thing for them to decide. The earthquake has indicated risks that mean you shouldn't be building in these places, and in fact there were issues even before, weren't there, with the proposed subdivision on that basis.

MR BARKER KC:

Yes but what was required there was qualitatively different.

GLAZEBROOK J:

I understand that because obviously as you say the earthquake has indicated that was even worse than was thought before but…

MR BARKER KC:

But there has been a fundamental change in understanding I think about –

GLAZEBROOK J:

Well then the fundamental change in understanding may lead to some other types of decisions that say that you shouldn't be building.

MR BARKER KC:

Yes, but when you come back, when we move from this to then the actual remedial strategy, ultimately, the remedial strategy is Mr Young gives up 17,000 square metres of his land, builds on the 3,000 square metres that's available to him, and puts enormous concrete bunds around it to stop any further works happening. So there is an acceptance of the reality that we're in. When we look at his case, all he's trying to say is that, you know, I shouldn't have to carry the cost of this entirely on my own. You know, the Crown should, as the owner of the 13 properties at the top of it, they should have to carry some of the responsibility for that as well.

O'REGAN J:

Let's just stick with the factual finding. Have we finished on that now?

MR BARKER KC:

No, there were further factual findings. I just wanted to –

WINKELMANN CJ:

Are you saying there are more factual findings you want to challenge or is that the only one?

MR BARKER KC:

No, no, they are matters of fact from the case that I wanted to draw to the Court's attention. The only real factual finding that I would directly challenge is that one in the Court of Appeal, as it hasn't been on both sides of the property.

WINKELMANN CJ:

Your factual basis for your challenge is the material you've just taken us to?

MR BARKER KC:

Yes, it goes on. Because we obviously don't have all day, I'll just quickly talk to the two plans that follow. If we could go back to those plans at 307.3120. But I would commend your Honours to go through Mr Duke's summary because it's

a very clear and easy to understand summary. So that's the first I'm going to be talking about.

If we go to the next page which is 3120, so this is the – the purple line there, so the purple band there, that is where the cliff is going to recede to as a result of the cracks, and the blue is where the rockfall – as that recedes, the rockfall that will fall down.

O'REGAN J:
That covers his entire land, doesn't it?

MR BARKER KC:
Not his entire land. So there's about –

WILLIAMS J:
A little bit left.

MR BARKER KC:
Well, no, so one of the points –

O'REGAN J:
It's enough for a driveway but it's not enough for any houses, is it?

MR BARKER KC:
But that's the point, is that so when you come to the remedial strategy, he's got 21,000 square metres of land available here. The remedial strategy will give him three and a half thousand. So he gives up almost the entirety of his property, and when you come then to –

O'REGAN J:
It does seem to be a slightly King Canute view of the world, doesn't it? Given that. I mean it's basically like the tide coming in. Except it's a rock tide.

MR BARKER KC:

Yes, but, the question then becomes well who's – that is the fact. That is the loss that is going to be suffered. Who has to carry the entirety of the loss, and you know, because it has, it affects his land.

O'REGAN J:

But it's the same situation that everyone in the red zone faces.

MR BARKER KC:

Well, not quite, because the distinction for him is that the problem for it is one that lies on his neighbour's property, and it's his neighbour's property which he says is the cause of this. I think that seems clear from flicking through the CCMA designations, et cetera, and it is the neighbour's property which is affecting his ability to use his land, and all he's saying is, can I have some contribution –

O'REGAN J:

Well, it's the effect of the earthquake on the neighbour's property, isn't it?

WINKELMANN CJ:

And the cliff.

MR BARKER KC:

Yes, but it's on the neighbour's property. So you can have a situation where God strikes one person's property –

O'REGAN J:

Yes, but my point is that everyone in the red zone was affected by the earthquake to a point where the only solution was to sell their property to the Crown. That's exactly the same for him, isn't it?

MR BARKER KC:

Not in the sense that he has a private law cause of action which people in the red zone do not have. So that is what the *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 487 (EWCA), all this line of

authorities is about. You know, he can say, I am different because I actually do have a claim against you. You can work out what the –

WILLIAMS J:

Well, he has a private law claim against the taxpayer.

MR BARKER KC:

Well, no, he has a – I think that's not a – I don't want to say "fair", but I don't think it's –

WILLIAMS J:

Well, it is, isn't –

MR BARKER KC:

I don't think that's a fair characterisation because the Crown's come in here and essentially acquired 13 properties for its purposes, whatever they are, but it comes into private land owner –

WILLIAMS J:

You know what they were.

GLAZEBROOK J:

I'm not sure it's his –

WILLIAMS J:

Rescue.

MR BARKER KC:

That's I think what we would push back at. I don't think that it should be characterised as a rescuer. It may be at a general public policy level, a rescuer, but we're talking about private law duty.

WILLIAMS J:

No, but it wasn't a commercial investment.

MR BARKER KC:

No, it's not a commercial investment, but it is – to turn that question on its head. What if the Crown hadn't come in and purchased these properties? His claim would be the claim that he's advancing here in this case. Why should that claim be any different just because the Crown came and purchased those properties? 1030

WINKELMANN CJ:

Well, can I ask you this, Mr Barker? Is it another way of putting what you've just been arguing that, and I think this might be how the Crown puts it, that really, the problem exists because it's a cliff and there's movement of the land caused by cracks coming one way, and movement of the land caused by the instability created by the cliff because that movement wouldn't be happening if it was all just solid ground. You can't however, fix this problem just by – the fix doesn't exist purely on your client's land, it's also on the Crown's, but is it right to equate the fact that the Crown has to, the Crown land has to also be subject to the fix to say that that is a nuisance coming from that land? I just think you may be conflating the corrective measures with the notion of nuisance to get you back to the critical legal issue.

MR BARKER KC:

Well I think the way we would look at it is that remediation on the Crown land is possible, and I'm going to talk about the remediation strategies, that was the Davis Ogilvie one. That is possible. It would cost a lot, I think it'd cost about $4 million to do it. I want to come back to cost because I think it's very easy to get too caught up in that number. But the problem that's always going to face is now the CCMA designation, that you'd have to do a spot change. Now I think I made some progress in cross-examination but I accept that it's going to be a difficult point to get that through, so we're not pursuing the Davis Ogilvie –

WINKELMANN CJ:

Yes but what I'm putting to you is that the fact that the remediation has to occur on the Crown land does not mean that it's a nuisance emanating from the Crown land. It's not the same thing. The fact the remediation has to occur

there doesn't mean that there's anything wrongful about their failure to remediate.

MR BARKER KC:

Well I think also the remediation. I don't think – so once we're in the Kupec design the remediation's not occurring on the Crown land at all. We're basically saying we've got the Crown land, that's nothing we can do about that. What can we do to our property to at least allow us to salvage some use of it? So it's not that.

In terms of the fact as to whether or not instability of a cliff et cetera or something like that is in fact a nuisance, I think that's, there's a lot of authority that that is, in fact, a nuisance, *Leakey* being the legal one, but there are other cases that have sort of taken the same point. So I think the threat of further collapse is certainly a nuisance.

Now my friend draws a distinction. He says, well actually, you've got no damage for it et cetera, but our analysis would be twofold. One is that when you've got the continuing threat you're always entitled to quia timet injunction to stop it occurring, reasonably, in fact almost every nuisance injunction is ultimately a quia timet injunction at its heart, so you've got that, but the other fact is there is, in fact, existing damage because the placing of the zoning over the land has basically destroyed the value of his property, and the zoning's only there because of the fact that the Crown – of the instability that exists on the Crown land. So in terms of there being an actionable nuisance we would say that there is because it would be enforceable by the *quia timet* injunction. Once we go from that, we then say, well if you're not going to grant the injunction in this case – I mean, really the reasons for not granting the injunction are primarily, and why it's better to give it a award of damages, that all the work's going to have to happen on Mr Young's land anyway, so it may –

WILLIAMS J:

There's quite a bit of contingency in that chain of reasoning though. How do you know that the cliff collapse and mass movement zoning would not have

been there if the Crown had done something other than purchase for abandonment? How do you know the council would have taken a different view?

MR BARKER KC:

No we don't, so we can really only deal with what the council did do, which is that they designated this whole area, which does have areas that do not.

WILLIAMS J:

That's right, but your reasoning hinges on there being an alternative in which that zoning was not there, and we don't know enough to know whether that's true at all or whether the council, which is not the Crown, was committed to removing this whole area from the housing base because the risks were too high whatever you did.

MR BARKER KC:

Well the way that the, when you come for remediation strategies, so the Davis Ogilvie one which isn't being pursued, so that's not being pursued here, that required work to be done actually in the area where work is prohibited. The Kupec design, so as I said there's 3,500 square metres which is outside any zone.

WILLIAMS J:

Yes.

MR BARKER KC:

The Kupec design has –

WILLIAMS J:

That rendered it non-complying rather than prohibited?

MR BARKER KC:

Yes, so just resource consent. Yes.

WILLIAMS J:

Yes but – okay, no, go on.

MR BARKER KC:

And that's only in respect of the bunds and part of one of the – part of the driveway. So no one's building into any of these zones. So our point is that, sure, we accept that Mr Allan said in his evidence that because it's ultimately going to have to require a consent, I don't want to predict what they're going to do, so I'm not going to say you're going to get a consent but in our case, there's obviously a real prospect you could get a consent, and then when you come to the case law, *Grocott v Ayson* [1975] 2 NZLR 586 is a case law that I'll take your Honours to, where Justice Cooke says: "Look, what's your argument about when you've got a problem with being able to implement a remedial design? It's essentially an argument about futility or impossibility and we're not going to say that – we're not going to impose on a plaintiff the standard that you must show something can definitely be done. We're going to say, look, if it's got a reasonable prospect of being done, you can go ahead and do it," and it doesn't rely on the mouth of the defendant to say: "Well, I've caused this harm. You can't do anything about it," et cetera. So it's a case I want to come to, but –

WILLIAMS J:

So what you were arguing before is not something you're pressing, the idea that if things had been done the way you wanted it to happen, there'd be no prohibition?

MR BARKER KC:

I don't think I could say that because I think that would be speculating too far. But what I can say, your Honour, and it's a point that I note later on in my submission, is that the only reason the CCMA – well, not the only reason, the CCMA came in in about – this part of it was effected about mid-2016. So around two and a half years, three years after Crown purchased most of these properties.

Now, prior to it coming in, literally weeks prior to it coming in, the Crown actually did a lot of remediation work within those areas, within the areas that later

became part of the CCMA. So if you look at Mr Young's property, when you come in off the road, immediately on the line is the main road coming in. It's called the Moa Cave area, and they basically benched all that and secured all of that area, et cetera, within what would become a CCMA area.

So it was always possible to do something had you done it quickly, but it hasn't been done. One of the complaints that's in the correspondence is that: "Well, you're benching it up to here, and as soon as you get to my property, you stop it. You know, why didn't you continue it around and, you know, protect my property as well?" And their response is: "Well, that's a significant road." I mean, a fair enough point to make, you know, it's a significant road – "I believe that's more important than protecting your private property." But the works was certainly possible, but they didn't do it before the CCMA came in and we're now in that situation we have, where we've got to deal with the CCMA as it is.

O'REGAN J:

Can we just get back to the – on the factual finding is your case dependent on us saying that the Court of Appeal's finding is wrong in relation to the location of the risk?

MR BARKER KC:

No, I wouldn't say it was dependent on it. If your Honours were to say we're not prepared to disturb that, I thought the more likely finding then would be something that the majority of it is on the Crown land but some of it is on Mr Young's land. I think that then just gets to how you balance the, you know, the remedy if you like. So if you accept our figures as to what the value of the loss is, we say it's around $4,500,000. We've asked for a contribution of $2,000,000 to that loss, which can be used to effect the Kupec design. Now if your Honours were to decide, well actually balancing it there's a different balance to be struck, then that would be where you'd find that balance in, you know, what the number is. But I don't think that – I mean I think that the, it would be going a long way to say that there is, in fact, the sharing is such that there should be no contribution from the Crown.

WINKELMANN CJ:

When I look at that case of *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (EWCA), you could say that *Holbeck* is against you in way, because the cliffs on the land, it's the instability of the cliff caused by mass geological movements et cetera, and it's the property at the bottom which is held liable for not having supported the cliff.

MR BARKER KC:

Well the difference in *Holbeck*, well there are two differences, one was that the claim fails because the loss was never foreseeable, so no one would ever have foreseen that that sort of collapse would occur, or that sort of slip would occur, and if you want to sort of apply that part of the case to our case, that would probably apply to the original cliff collapses. So as to whether there was a claim, which is talked about in the judgments, I'm not sure they quite accurately record what I've submitted in those courts, but if you say the day after the earthquake, looked at the claim at that point in time, there may well have been no claim because it was never foreseeable that that sort of cliff collapse would occur. But in terms of the sharing of the risk, in that case I think it's a, they say it's about 50/50 between those two boundaries, what the actual cause of it was, where the instability occurred. So it was a case of 50/50 which we'd say would be, you could never reach, you might, worst case for us you might say it's shared, but it certainly couldn't say that it was shared 50/50 between those two boundaries. So I think *Holbeck* is talking about an entirely different situation, coupled with the fact that in *Holbeck* it's a complete destruction of both properties. They are gone. The Crown cliff has gone completely. The entire hotel has gone. So you're not in a situation we've got here where you need to confront what are we going to do going forward.

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WINKELMANN CJ:

Well they are both gone here though, aren't they, because they're too unstable for use at the moment.

MR BARKER KC:

Well we would say they're not because you can, in fact, extract some use from our property, so it's not gone. There is, and there's a lot of evidence as to Mr Young's connections to the property and why he wants to stay there, and there is the ability once he – so he's in a situation where he's got this three and a half thousand square metres. He's got two houses sitting there. He's got his insurance monies he can use to repair them. If he can get the Kupec design the evidence is that that property will be worth at least $2 million to him, so that's what he wants to do, and why shouldn't he be allowed to try and get back and recover something for after this earthquake, because it is his home it's where he's lived for 40 years, and as I've said, there's a lot of material in the bundle that relates to his connection to that property.

ELLEN FRANCE J:

The position has changed with the change in the district plan, hasn't it, and if that's a neutral matter in the sense that you can't say you can't assert any sort of responsibility to the Crown for that, I'm not sure where that leaves you?

MR BARKER KC:

Well I think that the sits on top of the underlying risk. So assume there's no plan. Whether he'd actually be able to do anything on the property anyway because the risk is a live point, could you go up to the edge of the cliff and start removing rocks, well, so that regards to the plan that may be just too dangerous to do because of the instabilities, that people would have known. The instabilities are there. So I'm not sure the plan necessarily changed it, but it obviously presents it with an immediate problem that he's going to have to somehow address the requirements of the plan if he does anything, and the way that's being addressed is through the Kupec design which is trying, it makes sure that there is nothing being built in CCMA1. There is simply, in CCMA2 there is some bunding and a driveway, and sure you can't, you're going to have to get consent for that, but it doesn't seem to be that, you'd hope it's not that controversial that putting some protection measures in place on the edge of CCMA2 is going to be something the council's reasonably receptive to.

O'REGAN J:

We're guessing, aren't we?

MR BARKER KC:

We are, we are, but that comes back to –

WILLIAMS J:

Well if the council was receptive to it, it wouldn't be a non-complying activity.

MR BARKER KC:

Well, but it's not, but equally it's not prohibited. So it's –

WILLIAMS J:

Well that's true but prohibited is a sledgehammer, that's rare. Can you tell me whether your client objected when the plan was initially proposed?

MR BARKER KC:

I don't know. If you don't mind me turning round I can get the head nod from the back. I don't think so. I mean to be fair to him looking at that I don't think an individual objection was going to be much good. I think the council was pretty clear as to what was going to happen.

WILLIAMS J:

No but it would've delayed it taking effect?

MR BARKER KC:

Yes but in a situation where the Crown is refusing to do anything at all, you know, would that really have altered what would happen at all.

So I will, I'm conscious of time, so I'll just briefly note the points about, that I had noted in the facts in the oral outline, I want to go from the detail I hoped to, so we've got some time to actually deal with some of the legal principles on this. B was just noting the point that, and this really comes in to when we start talking about quia timet injunctions, clearly there's a present threat from it, and that's most closely seen in those blue designations in the CCMA areas. They are

referenced by fatality risks, and I think the CCMA1 the fatality risk is 1 in 10 to 1 in 100 of people dying in that blue area in the first, in one year. So it is quite a dangerous imminent situation. I've given you, her Honour in the High Court judgment actually explains that, and I've got the reference there, but then there's also other explanations as to how the risk works within those CCMA areas.

See, this was just addressing the point that had been made by the Crown in their submissions that the risk was known before the earthquake, and I don't think that's correct, that anyone understood the magnitude of this risk, and probably the best illustration of that is the fact that Mr Young had got a resource consent for a five lot subdivision in that area immediately before the earthquakes.

WILLIAMS J:

It did have conditions about the danger above it.

MR BARKER KC:

Yes, but the conditions, so if you go to that subdivision, I mean I think that the change, the subdivision is at…

ELLEN FRANCE J:

It does refer, though, to rockfall and the potential, admittedly smaller size debris, but a potentially unstable section of the cliff is located above the southern part of lot 4, et cetera.

MR BARKER KC:

Yes.

ELLEN FRANCE J:

So I mean there's some understanding isn't there?

MR BARKER KC:

Yes. I think it's fair to say that people knew there's always a risk that rocks are going to fall off a cliff. Fine. But I don't think anyone understood that this was actually going to happen and probably the clearest illustration is that lot, which they're talking about, lot 4, that lies under the entranceway which is completely deluged in rock after the earthquake. So it was a situation where people understood, as your Honour was saying earlier, that cliffs are prone to lose rocks and you need to do things about that. You should bolt the loose ones, scrape off things that look a bit like – et cetera, et cetera. No one anticipated that you're going to get this sort of collapse.

WINKELMANN CJ:

Well there was quite a very significant extent of work imposed upon Mr Young, wasn't there, for a subdivision?

MR BARKER KC:

I don't think it was that extensive. All he had to do, basically, was put a fence along the driveway where lot 3 was, which was done anyway as part of the design work, and then there was what they hadn't done was a rock proof fence on lot 4.

WINKELMANN CJ:

Wasn't bolting also involved?

MR BARKER KC:

Yes, some bolting had been done, but the cost of it was only $200,000 as her Honour found, that remained to be done there, so –

WINKELMANN CJ:

So the conditions include bolting into the cliff face?

MR BARKER KC:

Bolting of loose rocks, which I understand is reasonably standard for cliff faces, whereas, as I said, loose material, but that's why we've got this complete difference between that sort of risk, that something is going to fall off a cliff, and

the risk that the Balmoral mass movement is going to come down in a big chute and swamp your property, out to these blue line areas which are many, basically deluge the entirety of the property. So it's that difference, that there was risk – and actually a good example, your Honour, of that point is the *Holbeck* case that you talked about where people knew that there was a risk of the sea cliffs collapsing, and they had over time, and in fact my friend talks about the extent of the works required, but council had already spent £280,000 trying to stop that risk happening. What they never appreciated was that actually this could slip entirely and come all the way up under the hotel. So it was a difference in the kind of risk, and in the *Holbeck* case the Court talks about if we, if you think about sort of the more general nuisance sort of analogy, sorry negligence analogy, you know, *Hughes v Lord Advocate*, which is where the boy is burnt down the, falls down the roadworks hole and is burnt, and all you had to see was, foresee harm of that kind, i.e. burning, you didn't have to see how it arose. What they talk about in *Holbeck Homes* is that that's not really – *Holbeck Hotel* sorry – that's not an approach you should be taking here. You need to foresee how it would actually arise in order to have an obligation to do something about it. I also note there that, of course, it's not clear what the relevance that would be anyway because, just giving some references to the idea that if it's an argument that is coming to a nuisance that's somehow relevant, that's not a consideration.

I then talk, just note, just give you the references to the remediation strategies, just to note that they are, they're both possible, certainly the Davis Ogilvie one is possible.

WINKELMANN CJ:

What do you say that any event coming to a nuisance is not a defence. What do you mean by "coming to a nuisance"? I'm not understanding your point.

MR BARKER KC:

So coming to a nuisance is, the standard one would be you've got a speedway, you know, you've got Western Springs Speedway, and I buy a house beside it. It's not a defence as to whether or not Western Springs is causing a nuisance

for its loud stock car races. To say that, well you knew when you bought the property. So that's the defence of coming to a nuisance, and I've just given some reference – so that's what, I didn't quite understand the relevance of these comments in my friend's submission, but the only relevance I could see would be some argument, well you knew when you bought the house that they were prone to these sorts of things happening. I don't think that's true anyway but even if it were that's not a defence for a nuisance.

ELLEN FRANCE J:

I wasn't sure, Mr Barker, if *Lawrence v Fen Tigers Ltd* [2014] AC 822 (UKSC) is talking there about the use, and I wasn't sure if here that was quite analogous, because it's not so much the use, it's just the presence of the land in its current form. Is that the same, is that "use" in the sense that it was in *Fen Tigers*?

