IN THE SUPREME COURT OF NEW ZEALAND SC 5/2014

[2014] NZSC Trans 16

**BETWEEN** **QUAKE OUTCASTS**

Appellants

**AND** **THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY**

First Respondent

**AND** **THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY**

Second Respondent

**AND** **FOWLER DEVELOPMENTS LIMITED**

Third Respondent

**AND** **HUMAN RIGHTS COMMISSIONER**

Intervener

Hearing: 29-31 July 2014

Coram: Elias CJ
McGrath J
William Young J
Glazebrook J
Arnold J

Appearances: F M R Cooke QC, M S R Palmer and L J C McLoughlin-Ware for the Appellants
D J Goddard QC and A A Jacobs for the First and Second Respondents
S P Rennie and J E Bayley for the Third Respondent
V Casey and M White for the Intervener

SC 8/2014

**BETWEEN** **FOWLER DEVELOPMENTS LIMITED**
Appellant

**AND** **THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY**
First Respondent

**AND** **THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY**
Second Respondent

**AND** **HUMAN RIGHTS COMMISSIONER**
Intervener

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**CIVIL APPEAL**

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**MR COOKE QC:**

Please the Court, I appear with Mr Palmer and Ms McLoughlin-Ware for Quake Outcasts.

**ELIAS CJ:**

Thank you Mr Cooke.

**MR RENNIE:**

Please the Court, Mr Rennie and Mr Bayley for Fowler Developments Limited.

**ELIAS CJ:**

Thank you Mr Rennie.

**MR GODDARD QC:**

May it please the Court, I appear with my learned friend Ms Jacobs for the Respondents.

**ELIAS CJ:**

Thank you Mr Goddard.

**MS CASEY:**

May it please the Court, Ms Casey appearing for the Human Rights Commission with Mr White.

**ELIAS CJ:**

Thank you Ms Casey.

Yes Mr Cooke. I should say that the Court will receive the information that's been filed late. Not quite sure why it was necessary for it to be quite as late as it –

**MR COOKE QC:**

Yes. Well I apologise for that. That was really because we were awaiting the offer that we were expecting and – to put in the further information.

So by way of introductory comments, Your Honours, the Canterbury earthquakes have been New Zealand's worst natural disaster. The scale and the significance of the damage to property and to the, and to people's lives is perhaps still not fully appreciated by many New Zealanders. The damage from the September 2010 earthquake was significant and led to the passage of the Canterbury Earthquake Response and Recovery Act 2010, but the devastation caused by the February 2011 earthquake was unprecedented and led inevitably to the enactment of special legislation under urgency with, on a cross-party basis to give the Government extraordinary powers to enable recovery from the devastating effects of that

particular event. And the key question in this appeal is whether the Government could at its option elect to proceed outside the regime established by the Act for that recovery in implementing what can fairly be described as one of its most profound earthquake recovery measures involved in the creation of the red zones and the associated red zone measures.

Now, there's a degree of dispute about the characterisation and effect of what I call the red zone measures, but in our submission the evidence is clear that the red zones were the zones declared by the Government where the area-wide damage was too significant for it to be viewed as economic for it to be repaired or remediated and because of that those areas were no longer to be supported as residential areas, and to facilitate the resettlement of the residents the Crown offered to purchase their properties at pre-earthquake registered value.

Now, such measures were not implemented as we say they should have been under the regime for planned earthquake recovery measures established by the Act. They were implemented without any consultation or engagement with the community and without the transparency that would have been contemplated by the planned earthquake recovery measures contemplated by the Act, including on issues such as the tests to be applied for identifying the various zones that had been declared, the future status of the land, whether or not compulsory acquisition would be used for those who did not want to take up the Government's offer and indeed what the terms and conditions of future acquisition would be for those who were not subject to the June 2011 announcement of purchase offers. And in terms of the outcasts, they were not eligible to receive or to accept the offer the Government made at that time and they were left in limbo, literally in no man's land, while the suburbs were vacated around them. And they waited nearly a year and a half until they received their offers and their offers were made at 50% of the land value and nothing for the improvements.

The offer document that was sent out at the time made clear that the damaged infrastructure that was area wide in their areas would not be replaced and repaired, that other essential services were unlikely to be further maintained in the future and that if they didn't accept the offer that the Crown was making it may be that the Crown would compulsorily acquire their properties and if they did that that compulsory acquisition process would involve the market value of the properties at

the time of acquisition, which the offer document noted was likely to be less than what the Government was offering.

As the trial Judge held, they were placed in a "Hobson's choice" position and it's not an exaggeration to say that these steps have placed the Outcasts in a truly desperate situation. The offers didn't allow them to recover from the earthquakes that went on and created an environment of oppression from the earthquakes. Many of them are poor or elderly and are in deeply depressing circumstances, as is revealed by the questionnaires that they have completed, and those are in the case on appeal. They represent members of the community that would not normally have the resources to come before the Courts but they banded together and brought these judicial review proceedings given their situation.

And by proceeding outside of the Act the protections that were available inside the Act have been avoided by the Crown. Those protections include the transparent approach set out in recovery plans where, which have been formulated after formal engagement with the community and which focus on the key purpose of the Act, on steps that enable people to recover from the effects of the earthquakes with the measures to ensure that the communities recover from the effects of the earthquakes. And the test set out in legislation that the decision-makers ensure the measures achieve the earthquake recovery purposes of the Act and do what is reasonably necessary to achieve those purposes.

**ELIAS CJ:**
Is that a reference to section 10 alone?

**MR COOKE QC:**
So I'm sort of referring to section 10 and section 3, because section 3 sets out the purposes of the Act. And I'll be taking Your Honours quite carefully through the Act later in submissions.

But by rounding out what I'm saying here, that what we contend is that the avoidance of the regime set out in the Act and the avoidance of the protections that were inherent in this extraordinary legislation, the Government has acted unlawfully. So the Quake Outcasts say that resort to the third source or common-law powers to implement these measures were, was illegitimate.

And in terms of the structure of my argument in terms of that first question, I'll be dealing with it in terms of four key propositions or four reasons why we say the third source or the common law is inapplicable for making, for implementing the measures that are in issue here. And just by way of summary, the first of those is that any resort to the third source or common law is not permitted where Parliament has legislated in the field, and as the trial Judge, Justice Panckhurst held, "It's hard to imagine a clearer case of Parliament legislating in a field than this legislation."

The second of the four points, is that any use of the third source or common-law powers is excluded where there is existing positive law, and that is even apart from the Canterbury Earthquake Recovery Act 2011 there was an existing positive law regime established under other legislative and regulatory instruments: the Resource Management Act 1991, the Local Government Act 2002, and the regime established under those measures which regulated the use and enjoyment of land and the very existence of communities, the regime that regulated how communities existed.

The third of the four points is that the third source is excluded if it involves interference with rights or liberties. It's closely related to the second point about positive law. And here not only do these measures do that because of the rights and liberties arising under the statutory positive regime I've just mentioned, the RMA and Local Government Act regulatory regime, but because of the freedom to be free from arbitrary interference with home life that's recognised in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights. Because in cases of the third source there's no question of balancing rights against the interests of the state there's no question that the Crown can justify the intrusion on a balancing process and because the implementation of those measures wasn't done itself by any positive law, by any statutory regime or other recognise positive law, it is arbitrary as the High Court Judge held.

Then fourthly of the four points we say that –

**ELIAS CJ:**
Sorry, I just – you'll elaborate on this will you?

**MR COOKE QC:**
Yes, this is just a striding –

**ELIAS CJ:**
I don't quite understand why it's necessarily arbitrary.

**MR COOKE QC:**
Yes. I'll come to that in the argument. I'm just really providing an overview of where the submissions will go.

And the fourth point is that the third source or the common law can't be resorted to, to implement measures of a governmental character. What the third source does is explains that the day-to-day incidental steps taken for the ordinary business of Government don't need, doesn't need to identify express statutory or prerogative powers. So they are truly incidental functions that allow the day-to-day business of Government to proceed without having to point to such powers. They are the things that any person can do in their ordinary lives. It doesn't authorise things that ordinary people can't do, that is, governmental actions such as the actions that are in issue here.

Now those are the four points. There is of course the further academic debate, whether the true source of the Crown's or Government's incidental authority is a third source derived from the powers of a natural person or whether it is implied from express powers, and that's the debate perhaps that can be characterised between Professor Harris, who advocates for the natural person powers, or Professor Joseph, who in his latest edition has indicated that the more extensive recognition of implied powers, implied from express statutory prerogative powers and functions, is the better justification for these abilities.