MR BARKER KC:

I think ultimately to, I suppose we're dealing with lots of square pegs we're going to have to put into round holes in all of this stuff, but I think that if we were to adopt the –

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ELLEN FRANCE J:

That's what it seemed to me in your reference to *Fen Tigers* but –

MR BARKER KC:

Yes, but I think that when you're sort of trying to understand this within the world of nuisance, that is ultimately how you'd have to understand it, as some form of – I suppose, come back to *Leakey*, that sort of case, that the – whether it's used, it's the responsibility, I suppose, for your land. You know, is use just really a way of getting to the underlying concept of some form of responsibility for your land? In really in *Leakey*, that's what they said or in those sorts of terms that, you know, because it is on your land, you are responsible for what happens on it. But it's not – I'd agree, it's not a use of your land as such, so, it is probably an example when we're trying to deal with these nuisance things. I mean this is a new area of nuisance in a –

WINKELMANN CJ:

Is Mr Stephen raising it because of his argument that continuing nuisance requires proof of fault, and here, everybody was operating on the basis they understood that this was unstable land, and that's material to issues of fault?

MR BARKER KC:

Where they –

WINKELMANN CJ:

And so your client was going ahead and developing the land in the knowledge that it was unstable around him?

MR BARKER KC:

Yes, and my response to that would be that no one had any knowledge of the extent to which it was unstable. I think that seems –

WILLIAMS J:

Well, its instability is partly due to the earthquake and its instability is now much greater, and of course, is now very well-known.

MR BARKER KC:

Yes.

WILLIAMS J:

I don't think anyone would disagree that that's a difference.

MR BARKER KC:

Yes, I think that probably has two – to the extent that the risks with the property were latent at the time of the – or at the time of the earthquake, they were unknown, to the extent that they were exacerbated by the earthquake, they're also by definition unknown because they only occurred with the earthquake, so I think that's correct.

The final point, I note, was just the – and again, in a different forum I'd like to take your Honours through, just noting some of the context for these changes to the planning law, that there had been – that the change took over almost three years to come through and that the Crown had refused to undertake or consider any remedial works for Mr Young's benefit, and so forth. I think I spoke to that point to your Honours earlier, but there's just a short summary of what the references are there on that outline.

I'm going to briefly come back to facts, but that will be very much by way of overview. Later on, we come to application to this case, but I think we do need to now get into some of the cases, and I do that at paragraph 2(a), and the first one I wanted to refer to was to *Goldman v Hargrave* [1967] AC 645 (PC) which is at tab 6 of the authorities.

Your Honours will know from the written submissions of both parties that this line of authority starts with *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, liability for a trespasser. Again, to do so, you have to continue or adopt the nuisance. We then get to *Goldman v Hargrave* which is the case about the lightning strike on the gumtree which is cut down but then left to burn which caused then a neighbouring house to burn.

If we go to page 656, obviously your Honours are going to have to read these cases, but just draw some points to your Honours' attention. Yes, so it's paragraph F: "It makes clear that the case is not one where a person has brought a source of danger onto his land, nor one where an occupier has so used his property as to cause a danger to his neighbour. It is one" – so this is the point your Honour was making before. "It is one where an occupier, faced with a hazard accidentally arising on his land, fails to act with reasonable prudence as to remove the hazard. The issue is therefore whether in such a case, the occupier is guilty of legal negligence, which involves the issue whether he is under a duty of care." So it's the issue the Court confronted. Then over at page 661 –

GLAZEBROOK J:

What was that page, sorry? It didn't come up on the screen.

MR BARKER KC:

661.

GLAZEBROOK J:

No, the previous page.

MR BARKER KC:

656.

GLAZEBROOK J:

Thank you.

MR BARKER KC:

The very last paragraph of beginning on principle: "On principle therefore their Lordships find in the opinions of the House of Lords in *Sedleigh-Denfield* in the statements of… Scrutton L.J and Salmond… the support for the existence of a general duty upon occupiers in relation to hazards occurring on their lands, whether natural or man-made." So that's the general duty that's recognised.

Then over onto 663 we see the attempt to put some bones on that duty: "But the manner cannot be left there without some definition of the scope of the duty." So 663, the very – "so far it has been possible".

O'REGAN J:

Oh, so at the top, right.

MR BARKER KC:

Yes, very top. It's really actually that whole page. It's probably best I leave your Honours to read through that rather than me reading to you.

O'REGAN J:

Seems pretty open textured doesn't it, as a duty?

MR BARKER KC:

I mean it is –

WINKELMANN CJ:

A reasonably remarkable principle of law really, which is so responsive to the circumstances of the defendant.

MR BARKER KC:

Respondent's, yes, and I think that's the – I suppose that's the challenge for, you know, so any court now trying to apply this because *Leakey*'s very much in the same vein. Here's the base thing, here's some facts you might take into account but I mean, a lot of them, for example, and looking at our case, area dealing with relatively small things that could be cured quite easily. Here we're dealing with something quite big.

WINKELMANN CJ:

But in this day and age might we add into these kind of open textured considerations the broader policy issues that are arising in the context of climate change. So, for instance, we look beyond this earthquake based case and you have similar kind of scenarios occurring. Might that be relevant? To be taken into account?

MR BARKER KC:

I don't think there's any limit on – the test is, and this is part of what I was going to come to in some of these principles, is what is reasonable as between two neighbours. What is reasonable to expect as between two neighbours, and I'd say it's given that this event has happened.

GLAZEBROOK J:

I think your submission is that it is irrelevant that the Crown or council or any public body might have other obligations to other people. I just can't see how you can say that in the light of these open textured principles, because why individual circumstances which can take account of somebody's means, can't actually take account of means that might be spread and fairness to other

taxpayers. I just can't see it and I don't see that that's answered by the *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4 case at all.

MR BARKER KC:

Well I was going to say there was a *Tate Gallery* case –

GLAZEBROOK J:

Yes, I know, I'm just telling you, you will have to convince me –

WINKELMANN CJ:

Because actually you seem to accept it from me, that this was an available thing, but your submissions are that it's not an available consideration and *Tate Gallery* is different, isn't it?

MR BARKER KC:

Well I think the point in *Tate Gallery* is that all they're saying is that, or two things they're saying, one is that you can't visit that on the individual. So on this situation, forget about the Crown –

WINKELMANN CJ:

Well it's more like Western Springs, *Tate*, isn't it? *Tate Gallery* is more like Western Springs. The, you know, cars going round and round very loud, but it's a different scenario to this where there's a resource, the Crown is making, is like a person defendant who's got massive demands upon them, may have massive demands upon them.

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MR BARKER KC:

But I think the response would be that forget about the Crown. Imagine the Crown hadn't come in here. He could have still advanced this claim against those 13 homeowners.

WINKELMANN CJ:

Yes, but you've got the principles of this case against you on that, which is that it's material who your defendant is.

MR BARKER KC:

Yes but I think that that would, then we run into the point is to then to what extent should Mr Young be visited with the consequence of Crown policies in these things, but the Crown policy is to help out these people, should that also be visited on Mr Young, and really what cases like *Tate Gallery* is saying is that you, that's fine, you may not get an injunction, but when you come to the injunction *Tate Gallery* they may well not say that the Tate Gallery can't have people in the viewing platform, but they might say but you have pay them £100,000, because they now have people looking into them. So it can come in as a remedy part of it, but it shouldn't be something to deny you the remedy at all.

WILLIAMS J:

There's something slightly unreal about the proposition that you edit out the fact that it's the Crown, the Crown's there because of the largest earthquake in New Zealand's history, and the massive loss and devastation that occurred as a result of that. It's kind of the elephant in the room, beside your argument, isn't it because that changes thing pretty fundamentally. The fact is there would never have been those 13 people at the top of the cliff because their homes were wrecked.

MR BARKER KC:

Well there would have been homeowners. What their status would have been, we don't –

WILLIAMS J:

This was one of those unprecedented situations where the State had to step in and rescue a city. You can't really edit that out of the equation and say this is just two private citizens having a stoush over whose fault it's going to be when the cliff collapses, because that's to edit out something fundamental.

GLAZEBROOK J:

Where the statutory context is probably important to note as well.

MR BARKER KC:

There are two points I want to make in response to that point your Honour, and I'll take a little bit of time, so I'll just note them both now and then I might go to them. The first is, with the red zone offer, so it's proudly proclaimed in my friend's submission it's cost $1.7 billion et cetera et cetera. The red zone offer ultimately was a timing issue because what you had in these offers was the assignment of the underlying EQC claims, an assignment offer of the underlying insurance claims as well. So it's letting people get out of there quickly without having to do anything. So if you look at these properties here, the 13 properties, and it's accepted by the Crown witness in this case that when they purchased those properties they were taking the EQC claims with them.

Now those claims, he wasn't in a position to answer the question, but we know from the valuer's evidence that the – sorry I'll step back actually as I'm not sure to what extent your Honours are familiar with the way the EQC land payments work. But under the EQC Act you're entitled to a payment up to a set cap, the relevant cap here is going to be the one that is the value, the average value of a land, of a section in that area, and the value as set, that value and agreed with EQC as being $300,000. So in respect of these properties the Crown would have been entitled to $3.9 million at least, because it may also have been entitled to further payments for improvements on the properties, but at least $3.9 million for the purpose of reinstating those properties.

ELLEN FRANCE J:

I was just going to say is it conditional on reinstating? You don't get the money if –

MR BARKER KC:

It's not conditional but it's on the basis. So it's not conditional but under the –

ELLEN FRANCE J:

Well you'd be taking it for a – the purpose for which you'd get it is to reinstate?

MR BARKER KC:

Yes, but they don't require you to. But under the Act what there are are a few provisions that say if it's not reinstated then the property can – then the EQC is entitled to either A, decline a claim in the future or B, refuse to insure the property in the future. So that's where the stick is if you like. But as a general proposition you're not required to actually – sorry. It's paid for the purpose of reinstatement but it's not conditional on you actually reinstating.

GLAZEBROOK J:

Well these are red zones so they, it's a bit odd to talk about reinstatement in these circumstances anyway, isn't it? Most of these red zone properties you can't do anything with. So do they say it's conditional on you, this payment is for reinstating, or is it just a compensation payment?

MR BARKER KC:

I don't think they – Mr Moss is the expert on these things, having done many of these claims.

GLAZEBROOK J:

Because most of these properties in the red zone, you couldn't reinstate because you're just not allowed to build on them for absolutely obvious and clear reasons. If you did, you wouldn't have any services. Because I thought from *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 that people could choose what they did.

MR BARKER KC:

My friend was making the point to me that the suburb actually wasn't red-zoned. It was just these areas of the cliff were red-zoned.

GLAZEBROOK J:

No, I understand that, but red zone is red zone.

MR BARKER KC:

Yes, but I think –

GLAZEBROOK J:

They couldn't build on the top of those cliffs, could they, without a plan change that allowed them to do so?

MR BARKER KC:

But I'd look at it this –

GLAZEBROOK J:

Which is not going to be granted for, again, obvious reasons.

MR BARKER KC:

But if I look at it from a slightly different perspective is that you're being paid say $3.9 million on the counter-remediation of these properties by EQC.

GLAZEBROOK J:

Well, that's what we really want to know. Is the payment conditional on remediation?

MR BARKER KC:

No, it's not conditional on it.

GLAZEBROOK J:

Okay, so you get the payment no matter what. The Crown in this case hasn't claimed that, is that right?

MR BARKER KC:

They haven't said that. They said it was unresolved, is what his evidence was. But he accepted that they were entitled to it. So the evidence of Mr Bradley was that they were entitled to it, but the position was unresolved.

WINKELMANN CJ:

So if it had been the individuals, you'd be worse off, wouldn't you, because there would be a bunch of people with badly damaged properties, very low reinstatement monies, and there's no way that a court would be ordering them to pay all this money?

MR BARKER KC:

Potentially. Potentially, because I mean that's undeniable, that one of the factors that you may take into account is the value. There's actually quite a good case on that point.

WINKELMANN CJ:

I only raise that because I'm finding it hard to follow the thread of your logic or reasoning through, because one of your responses to the point that the Crown has all these demands on its – in this context, the Crown is meeting a lot of demands, and therefore, that's relevant for us to take into account. You responded, but if it it hadn't been the – it's not fair on the claimant because if it hadn't been the Crown stepping in and buying it, they could've pursued their private law claims against the individuals. My point is they've had a pretty steep task with that.

MR BARKER KC:

Well, A, we don't know what their financial circumstances were, but B, I'd also refer your Honours to – there's the *Abbahall v Smee* [2002] EWCA Civ 1831 case in there where this is – it's quite an interesting case because this issue as to what extent should you take financial impecuniosity in –

GLAZEBROOK J:

Sorry, can you just tell us where this – oh I see, it's tab 9, is that right?

MR BARKER KC:

It's tab 9. So I wasn't going to go through this, I'll just really talk to it. But the issue in this case was you had – a squatter had taken – had acquired two adverse possession – title to the top two floors. Person on the bottom, and one of the – who has been affected by the squatter not – well, they were the owner

now, of the property – not properly maintaining the outside fabric of the roof, et cetera, and there's quite a strong – one of the reasons for saying that they shouldn't have to contribute to that cost is that they've got no money and there's quite a strong response from the Court of Appeal saying that well, it doesn't really do much good if you can't afford to live there, you can't afford to live there, but you can't visit all of that on the consequences of the poor person at the bottom here, and they end up making the cost be shared 50/50, but there's a quite a good discussion about issue in that case.

Now, there was another point I wanted to make to Justice Williams which has completely slipped my mind as to what it was.

WILLIAMS J:
Oh really? It was probably devastating, too.

MR BARKER KC:
It was, it was a brilliant point, your Honour. Hopefully it'll come to me at some point.

GLAZEBROOK J:
Hopefully not tomorrow morning.

MR BARKER KC:
Well, at least tomorrow morning would be good. Late tonight would be bad. But hopefully it'll come back to me as we go through it.

So there was then *Leakey* which I think your Honours will all have read, but we might just go back to it because I mean it is the leading case in the area, and that's at tab 4. If we could go to page 508 of that decision, just a few lines off the top, just talking about the cause.
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So this is the instability on the upper land, you know, talking about. It was caused by nature: the geological structure, content and contours of the land, and the effect thereon of sun, rain, wind and frost and such-like natural

phenomena. It was held by the judge, and is not now in dispute that… knew that the instability," that's the knowledge issue, and that they'd failed to take steps. So it's a natural problem that you've got in *Leakey* through no fault of the person themselves.

At 511, just noting here that what, the remedy that was effectively done here, was actually done before they get to this hearing, is that they remove the spill and they also took protective measures to stop it occurring again. So just talking, that just sets out what was done there. So that's at 511, at the paragraph D and E. So there was an interim injunction given requiring them to do works to repair it and that was done and they just talk about the costs of it there.

But the main part of the decision, the famous statement, is at 523, the final paragraph: "If as a result...". I ask your Honours just to read that paragraph. Then over the page at page 524 we get, I suppose, the matching paragraph, that paragraph from *Goldman v Hargrave*, where they talk about what the content of that duty may require. That's the paragraph: "This leads on to the question of the scope of the duty." Then finally there's just a discussion about the issue again at 526, paragraph E, F, G.

O'REGAN J:
That really doesn't take us any further than *Goldman*, does it?

MR BARKER KC:
No. I mean it's a pretty open-ended enquiry that is suggested.

WINKELMANN CJ:
I'll give you an opportunity to comment. When I look at how open-ended it is, I do think when it's the Crown who's the defendant, we should be able to take into account the overall circumstances in which the Crown is operating in this context.

MR BARKER KC:

I think my response to that would be that that would be a matter that may well impact on the remedy they choose to grant. It's not so relevant here because ultimately, we are seeking damages, not an injunctive order. But if there is a public element involved in it, and usually, public benefit is something that's not relevant to a nuisance. It's a reasonably –

GLAZEBROOK J:

It's not public benefit, though, is it? Because it's not saying – well, *Tate*'s different in that sense because they say there's a public benefit in what they're doing, but here, what it is is that what is reasonable in the circumstances might take account of competing obligations that the Crown might have, and of the general statutory and other context, in the context of a major earthquake, which doesn't – and the duty's conceded here. So that's not what we're talking about. We're talking about what arises from that duty, aren't we?

MR BARKER KC:

I suppose it –

GLAZEBROOK J:

So saying it doesn't stop the duty. Well, nobody's suggesting it does, are they? The actual argument is what's reasonable in the circumstances. Which may be nothing, which is actually conceded also in *Leakey*.

MR BARKER KC:

They also do say that there could be a sharing as well when they talk about that issue.

GLAZEBROOK J:

Exactly. I mean there's obviously –

MR BARKER KC:

I think that –

GLAZEBROOK J:

I guess the idea is that a natural hazard isn't anybody's fault and you then fix it up the way – and with the sharing, whatever is reasonable in the circumstances.

MR BARKER KC:

I suppose the response would be that that may be one factor that the Court decides could be included, but the other side is I think the principle that any one individual should not have to be expected to carry the can for the broader social policy.

WINKELMANN CJ:

What about people on land which is – what's that thing called? You know where –

MR BARKER KC:

Liquefaction?

WINKELMANN CJ:

Liquefaction, yes. That's an incipient fault that's sitting there and everybody actually knew about it if they'd bothered to read their title documents, et cetera. How's that – and yet it affects, you know, hundreds and hundreds and hundreds of property, so…

MR BARKER KC:

I think that would be – I suppose ultimately the problem is on your property.

WINKELMANN CJ:

I suppose there's a difference.

MR BARKER KC:

Maybe, there can be some, where liquefaction is going to roll down into the other, but I think mainly it's going to liquidate – a problem on your property rather than one that starts in your neighbour's property and, you know, comes through onto yours.

WINKELMANN CJ:

Yes, it's an irrelevant example. I retract it. I still – the policy consideration seems to me to be a significant one against your proposition that the remedy that was offered by the Crown was not reasonable in the circumstances.

MR BARKER KC:

We do get into – just on remedy, I should note that the, it was sort of determined over the last day that the red zone offer is probably only worth about 730[,000], not the 1.2 million. I'll come to that later on because –

GLAZEBROOK J:

The competing demands, of course, are – that argument slightly goes away, if not totally, depending upon the basis upon which the Crown might be liable for those EQC payments that have been assigned to it in respect of the 13 properties.

MR BARKER KC:

Yes, yes.

GLAZEBROOK J:

So that's a bit unsatisfactory, that we have absolutely no idea on the evidence what the entitlement actually is, how it's conditional and whether it's a choice whether to accept it and one can – well, do you see the –

MR BARKER KC:

Yes, I mean, the evidence was limited. It's Mr Bradley.

GLAZEBROOK J:

Well, surely, there's some publicly available material that would tell us what the answer to that is.

1120

MR BARKER KC:

I think actually outside the calculations we've done in our footnotes, I think it would be absolutely – you couldn't argue with them. All they do is they take –

the relevant cap is the average value of a section in that area. One of the experts we reference in the footnotes says: "Well, EQC had agreed that the average value in that area was this." So while the Crown accepted it had the benefit of those, they'd be assigned to them, all the sale and purchase agreements assigned the EQC payment, they hadn't actually taken it any further with EQC for whatever reason, we don't know. Presumably because the Crown was sitting there as the owner of 8,000 properties. At the very least, it's taken an assignment of EQC payments in respect of all of them. It's got a very large negotiation to have with EQC as to what the value of that is, and that's a little bit why I – when my friend said in their submission the cost of the red zone programme was $1.6 million, well, that may have been the original purchase values, but it came with the right to the assignment of the EQC payments, and I think this Court in the *Quake Outcasts* case referred to the Cabinet papers that said that the actually anticipated cost was likely about $400 million because of these insurance payments, et cetera.

But there is the reality that in taking those, coming along to take those 13 properties, it was paid significant amounts of money in respect of the land. So we don't know what the net values were because unfortunately in the sale and purchase agreements, the actual purchase price is blanked out. But they were paying on land value. The red zone offers were basically the ratings value, and one would expect that certainly over an entire suburb, if the EQC payment is the average value over that suburb, it'd probably be very similar to the average rating value over that suburb as well. So I'm not sure there's actually going to be a huge disconnect between the cost of red zone and the ultimate fiscal position of the Crown. But looking at this case, we do know that they had the benefit of the EQC payments. We don't know exactly what they were, but one can assume that they're likely to be substantial.

So when we look at it from Mr Young's perspective, he's saying, well, you're now pocketing that, and, you know, can't you apply some of that given it's been paid in respect of remediation of your land? Can't some of that be applied to me?

Now, your Honours, going to the cases, I won't take your Honours to it, I'll just draw your Honours' – so I talked about *Goldman v Hargrave* and *Leakey*. I do also refer in my outline to *Ward v Coope* [2015] EWCA Civ 30 and the reason I did that is because it was a case of a retaining wall that collapsed in a situation where both parties had a support obligation in respect of it. But the thing I thought that was quite interesting about the case is that they decide that the original collapse doesn't give rise to any liabilities because no one could have foreseen what would happen. But the problem you've got is, what are you going to do now, and the result in that case is they say that the person on the upper side had to pay the entirety of the cost of repairing that retaining wall and retaining the land. So it's quite an interesting, I suppose, counterpoint to the *Holbeck Hotel* case in that I think it's more directly on the facts that we have here.