The Quake Outcasts are reasonably agnostic on which of those two theories –

**ELIAS CJ:**
Well I can't see that it's going to be necessary to resolve what is, as you say, an academic and perhaps ultimately arid debate.

**MR COOKE QC:**
Yes.

**ELIAS CJ:**

Because whether it's a third source or whether it's the first source, ie, the prerogative, nothing really seems to turn on that in this case.

**MR COOKE QC:**

It doesn't unless it's said that because you choose the third source you get more than just incidental administrative authority, you get a power. That's probably one of the difficulties with the very –

**ELIAS CJ:**

But I don't understand the respondents really to be arguing for that. But I might be wrong.

**MR COOKE QC:**

Well then we get into the debate about how you characterise what was done.

**ELIAS CJ:**

Yes. Yes.

**MR COOKE QC:**

Where my learned friend says, "All we were doing –

**ELIAS CJ:**

Was providing information.

**MR COOKE QC:**

– was providing information."

**ELIAS CJ:**

Yes. Yes I understand that.

**MR COOKE QC:**

But if the true character of what was done was more than just providing information and buying property but was an earthquake recovery measure then you'd have to make the third source the kind of thing that would become controversial, that is, more than just incidental but a source of actual power, which is the word, problem with the phrase, "the third source", in my submission.

**WILLIAM YOUNG J:**

What's the – I mean no doubt we'll come to it but what is the power of a Government to respond to an emergency where there's no legislative regime? Say the earthquake legislation had been held up in Parliament. Would the Government not have power to lay out resources to make decisions about what could happen in particular circumstances on a preliminary basis?

**MR COOKE QC:**

You would have to accept that there would have to be an ability by, of the Government to respond in some ways and there will be some –

**WILLIAM YOUNG J:**

In a governmental way –

**MR COOKE QC:**

And –

**WILLIAM YOUNG J:**

– and not in an individual –

**MR COOKE QC:**

Well there will be some, and I confess I haven't looked at this with –

**ELIAS CJ:**

But that's the prerogative.

**MR COOKE QC:**

That's prerogative and there will be also statutory –

**ELIAS CJ:**

If you can come within it and if you can avoid Lord Diplock's strictures on it being a bit too late in the day for the Courts to enlarge the prerogative.

**WILLIAM YOUNG J:**

But is it – I mean, say the Government says, okay, we're going to send some troops down. I mean these are the sort of things on the edge. I mean is that prerogative or common law or simply someone is the commander-in-chief, or…

**MR COOKE QC:**

There's also the civil defence –

**WILLIAM YOUNG J:**

Yes, I know there's the civil defence regime.

**MR COOKE QC:**

Yes. and presumably – I mean I confess I've not checked to say exactly what those provisions provide for but if there's a declaration of emergency, presumably that's under that statutory –

**ELIAS CJ:**

Well I've been reading Holdsworth. Which is very entertaining and it's not clear at all that there is a power, a prerogative power to declare an emergency. And Maitland also. So I mean we're a mile away from that because there are statutory powers, there are implied administrative powers and I would've thought that that's the battleground for this case.

**MR COOKE QC:**

It is. But to answer Justice Young's question, I mean I haven't got, looked at the civil defence legislation to see if under that regime you declare an emergency. I presume that you do. So it wouldn't be a revert to –

**ELIAS CJ:**

No, it wouldn't be a reversion –

**MR COOKE QC:**

Revert to the –

**ELIAS CJ:**

– to the prerogative, no.

**MR COOKE QC:**

It would be a statutory framework, I presume. But as Your Honour the Chief Justice indicates, that would be a very nice issue for another day or another case but we're not in that field. We have a field where Parliament passed emergency legislation and for the purposes of our argument that's the true issue.

**McGRATH J:**

And it's your position therefore, in fact one of your primary grounds, that what Lord Atkinson said in *Attorney General v de Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) applies, and whether we're talking about common law, third route or whatever –

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Or first.

**McGRATH J:**

– that limitation applies in this case.

**MR COOKE QC:**

It does. It does. Of course in some ways –

**ELIAS CJ:**

Depending on the characterisation.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Because you too accept that there are ancillary powers, administrative powers such as publishing information.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

So it really does come down to the characterisation, does it not?

**MR COOKE QC:**

That is true. When I take Your Honours to the legislation you will see that even this legislation regulates or has provisions in it dealing with the provision of information and the buying of property, so there's a very interesting issue – for example, the Chief Executive is given a power under section 53 to buy personal property. And other powers to get information and disseminate information. So, following the *De Keyser* principle, does that mean the incidental powers were excluded? Probably not because the Chief Executive probably still needs to buy stationery without applying section 53, but what those provisions indicate is that when you're using your power to buy property as part of the earthquake recovery regime contemplated by the Act, it would be, would have to be done within the Act. Now, I think section 53 literally might apply to the Chief Executive's decision to buy some paperclips because it actually says, "buying any personal property", so literally might apply, but for the purposes of my argument it makes – there's no harm for me to say, "Look, the Chief Executive must be able to buy some paperclips and otherwise arrange the Government department." That's not what's not in issue here. The issue is whether earthquake recovery measures must be bought within the Act and that's where *De Keyser's Hotel* principle bites, in my submission.

Before I descend into the argument, which will start with the *De Keyser* principle I suppose, just by way of introduction, on the second aspect of the case, that's the case, the question of whether now the Quake Outcasts should by way of remedy be entitled to a 100% offer or whether the differential treatment is by itself unlawful, we say effectively those two things, that there is no true earthquake recovery purpose for treating them differently so that any such differential treatment is in terms of the Act arbitrary and unlawful, and that even if that were not the case, that that – the circumstances in which they are placed now, given the other illegalities that we say have been established, that is, the failure to act within the regime and the avoidance of protections of the regime, the only effective remedy they could be given now requires them to get that offer because any other scenario would involve the Crown being able to take advantage of the regime that's been created by the other aspects of illegality that we say exist.

**ELIAS CJ:**

Would they be being treated differently in an arbitrary sense if the offer had been for 100% of the land value but no recovery for buildings?

**MR COOKE QC:**

Yes, that's still –

**ELIAS CJ:**

Uninsured buildings I'm talking about.

**MR COOKE QC:**

They still would be treated differently because the others will be, are getting and did a payment for –

**ELIAS CJ:**

No but – well, you'll come on to it, but I'm just thinking about the recovery available in respect of insured buildings and the fact that it does prompt some non-arbitrary arguably difference in treatment.

**MR COOKE QC:**

Well the answer to that is that the 100% offer to the insured was made irrespective of whether those insured people were getting significant recovery from EQC or insurance. It didn't matter.

**ELIAS CJ:**

No I understand that.

**MR COOKE QC:**

So it was a – it had to be a one size fits all approach because the reality is that the scale of the properties that were involved, the Crown sensibly said, "Well we've just got to make an offer that allows people to move on irrespective of the circumstances involved in their case," and –

**ARNOLD J:**

The offer didn't distinguish between those who held only EQC cover and those who held top-up cover, did it?

**MR COOKE QC:**

No. And neither did the type of insurance, you know, whether they had indemnity value or full reinstatement or anything of that kind. So it was a one size fits all approach irrespective of the individual recovery that the Crown might have got from a homeowner, and it had to be. It had to be from a pragmatic point of view a one size fits all approach.

**WILLIAM YOUNG J:**

So you're seeking the 100% payout on effectively the same offer that was made to everyone?

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

Everyone else.

**McGRATH J:**

But that would preclude the Government from later, if it made a fresh offer, from bringing into account these considerations.

**MR COOKE QC:**

Yes. And the argument will be, as I've mentioned, two-fold: one, because the considerations in on themselves involved undermining the very objective in terms of the Act that is involved, because it's not a contractual bargain where the Crown is getting something for their money. The payment is there to enable people to move out of the area. So the purpose of it is to ensure they can move on. So to bring in the considerations as we're getting less for our payment.

**McGRATH J:**

So no other offer would be in accordance with the purpose of the Act?

**MR COOKE QC:**

That's right.

**McGRATH J:**

It's going a bit further than *Fiordland Venison Ltd v Minister of Agriculture & Fisheries* [1978] 2 NZLR 341 (CA).

**MR COOKE QC:**

Yes. Every case depends on its circumstances. And the other aspect of it is the relief aspect, that even if you don't accept our submission that unequal treatment per se is contrary to the Act, the other aspects of illegality that have been established means the only effective remedy now would be to get that kind of offer.

**ELIAS CJ:**

Is there not a fall-back position, and I must say that this is prompted by Mr Rennie's submissions really, because it did strike me as quite a forceful argument, that effectively those who are getting 100% for land and buildings which were insured with the EQC and the top-up were receiving 100% of the value of the uninsured part, effectively, the land part. So I mean I can see that there is a fall-back argument, that it may not be rational to draw a distinction between vacant land and the land value of the, you know, the earlier payouts.