The next point I wanted to – I now want to just really go through probably four cases to deal with the principle aspect. The first is the *Fearn v Tate Gallery* because the reason we're going to this case is that, really to re-emphasise that the enquiry here is not just, is the Crown acting reasonably? It's not a generalised enquiry like that. It is quite a focused enquiry as to what is reasonable for a landowner to do, recognising the rights of the other landowners. So it's quite a targeted, constrained enquiry we're looking at and that's one of the points they talk about in *Fearn* where the Supreme Court is pushing back against this idea of people just loosely using the word "reasonable". You know, it's quite a defined understanding of what is reasonable. So the *Fearn* case is, and also while we're there we'll go to the point about public interest. It's tab 34.

It is a, I mean I suppose an attempt to provide an authoritative summary of the – maybe if you can go through to page 4 of this decision, thank you. Paragraph 9. Yes. Really trying, I'm not sure I'll get very far going through all of the detail of it, but trying to understand what nuisance is all about and how these various factors that we've been discussing might feed into it. But the first point they're noting at paragraph 9 in that little section, that it's focused with enjoyments of rights and land, going through over to paragraph 13, making the

point here that a nuisance can arise by any means at all, and I think I'd use this sort of summary here that can it be something tangible or intangible as being an answer to the point that my friend makes about there being no nuisance because there is no damage. I mean, there is damage here in the sense that because of the zoning activity you can't do anything on this property, it's affected your ability to develop it, and so forth.

On that point, I would refer your Honours to *Williams v Network Rail* [2019] QB 601 that they reference there which is a good discussion of that point, that I suppose the – you can look at the spectre of –

GLAZEBROOK J:

Sorry which one are you referring to?

MR BARKER KC:

So on paragraph 13 in *Tate*. But I'm just saying, in that paragraph they refer to the *Williams* case. So this is the idea that –

GLAZEBROOK J:

Williams and, I see.

MR BARKER KC:

This is the idea that you must have suffered some physical harm for it to be a nuisance and really what they're saying is no, a nuisance can actually be quite inchoate and in that what you had was an invasion of a vicious weed onto the property which had caused no damage but had the potential to do so, and just from that potential it damaged – it caused damage to them because planning consents became more difficult, so on and so forth, which is quite similar to what you've got here, is that you've got the spectre of it causing I suppose an immediate reduction in value because you can't do things on this property, it's going to make it harder to do things and so forth. So in that sense, that's actually damage to the property. But of course, we would also say that the idea of damage isn't actually necessary for the remedy because you can always get the – not always, but you – an invariable remedial response is the *quia timet*

injunction, which doesn't – which foresees in the future that damage happening and tries to stop it happen.

WILLIAMS J:

It's a bit of a dividing line between the driver of the CCMA, MMA, whatever it's called.

MR BARKER KC:

Yes.

WILLIAMS J:

And those things themselves which you mention is slightly problematic because you couldn't possibly say that local authority regulation is a nuisance, at least not in the sense we're talking about.

MR BARKER KC:

No, but I'd say it's reflective of the underlying instability. It is there because of the problem on their land. If what we say is a nuisance wasn't there the CCMA wouldn't be there. That is why it's been, you know, the GNS report, that maps all the problems we went through and the maps, those maps I took your Honours too, they are actually what then is put into the district plan, and that's actually Dr Kupec, and that's, the following section that we talked about, talks about that. But here are all the maps and this is what was then mapped on into the district plan. So I think it's pretty clear that those, the district plan is really just a reflection of the underlying problem with the land that we say constitutes the nuisance.

O'REGAN J:

Is that really in dispute here though? Is the Crown saying there's no nuisance here? My understanding was they are accepting there was one.

MR BARKER KC:

I think they do accept that there is a nuisance here, yes.

O'REGAN J:

Yes okay.

MR BARKER KC:

In light of the time I might – so I'll just briefly summarise that and then take us to the point about public interest, but in the rest of those initial sections the Court talks about the idea that it is a, you know, reasonableness is understood in the context of, you know, property ownership rights and it is also a reciprocal obligation, it's a reciprocal right. So a defendant can't be liable – if they cause harm to their neighbour they can't be liable if they're using their land in a natural, ordinary way because they're entitled to regardless of what harm it causes. Equally, the plaintiff can't complain if they're using their land in a non-natural way. There's sort of, it goes both ways. It's the whole idea of this community between two neighbours. So they're really trying to get away from this idea that you look purely at the defendant and ask yourself, is what they're doing reasonable or not? You've got to look at it more broadly and that's part of what I'm inviting the Court to do here.

1130

But the final point, which I'll just touch on before we go into the break, is on the public interest at paragraph 121. So this is the point that, saying it's private law rights and it shouldn't be, it just came to me your Honour, Justice Williams, it just came to me, and I think it is an important point, it is a very important point, we'll come to it after I think about it, private law rights should not be subjected to the, or surrendered to the broader public interest. Really 122 in particular: "Property rights are not absolute. There are circumstances in which they may be subordinated to the general good of the community – a classic example being the expropriation of land… but it is fundamental to the integrity of any system of property rights that, in any such case, the individuals whose rights are infringed or overridden receive compensation for the violation of their rights."

WINKELMANN CJ:

So, Mr Barker, how much longer do you think you'll be?

MR BARKER KC:

I was planning on going until 12.30 which…

WILLIAMS J:

You need to say that with more confidence Mr Barker.

WINKELMANN CJ:

Do you need that long, because we seem to have covered a lot of ground.

MR BARKER KC:

Certainly. Don't be scared by the outline because I'm certainly going over, the last page I would go to very, very quickly.

WINKELMANN CJ:

Well I'm not scared by the outline, I just said to you I thought you'd covered most of your ground.

MR BARKER KC:

No, there are –

GLAZEBROOK J:

The actual remedy, though, I think you do need to cover.

WINKELMANN CJ:

So I would be imagining you'd be moving onto that?

MR BARKER KC:

Yes, I want to take your Honours, well actually yes, because the next point I was going to go on the principles were, in fact, the remedy cases. So that's where I wanted to go to next. But the point, just as a teaser if you like, that point that Justice Williams raised, it was, of course I had overlooked Justice Mander's decision in this case earlier where the Crown applied to effectively determine the case on the basis that they had a statutory immunity under section 145 of the CER Act, which was rejected by Justice Mander, and there's a long discussion about how you shouldn't –

GLAZEBROOK J:

No, I understand that, I think the point that was being made, or at least my point was that you can still take into account that statutory context, and it would seem artificial to ignore it when you're looking at reasonableness. So it may not be an immunity, and that hasn't been appealed in any event, but are you saying it's totally irrelevant was the question?

MR BARKER KC:

I would say it's relevant to remedy but not to right.

WILLIAMS J:

That's what that judgment seems to say.

GLAZEBROOK J:

But we're not talking about liability.

WILLIAMS J:

That's what *Tate Gallery* seems to say.

MR BARKER KC:

Yes, yes.

WILLIAMS J:

Whether the facts are analogous is the question.

WINKELMANN CJ:

Let's go, morning tea break.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:

Mr Barker.

MR BARKER KC:

So, I won't take your Honours to the early *Young v Attorney-General* [2021] NZHC 463 judgment. It does sound like your Honours had the opportunity to read it. Just noting that the argument there was that there was an actual immunity under the Act for purchasing red zone offers which was rejected by Justice Mander.

So two more cases I want to take your Honours to until I return to this case itself. Both of them are really focused on remedy, and the first is the *Fen Tigers* case at tab 33, and if we could go to paragraph 101. This is just talking about the usual remedy for a nuisance: "Where a claimant has established that the defendant's activities constitute a nuisance, prima facie the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future." The precise form of it will depend very much on the facts of the case, and down a few lines: "Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant's land [*sic*] as a result of the continuation of the nuisance."

What they're doing in this case is they're then considering the circumstances in which you'd order damages in lieu of an injunction and if you're referring to the case more generally, Lord Sumption has a long discussion as to why he doesn't believe injunction should be granted in nuisances at all. But it's coming out of the case of *Shelfer v City of London Lighting Co Ltd* [1895] 1 Ch 287 which is the standard case about damages under Lord Cairns' Act, and the extract is quoted at the bottom of that page, but over at 104, over the following page, I just wanted to note this quote there because it does come to this issue later on as to whether or not a red zone offer should be offered as opposed to an award of damages, because the objection that Lord Justice Smith was making in *Shelfer* was that when you're awarding someone damages, you are effectively allowing them to purchase – compulsorily acquire, if you like, their neighbour's property rights, and that's the objection. That's why the law always has favoured the injunction for a nuisance because damages basically allow you to

purchase the right to your neighbour's property rights, and it's really this whole idea that the common law is, you know, I suppose, opposed, ultimately, to this idea that you can be forced apart with property rights.

Now, the rest of the case, I won't go through, but they are then discussing whether or not *Shelfer* has set the test too high with the result, certainly in Lord Neuberger's decision which is the majority decision, that *Shelfer* is too absolute. It's really just a question of discretion for the Court as to what form of damages it should award in any one case, or whether it should award damages in any case or not. So that was the *Fen Tigers* case.

GLAZEBROOK J:

Sorry, what do you want us to take from that?

MR BARKER KC:

In terms of the remedy, so if we say, look, there's not going to be an injunction ordered here, we now move to the world of damages, and it's really trying to give the Court the framework for how you get into the damages question to start with, I suppose, and then *Grocott* is a good example –

GLAZEBROOK J:

So do you want to put it into dollar or whatever terms then?

MR BARKER KC:

Dollar terms. So, we would say, particularly coming to *Grocott*, the next case I'm going to take your Honours to, that the appropriate award for damages here is really an amount that allows you to do the Kupec design.

WILLIAMS J:

You say the problem with the red zone offer is that it's effectively an acquisition?

MR BARKER KC:

Yes, it's two problems. One, it's not enough –

WILLIAMS J:

Well, that, too.

MR BARKER KC:

– and two, it's effectively an acquisition. That comes back to the –

WILLIAMS J:

That's what you say is in breach of *Fen Tigers*, effectively?

MR BARKER KC:

Well, the fabric of the common law put it actually more broadly but I want to make the claim on a broader basis that the common law is ultimately opposed to the idea of people, you know, being forced to part with property rights. You *can* be forced to do it for award of damages. You know? Essentially. So if I've got a property that's emitting a dreadful smell and the Court says, look, for some great public benefit, we're not going to order the factory not to emit the smell, but we're going to give you damages that reflects the impact of that smell on your property. Now, I've lost my property right to that. I could choose to go and live elsewhere if I wanted to or not. It's up to me, but I've been compensated for the loss of the property right.

When we come to Mr Young, if we get down to the steps of we're in the world of a red zone offer, his objection is that okay, well, if you don't accept my claim otherwise for the quantum I want to have, and we are in the world of the red zone offer, why do I have to go. Why can't I just have that money and make the decision myself as to whether I want to go. Because I'm going to use that money to try and do that Kupec design. But why are you saying that I've got to leave my property.

WINKELMANN CJ:

Well might it be because the Crown will always have obligations to him? So fast forward 10 more years and there's some other major rockfall et cetera, and there will be more obligations to him, and the situation – they can't just leave that then, there will be a whole bunch of new obligations to him, to protect him,

to rescue him, to deal with the health implications of what happens et cetera, et cetera, et cetera.

WILLIAMS J:

Or more fundamentally a successor in title.

WINKELMANN CJ:

Yes.

MR BARKER KC:

Yes, but I think that's the, the logic of the damages award in lieu of the injunction is that it discharges the duty, its entirety, now for future people are now caught by it, and I don't think the Crown –

WINKELMANN CJ:

But that's not how the world operates.

WILLIAMS J:

Yes but future people – if the remediation doesn't solve the problem, and there's two purchases down the line get deluged, they're going to look to the Crown, unless you're advocating a memorandum of the title that says, you're on your own buster.

MR BARKER KC:

I don't think that's any different to any other circumstance in which the Court grants damages in lieu of an injunction for –

WINKELMANN CJ:

But it's artificial, Mr Barker, because the Crown's obligation is not only, potential liability is not only a nuisance, it's got, as it's been making those plans in that region it's also looking to its broader responsibilities, so it's thinking about its responsibilities to maintain services, it's thinking about its responsibilities to rescue, to keep people safe, so it's not just thinking about its obligation to pay damages for nuisance.

MR BARKER KC:

But we, one, we have no evidence as to what to think about in this case, but the objection that the damages in lieu of a *quia timet* injunction, or damage in lieu of an injunction, are not final. I think, I suppose the point is that they should be final, because that's the whole logic of it. But if the risk is that they are not, that is the same risk that exists in every single nuisance case. You know, you've got the smell coming from your neighbour's property.

WINKELMANN CJ:

You're not really answering my question, are you?

MR BARKER KC:

Well the question, your Honour, of the broader interests that the Crown has.

WINKELMANN CJ:

Yes.

MR BARKER KC:

That's directly into the issue as to whether or not that public benefit should – or whether Mr Young should carry the can for that public benefit, and it's fine if the Crown wants to have that broader public interest, but why should he have to pay for it. So –

WINKELMANN CJ:

You could flip that proposition around quite easily, couldn't you, which is why should the Crown keep on having to rescue the situation when it's trying to close it out. It's saying we want to close this risk out once and for all.

MR BARKER KC:

But it's not. So the logic of the Kupec design –

WINKELMANN CJ:

And you would just say I suppose in that situation if it was to close it out once and for all it should pay more money.

MR BARKER KC:

Well I think that the evidence is that the Kupec design will remedy the nuisance in that. It will allow that remaining 3,500 square metres of property to be used, and I do, later when we come to, we'll just take you to the photos so you understand it's actually quite a big chunk of land that's still going to be left open to him.

WILLIAMS J:

Well except that it's a non-complying activity and whether it will remedy the situation actually hasn't been resolved yet because that's going to be for the local authority to decide on evidence called at the time.

MR BARKER KC:

Yes, and that's what I want to come to in the next case, to deal with that issue.

WILLIAMS J:

Okay, right.

MR BARKER KC:

But, and I do come back to the point that it's only the bunds and some of the driveways that are actually within the non-compliance. All living spaces are outside any restriction at all. So it is a pretty minor infringement on it. So it's something that I think there is some hope that they'll be able to deal with.

WILLIAMS J:

It's in the blue, though, isn't it?

MR BARKER KC:

No. So only the bunds and the, some of the bunds and the driveway, and some of the driveways.

WILLIAMS J:

So, because I didn't understand this, no rockfall or rock-fly.

MR BARKER KC:

On the living areas, no.

WILLIAMS J:

In the living, oh.

MR BARKER KC:

No, and so Dr Kupec, we go back, and I've given the references in the outline, that's kind of, the difference between the two designs was that Davis Ogilvie tried to come up with a design that maximised Mr Young's land. That maximised the land that would be available. It didn't get anywhere near by using all of it, it only allowed him to us 9,000 square metres, there's still another 11,000 he couldn't use. The Kupec design is, comes from the perspective I'm trying to maximise what you can do within the confines of the, or given the CCMA designation that there is, and his answer is that you're going to have to have some of the bunds within the area, but you can certainly do all of your living spaces outside any restriction under the CCMA2.

ELLEN FRANCE J:

Presumably you do need the bunds?

MR BARKER KC:

Yes you do. But the only question would be whether or not you'll get a resource consent to put those bunds in, would be the issue.

WILLIAMS J:

But why do you need bunds if there's no rockfall or rock-fly. There's probably a simple answer to that but I don't understand it.

1200

MR BARKER KC:

Well that is the protection, so that is the protection, yes.

O'REGAN J:

So that's only if the bunds are there there's no rockfall or rock-fly risk.

WILLIAMS J:

But the blue zone is a factual analysis of where the rocks will fall or fly to.

MR BARKER KC:

Yes.

WILLIAMS J:

So anything outside that zone you'd expect wouldn't need a bund.

MR BARKER KC:

That is his design but the fact is that those houses are outside any blue mark, or the CCMA1 and the CCMA2 areas. So I mean I suppose in theory there is always the potential for further rock-fly but it's outside those – we're now into the 1 in 10,000 chances, et cetera, et cetera.

WILLIAMS J:

Right, I see.

MR BARKER KC:

But certainly his view is that you would have to have bunds there just to rule off those areas. The final case I wanted to take your Honours too is at tab 12. So it is addressed to this issue of there is some uncertainty as to whether or not you can undertake the remedial works, and it's the decision of *Grocott v Ayson*.

O'REGAN J:

It's tab 32 of mine.

MR BARKER KC:

Sorry, yes, 32 sorry. So this is a situation of upper landowner did some drainage works which changed the, you know, cut out areas et cetera, caused instability in the cliff – not the cliff, in their land. Then subdivides the land so there's actually a couple of owners now, the beneficiaries, quote, of that instability, and then there's a lower landowner right about the slip and the slip

happens, and the question is how are you going to deal with that situation, there being a clear duty, or breach of the duty, because you had, the upper landowner had in fact caused the instability, and the problem that the Court had is that in order to do remediation works you'd need consent from people who weren't actually parties to the action. There was also potential council issues as well.

So his Honour Justice Cooke as he then was, just go through it, starting – if we start at page 387, which is down, scroll down a little bit further to the start of his judgement.

O'REGAN J:
587?

WINKELMANN CJ:
387? 587.

MR BARKER KC:
587, sorry. So the summary of, he's reviewed the evidence and then on that finally: "It would be less than responsible to deny… the plaintiffs. Prima facie a mandatory injunction to construct some form of retaining wall would be appropriate; the alternative of… merely on piecemeal repairs… not attractive." So prima facie, you would come to it with an injunction. If we go then through, to scroll through the next page down to line 30.

WINKELMANN CJ:
588?

MR BARKER KC:
Yes, 588, and this is now talking about in the face of that problem, how do you react in the law of injunctions, if you like: "The Court will not impose on a defendant an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful." Then goes on to quote from *Spry's Equitable Remedies (1971).*

WINKELMANN CJ:

But is this comparable? I mean the question here is not that it would be unlawful, is that it would be futile.

MR BARKER KC:

Well I don't think futile in the Kupec design. I think the evidence is that that design will lead to a release of three and a half thousand square metres for use and I'm going to show you just a photo of one that would actually allow –

WINKELMANN CJ:

No, no, but it's futile because of the planning status.

MR BARKER KC:

But we would – but we're not talking about within – we're only talking here about the need to get a resource consent for the bunds in the driveway, and that point we'd say it's very far from saying it's futile. We might say that it's going to, you know, it's going to have to go through the process. You know, there's always uncertainty associated with that process, but it's very far from saying it's something that could never actually be done.

WINKELMANN CJ:

So why is this relevant, this case then?

MR BARKER KC:

Because this is what his Honour Justice Cooke talks about, so if we read through that – because to say that it's – they're emphasising that point of futility or impossibility that's quite a high standard, and there's just – this is talked about – I'll just ask your Honours just to go through the quote from *Spry's Equitable Remedies*: "If… the effect of the injunction is not certain, and there was simply a greater or lesser probability it will either be futile or unable to be complied with… Here it is necessary to balance the possibility that the injunction will not achieve its purposes against the need of the plaintiff for protection and all other considerations tending for and against the grant… The consequence of the possibility that the purpose of the particular injunction in

question will not be achieved depends therefore on other circumstances of the case. Sometimes it will be decisive against the grant of relief. On other occasions… such a risk of injury to the plaintiff is found to be most…'" will be granted, et cetera, and goes on to talk about that. It's quite an important quotation there.

Then at line 7: "… and hence relief will not ordinarily be refused on the ground of futility unless that futility is quite clear or unless, at least, there is an additional circumstance, such as hardship…"

WILLIAMS J:
Do we know what the status of the activity was?

MR BARKER KC:
So I think it was putting in retaining walls, and so the problem was that you needed consent from people who are not in fact parties to the action, and you also – there was some concern over the, whether you get building permits, I think, for some of that work. If you then go on, Justice Cooke then –

GLAZEBROOK J:
This isn't a discussion that you get damages, though, is it?

MR BARKER KC:
Yes, so this is what it then moves to. So where Justice Cooke says, look, I'm not going to grant the injunction because of this uncertainty, but what I will do is I'll grant you damages, effectively calculated by reference to the remedial works. We see that over the page at 590, the second paragraph there: "Accepting, as I do, the substance of Mr Russell's… I have no doubt that the risk of future damage to the plaintiffs is such that in place of an injunction, at least damages should be awarded."

Then talks about the approach of damages and injunctions, and then comes on – it's at the bottom of that paragraph, line 28: "Where, as here, damages are to be assessed in lieu of a quia timet injunction for apprehended harm",

et cetera, sorry, I'm just going to the next paragraph at 38, line 38. "The cost of reinstatement was treated as – "

GLAZEBROOK J:

This isn't a natural disaster though, is it?

MR BARKER KC:

Sorry, your Honour?

GLAZEBROOK J:

This wasn't the result of natural disaster?

MR BARKER KC:

No, no. No, this was something for which they had – the upper landowner had created the nuisance.