**MR COOKE QC:**

Yes. Well, I mean there always is a fall-back position in terms of what I'm advocating for in a sense the High Court Judge who saw – I think the way he put it was, "considerable merit" in the unequal treatment proposition. Didn't go as far as we had asked. He gave directions under s 4 that there be new offers with – to be made in accordance with the principles set out in the judgment. So I guess I'm just trying to get as far as I can for my people –

**ELIAS CJ:**

Yes. I understand. Yes.

**MR COOKE QC:**

– who are genuinely in a desperate situation.

**ELIAS CJ:**

And your argument is that that is the purpose of the statute.

**MR COOKE QC:**

That's right.

**WILLIAM YOUNG J:**

How many of the individual applicants have houses that were seriously damaged in the earthquakes? Virtually all of them would have had some damage.

**MR COOKE QC:**

I can't tell you the extent of the damage to those properties and I'm not sure if –

**WILLIAM YOUNG J:**

Are they listed anywhere? Is it –

**ELIAS CJ:**

In that – there's some indication in that questionnaire isn't there?

**MR COOKE QC:**

Yes, the questionnaires all give an indirect answer to –

**ELIAS CJ:**

A lot of them are – half of them are vacant land cases, aren't they?

**MR COOKE QC:**

Yes. Yes. We have 19 vacant landowners, 24 homeowners, and we have two commercial or business representatives.

**WILLIAM YOUNG J:**

So 19 vacant land, 24 residential?

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

Two commercial.

**GLAZEBROOK J:**

And some of those homes the people say weren't damaged in fact and would be liveable?

**MR COOKE QC:**

Yes. Mr Tsao, for example, says that his property was relatively excluded from the serious damage that other properties had, so he's one of those who would've actually preferred to stay and probably still does want to stay in his suburb but unfortunately it's being vacated around him and so that's the dilemma that he's in. So –

**WILLIAM YOUNG J:**

But I mean one possibility isn't it – I mean now there are around 40 people, individual assessment, although that's not really what you want.

**MR COOKE QC:**

Well that's –

**WILLIAM YOUNG J:**

That's another fall-back.

**MR COOKE QC:**

That's another possibility.

**ELIAS CJ:**

Although that doesn't meet your equality of treatment argument.

**MR COOKE QC:**

No. No.

**GLAZEBROOK J:**

But it might meet the purpose of being able to move on argument. And it might also meet the, "I just forgot. I had a four-day window of where I wasn't insured – I've been insured forever."

**MR COOKE QC:**

Well I accept it might deal with the second point. I'm not sure about the first because the reality is that if the purpose of this payment is to allow resettlement, for – and

someone is uninsured for whatever reason, whether by accident or design, they need to resettle as well. They need to resettle because the Government has decided that this –

**GLAZEBROOK J:**

Sorry, I'm just meaning that if somebody got 400,000 rather than 600,000, they may still be able to resettle. Sorry, it wasn't –

**MR COOKE QC:**

I see. Yes.

**GLAZEBROOK J:**

So because if you had a $1 million property it may be that you can't in terms of the CERA be expecting a $1 million property elsewhere if you were in fact by design uninsured.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

Whereas it may be, even if you were by design uninsured in terms of the purpose of the Act, if it allows you to resettle at 400, 300.

**MR COOKE QC:**

Yes. Of course what would happen – I concede the point. But what would happen in that scenario is that only this category of person would then be subject to this detailed individual –

**GLAZEBROOK J:**

Oh, I understand that as well –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– and so I understand the – I understand the top argument.

**MR COOKE QC:**

Yes. And so once you've adopted a one size fits all approach then the reality is that you have to follow through with it. If you – if the purpose of the payment is to get, allow people to move on because the Government's decided, "Well we have to close the suburb," effectively –

**WILLIAM YOUNG J:**

But they may have had to move on anyway. Do we know that or not? I mean, some would've had to, some perhaps not.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

I mean it may be that – I mean it may be that building consents wouldn't have been able to be obtained for land. It may be that so many other people are going to move on that they would be living in a wilderness. So how do we know that it's the Government's decision as opposed to the consequence of the earthquake that require a move-on?

**MR COOKE QC:**

Well, we can never be sure about that except it's the Government's – in the end the Government's function under the legislation to make that call, and it did make the call, although they did it outside the Act, that these areas were too damaged on an area-wide basis, irrespective of whether there are pockets of land that is okay, but on an area-wide basis it just wasn't economic to repair the infrastructure and the land. So could it be possible that some of those people would have been in individual circumstances where they would have moved on anyway? Yes, that's possible. But in a way it's slightly speculative because in the end the Government made the call to move people on.

So…

**WILLIAM YOUNG J:**

You're on page 2 are you?

**MR COOKE QC:**

Actually, page 7 of the notes.

**ELIAS CJ:**

Are they the same as our notes?

**MR COOKE QC:**

I don't know, but I'm on, of my four propositions for the first argument, the *de Keyser's Royal Hotel* proposition, and I don't think I need to take Your Honours to the High Court Judge's analysis of this, but he did, after looking at the Act and the circumstances, come to the conclusion he doubted whether there was a clearer case of an express statutory power and a well-defined field than this.

**WILLIAM YOUNG J:**

It probably will have to do with it, but is there a timing issue? Is it possible for the Minister to have said, "Well, okay, I could possibly deal with this under a recovery plan but basically the world's moving on. People are telling insurers they've got to get cracking and whatever, and I don't have time to go through the process of the recovery plan. Ahead of that, I'm going to say what I think is going to happen."

**MR COOKE QC:**

Yes, there is a timing issue and indeed one of the purposes of the Act is ensuring that things are done in a timely and expeditious manner, and that's in a sense – and the purpose referring to community engagement refers to community engagement without interfering with a timely and expeditious need to move. I accept that at June 2011 the recovery strategy may have been too delayed to be the mechanism by which the red zone measures were implemented, but I don't accept that the recovery plans would have been an appropriate mechanism by which that is – that could be implemented because they could be implemented under a recovery plan swiftly and –

**ELIAS CJ:**

And they could be successive, couldn't they?

**MR COOKE QC:**

They could. I'll take Your Honours to the legislation but what the legislation actually contemplates is that a recovery plan would precede the overarching strategy and then if that happened that would then be reviewed later.

**WILLIAM YOUNG J:**
It still has to be notified, doesn't it, though?

**MR COOKE QC:**
Yes.

**ARNOLD J:**
There wasn't a requirement for consultation for a recovery plan, was there?

**ELIAS CJ:**
A limited consultation.

**MR COOKE QC:**
There was a more limited process under which consultation would take place and it was to be publically notified and, of course, there are also the forums that are established by the Act, the community forum and the cross-party forum and so we would have said that the appropriate process would have been to raise this with both forums, to have a truncated but nevertheless lawful approach of implementing this through a recovery plan.

**ELIAS CJ:**
The legislation provides for quite a degree of Parliamentary supervision, doesn't it?

**MR COOKE QC:**
Yes.

**ELIAS CJ:**
Does it in respect of recovery plans? I'm just not sure.

**MR COOKE QC:**
Well, what must happen is that there needs to be an annual review.

**ELIAS CJ:**
Yes. That's right.

**MR COOKE QC:**

So any recovery plan would be incorporated within the review that would be undertaken by the select committee.

**WILLIAM YOUNG J:**

There has to be notification and consultation, though, doesn't there?

**MR COOKE QC:**

There is more limited consultation.

**WILLIAM YOUNG J:**

I'm looking at section 20.

**MR COOKE QC:**

So it's publically notified and then section 23 talks about members of the public being invited to make written submissions.

**WILLIAM YOUNG J:**

So you have to wait for the submissions?

**MR COOKE QC:**

Yes.

**ARNOLD J:**

Well, perhaps you should take us through but how does 19(3) fit in?

**MR COOKE QC:**

I was going to spend some time going through the legislation.

**ELIAS CJ:**

Yes, you will have to spend some time going through the legislation so do it in your own order, perhaps.

**MR COOKE QC:**

I'm going to do that reasonably soon, but before I do that I was going to go first to the Minister's Hansard address on the legislation and in those bundles of authorities, if I can invite Your Honours to find the pink one, volume 1, and go to tab 17. As I've

mentioned, this legislation was passed under urgency and so the three speeches are within the same day or two of each other, and I just wanted to take Your Honours to the passage of Hansard at page 17899 and first of all the second to last paragraph on the left-hand side, to achieve its policy and legislation must ensure that an appropriate –

**ELIAS CJ:**

Sorry what page is it?