GLAZEBROOK J:

Do you say that you're not able to take into account uncertainty, because that doesn't seem to be what's being said. I mean, if there's a 5% chance that this will remediate, do you get the full cost of remediation anyway?

MR BARKER KC:

I think that the point of what he's saying – because he actually then ultimately just awards some generic sum which isn't necessarily related to it, is that – well it's not –

GLAZEBROOK J:

I can understand that because that would be – and here, it looks as though there was a reasonably good chance that they would actually be totally remediating, isn't there?

MR BARKER KC:

Yes, although they put a retaining wall in.

GLAZEBROOK J:

Yes.

MR BARKER KC:

But we would say that we're not talking about – we've given away the site, if you like. We're just talking about remediating this that allows him to use this one block of his land which is all he's going to have left from it. So the question is, is there a chance, a reasonable chance of being able to do that? We say that there is, and if the worst case scenario is that he isn't, and that's kind of why that number of roughly two million we've sought, and I accepted that, you know, one of the things we've never had in this case is any sort of assessment of the appropriate number, that if the Court decides that's too much, but that number also roughly translates to a contribution to the loss of his overall property. So you can kind of – if you can't do it, well, he's had a payment in compensation. So it's called – it's a rough justice aspect to it.

WILLIAMS J:

So you're saying in situations like these, this stands for the proposition that you move the risk to the plaintiff and that's fine?

MR BARKER KC:

Yes. Yes. They can have a go and do it themselves, and that's particularly the case here because –

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WILLIAMS J:

Well you move the risk of not getting the consent to the plaintiff.

MR BARKER KC:

Yes, yes, exactly, and that's particularly apt here because all of these works will happen on the plaintiff's land. So when you come and sort the injunction, well it will be pointless asking the defendants to do it because they would have to go onto our land to do it, so why don't you just say to the plaintiffs, here's the money to do it, go ahead and do it.

Now I'm going to – I've given – there's just a few reference to a couple of other cases there about this idea of remedial works being ahead of damages. Just, I ask you just to note perhaps on handwriting on that that I've talked about, *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321. The other case is that *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 case that I referred your Honours to about the Japanese knotweed which is – so *Network Rail*, it's tab 11, *Network Nail Infrastructure.*

WINKELMANN CJ:

Tab what sorry? Oh, tab 11.

MR BARKER KC:

Tab 11. Talking about that idea of remedial work being ahead of damages but I'm not going to take the Court to it. So I think I really have probably only about 19 minutes left so I'm going to – the facts are at 3, I won't talk about, it's covered in the schedule, but the basic point is that we would challenge the lost value of the property because it's not just land. It's also the houses that there, so there are two houses there that have value at the moment. So we challenged the calculation of the land, we've got two houses there that have value at the –

WINKELMANN CJ:

Where are you at in your outline?

MR BARKER KC:

Sorry, 3, which I'm going to –

O'REGAN J:

Isn't that again a challenge to a factual finding?

MR BARKER KC:

I don't think the Court of Appeal really makes any findings on these issues. They sort of leap straight to the red zone offer as being the – certainly not in the sense of any analysis of what the evidence was on it, but the problems that we say are one, you've got an underlying land value which we say that the

High Court judge got that wrong. But two, she ignored the fact that there were two houses already on this property which have value at the moment and will be lost if you can't access them or use them.

WINKELMANN CJ:

So you are saying there are wrong factual findings?

MR BARKER KC:

But in the High Court. I don't know if the Court of Appeal makes any real findings on these points.

O'REGAN J:

Yes but at the beginning we said to you: "What are the factual findings you challenge?" And you said the only one was the one you took us…

MR BARKER KC:

Sorry, I apologise. The –

GLAZEBROOK J:

I think to be fair you did mention there might be some others that you'd refer to as you went along.

MR BARKER KC:

Yes, as a later on, but these are not – the Court of Appeal very much just goes straight to it's just a red zone, and takes from there, so I don't think it's ever been properly reviewed, those points. But –

GLAZEBROOK J:

Your point about the red zone offer away is that it actually deprives him of the property right, so even if it was the right sum.

MR BARKER KC:

Right number, yes.

GLAZEBROOK J:

It means that he doesn't have that ability or that possibility of doing the Kupec design.

MR BARKER KC:

Yes, yes.

GLAZEBROOK J:

Which he wants to do. Is that – have I got that right?

MR BARKER KC:

Yes that is, that is exactly the point, is that if I fail at everything else and we're back, left with the red zone, our simple proposition is why does he have to sell his property to it? If the case for the Crown is that this property is worth nothing et cetera, why do they get to have it and not us? We don't think it's – well, it's worth nothing because you can't access it, but if we can solve that problem we clearly can unlock value here. We've got insurance proceeds to use to reinstate et cetera, et cetera.

GLAZEBROOK J:

Just remind me actually, now, that red zone offer, is that a similar red zone offer with the requirement to assign those claims, yes.

MR BARKER KC:

Yes, so just coming to that. So, just to leap ahead a little bit. So in the submissions we talk about the red zone offer being – our calculation being 1.2. So the problem with the red zone offer, and I've complained about this in the past, is that it was never actually suggested that this was the discharge of the measured duty, and I note in the submissions that A, it wasn't ever pleaded, but 2, it had a passing one paragraph reference in my friend's closing, that this was the discharge of the duty. What we were arguing about was, you know, is Kupec right, is Davis Ogilvie right et cetera et cetera. So as a result it was never actually worked out what the measured duty – what the number was on the red zone offer.

So after that, we asked our friend what is the red zone offer. He gave us a summary of it. We used that in the Court of Appeal, and the problem is that only – that formulation of it only took off the land payments that had been made by EQC. As my friend noted, he did say in the Court of Appeal that you should also take off the insurance proceeds that were received, and so the offer now is the deduction of the land proceeds plus the insurance proceeds, and it gets you down to this $730,000 amount. So that's why there's a difference between what –

GLAZEBROOK J:

Oh, okay. Thank you.

MR BARKER KC:

But yes, the problem is that it's contingent on us actually parting with the property.

The one final point I want to make before I get into the application in this case is just to understand that when we're talking about the Kupec design, our case is very much that, okay, the costs of it are 1.84, but you can't look at the actual cost. It'd just be what you have to pay put the bunds in and do that sort of stuff. We also got 17,000 square metres of our land to do it, you know? That is the other aspect of the cost of it.

So when you come to say that they should pay that number of, you know, $1.82 million to fund it, it's not as though we're saying, you meet all the costs of it. They are meeting those direct costs, but we are meeting costs in the sense that we give up all of that land to allow it to occur. So that's the sharing that we see as happening.

GLAZEBROOK J:

That's not a normal way of suggesting sharing, is it? I'm just thinking in terms of those cases.

MR BARKER KC:

No, that's – to be fair. But I don't think many of them –

GLAZEBROOK J:

Or do you say that –

MR BARKER KC:

But I think we are in a rather extreme situation. I mean, it's one thing to say that you're going to have to enter onto my property to put the footing for a retaining wall. It's another thing to say you've got to put the retaining wall, for want of a better word, on the bunds, inside 17,000 square metres of my property. So that's really all we're saying, is that when you talk about what the cost is and what's appropriate to share, you need to recognise, you know, the overall cost to us about it and it's not just: "Be out of pocket to put this thing in," it's actually the fact that we're giving up, you know, the vast majority of this.

In terms of the application, because I'm conscious I do need to finish soon, I tend to agree with your Honour, the Chief Justice, that I probably have covered most of those points as to how it – you know, the factors that we say are here that distinguish it, so I might just briefly say them, but if you want to pick me up on any of them, just the point that – so we talk about this number being large, et cetera, and it undoubtedly is, and that's fine, but we need to realise it relates to 13 properties at the top and the impact on Mr Young is extraordinary, you know? It's not a case where he's losing his backyard or anything like that. His property goes. So it is a large number, but it is in the context of large numbers, if you like.

I have noted the availability of the remediation strategy. I've noted the EQC land payments. (f), we've had that debate as to whether or not the public aspect is relevant, and then I note at (g), that point that I just made about it, we view it as being a shared cost. So the final issue I want to address is really this –

WINKELMANN CJ:

Where does the shared cost appear on your outline?

MR BARKER KC:

It's talked about more in the main submission, but it's really point 3 where I talk about the value. That's what we say the value of it is, and then 4(g): "It's also a reasonable contribution to the value of land lost if unable to undertake that design." Oh sorry, that's not the point, sorry. It's really in point 3, your Honour.

WINKELMANN CJ:

Yes.

MR BARKER KC:

The final point is just the red zone offer, and it has two aspects which we have discussed in general already, anyway. The first is what is the number, and in my submission I was, as a fallback, happy to take the 1.3 or 1.2 it was, now it's 7.3, then obviously we would say that number really should be – it's just not a big enough number as a compensation payment, given the other costs that are associated with that.

I make that point, which is even starker now, in (d), that even if you were to look at the Crown's own assessment of the value at 730, we're now starting to get, you know, into the realms of being like contributions at about 40% to the value of the land lost. Even less than that, so. The number's not enough. The second point is the fact that it shouldn't be contingent on sale.

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ELLEN FRANCE J:

Just in terms of that red zone context, the effect of your argument really is to say that the Crown has to continue the use of its land, when in fact it wants to abandon that land.

MR BARKER KC:

Sorry, your Honour, I don't…

ELLEN FRANCE J:

Well the Crown is not going to be doing anything with the 13 properties, is it? It doesn't want to use that land? But your approach means they have to do something with it. They have to use it in some way, if only to remediate.

MR BARKER KC:

No. So that's not what we'd be saying –

ELLEN FRANCE J:

Well –

GLAZEBROOK J:

Do you say the Kupec design doesn't require them to do –

MR BARKER KC:

That they do nothing on their land.

GLAZEBROOK J:

– anything, is that the answer to that?

MR BARKER KC:

Yes, actually I might, my junior actually – can we pull up document 201.074, just to give you an idea of what it actually requires. This is a photograph –

ELLEN FRANCE J:

No, I understand that, but, and perhaps I'm not putting it –

WINKELMANN CJ:

It would be quite interesting for me, I don't understand it as well as you probably. Can we pull that document up?

MR BARKER KC:

Yes, 201.0174 sorry.

ELLEN FRANCE J:

I suppose I'm questioning whether you can simply say, well, it's just money.

MR BARKER KC:

I think the benefit of the Kupec design is that it allows the Crown to do nothing with its land, it can leave it fallow, and what the Crown will do we don't know. I think it's now all been transferred to the local authority. But what the future of it will be, I don't know. So this shows the Kupec design. So you see that it will give you four lots. So you've got those bunds. The red line is actually the boundary, so this is Dr Kupec's document showing where the boundary line actually now transfers over all of this, and you'll see it's just got the bund and the accessway et cetera, and one and two are the existing houses that are there, which Mr Young wants to use his funds to repair and live. It's quite a large section, I mean 3,500 metres is not an insignificant area of land. But coming back to –

GLAZEBROOK J:

And your argument that's, just again so I understand, would be the Crown wouldn't be liable in nuisance on an ongoing basis, even for successors in title, because at least on the information that we have at the moment, if those cliffs collapse, they collapse and the properties are protected by those bunds.

MR BARKER KC:

Yes, that's the purpose of them.

GLAZEBROOK J:

So there's nothing foreseeable about anything, despite the cracks et cetera, is that…

MR BARKER KC:

That's exactly it and I'm sure there is a body of law somewhere about the effect of judgments on, you know, and discharge of sort of future interests, I just don't know that law at the moment, but I imagine the whole point is that if you are granting a damages in lieu of a quia timet injunction, that it is, the point of it is to, in fact, discharge that obligation, you know, for all time, how it gets –

GLAZEBROOK J:

Yes, well I suppose the other way of saying it is that – well I suppose if he chooses not to do that with the money, then again he's accepted that in lieu of that.

MR BARKER KC:

Yes. He wouldn't be able to come back to a court five years later and say it's slipped again.

GLAZEBROOK J:

And presumably would have to…

MR BARKER KC:

I'm sure there is some, that are just lost in the back of my mind, but I can't help you anymore on it unless you ask us to about it.

GLAZEBROOK J:

Well I'm sure he can't come back as successors in title, that might be the issue, but again probably they would be taking it as is where is at that stage I suppose.

MR BARKER KC:

Yes, and that successors in title issue is one that runs throughout nuisance which is why – because I'm sure it's dealt with somewhere because any nuisance that would be the same situation. So you sell your house beside the speedway, a new purchaser says, well I knew nothing about that, I don't like the noise themselves, I'm sure that's dealt with in the law of nuisance but unfortunately I can't help you at the moment on that.

O'REGAN J:

Looking at this slide, when you say Mr Young will lose 17,000 square metres, a lot of it seems to be unusable land.

MR BARKER KC:

Yes, that's because of the rockfall because you can't get in there and take rocks out because it's all within the CCMA area, so this is just accepting that you're having to give up this land.

O'REGAN J:

But he wouldn't have been able to use it if he didn't give it up anyway?

MR BARKER KC:

Well he would say he could if it wasn't for the nuisance. So if you look at the rockfall, the rockfall's a slight – he's able to go in and remove rockfall as a technical matter. The problem is you can't do any work in the CCMA1, so he can't actually do it because of the, we would say, threat posed by the land. So it all –

O'REGAN J:

Or because of the district plan.

MR BARKER KC:

Yes, but then we'd say the district plan is just a reflection of the threat posed by land. So we would say it all comes back to the fact he just can't use the rest of his property because of the threat posed by the unstable surfaces.

WILLIAMS J:

So 3 and 4 on that mock-up are proposed sites are they?

MR BARKER KC:

Proposed sites, yes.

O'REGAN J:

So he's intending to build behind the bund?

MR BARKER KC:

Or sell them.

O'REGAN J:

Right.

GLAZEBROOK J:

And you say the offer's not available now?

MR BARKER KC:

I'm not – I'd have to leave that to my friend to clarify.

GLAZEBROOK J:

All right, that's fine.

WINKELMANN CJ:

Well it says, confirms that it is, I think.

GLAZEBROOK J:

Yes I thought that, I thought the Crown –

MR BARKER KC:

Yes, no, I was saying that the implication was that it had, in fact, been open up until for all the time it was, that was with, what we were told is that – so, from our perspective, we may have a different view, going into trial there was not a live red zone offer. It had been withdrawn a long time ago, so this whole red zone offer was not a focus, it's something that's emerged later.

GLAZEBROOK J:

Oh okay, no you mentioned – you did mention that.

MR BARKER KC:

Yes, going to the Court of Appeal it had been withdrawn because the Act itself had, in fact, been repealed, I think. I think the Greater Christchurch Regeneration Act has been repealed. It's actually live as to whether there's the power to make a red zone offer anymore as opposed to just simply an offer that is contingent on sale.

GLAZEBROOK J:

Well it probably doesn't matter.

MR BARKER KC:

Probably doesn't matter, but in terms of those red zone powers.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

So the Kupec plan will create saleable land, and whereabouts on the picture would the saleable land exist? Would it be on lot 4?

MR BARKER KC:

It would be all four of those lots if he chooses – he wants to live in one of those houses.

WINKELMANN CJ:

But more development, more development.

MR BARKER KC:

No, so it's only – all you could do is 1, 2, 3, 4 on that photo.

WINKELMANN CJ:

So it wouldn't enable further development?

MR BARKER KC:

No because they'll all be outside, because behind those bunds is the CCMA1 area. Well actually in CCMA2, but primarily in CCMA1. So it's going to create four lots – a four lot subdivision basically. I think the rest of the issues I've probably dealt with in my written submissions unless your Honours have any further questions.

WINKELMANN CJ:

Thank you, Mr Barker. Mr Stephen. Why is your name misspelt in your email address?

MR STEPHEN:

Mine?

WINKELMANN CJ:

Well it is on this, it is on the intituling. I was just about to correct.

MR STEPHEN:

It's correct on our submissions, Ma'am.

WINKELMANN CJ:

Yes. I'm very confused.

MR STEPHEN:

I have three names and they could all be taken to be first names.

WINKELMANN CJ:

No, no. On your submissions, your email address has your surname spelt with a "v".

MR STEPHEN:

I see. I don't know. Probably trying to dodge people emailing me, Ma'am.

WINKELMANN CJ:

I was just busy correcting something, I thought oh, that's wrong. Then I realised it wasn't wrong, so. Go ahead.

MR STEPHEN:

May it please the Court. First, I'd like to apologise to Justice Williams for my appalling te reo. But I'm trying.

WILLIAMS J:

The struggle is real Mr…

MR STEPHEN:

Stephen.

WILLIAMS J:

Stephen. Mr Tipene.

MR STEPHEN:

Seeing we were left with the red zone offer I thought it might be appropriate to deal with that with your leave because it gets it out of the way, subject to my friend's right of reply. The first thing to say is that there are a series of red zone offers of various sorts and I take it that the Court is familiar with why we got to the hybrid one, which was to accommodate the position that Mr Young found himself in, and that was largely due to the fact that titles hadn't issued in the two houses 4 and 5. That meant that the Crown felt unable to sort of carve those out and ascribe a value. If I could perhaps take the Court to document –

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GLAZEBROOK J:

What's probably more helpful is what's on the table now, and the actual amount.

WINKELMANN CJ:

And why from your position it's important that it's a condition that the land be transferred to the Crown?

MR STEPHEN:

Well that's in the nature of the offer.

WINKELMANN CJ:

Yes, but why.

MR STEPHEN:

Why, because the intention is to retire land. The general view was that offers which were in almost all cases extremely generous would be accepted, making the point that no one had to accept them, although in Quake Outcasts there was a, I think the expression was it was a Hobson's choice and that was because they were very generous. The idea is that the land generally fits in the red zone, is potentially uninhabitable, and that leads to the proposition –

GLAZEBROOK J:

Well that was quite true in respect of houses that were right in the red zone because nobody was going to give them services including services absolutely necessary for health like rubbish collection, but if you're looking at isolated houses, or isolated properties which the argument is they are here, that doesn't apply, does it? I mean if they're next door to somewhere that's getting services, and are potentially habitable with remediation work, then the view that you have to retire them because of the sort of things you're talking about just does not hold water does it?

MR STEPHEN:

I wouldn't go that far. To some extent, if you'll recall Ma'am, the ball, what was the expression, there was a need for a whole response to a widespread problem. The was also I think from memory in *Quake Outcasts* in the Supreme Court the proposition that the Crown didn't need to deal individually with all 8,000 people. So it was, to some extent, a one fit.

WINKELMANN CJ:

One size fits all?

MR STEPHEN:

Yes Ma'am.

GLAZEBROOK J:

But not in the context of, as I think Mr Barker would say, a private law claim for nuisance. On the part of any of those people, or at least certainly not the bulk of them?

MR STEPHEN:

So we say that maintaining the offer, which was intended to be of use to Mr Young to enable him to move on, assists us when it's maintained because we say it meets the measured duty.

GLAZEBROOK J:

You say what sorry?

MR STEPHEN:

It meets the measured duty.

GLAZEBROOK J:

Well why?

MR STEPHEN:

Well we adopt the reasoning from the Courts below.

GLAZEBROOK J:

Because it's reasonable to deprive somebody of property rights in relation to a property they could remediate and use?

MR STEPHEN:

No, we're not denying them their right. Mr Young can stay there.

WINKELMANN CJ:

So you're saying he can stay there?

MR STEPHEN:

Everyone could stay there under a red zone offer.

WINKELMANN CJ:

Okay, but only if they don't accept it?

MR STEPHEN:

Yes. But they don't have to is my point. And just to segue slightly away from that, there is a suggestion that this is in the form of a compulsory acquisition, and we say it's not for the reason I've just explained.

WILLIAMS J:

He's say it's a bit of a Hobson's choice because he's living with the nuisance but can't get the offeror to remedy, help him remedy the nuisance.

MR STEPHEN:

Well there's an irony in that, Sir, because of course –

WILLIAMS J:

Why would he stay there if it was unsafe?

MR STEPHEN:

Well can Mr Stephen say something.

MR STEPHEN:

It's not a Hobson's choice, although that's the way it was described in the *Quake Outcasts* case, because he says he wishes to stay there. He says that he can adopt one of the, something along the Dr Kupec plan, that will enable him to subdivide and he'll get the benefit of whatever value is ascribed to those properties.

WILLIAMS J:

So that gets back to you accept there's a nuisance.

MR STEPHEN:

Absolutely.

WILLIAMS J:

How do you factor that into life after rejection of red zone offer?

MR STEPHEN:

Well, we say that the offer is a – it meets the reasonableness duty.

WILLIAMS J:

But you also accept that he has a right to reject it?

MR STEPHEN:

Yes.

WILLIAMS J:

It's his call?

MR STEPHEN:

Yes.

WILLIAMS J:

You haven't denied the fact that there's a nuisance. What then happens?

MR STEPHEN:

Yes, and the question is what is the remedy.

WILLIAMS J:

Yes.

MR STEPHEN:

What is reasonable in the circumstances? I should have said –

WILLIAMS J:

So are you saying that it's reasonable simply to make the offer and acquire the land?

MR STEPHEN:

That's right.

WINKELMANN CJ:

Can I just ask there, it tends to, it comes back to why the land is retired, doesn't it? Why has the Crown got a legitimate interest in retiring the land perhaps?

MR STEPHEN:

Well, the Court has already touched on this. So the 13 clifftop properties are not required, at least not to be held by the Crown. There is a global settlement of some sort with Christchurch city which means that most – I don't know how far it's gone but properties that have been red zoned, cleared, whatever, will be transferred to Christchurch and at the moment at the top of the cliff can't

because of a clause in that agreement, and the reason for that is a relatively straightforward one in that there's still potential for liability in the future.

WILLIAMS J:

You haven't really dealt with the contingency that this land doesn't need to be retired because it can be occupied perfectly safely following the appropriate environmental assessment under the appropriate Act. Isn't there an argument that it would be reasonable to facilitate that as to the nuisance feasor, or whatever the correct phrase is? It would be reasonable to facilitate that if in fact retirement is not necessary.

MR STEPHEN:

Well, retirement is necessary in the sense that what do we do with the clifftop properties?

GLAZEBROOK J:

You don't have to do anything with the clifftop properties is what Mr Barker is saying. The clifftop properties can fall into the "behind the bunds" if they wish to do so.

WILLIAMS J:

Do you see that's a question of scientific fact or at least scientific rejection?

MR STEPHEN:

Yes.

WILLIAMS J:

It's not a legal question. If retirement is not the only reasonable response to this nuisance, should a reasonable land owner of the source or at least part of the source of the nuisance not be required to take that into account when considering a reasonable response?

MR STEPHEN:

I accept that's a possibility, Sir. The history of this case though is that we have pursued or continued the offer and at least to the Courts below it has been construed as meeting the reasonableness requirement.

WINKELMANN CJ:

So can I just take you back to the answer that I think you were part-way through giving before? The reason – I'm not sure that it is an answer but I just want to clarify it. You say the Crown has a legitimate interest in retiring this land and that's because the 13 properties are not required by the Crown, they have been red zoned and cleared and will be transferred to the Christchurch City Council and the reason they haven't been transferred is because there's an unresolved liability in respect of them which arises from this proceeding.

MR STEPHEN:

That's right.

WINKELMANN CJ:

"When this proceeding is resolved, however, that will resolve that liability in respect of the 13 properties."

MR STEPHEN:

Will it? There could be a continuing nuisance claim in the future.

GLAZEBROOK J:

The argument is "no" because even if they subside they'll be behind the bund that's been put up and that will be the end of the nuisance. That's the argument.

MR STEPHEN:

Yes, yes, well –

O'REGAN J:

But that assumes the bund will be built which we don't know yet.

MR STEPHEN:

That's what I was going to say. So there are issues in relation to the Kupec scheme or something similar.

WINKELMANN CJ:

So can you perhaps, if you could just –

WILLIAMS J:

Yes, that's going to rely on a resource consent application.

WINKELMANN CJ:

Okay. Well, can you just squarely state it for me, Mr Stephen? So either result in this claim will not necessarily resolve that liability attaching to those 13 properties because?

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MR STEPHEN:

The overall scheme of arrangement was to make offers under the red zone and because there was only one property, still is only one property, that that was applied to all of Mr Young's land.

GLAZEBROOK J:

I don't think that quite answers the question.

WINKELMANN CJ:

That's a different point again I think. I think you're starting a new point, but just to finish the points you've made, even resolving this won't necessarily resolve the liability attached to 13 properties because there's no – I think your point is because there's no certainty as to the outcome.

MR STEPHEN:

Yes. And picking up on Justice O'Regan's point, we don't know whether or not a bund will be permitted. It's in CCMA2. It was assumed that it could but it will require quite a bit, including resource consent which can't be guaranteed.

WILLIAMS J:

So the question then is in terms of this balance of reasonableness, whether it is appropriate to wait to resolve that question finally before deciding what a reasonable owner of the source, or at least part of the source of the nuisance should do in response to it. Because if the consent is granted and the council is perfectly happy that it is safe to live behind the bund, what's the problem with that?

MR STEPHEN:

Well, there may be none but waiting could take a very long time.

O'REGAN J:

Well then who's going to pay for it in the meantime?

GLAZEBROOK J:

Mr Barker's point though is that don't you – it doesn't matter whether you wait or not, that you're transferring the liability for the nuisance to the plaintiff and the plaintiff in receiving that money, whether they choose or are able to do that or not, discharges the nuisance or any liability on the part of the Crown? I don't know whether that's the case or not.

WINKELMANN CJ:

I don't think he actually – that was his answer. His answer really was that the bund, the bund solved it all.

GLAZEBROOK J:

No I know the first answer was the bund would do it. But he was – I think the other answer was that you then have discharged the liability for the nuisance because it's then – you've transferred the risk for that onto the plaintiff.

MR STEPHEN:

I'm not sure that was quite my answer.

GLAZEBROOK J:

No it wasn't your answer.

MR STEPHEN:

No.

GLAZEBROOK J:

It was Mr Barker's answer.

MR STEPHEN:

Yes, I see.

GLAZEBROOK J:

So I'm asking you what you're saying about that?

MR STEPHEN:

Well we're actually saying something different which is he can do what he likes, yes.

GLAZEBROOK J:

Well it's not very helpful to say something different because if we accept Mr Barker's we're not going to be able to – Barker's submission, we're not going to say oh, but actually there's a totally different answer from the Crown.

MR STEPHEN:

Well it begs the question of where there is is a liability that's being transferred, and our theory of the case is that it is reasonable given the whole scheme of the red zone offers to make them and keep them open in order to enable the Crown among other things because it – one of the theories is it might be better if people didn't live in that area at all.

WILLIAMS J:

But that's a question of fact.

MR STEPHEN:

Yes.

WILLIAMS J:
Not a question of policy.

MR STEPHEN:
True.

WINKELMANN CJ:
Oh I think it's a question of policy because I think it was the second point you were coming to that I stopped you coming to, which is that when the Court's – Crown's approached this they've approached it in this wholistic basis, so you can't actually just extricate this property from the overall allocation of resource that the Crown made.

MR STEPHEN:
That's right.

WILLIAMS J:
Except that that –

WINKELMANN CJ:
Disregards the private law nature of the claim.

WILLIAMS J:
It's, yes, "it's our policy" isn't usually a good answer to a common law duty.

MR STEPHEN:
Can I say as a personal note that I'm a bit deaf. I can hear you well except when you're all talking at me.

WILLIAMS J:
Okay.

WINKELMANN CJ:
Fair enough, Mr Stephen.

WILLIAMS J:

Well then you're in deep trouble in this court, Mr Stephen.

MR STEPHEN:

Well it wouldn't be the first time, Sir.

WINKELMANN CJ:

No. We will be more careful about not over speaking.

MR STEPHEN:

No that's all right, I'll –

WINKELMANN CJ:

No, fair enough, that's a very good point. Thank you Mr Stephen for making that point.

ELLEN FRANCE J:

Mr Stephen, are you saying there will be an ongoing liability for the Crown or simply that it's unclear whether or not there will be?

MR STEPHEN:

The latter, Ma'am.

ELLEN FRANCE J:

Unclear?

MR STEPHEN:

Yes. So where we are at the moment, as I read the Court of Appeal's decision, is that inoculates the Crown, or any other owner of Mr Young's – sorry, owner of the clifftop properties, from further claims. So it depends, sorry to be mean to you again, where this Court gets to.

GLAZEBROOK J:

It is a bit odd that a red zone offer that's not accepted inoculates the Crown from further claim, but a payment of damages which has exactly the same effect

in that Mr Young will continue to own that property and continue to have the risk of that happening will not inoculate them from further claims.

WINKELMANN CJ:

It only inoculates them because they retired the land under the red zone.

GLAZEBROOK J:

Well, no, only if it's accepted though. So the offer itself doesn't unless it's accepted. Because obviously if it's accepted, Mr Young has no more claim because he doesn't own the land.

MR STEPHEN:

That's right.

GLAZEBROOK J:

But if it's not accepted, and that was what your proposition was, just the making of the offer alone, whether accepted or not, inoculates the Crown from further claims, and what I was asking you is if that is the case, why doesn't a payment of damages, maybe for the 730,000 inoculate the Crown?

WINKELMANN CJ:

Do you say that the making of the offer inoculates you from further claims? You don't, do you? You only –

GLAZEBROOK J:

He just said that, I thought.

WINKELMANN CJ:

No, I don't think that is the point. I don't think that's the Crown's point. The Crown's point is not that the making of the offer inoculates them, it's that it is the reasonable response to the duty that's been found to be owned.

MR STEPHEN:

That's right.

WINKELMANN CJ:

Mr Stephen was saying that the reason why they stipulate for the transfers of land is to inoculate them from further claims. So it's two different things.

MR STEPHEN:

Yes, I accept that proposition.

GLAZEBROOK J:

If it's not accepted, why can't Mr Young sell the land on to somebody and then they claim a nuisance?

MR STEPHEN:

I hadn't thought about that, Ma'am. Can you transfer a claim?

GLAZEBROOK J:

Well, not transferring a claim, you're just transferring the land.

WILLIAMS J:

It's an ongoing problem.

MR STEPHEN:

Yes.

WINKELMANN CJ:

Isn't it a little bit of a – I mean it's an academic question, I suppose, at the moment. It's all getting rather speculative because no one – he's not going to be able to transfer this land as it currently stands, is he?

MR STEPHEN:

No, and you'll bump up against limitation issues.

GLAZEBROOK J:

Well, no, it's an ongoing nuisance, is what the argument is.

MR STEPHEN:

I suppose it continues each day.

WILLIAMS J:

So if the appropriate reasonable response to this is a question of fact in the circumstances, and if as Justice Cooke, as he then was, said well, unless it's completely hopeless, there should be some sort of pathway through this. One pathway might be just to ask Mr Young to put his money where his mouth is and apply for consent.

MR STEPHEN:

And then wait and see?

WILLIAMS J:

And then wait and see, and if the council's perfectly happy that it's safe, so be it, and if it's not, there's your answer.

MR STEPHEN:

Which is, Sir? Sorry to ask a question of the Court.

WILLIAMS J:

Sorry? Well, your answer is, accept the red zone offer if it's still there, or if the offer's been withdrawn, then he's lost the gamble.

MR STEPHEN:

Yes. I don't know what the Crown would do, but if that was the direction.

WILLIAMS J:

It's just no one could build there then. That would be the end of the matter.

MR STEPHEN:

Yes, it's contingent on the offer remaining available.

WILLIAMS J:

Well, yes, the question of whether an honourable Crown would keep the offer open in the meantime.

MR STEPHEN:

We have for many years, Sir, so.

WILLIAMS J:

Yes, quite so. Because there is a point that even a non-complying activity application is not hopeless.

MR STEPHEN:

The evidence was that it was unlikely but certainly not hopeless.

WILLIAMS J:

Yes.

WINKELMANN CJ:

Would that leave you with the problem that you would still have a potential claim against the 13 properties so you couldn't then transfer them to the city council?

MR STEPHEN:

Yes. As I mentioned earlier, I think there's a clause in the agreement that says that the council doesn't have to take them while this matter is still at large. Or any matter.

WILLIAMS J:

Yes, well, you see but if there is a consent granted on the basis of evidence from experts that this is safe, then what liability might there be?

MR STEPHEN:

Potentially none.

WILLIAMS J:

You'd hope so.

MR STEPHEN:

There would still be technical questions associated with the…but they might be answered through the planning process.

WILLIAMS J:

They have to be answered or they'd never get consent.

MR STEPHEN:

Yes.

WILLIAMS J:

There'd have to be lots of comfort and confidence around the answer being the appropriate remedial answer, and if there wasn't I'm sure the council would never grant the consent because they wouldn't be particularly sympathetic in the first place.

1250

MR STEPHEN:

So how would that absolve the Crown of liability for nuisance?

WILLIAMS J:

Well, there'd be no nuisance or, at least, no – what's reasonable would be the giving of the red zone offer and the undertaking of the remediation that all experts and the council considered rendered the land safe from harm. Now if you got a [Richter scale] 10 earthquake down the track, who knows, but that would be not the sort of problem that you would be seeking to inoculate yourself against.

MR STEPHEN:

I understand the reasoning, Sir. I'm quite sure that my clients would not particularly want to be sitting on a potential liability. If we ended up in that sort of situation, there isn't any requirement on Mr Young to do anything. So if you were minded to go that route then it would need to be time bound.

WILLIAMS J:

I'm not minded to go any route. I'm just testing this reasonableness in all the circumstances assessment so that the assessment we make is not unduly oppressive.

MR STEPHEN:

Well, I don't –

WINKELMANN CJ:

Anyway, perhaps we'll let you get on with your argument. We can loop back around to that after lunch.

GLAZEBROOK J:

Can you perhaps, you said, I think even in respect – you said in – sorry, I know, if I get away from the microphone…

MR STEPHEN:

I didn't mean to embarrass anyone, other than myself possibly.

GLAZEBROOK J:

No, I was doing a Justice Young. He used to lean back like this and – which I don't normally do but…

WINKELMANN CJ:

He still does, actually. He still does.

GLAZEBROOK J:

You said the Kupec plan in itself was unlikely to be consented. Do you want to, after lunch or at some stage, give us the references in respect of that?

MR STEPHEN:

Sure.

GLAZEBROOK J:

Because I hadn't thought that was the case. I know there are issues but –

MR STEPHEN:

Well, I'll find it. I'll hunt it out.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Yes, and don't be diverted too much by what Justice Williams has said to you. He's just asking to go down one line of thought.

MR STEPHEN:

Shall we talk about quantum?

WINKELMANN CJ:

Yes, well, why don't we go back to where you want to take us to, Mr Stephen, because we've taken you at the very beginning of your submissions right off beam and I think we should let you regroup and take us to where you want to take us to, and, if you wanted to take an early lunch adjournment, we could do that if you wanted to regroup, but I'm not suggesting you need to.

MR STEPHEN:

Well, I'm just wondering whether we could deal with the red zone offers in the remaining seven minutes because it might be efficient. I'm not making a promise because – and I'm assuming the Court's familiar with the nature of the offers, and I think I've said this already, and the nature of the hybrid offer, and due to my error –

GLAZEBROOK J:

What do you call the "hybrid offer", sorry?

MR STEPHEN:

So perhaps I should go back to basics and then we can – yes.

WINKELMANN CJ:

Yes.

MR STEPHEN:

So the red zone offers had two sorts and they're an either/or, or a third being take no offer. Standard offer A was the land was acquired for the ratal value in 2017 and EQC and private insurance were transferred to the Crown, so the Crown took everything over.

O'REGAN J:

That was at the pre-earthquake value?

MR STEPHEN:

Yes, so 2017 was…

O'REGAN J:

2007, was it?

MR STEPHEN:

'07, sorry, yes, and it was the height of the market at the time, so just to reiterate my submission that these offers are generous. Standard offer B was the land value only plus the EQC land value. Land value. Now again with the transfer but –

WINKELMANN CJ:

Sorry, what was standard offer B?

MR STEPHEN:

B?

WINKELMANN CJ:

Yes. What was it?

MR STEPHEN:

I was half way through it, your Honour. Shall I start again?

WINKELMANN CJ:

Yes.

MR STEPHEN:

It's spelled out in particularly the Court of Appeal's judgment, but standard offer B was the land value only plus the EQC land value, and the transferor kept other EQC and private insurance claims relating to the property, and the reason it was framed that way is many people did better by keeping their insurance claims and claiming them off than assigning them to the Crown, and for obvious reasons, the Crown was acquiring worthless land, so – well, generally worthless land, so at least it could, if the vendor wanted to, take the benefit of insurance and recover that to offset the purchase price.

Now, Mr Young was confronted with a problem because he felt unable to take either of those options, and so in order to try and find a way through, what became known as the hybrid offer was made, and that was Mr Young would transfer, if he chose, his land at 2007 values, and of course also, the EQC private insurance, he keeps his EQC private dwelling payments for his two properties, if I could call that properties 1 and 3, and keeps his private insurance for the dwellings.

WINKELMANN CJ:

For those dwellings or all dwellings?

MR STEPHEN:

For all dwellings, I think.

WILLIAMS J:

Presumably it's three of them.

WINKELMANN CJ:

Well, anyway, we can look at the detail of that –

MR STEPHEN:

Yes, okay. Plus – so that was 105,000 – sorry, 1,050,000. The EQC land payment was 793, around about, and that comes off. Then he keeps his EQC dwelling payment and his private insurance payments. We don't know what

they are. Then, the valuation for houses 4 and 5 is added to the price, and that was 1,030,000. Then there is subtracted the EQC and dwelling payment for houses 4 and 5, and that was 553,500. The figure that comes to which my learned friend suggested was $733,601.70. It might be useful –

WINKELMANN CJ:

That's set out in your submissions somewhere, isn't it?

MR STEPHEN:

Yes, but the figures are different.

WINKELMANN CJ:

Ah. I was not taking note of them, but it's all right, we'll go to the transcript where you noted them. So we have to correct your figures when we go to the submissions. Can your junior tell us what the paragraph number is in the submissions?

GLAZEBROOK J:

So the 733,000 is correct, is that right?

WINKELMANN CJ:

Have you got the paragraph?

GLAZEBROOK J:

No, I'm just trying to find it. And it's still on the table, is that what I understand?

MR STEPHEN:

That's correct. Yes. There is –

GLAZEBROOK J:

And possibly not a red zone offer but a proxy red –

MR STEPHEN:

Well, it's still conditional on the…

GLAZEBROOK J:

Yes.

O'REGAN J:

I wonder if you could file a memorandum just setting out all those details and run it past by Mr Barker so that we know exactly what it is we're dealing with. It doesn't have to be done today, but just – these figures are, you know, there's a lot of pluses and minuses. It would be good to get them all just, you know?

WINKELMANN CJ:

Yes. I think it's at paragraphs 11 and 12 of your submissions.

GLAZEBROOK J:

But you're saying those are wrong now?

MR STEPHEN:

Yes.

WINKELMANN CJ:

Yes, and it would be good to have a correction of them.

MR STEPHEN:

Okay.

GLAZEBROOK J:

But you do seem to agree on the 733,000 figure, is that right?

MR STEPHEN:

There's a subtlety from the Crown's perspective but –

WINKELMANN CJ:

Doesn't that – because you don't know what the private insurance pay-out is?

MR STEPHEN:

No.

WINKELMANN CJ:

So actually it's less than – you know that it will be more than the 700,000 he will receive in return?

MR STEPHEN:

We assume so. I mean we were criticised in the lower Courts for being somewhat imprecise about the numbers, but that was in part because we didn't know what they were despite having asked for them.

GLAZEBROOK J:

So the only thing you don't know though is the private insurance which Mr Young keeps?

MR STEPHEN:

Yes, and after lunch –

GLAZEBROOK J:

Which I had actually written down something different here, but… So he doesn't keep the EQC payment, but he… No.

WINKELMANN CJ:

Were you going to say something else? Was it more than –

MR STEPHEN:

It's my submission that probably now is an appropriate time, but just to foreshadow that, we've done an exercise to see what Mr Young actually received and contrasted that with what he gets which I'm sure my learned friend will find things to trouble him about, but I think the best answer is for us – because we're still slightly up in the air about the pricing – to agree a joint memo.

WINKCJ:

Okay, excellent. That will be good. We'll take the afternoon adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Mr Stephen.

MR STEPHEN:

Thank you, your Honour. Over the break we have identified the evidence of Mr Benge in relation to the – no, sorry, that's the wrong Post-It.

WINKELMANN CJ:

It wasn't a Post-It at all.

MR STEPHEN:

Sorry. It was the proposition that we were advancing, which I now can't find, that the prospects of – yes. So the reference is 201.0233. It's the brief of evidence of Mark Allan.

GLAZEBROOK J:

I'm sorry, that was the reference for the…

WILLIAMS J:

Mr Planner.

MR STEPHEN:

So the question was what prospects the Christchurch City Council would have.

GLAZEBROOK J:

Right, that's what I thought you said.

MR STEPHEN:

Sorry, I should have started with that.

GLAZEBROOK J:

No, no, that's fine.

WINKELMANN CJ:

What paragraph?

MR STEPHEN:

54. The bottom portion which you can read, that: "I consider it more likely than not that CCC would find such a proposal to be sufficiently opposed to the objectives and policies as to warrant decline."

1420

WILLIAMS J:

Was there any contrary evidence, any suggestion – was there no planning evidence called from the other side?

MR STEPHEN:

There was – my learned friend is saying there wasn't a contrary view.

WINKELMANN CJ:

There wasn't? I mean your submissions say there wasn't a contrary view.

MR STEPHEN:

Yes, that's right.

WILLIAMS J:

But was there a planner on the other side agreeing with Mr Allan?

MR STEPHEN:

Again, I'm advised no planner was called.

WINKELMANN CJ:

Mr Fong, do you think would it assist you if you sat there?

MR STEPHEN:

Certainly assist me.

WINKELMANN CJ:

Because this a fact heavy thing, isn't it, the case? So it's just helpful if you've got references for Mr Stephen.