**MR COOKE QC:**

Page 17899, and at the bottom of the page, second to last paragraph, there's the reference to the policy intent of the legislation. An appropriate balance is struck between certainty for residential communities, investors and how the legislation will work, what is needed for recovery, and providing flexibility for different and innovative solutions to specific circumstances. "Processes set out in the bill are efficient while providing appropriate safeguards." And then there's the reference to the strategy and the plan and how they interlinked with the underlying regime under the RMA and LGA. And then it's the next passage in particular that I wanted to draw the Court's attention to. "Only those powers considered necessary have been provided for, and they fall into a series of broad groupings. The first is information gathering, reports, and investigations. These powers are necessary, as critical decisions must be based on accurate information. Most notably here, gathering information for a large data set that will help make informed decisions about the future viability of some streets and, indeed, some suburbs in Christchurch is absolutely essential. This information must be able to be shared to ensure appropriate levels of consultation, and explanation of the decisions made. I hasten to add that much of the information that is provided will be available for analysis by an agency of Government, but will not be generally available, because of its commercial sensitivity. Aligned with the gathering of information is the need to commission reports and investigations to ensure that decisions are soundly based. One can only imagine what it would be like to find out that people living on one side of a road have a section that is no longer viable and may need to move, but people on the other side of the road are deemed to be on a safe and stable piece of ground. Anyone in that situation will want to know that the very best of information has been gathered and the most appropriate analysis of that information has been made."

Now that person is Mr Tsao, exactly Mr Tsao's circumstances. He's on one side of the road in the red zone. On the other side of the road people are in the green zone. So the key issue that's being highlighted there by the Minister in explaining the need for this legislation is that there are going to have to be decisions about the future viability of suburbs. That those decisions mean that the land is no longer viable and people may need to move and it's got to be appropriate legislation given those decisions that involve information that must be shared to ensure appropriate levels of consultation and explanation of the decisions made.

Now as Your Honours will see that's on the 12th of April 2011 and it's interesting to see where CERA and the Minister were getting to in terms of their decisions in this respect at that time and if I can invite Your Honours to go to volume 3 of the case on appeal and to tab 37. This is a briefing to the Minister which we find out from the second page in is for a 9 May 2011 meeting, and you'll see the subject on that first page, "Briefing note identifying where we can rebuild and where it is more realistic to retreat." The first page in, paragraph 1, purpose report, this briefing note provides you with additional information to the A3 on the recovery effort in the affected suburbs on the ACE agenda Monday 9 March.

**ELIAS CJ:**

What is, I've seen reference throughout to A3, it's in the chronology too. What's A3?

**MR COOKE QC:**

An A3 is a, not an A4 piece of paper, but an A3 piece of paper.

**ELIAS CJ:**

Is that all?

**MR COOKE QC:**

On which there is a flow chart and they're called colloquially in these documents as the A3s.

**ELIAS CJ:**

I see.

**MR COOKE QC:**
So if then we go down to paragraph 7 of this, the A3, the A3 outlines the process for determining which areas can be rebuilt and which areas cannot be remediated at any reasonable cost where relocation is the most realistic option. The process had been based on the mitigation of earthquake damage.

And then down at nine, "The key determinant for a decision to relocate is whether the overall cost of remediating the land to the desired standard is going to be greater than abandoning the land for future residential use."

Ten, "Once the decision to abandon the land has been made consideration will need to be given to the options available to facilitate the timely relocation of affected households and the appropriate level of acquisition payment."

And then if you go to the A3 which is attached, and particularly on page 375, "Canterbury earthquake – identifying where we can rebuild in Christchurch." There's a flow chart and you –

**ELIAS CJ:**
Sorry, what date is this one?

**MR COOKE QC:**
This is for a meeting on 9 May. So we have Canterbury earthquake – identifying where we can rebuild in Christchurch". And there's a flow chart, "Is the status quo acceptable?" No. "Is it an individual or area-wide issue?" Area wide. "Can the land be physically remediated?" No. Then you go to, "Relocate elsewhere". And the key determinant for a decision to relocate is whether the overall cost of remediating to the desired standard in an affected area is going to be greater than abandoning the land for future residential use." So that was the thinking of CERA at the time shortly after the minister had explained to Parliament the need for the legislation because of these necessity to make these kinds of decisions.

And I'm sorry for the foreshadowing but it's in that background that I go to the Act itself to see where we see the provisions that contemplate these kinds of measures. Now, I'm going to use the version of the Act in my learned friend's separate bundle of authorities because it has the enormous advantage of being a complete copy of the

Act rather than for some reason an abbreviated copy of the Act and I'm sorry about that. That's behind tab 1 of that bundle.

**ELIAS CJ:**
Sorry, I didn't realise there was a full one.

**MR COOKE QC:**
Yes. And my learned friend has filed a separate bundle of authorities. The first and second respondents.

**ELIAS CJ:**
Yes.

**MR COOKE QC:**
And it's behind tab 1. And I begin, as is appropriate, in section 3 of the Act, the purposes of the Act, 3(a), "to provide appropriate measures to ensure", that word "ensure" pops up a lot in this legislation, "to ensure that greater Christchurch and the councils and their communities respond to, and recover from –

**ELIAS CJ:**
What emphasis do you place on that word?

**MR COOKE QC:**
Well, it's used throughout and it's – there are obviously different ways you can describe the nature of the meaning of that word but it is to make sure that people do recover from the earthquakes.

**WILLIAM YOUNG J:**
But not every individual surely.

**MR COOKE QC:**
No, the communities.

**WILLIAM YOUNG J:**
Yes.

**MR COOKE QC:**
It's true. But of course the communities are made up of individuals. There's no guarantee that each and every person will be able to do so but I guess the word "ensure" means you're doing it as far as you possibly can to get that community recovered from the impact of the earthquake, so that's the function of the Act.

And in 3(b), "to enable community participation in the planning of the –

**ELIAS CJ:**
Sorry, so is it aspirational?

**MR COOKE QC:**
No, it's – I think it's more than aspirational because we'll see elsewhere in the Act that the Act places obligations on the decision-makers to comply with that standard of ensuring. I guess the word "ensure" contemplates –

**WILLIAM YOUNG J:**
It will happen.

**MR COOKE QC:**
Yes. Now you can't – it's different from "guarantee" because the best will in the world you can't guarantee things but you are making that happen.

And (b) involves "enable community participation in the planning of the recovery of affected communities", and then those words I mentioned earlier, "without impeding a focused, timely, and expedited recovery".

And then (c), and again the word "ensure" comes in there, "to provide for the Minister and CERA to ensure that recovery".

And then there's (d), the reference to "focused, timely, and expedited recovery".

And then (e) and (f) are really a reference back to what the Minister said in that Hansard passage, "to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes", and (f), "to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property."

And then over the page there's the more wide-ranging purpose, "to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities". And the Court of Appeal in *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 indicated that considerably broadened the purposes of the Act and contemplated an all-encompassing approach to recovery.

And then you get the adequate powers to do what is in (a) to (g) and then repeal the old Act.

It might be relevant to look across the next page just to the definition of "rebuilding", "includes extending, repairing, improving, subdividing", and (b), "rebuilding communities". And "recovery" "includes restoration and enhancement". Now, we place some significance on the forums established by this Act under Part 2, sections 6 and 7. So section 6, "The Minister must arrange for a community forum to be held for the purpose of providing him or her with information or advice in relation to the operation of this Act." And then we get the word "ensure" again in 6(3), "The Minister must ensure that the forum meets at least 6 times a year," and (4), "The Minister and the Chief Executive must have regard to any information or advice he or she is given by the forum."

Now, no – there was no engagement with the community forum about the red zone measures. The Minister simply says in his affidavit in paragraphs 40 and 41, and the reference in the case on appeal is volume 2, tab 27 at page 333, that no information or advice was – came from the community forum about the residential red zone.

**ELIAS CJ:**
Sorry, what – is that reference in your submissions and – so where is it?

**MR COOKE QC:**
I was giving the reference to the case on appeal to the affidavit.

**ELIAS CJ:**
Well give it again then if you don't want to say it, point it out in the submissions.

**MR COOKE QC:**

Volume –

**ELIAS CJ:**

If it's in your submissions that's fine.

**MR COOKE QC:**

Yes it is, it is as well.

**ELIAS CJ:**

Where is it in your submissions? Oh, it doesn't matter. Give us the reference.

**MR COOKE QC:**

Volume 2, tab 27, page 333 of the Minister's affidavit.

**ARNOLD J:**

So by the time the red zones were declared the community forum had been meeting, had it?

**MR COOKE QC:**

Yes. But we have to read between the lines I guess a wee bit in the Minister's affidavit but he didn't approach them about the proposals and he says he didn't receive any advice from them about, community forum about it. Now, that's not just for the June decisions but also if you go through to the September the following year for the subsequent decisions for the Quake Outcasts, there's no engagement with the community forum about the offers.

Now, section 7 is the cross-party forum. It's less definitive in terms of obligation on the Minister but 7(1), "The Minister must arrange for a cross-party parliamentary forum to be held from time to time for the purpose of providing the Minister with information or advice in relation to the operation of this Act," and then the following – the composition is in 7(2). It doesn't have the obligations in terms of the number of meetings or having regard to their advice, but in a sense this was a disaster-recovery programme, it was passed with cross-party support, I think the Greens and the independents may have opposed the Act but both the major parties voted for the legislation and so there's a degree in which this legislation contemplates as we put to

one side our party allegiances and we try and do a planned recovery for Christchurch.

Now, the Minister doesn't mention at all the cross-party forum in his affidavit for this case. What he did in the *Independent Fisheries* case, and that – his affidavit in the *Independent Fisheries* case is in this case on appeal because we put it in as an exhibit is that he said that the political forum was not the appropriate place to discuss his independent statutory decision-making functions, and again the reference to that will be in our written submissions, but I'll provide the reference for Your Honours. That's volume 5, tab 199, at page 1649, para 20.

**McGRATH J:**
Just give it to me again. Volume 5?

**MR COOKE QC:**
Tab 199, page 1649 at para 20. So we say the lack of any engagement with these forums is an important failure that arises from stepping outside the legislation. Carrying on –

**McGRATH J:**
The Minister said it was still being set up, didn't he?

**MR COOKE QC:**
I think he might have said –

**McGRATH J:**
Paragraph 40, 41.

**MR COOKE QC:**
This is in the *Independent Fisheries* affidavit or…

**McGRATH J:**
No, in the affidavit –

**ELIAS CJ:**
I think we should go to this.

**McGRATH J:**

Volume 2 of the case on appeal at page 333. Sorry I think that's where I see it.

**ELIAS CJ:**

We were looking at volume 5. Is this a different one?

**McGRATH J:**

He said it was in an establishment phase in 2011.

**GLAZEBROOK J:**

So what page?

**MR COOKE QC:**

Page 333 and we're looking at paragraphs 40 and 41. So in paragraph 41 he said, "The community forum is a diverse group made up of 38 people who were nominated by various communities. It was at an establishment phase in 2011 and the first few meetings provided an opportunity for CERA officials to outline what work was happening and clarify questions. There was no – "

**WILLIAM YOUNG J:**

Sorry, what para is it sorry?

**MR COOKE QC:**

Paragraph 41, page 333.

**GLAZEBROOK J:**

When were the first few meetings, do we know?

**MR COOKE QC:**

I didn't look at that. I believe they were before June 2011 so I think they might have been May from recollection. I can't remember but the point is there has been no engagement with the community forum, either before or after the June decision, about the red zone measures. And we just have that last sentence of paragraph 41.

So going back to the legislation, the functions of the Minister, it's interesting, the functions that they follow the course of the chronology of events in the Act itself but 8(a) is to establish these forums and then 8(b) to 8(e) is really a reference to the

planning instruments, the recovery strategy and the recovery plans are the functions (b) through to (e) and then (f) onwards is a reference to the other statutory provisions elsewhere in the Act that are of significance.

Similar functions for the Chief Executive of section 9, they begin with a strategy and then there's a reference to the other statutory functions of the Chief Executive and I guess section 10 is a very important provision in terms of this legislation. Powers to be exercised for the purposes of this Act and again we get this word "ensure" in 10(1). "The Minister and chief executive must ensure that when they each exercise or claim their powers, rights and privileges under this Act they do so in accordance with the purposes of the Act." So to phrase that in another way you must make sure that what you're doing furthers the purposes of the Act and in, as I've highlighted, the purposes of the Act have as a central point, ensuring people recover from the impact of the earthquakes.

And then 10(2), "The Minister and the Chief Executive may each exercise or claim a power, right, or privilege under this Act where he or she is reasonably considers it necessary." Now we don't, it doesn't actually say necessary to do what so I think the Court of Appeal in *Independent* indicated the missing words were necessary to achieve the purposes of the Act, are the unspoken, but obviously correct words. But that's an important additional requirement. Meeting the standard of a necessity which is an objective test. It must be a reasonable view that the decision-makers make and it's not *Wednesbury* unreasonableness. It's an important objective check on the statutory power and together 10(1) and 10(2) indicate that it is necessary to ensure that what you are doing allows people to recover from the impact of the earthquakes and that what is done is reasonably necessary to achieve that objective.

**ELIAS CJ:**
Well on that point you say it's objective but that's not a correctness standard. That's a, that must allow some discretion.

**MR COOKE QC:**
Yes, because there are various reasonable options –

**ELIAS CJ:**
Yes.

**MR COOKE QC:**

– that a particular decision-maker couldn't make but what the law requires, and what the Court has to check, is whether they're within that reasonableness.

**ELIAS CJ:**

Yes. That's *Wednesbury*.

**MR COOKE QC:**

Well no –

**ELIAS CJ:**

It's not the extreme version, it's the contextual version.

**MR COOKE QC:**

Yes.

**McGRATH J:**

Section 10(1) is really just a statement of a standard public law principle, isn't it?

**MR COOKE QC:**

Well the wording, I think the wording "ensure" takes it a bit stronger than the normal public law. I mean all public laws have to be exercised for proper purposes but this –

**McGRATH J:**

And they have to ensure it.

**MR COOKE QC:**

Yes, well, I'm not sure that even the common law puts it that strongly. This is, with different statutory language, directing that there must be a degree of certainty about what is being done in terms of achieving the purposes of the Act, and that then 10(2) is –

**McGRATH J:**

But 10(2) I would've if I, you may not accept 10(1) but if you just take that –

**MR COOKE QC:**

Sure.

**McGRATH J:**

– as the premise as it seems to me at the moment, the issue then is to what extent 10(2) curtails the discretion that the Minister has –

**MR COOKE QC:**

Yes.

**McGRATH J:**

– and you say it's curtailed to circumstances of necessity in his reasonable consideration?

**MR COOKE QC:**

Yes.

**McGRATH J:**

I think that must be so.

**MR COOKE QC:**

Yes and we might quibble about the extent to which 10(1) has a degree of curtailment or not in terms of the ordinary principles. My submission would be that the words "must ensure" is removing a degree of benefit of the doubt that might otherwise exist.

**McGRATH J:**

Yes.

**MR COOKE QC:**

It is saying what you really do have to be within promoting the purposes of the Act without giving you latitude. In that sense, you really have to be sure you're in it, and that also it must be reasonably necessary, and none of this is surprising given that this is – these are extraordinary powers that are contained in this Act.

**ELIAS CJ:**

It maybe simply an indication that care needs to be taken, you can't be casual about these powers. The reference to "must ensure".

**MR COOKE QC:**

Yes, I would suggest it's a bit stronger than that. I would suggest that it places a positive obligation of certainty and necessity that I think transcends simply being careful about it. I think, especially when you've got extraordinary powers that have potentially profound implications, but the Act has important checks on those powers and is saying that you really do squarely have to be within the purposes of the Act in promoting those purposes, and it really does have to be necessary for you to exercise the powers that you are.

**GLAZEBROOK J:**

I would've thought even 10(1) goes further than proper purposes because it's actually tying it specifically back to the purposes but you can't look for a wide ranging power and you're just not using it for malicious purposes that's found in the rest of the Act. You have to tie it very closely back into the purposes which may be done by way of statutory interpretation of the individual powers but I think I'd consider a further push along those specific purposes and not for other purposes that otherwise might be legitimate purposes, even on an interpretative basis for some of the wide powers under the Act.

**MR COOKE QC:**

Yes, that would be another way of putting it. So it wouldn't have consistent but collateral purposes. You really need to go back to section 3 and say, well look, how are my decisions consistent with, what were these purposes. I must make sure that – how do I do that, how do I achieve this, and the purposes themselves have those words in it, ensuring recovery. So Parliament is, it's quite hard for Parliament to enact legislation that makes it clear that they're really requiring decision-makers to act in a particular way but they're doing that here. They're saying, look, you really do have to tie yourself to the purposes of the Act. It really does have to be necessary, and you must ensure that. So this section 10 is an important check, read together with section 3.