MR STEPHEN:

Thank you. So I propose, because I'm not feeling that well, to be honest, that I deal with compulsory acquisition and concurrent findings and then hand over to Mr Fong, and if need be I can pop up at the end.

WINKELMANN CJ ADDRESSES MR STEPHEN – ABILITY TO CONTINUE (14:21:25)

MR STEPHEN:

So these next couple of points are relatively short. As I understand my learned friend's argument, there was a suggestion either that the effect of the red zone offer was in the form of compulsion, and I've addressed that and I don't think I need to go through it again. It was voluntary, albeit it might have been a Hobson's choice. The second proposition, as I understood it, was that the Crown could have compulsorily acquired the land, and under both the Canterbury Earthquake Recovery Act and its successor, the Greater Christchurch Act, there are provisions that enable the Crown to compulsorily acquire land. They're a bit like the Public Works Act, and if I could just draw attention to tab 1 of the respondent's bundle of authorities it's a short extract of the CERA Act which details the process one would go through to first provide a notification of an intention to take land and then Subpart 5 is the compensation payable. So, as I say, it is possible to…

GLAZEBROOK J:

Is this still in force?

MR STEPHEN:

No.

GLAZEBROOK J:

No. That's what I thought.

MR STEPHEN:

Yes, that's one of the quirks in this is that the – but theoretically, thinking on my feet, the Public Works Act would still apply. You just have to have a public work that justified the compulsory acquisition. There are two principal reasons I submit why resort wasn't had to this. The first is that it flies slightly in the face of the red zone offers which weren't compulsory and, secondly – perhaps there are three reasons – it was really contrary to the scheme of the way in which the Crown was operating, and thirdly the accusation could probably be made that we were simply buying our way out of a nuisance, and then we would get into a bit of a tangle over what the compensation would be.

GLAZEBROOK J:

Would there be a public work?

MR STEPHEN:

No, Ma'am. That's my point.

GLAZEBROOK J:

Yes, that's what I thought.

MR STEPHEN:

Sorry, I should have been clearer. Well, I can't think of one anyway to submit on.

GLAZEBROOK J:

No, that's why I asked.

MR STEPHEN:

And then if you –

WILLIAMS J:

Well, I expect that protecting surrounding properties is a valid public work. I mean it's not for scenic purposes.

MR STEPHEN:

No, but…

WINKELMANN CJ:

Well, that's a whole different factual inquiry. We're not going to be able to resolve it now, are we?

GLAZEBROOK J:

It was why you had the CERA Act in the first place, I think, wasn't it?

MR STEPHEN:

That's right, and to respond to Justice Williams' point, the public work would be to retire the land and make it safe. But anyhow, that wasn't the choice that was made, and then when it comes to determining compensation section 64(2)(a) provides that "in the case of the compulsory acquisition of land, as at the date", it's "as at the date" of the acquisition. So depending on how you view the value of the two houses that are still habitable, it could be said that the land was valueless, in monetary terms, it's clearly valuable to Mr Young.

WINKELMANN CJ:

But valued on a willing buyer/willing seller basis it could be valueless?

MR STEPHEN:

Well, we don't know because we haven't gone through the exercise and I know from past exchanges in the lower Courts that my learned friend would take a different view.

WINKELMANN CJ:

But it's as at the date post-earthquake would be the valuation?

MR STEPHEN:

Yes. Well, it's the date that you start the acquisition period, and there are, of course, appeal rights still. But I'm just trying to put this to bed.

WINKELMANN CJ:

Carry on.

MR STEPHEN:

So the next point, and hopefully my last, is to try to respond, well, to two issues but they're to do with the concurrent factual finding argument that we began with. So to repeat the Crown accepts there is a nuisance but says it's the instability of the cliffs, or at least stemming from them, and in the High Court at page 101.0057…

GLAZEBROOK J:

Do you want to just give the paragraph number?

MR STEPHEN:

Para 110. So the point I'm trying to make is that the Court confirmed that – that's the last or second to last sentence of 110: "I cannot ignore the fact Mr Young's property has been made unstable because of the collapse of the cliff face".

1430

WINKELMANN CJ:

Unusable.

MR STEPHEN:

I'm sorry, yes, "…largely within his own property."

My learned friend took you to paragraph 36, 101.0035, and there, above that, immediately above that paragraph at 35, there's a statement which confirms that 70% fell from the cliff face which lies within Mr Young's property. The evidence was it was 72%, I think. Sorry, I may be…

Then that is adopted by the Court of Appeal which is behind tab 13 at paragraph 16. The second paragraph is the important one: "That was so despite the fact the rockfall risk to date originated primarily from Mr Young's own land."

GLAZEBROOK J:
Sorry, which paragraph again?

WILLIAMS J:
16, second sentence.

MR STEPHEN:
The whole paragraph is relevant, but…

WINKELMANN CJ:
It's also again at Court of Appeal in 39.

MR STEPHEN:
Yes, Ma'am.

WILLIAMS J:
My recollection is the Court doesn't really address the argument Mr Barker's putting about it's all about the push from behind.

MR STEPHEN:
No, because it wasn't argued that way.

WILLIAMS J:
Oh, I see.

MR STEPHEN:
Your Honour was right, I think in a comment made earlier, that the remaining cliff face prevents the clifftop properties from falling while the face is still there.

WILLIAMS J:

Is this where Mr Benge comes up? I think you were looking for your yellow sticky.

MR STEPHEN:

Well, I was going to take – yes. Sorry. But now I've lost Mr Benge.

WINKELMANN CJ:

I'm sure you can find the yellow sticky. Or Mr Fong can.

MR STEPHEN:

In any event, if we could go, please, to an extract from – oh there's Mr Benge. So the relevant page number is 201.0382, and that's a helpful explanation of, based on zones, as to where the rockfall came from and helpfully the percentage from the Crown land versus Mr Young's land. So the findings of the Court are entirely consistent with the evidence.

To reinforce that, again, Mr Benge at 201.0400, lines 11 and 12, in cross. There was an original proposition that the Crown owned 95% of the cliff, and of the cliff face. That's a question, sorry. Line 11: "Would you accept that Mr Young owns a good proportion of the cliff face?" Answer: "Yes, I believe the cross sections identify that." So that doesn't get us through the question of the argument against us that the nuisance emanates somewhere else in the cliff face.

Then because Justice Williams in particular is keen on evidence, if we could please go to 301.0043, and that's the David Ogilvie very thick report.

WILLIAMS J:

0043, did you say?

MR STEPHEN:

Yes, so it's 301.0043, and this is really just a…

WINKELMANN CJ:

We're not quite there yet, I think.

MR STEPHEN:

No, I was just going to say this is just to inform the Court of what the facts were, or what the evidence was. It goes both ways.

WILLIAMS J:

So it does.

WILLIAMS J ADDRESSES THE COURT – TECHNICAL ISSUES (14:37:06)

WINKELMANN CJ:

All right, so that report is so substantial that it's crashed the system.

MR STEPHEN:

Okay, if you could then make a note, it's page 29 of the report, and I'll read it. "8.1 Failure Mechanisms. GNS have identified cliff-top recession and debris avalanches as the primary hazards to the developed areas below Redcliffs, which as they describe involves 'a rapidly rapid type landslide involving many hundreds or thousands of boulders'." So that's the primary hazard, according to the report. "GNS estimate that up to 24,000 square metres of debris fell from Redcliffs during the 2020 February 2011 earthquake, and that the cliff edge recessed by up to seven metres as a result of the 13 June 2011 earthquake event. Based on our survey Davis Ogilvie estimate 21,400 square metres of fallen material and clifftop recession in the order of zero to eight metres."

Then there's a paragraph that contains all sorts of technical things. But importantly, on the following page, page 30, which is 301.0044 – there we are.

WILLIAMS J:

Yes, we're on. 0044?

MR STEPHEN:

Yes. So you'll see at 81 the primary hazard is described as clifftop recession and debris advances – no – avalanches. Then on page 30, which is just the continuation of a preceding…

WINKELMANN CJ:

Can you just show us that photograph there? Are those the houses up the top there?

1440

MR STEPHEN:

The houses hadn't been removed at that stage.

WINKELMANN CJ:

They have now.

MR STEPHEN:

But in fairness to my friends, the paragraph that's at the bottom of the view: "Other likely triggering mechanism include prolonged heavy precipitation resulting in an increase in pore water pressures in open tension cracks within the overlying loess and joints within the underlying rock mass, and progressive weathering of the rock material." So it's combination of both, potentially.

In the hope that we don't crash it again, could you go please to 305.2092? This is really just to orientate the Court, and it's a couple of GNS pictures or figures. So these are schematics of the way the cracks might occur and where they lie. You'll see in figure 26, which is the bottom one, that at least an equal and possibly more are predicted to lie within the cliff face.

WILLIAMS J:

Sorry, point that out to me again? Sorry. Can you just point that out to me again on the page?

WINKELMANN CJ:

We might need that one to be expanded.

MR STEPHEN:

The lines that run through the red and part of the green and the loess at the top which is, I understand it, a sort of soil, represent where the main areas of cracking appear to be.

WILLIAMS J:

Is there a line there showing boundary?

MR STEPHEN:

No, there isn't, Sir, but we've been taken to several – oh, and this is – I should've gone there first, but if you go to 301 – no, 301.0041, again, in the Davis Ogilvie. So the boundary I take it to be the black line. You can see in the south-west corner that there appears to be a significant amount of land within Mr Young's property, but there are, we can see the areas where the Crown also is within it.

WINKELMANN CJ:

It doesn't look on that – oh, so the… Where's been the major recession on that?

WILLIAMS J:

The red.

WINKELMANN CJ:

It's the red? Because it doesn't look like several metres. It looks less than that, but…

WILLIAMS J:

It's a matter of scale.

WINKELMANN CJ:

It's just a matter of scale.

MR STEPHEN:

Yes, I'm not making anything of it by way of submission.

WINKELMANN CJ:

No.

MR STEPHEN:

It goes to the question of where the nuisance might lie, but that's different. This is just about where the factual matters appear to have been determined by the courts and the experts.

WILLIAMS J:

I just looked at cross-examination of Mr Allan on the point of the non-complying activity was – he's not quite as strong under cross-examination on that point?

MR STEPHEN:

No, but he didn't completely concede either.

WILLIAMS J:

No, but he didn't repeat the "more possible than not". He said he was reserving his position because of the status.

MR STEPHEN:

Yes, Sir.

WILLIAMS J:

All right.

MR STEPHEN:

Well, I can't take that any further. It's what it is. So unless there's anything else on those issues, I'm going to yield to my learned friend.

WINKELMANN CJ:

Thank you, Mr Stephen.

MR FONG:

Your Honour, can I begin by just indicating the direction of travel for my submissions. I intend to cover three matters. The first concerns the nature of

liability for the tort of continuing a nuisance and it's an important point that I wish to emphasise because in my respectful submission my learned friend's argument, both on the issue of liability and on remedy, seems to overlook the particular feature of the tort we're talking about and the proposition we'll be advancing is that the wrong to which the common law responds to is the defendant's negligent failure to intervene by way of abatement, and so one of the core issues that the Court has to grapple with in this case is whether the Crown's omission to remediate the cliff can be characterised as negligence. So that's the first submission.

The second matter I'll be covering is the primary relief sought by the appellant. We will be making the submission that taking reasonable care in the circumstances for this case does not require the Crown to undertake an extensive and expensive remedial proposal, the achievability of which is either unlikely or at best uncertain, and for that reason we say there is no basis for claiming the relief sought.

The final matter that I will be addressing the Court on is the issue of the alternative relief sought by the appellant. The argument on behalf of Mr Young is that the Crown should pay damages as the way to discharge its duty. Our submission is that framing is misplaced because it fails to grapple with how the making of the hybrid offer might relate to the duty to abate reasonably, and that sort of answers, albeit an attempt to answer, the Court's question as to why there has to be concomitant obligation on Mr Young's part to sell his land as part of the hybrid offer mechanism.

Now with that in mind can I turn to the first matter which is the nature of liability for continuing a nuisance. As your Honours will know, we've discussed the authorities in some depth at paragraphs 23 to 39 of our written submissions and I don't propose to take your Honours through those materials but what I do want to do is to focus on what we call as the two themes that emerge from the cases and, for the purposes of orienting your Honours, my submissions on those issues start at paragraph 40 of our written submissions.

As your Honours might be familiar from reading the written material, the law of nuisance really has two categories of liability. In the first case we're talking about creating, a defendant creating a nuisance, and this is what some of the cases referred to by my learned friend this morning deals with, like *Fearn v Tate*, *Morgan*, et cetera, and our submission is this case isn't really belonging to that basket.

1450

This case is really about the second category which is where a defendant was not responsible for creating a nuisance but has adopted or continued it, and under this category the defendant's liable for failing to intervene in circumstances that they should have known about the nuisance and that there were reasonable steps they should have taken to abate the nuisance, and so in sum, we say, liability is based on negligence.

WINKELMANN CJ:

When you say they've adopted or continued it, you mean they've adopted it or allowed it to continue?

MR FONG:

Yes.

WILLIAMS J:

That, yes, well, allowing it to continue is the adoption?

WINKELMANN CJ:

No.

WILLIAMS J:

Isn't that right?

MR FONG:

No, "adoption" is more making use of the state of affairs whereas "continuation" is not doing anything about it.

WINKELMANN CJ:

Yes, so it's allowing it to continue. It's omission.

MR FONG:

Yes, that's right, and this is the case about continuation.

Now before I come onto the two authorities I will touch on, I just want to stress this isn't just an academic point because as your Honours will know from the road map prepared by my learned friend, particularly at paragraph 2(b), there is a suggestion that the test is what's reasonable between the two property owners, not a general inquiry into the reasonableness of the defendant's actions, and we say the complete opposite is true in this case because what we are concerned about as we're operating in the realm of negligence, we're concerned about the quality of the defendant's conduct, and so the Court's assessment of "reasonableness" is directed to that question. We're not dealing with the classic case of creating a nuisance where the Court is thinking about whether the effect of the defendant's conduct is unreasonable or not.

GLAZEBROOK J:

I'm not sure you're right on that, and I'm not sure it makes any difference to your argument, but I would have thought it's what is the reasonable response to this, nothing to do with whether the defendant is – well, the defendant, in order to be liable, has to have known about it and then foreseen what the damage was, but isn't the reasonableness question what is reasonable for the defendant to do about it? So the defendant could – because what they say in those cases is if it's really easy to fix it then you should fix it and if it's really, really hard to fix it and too expensive or whatever then something else has to be done or apportionment or something along those lines. So I don't see it as related to how negligent the defendant is but just how reasonable the remediation is.

MR FONG:

My response to that, your Honour, is both the cases and the commentary is quite clear in terms of grounding the liability.

GLAZEBROOK J:

No, no, but we've already said there is liability and it's grounded on that, but then the question is what is the response and what is the reasonable response to that liability.

MR FONG:

Just in terms of clarifying, we accept it would be a duty. We don't accept there is a liability. Liability is only –

GLAZEBROOK J:

Well, same thing, isn't it?

MR FONG:

We would say liability only kicks in when there is a breach and so we say whether – and the Court in determining whether the Crown has breached its duty of care in this case, that's the real question your Honour has to determine.

WILLIAMS J:

It's somewhat circular though, isn't it, because that depends on, the breach depends on what's reasonable? It's the same question in the end. What is a reasonable response tells you about whether the duty has been breached or not, because if it not's a reasonable response it's been breached.

WINKELMANN CJ:

Yes, I think that's what Mr Fong was saying.

MR FONG:

Yes, that's right, and what I wanted to simply emphasise is that the focus is on the defendant's conduct as opposed to striking a broad balance between competing property rights.

WINKELMANN CJ:

So that's what you were rejecting because how Mr Barker put it, you say, makes it sound like you're measuring things between the parties –

MR FONG:

Yes.

WINKELMANN CJ:

– and really you're saying the focus has to be on the reasonableness of what the defendant has proposed to do to address its duty.

MR FONG:

That's right, your Honour. If I could now take your Honour to the two authorities. The first is the second edition of *The Law of Torts in New Zealand* which your Honours can find at tab 15 of the respondent's bundle of authorities. I refer to it because this chapter was authored by the late Justice Chambers who, as your Honours would know, had great expertise in this area of the law. At paragraph 9 –

GLAZEBROOK J:

I'm sure he was an expert on nuisance, actually, but…

WINKELMANN CJ:

On everything, Susan. On everything.

MR FONG

So starting at paragraph 9.4. If we go to the very last word on that page, "there", that is where the sentence starts on, so: "There…" – go into the next page – "There is authority in some circumstances that the presence or absence of negligence is decisive on the question of liability." If your Honours look at the footnotes, 130, it obviously cites two of the leading seminal cases in this area of the law which is *Goldman* and *Leakey*.

Then if we go to the next paragraph on the same page, where Justice Chambers attempts a rational exposition of the law, if we go to line 3 towards the end, his Honour makes the point that: "At least since *Barker v Herbert* a distinction has been drawn between 'the creation of a nuisance' and the 'continuance of a nuisance'."

If we move onto the next paragraph starting with the words: "It will be immediately apparent that the distinction between creating a nuisance and continuing a nuisance is very similar to, if not on all fours with, the distinction between misfeasance and non-feasance in negligence," and then Justice Chambers considers that there is some logic to the distinction made.

Then if we move a bit later in the same paragraph on the same page, three lines from the bottom, there, it is stated that: "Until *Goldman v Hargrave*, the tendency was, in 'continuance' cases, to say that liability depended on a knowledge of the state of affairs and a failure to take reasonable steps to bring the state of affairs to an end." The next sentence tells us: "The modern tendency is to use without qualification the language of negligence."

The same position is reached in the current or the latest edition of *Todd on Torts* which your Honours can find in the next tab, tab 16. This is now written by Professor Bill Atkin from the University of Otago. If we go about four pages in –

O'REGAN J:
Victoria.

WILLIAMS J:
I think he's from Victoria.

MR FONG:
Victoria, my apologies. At page 570. So tab 16 of the respondent's bundle about four or five pages in. Next, the page after this one. The next page. On the screen. Oh, this page appears to be missing…

WILLIAMS J:
No, it's there.

WINKELMANN CJ:
What page are you looking for?

MR FONG:

570. Oh yes, that's 570. So the professor makes a distinction and made it stark which is between what the two different torts are really talking about. The nuisance, if we – three lines down the paragraph, says: "The nuisance standard of unreasonable interference is not the same as the negligence standard of unreasonable conduct in the face of a foreseeable risk of harm." If we move about three lines down there, it says: "In nuisance the court is not concerned with determining what is an adequate level of precaution." That, however, can be contrasted with the tort that we're dealing with here, which is the next paragraph, where the professor says: "The label 'nuisance' has also been applied to situations which lie outside the traditional boundaries of the tort. Where the…plaintiff's complaint is that the defendant has 'adopted' or 'continued'" a nuisance, "…'fault' in the sense of failure to take reasonable precautions against a foreseeable risk of harm is an essential element of liability and the actions of nuisance and negligence overlap."

GLAZEBROOK J:

What do you say the reasonable precautions that the Crown has taken here are?

1500

MR FONG:

I will come onto that, but just to flag the nature of the answer, your Honour, faced with hazard like an unstable cliff, there are really just three options in terms of how you deal with it, and this is discussed in Dr Kupec's evidence. Either you remove the hazard in its entirety which is essentially the plaintiff's original remedial proposal advanced at trial which was rejected by the trial judge and abandoned on appeal. The second option is to install some sort of protection works between the hazard and the plaintiff's property which is what the Crown's remedial solution is trying to – well it's attempting to achieve, but we say even on –

WILLIAMS J:

The Crown's? You mean the plaintiff's?

MR FONG:

The Crown, the Kupec –

WILLIAMS J:

Oh, it's not your remediation option. You don't have a remediation option.

MR FONG:

No, well, it's the evidence that is used by us.

WILLIAMS J:

It's the evidence of your expert.

MR FONG:

Correct, and we say that's also not reasonably practicable given the uncertainty which affects whether that plan can be consented. That leaves us in these circumstances with the only other way to really abate the nuisance, which is to move away.

We say what the Crown did in this case is to offer an opportunity for Mr Young to move away through the hybrid offer, and that, we say, is how the hybrid offer is connected with a duty to abate reasonably.

GLAZEBROOK J:

I still don't understand that as being anything other than providing some kind of compensation which assumes there is a duty, but that it's not practical to do anything with it, but as I said, it probably doesn't matter. It's just that I can't quite see this as being – because the duty is to abate the harm.

MR FONG:

Reasonably.

GLAZEBROOK J:

Reasonably.

MR FONG:

So if –

GLAZEBROOK J:

So the argument has to be that the first two aren't practical. Anyway, I don't think it matters, but I just can't see this as part of the taking away the duty or the liability.

WINKELMANN CJ:

So the Crown could defend this on the basis that it has a duty, but the only thing they can do to meet the duty is unreasonable to impose upon it in all the circumstances. Could it have argued it on that basis, applying the kind of *Leakey*, *Goldman v Hargrave* analysis, that there may be a duty, but what would be taken to address the continuing nuisance is too great, too much?