Now section 11, or subpart 3, we deal with the recovery strategy. Now as the Court of Appeal held, the recovery strategy was really at the apex of this plan recovery process, so 11(1), "The chief executive must develop a Recovery Strategy and submit the document to the Minister." And you'll see 11(2), that a recovery strategy is implemented by the Governor-General, by Order in Council, on the recommendations of the Minister. So it is, it's a high statutory instrument. Then you

see in (3) what it is. "The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address." And (a) and (b) are important for the, whether the Act covers the field. "The areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment: (b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding and reconstruction." And that is exactly what was being considered and addressed by the residential red zone measures.

And then (c), "The nature of the Recovery Plans that may need to be developed and the relationship between the plans: (d) any additional matters to be …. development of the plans." So the strategy is indeed the overarching strategy. I prefer to think of it as the overarching plan but I don't want to confuse the language. But you have the mega plan for recovery and then you have specific recovery plans that implement that overarching strategy and you see from subsection (4) it's developed with the key territorial and other significant bodies within greater Christchurch.

There's the process for developing it in section 12, public hearings, where people may appear and be heard in 12(1). It's got to be developed within nine months and 13, a draft recovery strategy is publically notified and written comments are able to be made on it. So the difference, jumping ahead a wee bit, between plans and the strategy is that under section 12 there's a process for public submission in terms of the strategy but in terms of plans and the strategy you can provide written comments on the draft publically notified proposed strategy.

Section 14 deals with subsequent changes to the strategy. Similar process for doing that. Section 15 is significant. "No RMA document," which is a defined term, "or instrument referred to in section 26(2), including any amendment to the document or instrument, that applies to any area within greater Christchurch may be interpreted or applied in a way that is inconsistent with a Recovery Strategy." What this does is provide how this instrument interlinks with all the underlying regulatory instruments that would otherwise apply within greater Christchurch such as RMA plans, territorial authority, annual plans, long-term plans, transport plans, and the kind of instruments we're talking about are listed in 26(2). So they include annual plans, long-term plans, under the local Government land transport plans, things like Conservation Act policies, and that's quite important –

**ELIAS CJ:**

Are infrastructure services, apart from transport, referred to?

**MR COOKE QC:**

Only to the extent they will be covered by the kind of plans that we're talking about. So plans such as annual plans, long-term, triennial agreements under the Local Government Act would include the plans for the general infrastructure and support for the community.

**GLAZEBROOK J:**

They're specifically mentioned in section 11(3)(b) and presumably in (a) you wouldn't be providing infrastructure if you're not going to remediate them.

**MR COOKE QC:**

Yes. That's one important point in a way because the argument for the respondents have been, well, look, infrastructure is not our call. That's the local authorities' decision but under the Act that's –

**ELIAS CJ:**

There's a power for the Minister to direct local authorities under this Act, isn't there?

**MR COOKE QC:**

Yes, there is. That's further on. I mean, you can do that through the recovery plans itself and the strategy itself and you need a self-standing statutory power to do that so I might just deal with that as I go through, but the point I was making is it's not right to say, in terms of earthquake recovery, that infrastructure is the council's issue because what this Act contemplates is the Crown will make the decisions about infrastructure remediation, where it's going to be built and repaired. It will provide for that in this planned transparent community engagement way and then what we get in 15(1) which I've talked about in the beginning where there's then that plan or strategy governs the situation. The other instruments have to then be read consistently with it. You can't act inconsistently with what's in the strategy. There's similar provisions in relation to recovery plans if you look at section 16. Recovery plans generally –

**ELIAS CJ:**

Well, "apply" is more than "interpreted". It prevents you. It overrides.

**MR COOKE QC:**

It trumps, yes, and as I'll come on to, they can contain directions within them and there are specific statutory powers for direction as well. Section 16, what 16(1) indicates is that the Minister directs people to develop recovery plans and it's interesting to see the potential breadth of a recovery plan. Direction must specify the matters to be dealt with by their plan which matters may include provision on a site-specific or wider geographic basis within greater Christchurch for any social, economic, cultural or environmental matter, any particular infrastructure again work or activity, so it's a pretty broad empowerment provision. The plans can deal with those matters.

**ARNOLD J:**

Responsible entity includes the network operator.

**MR COOKE QC:**

I hadn't noticed that.

**ARNOLD J:**

The Minister can direct a network operator to prepare a recovery plan.

**MR COOKE QC:**

Yes. It's the definition of a responsible entity.

**ARNOLD J:**

There's a definition of responsible entity at the bottom of page 7 and the top of page 8 of the statute. Network utility operator.

**ELIAS CJ:**

So a network utility operator that was being pursued by residents to provide services could say to the Minister, "Please develop a recovery plan for us"?

**MR COOKE QC:**

I think it's more likely the other way round. I think what was more likely to happen is that the Minister would say, "I direct you, Telecom, to develop a plan for where telephone services are going to apply in the greater Christchurch region." Now, whether there really would be a Telecom recovery plan I …

**ELIAS CJ:**

Well, there would be power to do that but this also enables the responsible entity to request that plan be given to it.

**MR COOKE QC:**

Yes. The provisions then, further provisions about the interrelationship, Your Honours will see section 18(1), that a plan must be consistent with a recovery strategy and 18(2), however, a recovery plan may be developed and approved before the recovery strategy is approved, so we have a nine-month period for which the recovery strategy had to be developed, so plans could be done before then, which caters for that point that Your Honour Justice Young raised, but if it's done before then you'll see in subsection (3) there has to be a review of that plan after the strategy's implemented to ensure consistency.

Section 19's interesting, about recovery plans. That allows in (1) the determination of how they're to be developed, including any requirements for consultation or public hearings. That's a matter of the ministerial discretion, so if it has to be faster no doubt the Minister would simply limit it to the 17 and 20 requirements, and 19(2), the Minister when acting under (1) "must have regard to", and a series of things under (2) that I wanted to highlight, are, "the needs of the people affected by it". so that's again a focus on the Minister having to turn his mind to the needs of the people, and again we're going back to ensuring that communities recover from the impact of the earthquakes, and then interestingly 19(2)(c), "the possible funding implications and the sources of funding", and I just mention that because there's been reference to the question of how the Crown's decisions in relation to the commitment of resources are significant. What I say about this legislation is it contemplates how, the legislation contemplates how things are going to be paid for. Because that's one of the things that must be contemplated by the Minister when determining the recovery plans.

**McGRATH J:**

If a recovery plan is changed that may create a situation in which the Minister can direct that – sorry, if a recovery strategy is changed that may create a situation in which the Minister can direct a change to the recovery plan. Is that right?

**ELIAS CJ:**

There has to be a review. Doesn't there? Because the plan has to comply with the…

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

Yes, 18.

**MR COOKE QC:**

Yes, consequential.

**ELIAS CJ:**

18(3).

**McGRATH J:**

18(3).

**MR COOKE QC:**

So 18(3)'s the pre –

**McGRATH J:**

That's the nine-month period?

**MR COOKE QC:**

18(3) is if the plan is developed before the strategy.

**McGRATH J:**

But that's contemplating the nine-month period you referred to?

**MR COOKE QC:**

Yes, yes.

**McGRATH J:**

But it can happen afterwards, I presume, if there was a change in the recovery strategy.

**MR COOKE QC:**

And there's 18(4), "The Minister may direct a further review and amendment of a Recovery Plan whenever –

**McGRATH J:**
Sorry. Thank you. I understand.

**MR COOKE QC:**
Section 20 is the one Your Honour Justice Young drew to my attention, and that's the requirement for notification of a draft recovery plan, and so that is the minimal public engagement criteria, which was provided for in 19(1). There's a process for approving them in 21, a programme for changing them in section 22 and then you get 23, "Councils not to act inconsistently with Recovery Plan on and from its notification". "Must not make a decision", I'm reading 23(1), "must not make a decision or recommendation that is inconsistent with the Recovery Plan" or in exercising the following RMA decisions.

And then 24, "Councils to amend documents if required". If the recovery plan directs it to then there must be amendments to the consequential documents. That would normally be within the control of the territorial authority.

And then 26 goes ever further, "Relationship to other instruments". "The instruments to which this subsection applies, so far as they relate to greater Christchurch, must not be inconsistent with a Recovery Plan approved by the Minister." And then you get the list of all those instruments that I referred to earlier.

So it's a pretty clear set of provisions that enables the recovery strategy first and then the recovery plan to trump the otherwise applicable machinery.

**ELIAS CJ:**
I should know this, but I don't. Have recovery plans been made in respect of any of the zones?

**MR COOKE QC:**
The red-zoning is not provided for in either the recovery strategy or any recovery plan.

**ELIAS CJ:**
Yes, but what about the other zones? Are there recovery plans?

**MR COOKE QC:**

Again, they're not implemented through those measures. There's passing reference to zoning in, for example, the recovery strategy and I will take Your Honours to that but it's not – those plans do not in themselves implement those measures.

**WILLIAM YOUNG J:**
But are there finalised recovery plans?

**MR COOKE QC:**
Yes.

**ELIAS CJ:**
What for?

**MR COOKE QC:**
There's a CBD recovery plan and that was compulsory under section 17, and there is a land use recovery plan which has been implemented, which, by its name, you would have thought might be the sort of thing that would have been the subject to red-zoning but doesn't deal with red-zoning.

**ELIAS CJ:**
Do we know what it deals with? It just might be interesting to look at.

**MR COOKE QC:**
It deals with a matter that's going to be the subject of a High Court challenge later this year. It's the Independent Fisheries case part 2, if I can call it that. So it deals with things like – in effect, it's a regional policy statement. It's a new regional policy statement for greater Christchurch and deals with, for example, the airport noise corridor which Independent Fisheries is contesting in that further judicial review, so it does deal with the location of future housing within Christchurch for the next – I think the timeframe is 30 years or 25 years or something like that and where –

**ELIAS CJ:**
It deals with future housing for the greater Christchurch area?

**MR COOKE QC:**
Yes.

**ELIAS CJ:**

Does that, by necessary implication, affect the red zone?

**MR COOKE QC:**

But it doesn't actually implement the red zone decision.

**ELIAS CJ:**

But presumably there's no housing provided for in the red zone.

**MR COOKE QC:**

Well, it doesn't deal with that question directly at all, so it doesn't change the zoning of those areas under the RMA.

I'll take Your Honours to a reference to the draft land use recovery strategy later, but without it getting too complicated, I think it doesn't either directly or indirectly give effect to the red zone.

**ELIAS CJ:**

Well, it's just that it might be interesting to see –

**MR COOKE QC:**

What is dealt with there.

**ELIAS CJ:**

Well, yes, and why the statutory processes would have followed there which would be illuminated by seeing what is covered.

**GLAZEBROOK J:**

Well, the Crown position, of course, is that it's up to these people whether they want to live somewhere where everybody else has moved out and where there's no infrastructure. It's their choice and I'm sorry to put it quite as bluntly as that but that seems to be the Crown position.

**MR COOKE QC:**

Yes. That's right.

**GLAZEBROOK J:**

So they're not forcing anybody to move out. They're just providing information and if they choose to live in a wasteland, then that's their choice.

**MR COOKE QC:**

Of course, apart from it being a wasteland, the other little thing is, "If you don't take our offer, bear in mind we could possibly acquire you and if we do compulsorily acquire you it's the value of the land at the date of acquisition that will count, and that's likely to be lower." Part of the problem with the transparency of that, they don't say, "We will." They say, "We might."

**GLAZEBROOK J:**

One can understand one might, if one wants to, develop the land in some way such as a park or some other type of land. One might well want to acquire these people so then it's no longer their choice to stay.

**MR COOKE QC:**

Yes, but in terms of it being a choice the reality is you're told, "This is what you get. Your choice is to live in a wasteland against the risk that we're going to compulsorily acquire you and likely pay you less," which is why the Judge fairly described it as Hobson's choice because it's really no choice at all, because –

**GLAZEBROOK J:**

And arguably, having created the lower market value by moving everybody else out and not providing infrastructure.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

So for Mr Tsao, is that his name?

**MR COOKE QC:**

Tsao, yes.

**GLAZEBROOK J:**

Is that how you pronounce his name? So he lands up with, because of the red-zoning decision, a much lower market value than his neighbour across the street.

**MR COOKE QC:**

Yes. Now, to be fair about those valuations, the Valuer-General has been instructed to exclude the impact of the earthquakes from the valuations, but it's still interesting is that what's happened is the red-zoned land has been valued as rural land and is significantly lower than the adjacent green zone land, which is also not to take into account the damage of the earthquakes. So that's pretty profound and the exhibit to Mr Tsao's affidavit demonstrates the huge difference that that makes and there's the reference in the papers from the internal papers of Quotable Value to the stigma –

**GLAZEBROOK J:**

I was going to say, what was the stigma if it's not part of the earthquake?

**MR COOKE QC:**

The red zone. Yes. No, it's not the earthquake, it's the red zone is the stigma.

**ELIAS CJ:**

Well I just wonder about looking at all of this in isolation. Because if you say that there is a land use recovery plan which deals with where housing is going to be permitted in – or encouraged or whatever, in –

**MR COOKE QC:**

Growth.

**ELIAS CJ:**

Growth. That itself is inevitably going to have an impact on the value of the land. Not within that recovery plan.

**MR COOKE QC:**

Well indirectly I suppose that's true.

**WILLIAM YOUNG J:**

The – as I understand the papers I've read, which I haven't read entirely systematically, that the Government's position was that the offer of 50% would be in excess of the post-earthquake value of the land.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

And that's – is that really – now, that might be disputable in particular instances but it's not disputable as a broad proposition, that on the whole the offer was more than the land was worth post earthquake?

**MR COOKE QC:**

Well, it's difficult to, again it's difficult to know. We haven't run this case with valuation evidence and that sort of thing to contest individual values on that basis and that's largely because of the way that we see it. The acquisition by the Crown is not so much a contract at fair market value as much as the payment that is necessary to enable the community to resettle. So it's not –

**WILLIAM YOUNG J:**

All right. Okay, well just – I think I understand that but what I'm sort of struggling with is – want to get clear in my mind, the Crown position is that the land lost its value irrespective of the red zone decision.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

But if it hadn't been for the red zone decision this land was still going to be less worth –

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

– worth less than they were offering?

**MR COOKE QC:**

Yes. Well, yes, that's what they say.

**WILLIAM YOUNG J:**

Yes. And that's not – that may be challenged in particular people but it's not challenged as a general proposition.

**MR COOKE QC:**

As a generalisation, the answer is I'm not – I just can't give you a definitive answer on that because it's too difficult to know the basis upon which you go about the valuation exercise, and that's demonstrated by the difficulty that Quotable Value had and their decision in the end to value the red zone land as rural land, because the ambiguity about what the red zone does –

**WILLIAM YOUNG J:**

But for what purpose did they do that valuation?

**MR COOKE QC:**

Because they have to do – it's the next –

**WILLIAM YOUNG J:**

Oh, it's the next rating value. It's not – it's unconnected from what was offered and paid here?

**MR COOKE QC:**

Correct. Except that there was a notice that instructed the valuations to exclude the impact of the earthquakes from the valuation exercise.

**ELIAS CJ:**

And what was that notice given under?

**MR COOKE QC:**

That was one of the Minister's powers under – to give a direction.

**ELIAS CJ:**

Under this Act?

**MR COOKE QC:**
Under this Act, yes.

**WILLIAM YOUNG J:**
What's the relevance of that to what's before us?

**MR COOKE QC:**
The only relevance of that is that that exercise demonstrates the difference in value caused by the red-zoning. Because the difference to Mr Tsao and his next door neighbour and the diminishment of his value compared with his next door neighbour's values, it arises purely from the red zone because the impacts of the earthquake have been excluded.

So it may just be helpful if we just look at that table, which is at Mr Tsao's further affidavit, second supplementary affidavit, tab 33.

**GLAZEBROOK J:**
Sorry, what bundle?

**MR COOKE QC:**
This is the supplementary affidavit, second supplementary affidavit for Mr Tsao.

**ELIAS CJ:**
I don't seem to have – oh yes I do.

**MR COOKE QC:**
It's the one you – that was received late.

Tab 33, and what that demonstrates is those in the red zone and those in the green zone across the road, Mr Tsao's house is where the A is in the middle of the page and you'll see that his valuation has changed from 645,000 to 44,000, and across the road the valuation has gone up from 423,000 to 450,000. And you see that the general pattern is the same for the other red zone land compared with the green zone land. With some, of course, variations, but the general impact is demonstrated. Now, is that a convenient time?

**ELIAS CJ:**

Yes. Thank you. We'll take the morning adjournment.

**COURT ADJOURNS: 11.31 AM**

**COURT RESUMES: 11.52 AM**

**MR COOKE QC:**

We don't have the final land use recovery plan in the evidence but we do have a draft. It may be just appropriate just to round off what Your Honour the Chief Justice was asking about that. That's in volume 7 of the case on appeal, behind tab 367.

**ELIAS CJ:**

367 in…

**WILLIAM YOUNG J:**

It's in the second bit of it.

**ARNOLD J:**

It might be in the second part.

**ELIAS CJ:**

Oh.

**McGRATH J:**

Sorry, I've missed that.

**MR COOKE QC:**

Volume 7.