MR FONG:

That's right, and that's the basis on which the Crown said both the remedial solution proposed by the plaintiff and the Kupec design. That's why we made the submissions in the courts below that the Court shouldn't adopt it and that the Crown shouldn't be liable for implementing it. So your Honours are faced with a situation where what does the *Leakey* duty require?

WINKELMANN CJ:

So in the case law, when the courts find that, say it was a situation where that red zone offer hadn't been made, but there was something, some enormously expensive thing to fix on the Crown's land and the Court said, no, that's too much in all the circumstances to impose, we're not going to do that, does the Court then proceed to do something less or does it just then give no remedy?

MR FONG:

As Justice Glazebrook mentioned this morning, in *Leakey*, Lord Justice Megaw said, well, just because there's a duty, inaction doesn't mean there's a breach. So on that view, the Crown has nothing else to do. But it seems to me in the handful of cases in more modern times, the courts are more reluctant to adopt that approach, but for understandable reasons, what the Court requires in those

cases are very, very modest duties which include either a duty to warn the plaintiff about the risk or allow the plaintiff to come onto the defendant's land to implement whatever design they might wish to carry out.

If it's convenient, your Honour, it might be a good juncture to turn to the *Holbeck Hall Hotel* case which addressed this particular issue. Your Honours can find that case in the appellant's bundle of authorities at tab 7. Your Honours will be slightly familiar with the facts, both from the summary and the Court of Appeal's judgment and in our written submissions, but essentially the plaintiff's house sits on top of a cliff; the council owns the land under the cliff that was subject to marine erosion and as a result the cliff collapsed. The hotel brought a claim at first instance which prevailed but was overturned on appeal.

Now as my learned friend, Mr Barker KC, mentioned, that the case was largely resolved on the basis of foreseeability but that doesn't mean the Court didn't comment on the facts as relevant to the *Leakey* line of cases.

If I could just take your Honours to paragraph 21 first in that judgment. There the Court made the observation – at paragraph 21. Yes. So the Court made the observation that an unusual feature of this case was that the hazard existed on both sides of the boundary and that, on the Crown view, describes the facts of the present case.

Then if I could take your Honour then to paragraph 46, His Lordship made the observation that this "is a case of non-feasance". So this is the language that Justice Chambers also used in his text. The council "have done nothing to create the danger which has arisen by the operation of nature. And it is clear that the scope of the duty is much more restricted."

Now if I could then turn to paragraph –

WINKELMANN CJ:

Yes, because I suppose what the question is is the scope of the duty to remove the nuisance or is it to compensate for the harm done by the nuisance if it's not capable of being remedied?

MR FONG:

Well, the latter would have to assume the defendant is liable already and we say that's jumping ahead in terms of analysis. The Court has to first determine whether the Crown or the defendant in not undertaking any remediation is itself a breach of the duty. So if we go to paragraph –

GLAZEBROOK J:

It's a very odd situation where the duty depends on what's reasonable to remediate. I mean I would prefer to look at it in terms of the remedy is what's reasonable because you've breached it as soon as you have foreseen it and not done anything.

MR FONG:

But of course that has to assume the nuisance is capable of being remedied because on the authorities the –

GLAZEBROOK J:

Well, that's probably true but just about anything is going to be capable of being remedied. It just might cost an awful lot of money to do so.

MR FONG:

Yes, and –

GLAZEBROOK J:

I mean in this one to put up a huge sea wall or something of that nature. But it just seems a very odd thing to be asking what's reasonable to do because you can land up saying, well, nothing's reasonable and therefore that's absolutely no reason to do anything about it, which gets a bit like futility, I think, and if it's

not futile – well, that's what those cases seem to be saying, that that futility should be a really, really high standard.

MR FONG:

And I will come onto those authorities but again I –

GLAZEBROOK J:

But I'm not sure that it actually matters for the Crown's argument because the Crown's argument, isn't it, is that none of these were feasible apart from the red zone offer and the red zone offer has to be looked at in the context, as Mr Stephen was arguing, I think, of the whole statutory and other aspect of the earthquake and the response to the earthquake?

1510

MR FONG:

Quite correct, except the only point I want to stress is, and this comes across very clearly in the authorities, which is that the defendant is not liable simply because a nuisance exists. The whole reason for the distinction between creation and continuance is that the defendant wasn't liable – it's not responsible for causing the nuisance, and so the Court has to identify the fault element in the defendant's conduct.

GLAZEBROOK J:

Isn't the fault knowing about the nuisance, foreseeing the damage, and not doing anything about it? Unless it would be totally futile to do something about it.

MR FONG:

I wouldn't put that that high because the standard is still reasonableness, so if your Honours find that it's unreasonable in the circumstances to carry out these –

GLAZEBROOK J:

Well, then you say there's no liability at all, and not even the red zone offer was needed, don't you? That's the logical extension of your arguments.

WINKELMANN CJ:

I think Mr Fong accepted that from me actually earlier, didn't you, that the Crown could be saying that?

MR FONG:

It could be, but the reason I'm taking your Honours to this case is that the Court seems to say, well, the defendant can't say you can do nothing at all. There's still something that potentially could be done and –

WINKELMANN CJ:

Because when you've got a nuisance where you create then you pay the plaintiff for the harm that your nuisance has caused. That's reasonably straightforward. But here, this is a situation where you were not responsible for setting the nuisance running in any way, and the law is effectively that the defendant will only be responsible for those nuisances in that category, where they really reasonably can do something to stop it. So the liability arises not from the nuisance's existence but actually from their failure to do that which is completely within their power.

MR FONG:

That's correct.

WINKELMANN CJ:

The case law is to do with very simple and low-cost remedial things like putting the tree out, the fire in the tree out. So it's a different basis of liability.

MR FONG:

Yes.

WILLIAMS J:

So the question then becomes of the three options, is there any other than the third that is reasonable? I guess your argument is, well, that was for Mr Young to establish, and in the absence of establishing it, Mr Allan's view as to option 2 is what prevails, which is less likely – well, more likely than not that it would be refused. I've lost you, haven't I?

MR FONG:

But that's an inability on my part, Sir, if you could repeat –

WILLIAMS J:

No, no. It's three options. The Ogilvie option, the Kupec option, the move out option. You say the move out option is the only reasonable one?

MR FONG:

That's right.

WILLIAMS J:

Therefore, this duty is not breached.

MR FONG:

That's right.

WILLIAMS J:

So issue arises. Everyone seems to agree that the first option is not reasonable. Issue arises about the second one, and I guess you have to argue that in the absence of positive evidence from the other side, that consent was sufficiently in prospect for it to be a reasonable option, wasn't established, and you're stuck with Mr Allan who says more likely than not that it would be declined.

MR FONG:

That's right.

WINKELMANN CJ:

Can I just say, it seems to be a reasonably fundamental point, the point that I was just exploring with you before, because if you were prepared to impose quite substantial obligations on people to address things that are set running on their land that they have no control over, it could be it's quite a reworking of the law –

MR FONG:

That's right, and –

WINKELMANN CJ:

– private law because – and the case law is quite particular, isn't it? That you really, in this area, you're proceeding very cautiously and you're only imposing very reasonable obligations on people, simple acts, things that can be simply addressed. Seems to me.

MR FONG:

Precisely, your Honour.

WILLIAMS J:

I'm not sure I agree with that.

GLAZEBROOK J:

I'm not sure that is what the case law is saying. It's saying that you look at what the means of the defendant are, et cetera.

WILLIAMS J:

Yes, look at the context.

WINKELMANN CJ:

Yes, well, we can hear you on that. We're reading the case law differently.

GLAZEBROOK J:

I mean I'm not suggesting the Crown is looking at the bountiful means, but they seem to be saying that you do look at what's reasonable in the particular and individual case, but you don't have a generic thing that says this – well with

something like as simple as putting a fire out, then, you might say, well, that applies to absolutely everybody because that's incredibly simple, but once you look at more complicated things, you then look at more tailored solutions which might be sharing liability, which might be looking at the means of the defendant, et cetera, and the practicalities involved.

MR FONG:

Yes, and we accept that. Your Honours, when you come to review our submissions again, even though the fourth theme that we've identified is the idea of modesty, we're not suggesting that the common law would only respond whenever the response is modest, but we say that general pattern makes sense given the duty is constrained by the concept of reasonableness, and –

WINKELMANN CJ:

Yes, the point I was trying to make is that if there are – you know, this case is about an entire hillside moving and we'd have to move pretty carefully in the zone of making someone personally responsible for stopping a whole hillside moving, when they didn't set the hillside moving.

MR FONG:

That's right. So coming back to the question is what did the Crown do wrong in this case, and that's ultimately the question the Court has to decide and we say the pleaded case is that the Crown has failed to remediate the instability. Our response is there are no reasonably practical means of fixing the instability and so the logical conclusion would be if anything the Crown is liable to do it has to be something that falls well short of either doing or paying for remediation.

WINKELMANN CJ:

So that's where I came in with my question. In this particular category of nuisance are there cases that say when you couldn't take reasonable steps to remediate you should be liable for damages to some extent?

MR FONG:

Yes, not for damages yet but that was the reason I was taking you to the *Holbeck Hotel* case. So we're at paragraph 53, if I may take your Honours to it. Four lines down, paragraph 53, the English Court of Appeal describe the remedial scheme that is being imposed on the Crown at trial which would cost about £500,000 and would've affected a substantial part of the hotel grounds, and your Honours will see from paragraph 37 of our written submissions that that works out to be about 1.7 million New Zealand dollars today, so not too far apart from the sum that's being pressed by Mr Young in this case.

If we then go to paragraph 54, there the Court of Appeal begins by addressing resolving the issue based on their concept of foreseeability but Their Lordships go on to say at line 4, starting from the middle: "It may also have been limited by other factors, as the passages from *Goldman's* case and *Leakey's* case cited [earlier], so that is not necessarily incumbent on someone in [the council's] position to carry out extensive and expensive remedial work to prevent the damage…"

Now we then come on the point the Chief Justice has been asking me: well, what happens then? The Court then say: "The scope of the duty may be limited to warning neighbours of such risk as they were aware of or ought to have foreseen and sharing such information as they had acquired relating to it." So that's one example where remediation is not reasonable or practicable but the Court says, well, there is still a duty to give a warning.

The Court makes the same point then at paragraph 58 which I won't read out.

WILLIAMS J:

So what do you say therefore it – I'm not sure I agree with the "what did the Crown do wrong" but what would a reasonable Crown do in these circumstances?

MR FONG:

What the Crown did reasonably, in our submission, is to offer an opportunity, a realistic opportunity for Mr Young –

WILLIAMS J:

Yes. No, I'm not saying what did the Crown do. I'm saying what would a reasonable Crown do, and I think you're driving at the proposition that a reasonable Crown would warn Mr Young. Really?

GLAZEBROOK J:

Well, this wasn't a very –

WINKELMANN CJ:

No, he's not. He's not.

O'REGAN J:

Let him answer.

WILLIAMS J:

Can I get an answer?

O'REGAN J:

Just let him answer, yes.

MR FONG:

Well, what we say in our submissions is that we did warn Mr Young of the risk.

WILLIAMS J:

Yes, I'm not talking about the facts. What would a reasonable Crown do? What's the standard? I'm not sure whether you're saying that simply notifying per *Holbeck* et cetera was all that the Crown was required to do and therefore the red zone offer is a gratuity. Is that what you're saying?

1520

MR FONG:

We're saying that's one way the Court could resolve the issue.

WILLIAMS J:

What are *you* saying is what I want to know.

WINKELMANN CJ:

He's answering my question is what he was saying. I was asking him –

WILLIAMS J:

I haven't had an answer to my question yet.

WINKELMANN CJ:

No, no, I'm just going back to where we were. I was asking Mr Fong what is the basis for liability under this head, because if the duty is to remediate if it's reasonable, and it's not, the remediation is not reasonable, then how is someone liable to make any kind of compensatory payment, and he was taking us to this case. He wasn't saying that was what the Crown was obliged to do here. He was showing us the early discussion in the case law that he had –

WILLIAMS J:

Right, so my question was –

GLAZEBROOK J:

It was in a very particular context, this case. It was because they didn't know the extent of the damage without doing extensive geological investigation. So it was a very particular case, wasn't it, this one? So you're not saying it's a generic issue. It's –

MR FONG:

No, no, as your Honours have emphasised both this morning and this afternoon, it's a fact-sensitive enquiry and we don't dispute that. But –

WILLIAMS J:

So what do you say is the Crown's responsibility? I'm not asking you what the Crown did. I'm asking you what you think the standard is that the Crown must meet to avoid breach of the duty.

MR FONG:

In this particular case, we say, is to provide a reasonable opportunity for Mr Young to move away from the hazard because that's the only way one could deal with the nuisance, so to speak.

WILLIAMS J:

But that is a substantial cost.

WINKELMANN CJ:

Yes.

WILLIAMS J:

That's, you know, getting up there, close to the 1.7 mil. Yet you say that's what they were eschewing?

MR FONG:

We're not saying the Crown has the duty to make the hybrid offer. We're saying that the duty might include the Crown providing an opportunity for Mr Young to move away and to make –

WILLIAMS J:

What's the minimum? I need some clarity here. What's the minimum duty?

MR FONG:

I can only operate on the facts of this case which is that what the Crown did here more than discharged the duty. I think I have to accept your Honour's point which is the logical implication of my submission is that the Crown's duty extends no more than warning, providing a warning and potentially allowing access for Mr Young into his own property.

WINKELMANN CJ:

Yes. Because I should make clear that I'm not satisfied, notwithstanding the Crown's concession, that it should have made the offer, that in fact, there is anything beyond an obligation to remediate, if it's reasonable, warn or allow access. So I'm not sure that there is an obligation to make good the loss, failing that, you know, so –

MR FONG:

No, and we've tried to strike a balance, your Honour. In our submissions we've made it quite clear that the Crown doesn't have a duty in tort to make a hybrid offer because that clearly is a massive public policy. The submission that we've advanced –

WINKELMANN CJ:

Is if it has any responsibility, that must make it good.

MR FONG:

Yes, that's correct, your Honour.

GLAZEBROOK J:

Or is it just that whatever that was, it was certainly enough to deal with any breach of duty?

MR FONG:

That could be another way to look at it. The only hesitation, your Honour, and we've talked about this a few times, my hesitation is –

GLAZEBROOK J:

No, no, I understand your argument about what breaches a duty and what doesn't.

MR FONG:

Yes. That's right. Our primary position is that there is no breach.

WINKELMANN CJ:

Why I said that, about I'm not sure about this obligation to pay damages, is going to back to that earlier point which it could have very widespread implications.

GLAZEBROOK J:

That's your third point, isn't it? You're coming to that, aren't you, the damages?

MR FONG:

That's right. That's the alternative relief.

O'REGAN J:

We're getting a bit short of time, I think.

WINKELMANN CJ:

Yes.

MR FONG:

So our written submissions on that point starts at paragraph 62, just to give your Honours a reference in terms of what we're dealing with. Can I begin by just distinguishing the two cases that my learned friends have cited which is the *Fen Tigers* case and the *Grocott* case? Starting with the *Fen Tigers* case which is at tab 33 of the appellant's bundle of authorities. So this is clearly a case of creating a nuisance by permitting motor sports at a stadium and my learned friend took you to the *Shelfer* test which your Honours can find in a section starting at paragraph 100. So that's where the section begins, but perhaps it's more instructive to look first at line 1 of the next paragraph, paragraph 110, where Lord Neuberger said where a claimant has established that the defendant's activities constitute a nuisance, then the prima facie remedy would be an injunction. So because we're dealing with a creation case the fact that the activity constitutes a nuisance almost completes the course of action subject to damage. But that's not necessarily the case in a continuance case. The fact that there is a nuisance is very far from completing the circle in terms of making the defendant liable.

Now if we could turn to paragraph 104 which is part of the *Shelfer* case, Lord Justice Smith begins by saying a person by committing a wrongful act is not entitled to ask the court to sanction his doing so by purchasing his neighbour's rights. The operative word, of course, is "committing a wrongful act" and this comes back to the Chief Justice's point as well: what's the wrongful act here? The authorities say it must be the negligent omission. So unless the Court finds that the Crown was negligent in not remediating the cliffs then these authorities don't really bear on the issue the Court has to decide.

The same goes for the *Grocott* case which is at paragraph 32 of the same bundle. Again, your Honour, this is a creation case. The facts are a bit limited in this reported version, I think, but the point is some damage has already occurred and the injunction seeks to prevent future damage, and your Honours can deduce that from the first paragraph of Justice Cooke's judgment which says there was "very strong probability that there would be further slipping", and if we could go across the page where his Honour referred to *Spry's Equitable Remedies*, I won't start from the top but if we turn over the page at 589, at line 3, the learned author says: "In particular, it lies ill in the mouth of a defendant who is presently, or may subsequently, be guilty of wrongful behaviour to assert that an injunction should not be granted because it won't confer upon the plaintiff the benefit which he seeks." Again, the emphasis is on the "wrongful behaviour" and I repeat the point in this case, that the "wrongful behaviour" is almost complete, the fact that the activities constitute a nuisance. Ordinarily, you would probably have a course of action completed already, subject to damage occurring, but that's not the case we're dealing with here.

So if my learned friends are right that the payment of damages is the way to discharge the Crown's duty, what the Court would effectively be saying is that the Crown is under strict liability for nuisance caused by the operation of nature.
1530

The second point, of course, as your Honours have alluded to already, is it will have significant policy implication. As your Honours will know, the common law, particularly the law of negligence, is generally but not invariably opposed

to imposing liability for omission precisely because of the tendency not to impose a positive obligation on defendants, and accepting my learned friend's argument on the alternative relief would reverse that established understanding at common law.

WILLIAMS J:
It's not that uncommon in negligence for negligent parties to be found liable for omission.

MR FONG:
No.

WILLIAMS J:
There's a whole body of work on compensation law based on it.

WINKELMANN CJ:
Still (inaudible 15:30:57) principle.

MR FONG:
That's correct, but the common law is quite careful in limiting the circumstances in which liability for omission might arise. But the point I'm saying is – I'm not saying there's no liability for omissions, per se. Clearly, the common law visits liability on defendants sometimes for negligent omission. All I'm saying is that it would seem to contradict the flow of the common law if the Crown is found liable to pay damages basically for the damage done by the earthquake.

So the last point I really want to make is if your Honour accepts my framing of the issue which is the Crown did what was reasonable in the circumstances by offering a way out for Mr Young, it follows logically that Mr Young can't simply accept the payment of the hybrid offer without the concomitant obligation to leave his land because the whole point of the duty that could be achievable in the circumstances is to move him away from the hazard. It would defeat the entire spirit of what the *Leakey* duty about if Mr Young simply stays within the

danger zone, albeit receiving a sum of money from the Crown which he may or may not use for remediating the cliffs.

WINKELMANN CJ:

So if it wasn't the Crown and it was just the property owners at the top, they're not likely to make that concession. I mean, I'm just keen that the Crown's position not distort the law in relation to what people's obligations are.

MR FONG:

Yes, that's right, and if anything, they would be subject to a lesser duty because one can imagine if one were to subjectify the standard of care, it seems difficult to accept the proposition that the clifftop owners would have to expend a large sum of money to remediate the cliffs.

WINKELMANN CJ:

Because really what the Crown has offered is not really – it's its general policy approach in Christchurch. It hasn't really constructed this offer to respond to allowing a continuing nuisance, it's part of its general offer.

GLAZEBROOK J:

But that might make it reasonable in the circumstances as a response to this, I suppose, is part of the argument.

MR FONG:

That's right.

GLAZEBROOK J:

So that's within the general policy framework of what's been happening elsewhere, and in fact, it might be unreasonable if the Crown refused to apply it in these circumstances.

MR FONG:

Yes, and I think that's –

GLAZEBROOK J:

Which doesn't make it reasonable for anyone else. It just would've made it unreasonable for the Crown because of the general policy background.

MR FONG:

Yes.

WILLIAMS J:

I thought you were driving an argument to say that this is a matter of government policy, not private law at all.

MR FONG:

That's the primary argument which is what the Chief Justice has put to me, which is the Crown's duty is limited to providing a warning, facilitating access. If the Court is with me on that point, then the hybrid offer only –

WILLIAMS J:

Is by-the-by?

MR FONG:

That's by the by in the sense that the Crown is adopting a consistent approach, adopting an area-wide solution to an area-wide problem. The fallback argument is the one identified by Justice Glazebrook which is in totality, taking into account all the different factors referred to in the authorities, the Crown's response was a reasonable one, but with the caveat, if your Honour comes to that conclusion, that the caveat is that we're not saying the common law of torts would require the Crown to make a specific monetary offer.

GLAZEBROOK J:

No, I was really saying that in the context it would've been unreasonable not to, but that's nothing to do with what would be the obligation had there not been a Christchurch-wide response, red zone response.

MR FONG:

Yes, and that's based –

WINKELMANN CJ:

Mmm, that's in that context.

GLAZEBROOK J:

Yes.

MR FONG:

So in terms of my submissions, that's where I plan to stop unless your Honours have any questions and subject to my senior…

GLAZEBROOK J:

Can I, you said you were dealing with three things. I just want to make sure we haven't – I didn't jump you to the damages one when you had something in the middle to deal with, because I did say, so just – I think you have dealt with them.

MR FONG:

So the only thing that I might have skimmed over is the second proposition about the fact that taking reasonable care in the circumstances doesn't entail the Crown undertaking the Kupec design, and I'm not sure if I can take your Honour further on this.

GLAZEBROOK J:

No, I think you have made that point.

WILLIAMS J:

What about the idea of contributing to it?

MR FONG:

So the answer to that would be that that assumes that there is a duty to remediate when the evidence, the only evidence before the Court, is that it's more likely.

WILLIAMS J:

So there is no duty to contribute to protection of the property beyond removal? Well, even that's not a duty. That's a matter of a policy.

GLAZEBROOK J:

Well, no, but you're saying just on the facts it's because –

MR FONG:

Yes, that's right.

GLAZEBROOK J:

– because if the Kupec proposal, I'm assuming, if the Kupec proposal was one where they said: "Oh, yes, planning consent would be easily given for this," the issue then would be how much of a contribution would be reasonable.

MR FONG:

Yes, that might well be right, your Honour.

GLAZEBROOK J:

But because it's – as I understand your argument is because the Kupec proposal isn't reasonable, because it is unlikely or more likely than not…

WILLIAMS J:

To fail.

MR FONG:

That it'll be declined, yes.

GLAZEBROOK J:

Sorry, we're going to get – not to get consent.

MR FONG:

Yes.

WINKELMANN CJ:

So you would say the Court of Appeal failed to do that preliminary point, possibly because of how it was argued no doubt which was forming a view as to whether the remediation proposal was reasonable, the Kupec proposal. Well, I don't know actually.

WILLIAMS J:

Yes.

GLAZEBROOK J:

Well, you say it wasn't on the facts.

WINKELMANN CJ:

Yes.

MR FONG:

Yes, as –

GLAZEBROOK J:

It wasn't reasonable on the facts.

MR FONG:

That's right. That's been the consistent submission or position maintained by the Crown throughout the proceedings.

GLAZEBROOK J:

And if it was going to get consent then the issue might be whether it nevertheless was reasonable to spend that amount of money?

MR FONG:

That's correct, and your Honour is – we do have a section in our submissions dealing with that.

WINKELMANN CJ:

What section is that, Mr Fong? Can you give us the paragraph reference?

MR FONG:

If I could just find…

GLAZEBROOK J:

But that might just have been an issue of how much contribution might have been reasonable to make.

MR FONG:

That's right. Your Honour can find my alternative submissions on that point from paragraph 56 to 61.

WILLIAMS J:

That's about the design rather than the Crown contribution, should there have to be one. I mean it's a matter for the land owner to decide what they do. The only question, if we've got that far, is how much the Crown's cheque should be.

MR FONG:

Yes, but the authorities also seem quite clear in saying the obligation to contribute would only kick in assuming the works have already been done.

WINKELMANN CJ:

Actually it's paragraph 51 on I think you wanted, not 56.

WILLIAMS J:

Why would that matter?

MR FONG:

I think for two reasons. Well, one reason would be it can't be simply an obligation and pay across a sum of money. It's the idea that it has to be linked. The obligation to contribute must be linked to the works having been undertaken.

1540

WILLIAMS J:

Yes, well, that's the conclusion. The question is why? You can see why it has to be linked to works proposed or undertaken, but why need there be more than that? Anyway, perhaps that's just by the by.

GLAZEBROOK J:

Well, but if the duty is to remediate one would assume that just paying a sum of money for no remediation either doesn't meet the duty or is for something totally unrelated to the nuisance.

MR FONG:

Yes, or be unprincipled for the law to require that result because there won't be a connection between the duty to abate and the payment of the money unless, unless the –

WILLIAMS J:

If I crash my car I get the cost of remediating it. Whether I remediate it or not is irrelevant.

O'REGAN J:

That's because your insurance policy says that.

GLAZEBROOK J:

Well, it wouldn't be good policy anyway because then you're just, like the leaky homes, passing on the actual problem right down the line.

MR FONG:

I think another answer to that question would be in that factual scenario the defendant would already be liable.

WILLIAMS J:

Well, that depends on whether I was driving properly or not.

MR FONG:

But I guess what I mean is that the damages, the payment of damages would only make sense if the defendant has breached the duty.

WILLIAMS J:

Was at fault, yes.

WINKELMANN CJ:

I think we're going round in circles now.

MR FONG:

Yes, your Honour, I don't –

WINKELMANN CJ:

So, Mr Fong, would – costs. Does Mr Stephen want to address us on costs?

MR FONG:

The costs appeal, your Honour, or…

WINKELMANN CJ:

No, not the cost appeal.

ELLEN FRANCE J:

Costs in this Court.

WINKELMANN CJ:

Costs in this Court. Mr Stephen probably wants to address us on that.

MR STEPHEN:

We say that costs should follow the event, so we seek them.

MR FONG:

Unless your Honours have any questions, those are the submissions for the Crown.

WINKELMANN CJ:

Thank you, Mr Fong. Mr Barker.

MR BARKER KC:

Thank you, your Honour. I want to start with just a response to that point that you were just discussing before about the Kupec design, its consentability, because it's one of the, we would say, deep unfairnesses that run through this case that for years Mr Young – well, just to give you the references in my outline I gave you, so at paragraph 1(e), this point which we skipped over a little bit – but for years Mr Young asked the Crown to do something about remediation, about the cliffs, and they refused to do so. At the same time they go off and do these works along the Moa Cave road and Peacocks Gallop further down the road and so on and so forth, and then they come along later and say: "Oh, well, actually, yes, we agree you can in fact do some remediation works. We're going to put forward the Kupec design. But too bad, it's gone, too late, the plan has changed and we can't do them now." So it is one of these deep unfairnesses that is in the case that there was, in fact, a remediation strategy which would have been unobjectionable on every level. The problem is now that because the District Plan has changed it causes some difficulties with it, but, as we said, we don't think they are as extensive as they are made to appear, and I've – it's what I think Justice Williams maybe picked up on, the cross-examination, I did think that while I didn't get him to wind back the statement, I think it certainly did qualify the certainty with which that consentability issue was advanced, and on that point I was asked –

GLAZEBROOK J:

What are we supposed to do with just an assertion from the bar that the problems aren't as heavy as has been indicated under the new district plan?

MR BARKER KC:

Well, I think that we are with the – I think we can look at Mr Allan's evidence and say is that really evidence that would meet the standard of, I suppose, futility? Really that high standard. It's not possible to get this consented and done.

GLAZEBROOK J:

Well, you then have to convince us the standard is "futility", not "reasonableness".

MR BARKER KC:

Yes, and I think that it certainly is very far from saying that he's got on –

GLAZEBROOK J:

Well, but whichever way you conceptualise it, whether it's Mr Fong's conception of there's no liability if there's nothing reasonable, or what I'm saying is you look – you say there is liability but you then look at what is reasonable, on either of those analyses you don't have "futility" there. It's "reasonableness".

MR BARKER KC:

Yes.

GLAZEBROOK J:

And is it reasonable – well, I think Mr Fong would say it's not reasonable in these circumstances given the major risks that are involved at any event, and that the –

WINKELMANN CJ:

Uncertain rewards.

GLAZEBROOK J:

– it's unlikely to be consented. That's not a reasonable response.

MR BARKER KC:

I think we'd probably respond that, is it reasonable to pursue that as an option because it offers the ability to save this land.

WILLIAMS J:

It didn't help that you didn't have any contrary evidence.

MR BARKER KC:

No. No. I mean, there was no contrary evidence, I accept that. The extent of the evidence is what was given by Mr Allan in the cross-examination of him.

GLAZEBROOK J:

Okay, so you're saying it's not futility. We'll go away from that then. You say that the question is, is it reasonable to pursue that as an option?

MR BARKER KC:

Yes.

GLAZEBROOK J:

And you would say yes because there's still a chance that it could be consented?

MR BARKER KC:

Yes, there's a realistic chance, and I think when you – I was also asked by – if we can call up document 307.3129. This is from the slideshow I took you to earlier.

GLAZEBROOK J:

So just to check, the difference would be Mr Fong would say it's not reasonable to pursue that as an option or at least to require that to be pursued as an option because it's unlikely to be consented, yours is, there is still a realistic chance it could be consented even if it's more likely than not it won't be, and therefore, it's reasonable?

MR BARKER KC:

Yes. Add to that also consider why we're in this position to start with, and that is –

GLAZEBROOK J:

Why what, sorry?

MR BARKER KC:

Why we're in this position to start with is because the Crown refused to even consider remediation until we get to this trial, and in that period, the district plan was changed to create the obstacle. Because absent the district plan we'd be in that situation that you were putting to my friend Mr Fong about, we could do the remediation strategy but how do we share the cost of it.

GLAZEBROOK J:

But I mean the difficulty with that is that the district plan is put that way because it thinks it's far too dangerous to be doing this sort of stuff post-earthquake under cliffs.

MR BARKER KC:

But of course, that the Crown was. All the remediation work is actually –

GLAZEBROOK J:

Well it was because it had a major road that it had to do something about that presumably even the district plan might've taken into account if you were going to cut off a whole suburb. I think you can go back up over the hills, can't you, but – I'm actually not sure you can because you can't get down, can you?

O'REGAN J:

Anyway, it doesn't matter.

WINKELMANN CJ:

Mr Barker, can I change the subject? We heard from Mr Stephen about the hybrid offer and that it was uncertain what that would be worth to Mr Young. If you're asking us to take into account – if you're challenging the reasonableness of what that offer would be for Mr Young, is it not incumbent on you to tell us what the insurance portion of that is for Mr Young? Is there evidence on that? Should you have put evidence in on that?

MR BARKER KC:

This comes back to the point that the red zone offer was just not an issue at trial. The actual offer wasn't even in the bundle at trial. It was something that

was, as I said, one paragraph in the closing submission. It was picked up by her Honour as being – it was picked up and run in the Court of Appeal by my friends. So it was not an issue, so none of it is there.

WINKELMANN CJ:

Okay.

MR BARKER KC:

So where we got to with this problem is that after the trial, we said to them, well, what is the offer that you are making? Then we had a letter saying this is the offer, so we calculated that offer, and that's the number we get, the 1.2. It's been clarified that actually, no, it's also the insurance proceeds which we told them. That was actually known at trial because Mr Young was cross-examined about the insurance proceeds he'd received, how he'd apply it, and what he was going to do with them, et cetera, because one of the benefits of this all to him is if he can get into this property is that one, he's got the insurance proceeds on 4 and 5, but two, he's in the EQC programme that allows you to get the top-ups if your indemnity value wasn't enough to in fact reinstate. So he's got this thing that can be opened up to him to in fact turn these houses back into liveable houses. That's actually the point that Mr Young wants me to emphasise to the Court and why I asked this document to come on because if you –

WINKELMANN CJ:

So he's got EQC payments already beyond the top-up ones as well?

MR BARKER KC:

He's got the standard land claim, but his problem was always that it was only one plot for EQC, so although he had a five-lot subdivision, it was one plot. So he sued them for that and got some uptick on that from it being –

WINKELMANN CJ:

What is the kind of level of that?

MR BARKER KC:

I think the land was 570 and then I think the improvements were around 200. 1550

WINKELMANN CJ:

And if he gets back in he can get the accelerator…

MR BARKER KC:

Yes, so that sort of top-up when your indemnity value on your house isn't enough to cover it, you can go back to EQC and get the On-Sold programme.

O'REGAN J:

So what did you want us to take out of this slide?

MR BARKER KC:

So just on this, so this picture, so this is the one, if you look at the horizontal lines, they are the CCMA1 area and then the lines that are on the angle are the CCMA2, and it's just showing – and then the point is – so there was talk earlier about what parts are affected. Of course, the houses that are there at the moment and in which Mr Young currently lives are entirely out of any area at all. So there is –

GLAZEBROOK J:

Out of what, sorry?

MR BARKER KC:

Out of any CCMA area at all. They are completely clear. So it's only where you see those little bits where the bund had just been put in there that is affected by this. So it's not hard to see, and I take it is from the Bar, but there is a whole bunch of land that is unrestricted as to what you can do. The only problem is you've just got to get the access in which goes through the CCMA2 area. So to think that this is doomed, I suppose, just – I think Mr Allan was cautious in his statements but our submission would be there's something – there's a real prospect that this will in fact be able to be done, and then there's the evidence

which I refer to in my written submission from our valuer, Mr Foster, that once you can get in there and do this and spend your moneys then those two houses alone are going to be worth at least $2 million once they're repaired, reinstated, you can live in them, et cetera. So that's really what he's trying to drive at is how to unlock that value that sits in his land.

WILLIAMS J:
It might have been useful for you to hire Mr Kupec and apply for consent.

MR BARKER KC:
That may well be a…

WILLIAMS J:
Because that would have resolved this and we wouldn't be guessing about what that result –

MR BARKER KC:
Well, I think actually Mr Kupec, I think he notes this at the beginning, is actually the council's geotechnical expert.

WILLIAMS J:
There you go. And perhaps Mr Allan too if you could convince him to change his mind.

MR BARKER KC:
Now, your Honour, the second point I wanted to go to was really an answer to something we were talking a lot earlier about this idea as to how do you get certainty going forward if you give damages, et cetera, et cetera, and I said to the Court I thought there must be some principle here that would stop you.

I can deliver some submissions on behalf of the junior, a former clerk here, Mr Coad, who very generously spent his lunchtime in that having a look at this issue for me, and the answer is so the decision is *Jaggard v Sawyer* and the

answer is – so I'll give you the reference. *Jaggard v Sawyer* [1995] 1 WLR 269 at 285 to 286. Sorry, 269 is the case.

GLAZEBROOK J:

And what was the – *Sawyer* – what was the first…

MR BARKER KC:

Jaggard.

O'REGAN J:

And that says once you –

MR BARKER KC:

So I'll read you the quote from it. "It is, in my view, fallacious," so they're talking here about the idea that giving damages licenses the nuisance which is the great objection talked about in *Shelfer*, et cetera, et cetera, that you're purchasing the right to do it, and I'll read you what – the summary it is. Well, assume it's my submission although again I'll pass copyright to Mr Coad. Millett J wrote in *Jaggard* that although the Lord Cairns' Act "does not enable the court to licence future wrongs, this may be the practical result of withholding injunctive relief;" and here's the section – this is now a quote from the decision: "It is, in my view, fallacious because it is not the award of damages which has the practical effect of licensing the defendant to commit the wrong, but the refusal of injunctive relief. Thereafter the defendant may have no right to act in the manner complained of, but he cannot be prevented from doing so. The court can, in my judgment, properly award damages 'once and for all' in respect of future wrongs because it awards them in substitution for an injunction and to compensate for those future wrongs which an injunction would have prevented." And this is the important point: "The doctrine of *res judicata* operates to prevent the plaintiff and his successors in title from bringing proceedings thereafter to recover even nominal damages in respect of further wrongs for which the plaintiff has been fully compensated."

WINKELMANN CJ:

I can see quite a lot of room to move on that.

MR BARKER KC:

But I think it's the –

WINKELMANN CJ:

We'd just need a slight change in circumstances to give you a new cause of action perhaps.

MR BARKER KC:

But I mean that's the problem with nuisance, I mean, nuisance in general. If you get an injunction, it's got to license a nuisance. That's what *Fen Tigers* is all about, you know? You're purchasing the right from the other person and the other side of that must be that it must be binding, and that's just making the point that you bind them through res judicata. There are a few other points, your Honours, I –

WILLIAMS J:

I guess that depends on reading the problem as a unity wherein, of course, it's several events.

MR BARKER KC:

But if here the "nuisance" is the unstable cliff surfaces, and you say that problem will be remediated by the Kupec design, we're not going to order you to do that, I decline the injunction, but we'll give you the damages for that to be done, then we'd say that that actually triggers the thing that this nuisance to the extent that it affects Mr Young's property has been fully compensated and dealt with.

WINKELMANN CJ:

Ms Wilde has put the case up on the screen for us so we have it.

MR BARKER KC:

There we go. The next few points may be less structured thematically, but just points I wanted just to be noted, your Honours, as we go through.

The one about the concurrent findings of fact on the harm – on the cause of the risk and the reference to the High Court judgment, I think that what's been the confusion here is between, the rocks that fell on his property is accepted as 70% from his land, 30% from the Crown land, but I don't think her Honour is there addressing the reason as to why they fell or why they will fall in the future. So what she's talking about there is that rockfall issue, which is not really part of our claim at all because this claim was not about the actual damage to the land, it's about the impact on the value of the land as a result of the instability that's there. That's why we're not suing for the damage caused to houses 1, 2, and 3. I mean, we're not talking about what was actually harmed during the earthquake. We're talking about what is – if you fixed everything that happened, removed all the rocks, where would you be? You'd still be in a position you can't do anything with this land because it's hopeless. So that's the – I don't think her Honour there was talking about that background cause of it all. She's talking about the actual rockfall that happened during the event.

On that point, my friend took you to that schematic at 305.2092, and I thought if any document shows you how the harm lies on the – or the risk lies on the Crown land, it is that document. Because you can see –

WINKELMANN CJ:
405?

MR BARKER KC:
305.2092.

WILLIAMS J:
This is the model of the slumping cliff?

MR BARKER KC:
It's the model with the – yes. With the red part. Because you can see where the cliff edge is quite clearly and you can see that scouting in behind it are all the cracks that are going to cause that whole thing to slide out.

Yes, so you see that, and when they talk about main area of cracking you see there at the top. I mean, I haven't gone back and read the entirety of this report, but I'll assume that's the 50-metre zone that we talked about earlier when we went through the plan at the very beginning of this. So I think that show what the cracks are doing. They're actually on the Crown land undercutting under to cause the failure on our land.

WINKELMANN CJ:

What's the difference between figure 25 and figure 26? Is it just where the red is placed?

MR BARKER KC:

Yes, I don't – yes, maybe it's even going lower. I'm not sure. I can't say I've studied this report, I relied more on the summaries of it from the experts, but I was thinking it did seem to show that.

O'REGAN J:

They're just adopting different models, I think. Yes.

WINKELMANN CJ:

I actually think it is mainly where the red is placed, I think.

MR BARKER KC:

But you can see what's caused – the bits cutting out under it, and you can see where the edge of the cliff is.

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A very minor point, just when we talked about the compulsory acquisition, I mean I don't think anything turns on it. There's the Public Works Act issue. The other principle and the reason that it would've been quite difficult is that when you're doing public works compensation, this is set out in section 62, yes, you do the fair market value but also you exclude the effect of the public work. So if the public work here was in some way, the reason for the acquisition was

in some way because of the instability of the Crown land, that fact, then when you came to the valuation you'd have to exclude that from the effect of it, you know, so – well, the usual rule in Public Works Act litigation is that: "I own a property worth this. If the Crown's going to put in a four-lane motorway beside it, I don't say the property is now worth this minus X because there's a four-lane motorway beside it." It's that idea you try to extract from the public work, so if the public work was in some way related to the instability then that would be excluded from the valuation.

I did – if the concern was that whether or not the Kupec design could be implemented, I mean there is always the possibility, of course, of making any award conditional on that work being undertaken, I would probably be – I could see just a whole range of trouble down that road if that's the basis for it because you suddenly have to change something if the council wants this or et cetera, et cetera. But it is certainly one way of doing it but it would involve a degree of supervision, I suspect, from the Court.

Just one final point I had written here was just her Honour, the Chief Justice, made the point about holding someone fully liable for the consequence of this slip. Well, I mean, I suppose from Mr Young's perspective he is the person being held fully liable for the consequence of this slip at the moment and really what he's seeking is some ability or some right for someone else to share that burden, and in particular the person on whose property that risk arises.

Unless your Honour's have any further questions?

WINKELMANN CJ:

Well, he's not being held fully liable to remediate it. He's carrying the effective cost, the effect of it.

MR BARKER KC:

Yes, he's the one who's carrying the cost of it at the moment.

ELLEN FRANCE J:

And costs, Mr Barker?

MR BARKER KC:

Costs I dealt with, but obviously costs following the event, and I've put something in the submission about that.

ELLEN FRANCE J:

Yes. No, no, I was just checking there was nothing else.

MR BARKER KC:

No, thank you.

WINKELMANN CJ:

Because the presiding Judge often forgets to ask people, so Justice France is just making sure I did.

MR BARKER KC:

Thank you. I'll leave Court politics to the Court.

WINKELMANN CJ:

Fair enough.

MR BARKER KC:

Thank you, your Honours.

WINKELMANN CJ:

No politics. Thank you, counsel. We will take some time to consider our decision and let you have it in due course. Thank you all for the very helpful submissions, and Mr Stephen, thank you for coming whilst unwell. That's showing dedication to the interests of justice above and beyond the usual.

MR STEPHEN:

It's the spirit of service.

WINKELMANN CJ:

The spirit of service.

MR STEPHEN:

That's what the Public Service Commissioner goes on and on and on about.

WINKELMANN CJ:

Well, perhaps you should now go home and rest.

MR STEPHEN:

Thank you, your Honour.

WINKELMANN CJ:

We will adjourn.

COURT ADJOURNS: 4.03 PM