**GLAZEBROOK J:**

Oh volume 7. Oh, right, sorry. I did miss it.

**McGRATH J:**

Not 7A?

**ARNOLD J:**

7B I think. The second.

**GLAZEBROOK J:**

7B?

**ARNOLD J:**

Yes. Ours are divided into two parts.

**MR COOKE QC:**

I see. Well...

**GLAZEBROOK J:**

So what tab are we?

**MR COOKE QC:**

367. Are we all on the same page, literally? You should have a draft land use recovery plan.

**GLAZEBROOK J:**

Yes. Finally.

**MR COOKE QC:**

And just so you know, this was received by the Minister on 5 July 2013. A final version of this has in fact since been approved which is different, of course, in some respects from the draft.

**WILLIAM YOUNG J:**

Does this deal with the CBD or not?

**MR COOKE QC:**

No. The CBD had its own recovery plan. Just looking at the table of –

**ELIAS CJ:**

When was the, when was it finalised?

**MR COOKE QC:**

The – it was finalised – just looking at chronology, it's not – I'm afraid we don't.

**ELIAS CJ:**

Oh, don't worry.

**MR COOKE QC:**

And we can make a final, the final plan if –

**ELIAS CJ:**

No, we probably don't need it. It's really just to see the scope.

**MR COOKE QC:**

Yes, and maybe just – in terms of scope if you look at page 2283 of the case table of contents you'll see for example in part 4, "A plan to lead recovery dealing with rebuilding communities, building new communities, providing for business, delivering and restructuring services." And if you go over the page you'll see the content a wee bit more. You'll see from the first page the executive summary, first paragraph of the executive summary, that it's been developed by Environment Canterbury together with the territorial authorities, Ngāi Tahu and CERA.

And in the next part down, the shaded box, it describes what it does. "The land use recovery plan includes 56 actions in a commitment from the strategy path to deliver results for recovery immediately and over the next 10 to 15 years." And then in the bullet points, second bullet point down, provides for anticipated 40,000 new households, agreed in-field intensification areas. Sets a target of 18,000 new households to be provided within existing urban areas to provide medium-density housing, et cetera.

And you'll see at the end of that part, just before the heading on the page, "Key challenges for recovery", is the sentence at the very end, "However, in accordance with the Minister's direction this recovery plan cannot direct the future use of the red zone land or changes to the Canterbury central recovery plan." So the Minister directed that the future use of the red zone land wouldn't be the subject of this plan. And there's a very interesting observation in the draft that I can tell you that this came out of the draft for the final on page 2287 under the heading, "Avoid natural hazards", on the right-hand side. The second to last paragraph on the right: "In existing urban

areas the significant hazard has been addressed through establishing residential red and green zones by the identification of green zone land and the three technical categories. Until such time as the future use of this land is determined by the Crown the only area that are prohibited from urban activities are those within the residential red zone."

Now, I understand comment that that's just an error. It's an error in the draft recovery plan developed by all the territorial authorities and CERA for the Minister's approval, and yes it did come out, that observation did come out on the final LURP but that slip or perhaps the slip of reality in terms of what was really going on. And the final LURP, I've now been told was gazetted on 6 December 2013.

Now, if I can take Your Honours, I was going through the legislation and drawing close to the end of the analysis, but if I can go back to the legislation, is that that deals with both, dealt with both the strategies and the plans and how it interweaves with the existing regulatory regime.

The next section of significance is section 27 of the Act and you'll see in section 27 the Minister's given additional power to give directions to the relevant authorities.

**WILLIAM YOUNG J:**
The recovery plan is like a super Resource Management Act document, is that right?

**MR COOKE QC:**
Yes. Well that's one way of describing it because it overrides existing documents and makes provision for amendment to district plans and regional policy statements and –

**WILLIAM YOUNG J:**
So it would otherwise contain the sort of stuff that would be in a regional plan or a district plan?

**MR COOKE QC:**
Yes. Although –

**ELIAS CJ:**

Not necessarily as comprehensive since it will prevail over inconsistency in any event.

**MR COOKE QC:**

Yes. And of course it's directed to earthquake recovery, so its focus is different.

**WILLIAM YOUNG J:**

But what does it – does it do anything other than deal with the matters which would otherwise, which aren't dealt with in regional plans or district plans?

**MR COOKE QC:**

Well, for example, the controversial issue that it's dealt with is the location of the airport noise corridor and that's the –

**WILLIAM YOUNG J:**

But that would be a regional plan issue.

**MR COOKE QC:**

That was to be in the regional policy statement. So –

**WILLIAM YOUNG J:**

So that's – so, sorry, when I meant plan I should include all regional –

**MR COOKE QC:**

The broad stuff, yeah.

**WILLIAM YOUNG J:**

– and district planning instruments.

**MR COOKE QC:**

Yes. I'm trying to think about whether there were provisions that because of the earthquake focus wouldn't be in what is defined as RMA documents. I don't think that would be the case although of course because it is focused on recovery, earthquake recovery, there will be – there is a different focus about it.

**WILLIAM YOUNG J:**

Could you have something in a recovery plan that says – well it couldn't provide for compulsory acquisition of land. It couldn't stop people doing anything who had existing-use rights, presumably.

**MR COOKE QC:**

Yes it can.

**WILLIAM YOUNG J:**

Can it?

**MR COOKE QC:**

Yes, and that's relevant to what I'm just about to touch on.

**WILLIAM YOUNG J:**

Sorry, okay, sorry.

**MR COOKE QC:**

Section 27.

**WILLIAM YOUNG J:**

Oh no but that's not, section 27 isn't, is powers for the Minister, it's not what's to be dealt with in a plan.

**MR COOKE QC:**

No, no, but – yes, so to withdraw existing-use rights you would use section 27 –

**WILLIAM YOUNG J:**

Yes.

**MR COOKE QC:**

– in conjunction with the power to direct plan.

**WILLIAM YOUNG J:**

And it wouldn't address necessarily what utilities did, a regional plan – a recovery plan. It might signal –

**MR COOKE QC:**

Well as His Honour Justice Arnold indicated, the definition of the responsible entities, could be asked to develop a plan include the network operators. So they're within the compass.

**WILLIAM YOUNG J:**

But would that be for things, the sort of things that network operators are interested in connection with, say, district plans, for instance, designations, corridors for their power lines, et cetera?

**MR COOKE QC:**

Yes, presumably that's what you would be –

**WILLIAM YOUNG J:**

As opposed to saying, don't supply electricity to Number 33 Burwood Avenue or something?

**MR COOKE QC:**

Well I will take Your Honours to the recovery strategy which in its non-statutory part refers to CERA working with infrastructure providers, about withdrawing infrastructure from the cleared red zone areas. But I'll – I guess these submissions are rather like a series of foreshadowings.

**WILLIAM YOUNG J:**

Okay, that's fine.

**MR COOKE QC:**

But just in terms of section 27, that gives the power of the Minister by public notice to suspend, amend or revoke the whole or any part of the following and then lists all the RMA instruments and then all the other regulatory instruments that sort of, that regulate the community in the broad sense, including conservation management strategy, using things like that. But that's the power of direction, well outside, explicitly outside the plans, although, of course, there's no reason why the section 27 power couldn't be used in conjunction with a recovery plan and then one of the key important sections in this is 27(2). This includes, "The Minister may, by public notice, suspend," or cancel, "in whole or any part of the following…" for an activity within greater Christchurch. And not just any resource consent but (b) "Any use protected

or allowed under section 10, 10A or 10B of the Resource Management Act 1991." And those are the existing-use rights that Your Honour was referring to. So if a zone is changed under the RMA, say from residential to rural, the RMA in section 10 would say you can't prevent people who have got existing residential uses from carrying on their residential uses. So that's existing-use rights under the RMA and this gives the power of the Minister to say well, no, you can no longer use this land, for example, for residential purposes.

**WILLIAM YOUNG J:**
But no compensation can be payable.

**MR COOKE QC:**
Yes, that's true, under subsection (7), no compensation is payable for that Act alone. But the point we make about that is it's still the Minister and the other decision-makers have got to implement these matters, these measures, in a way that ensures that people recover from, communities recover from the earthquakes. So you would expect if residential use is going to be terminated, that measures will be implemented to allow people to recover from the earthquake. It's not a question of compensation, it's a question of dealing with the Act's purposes in an appropriate manner.

**ARNOLD J:**
I'm just trying to get the overall scheme of this. So under section 26 all of those listed instruments can't be inconsistent with a recovery plan and they're all local Government, transport agency, land management, so on and so on. In respect of the RMA, under section 24, if a recovery plan directs a council has got to amend the RMA instruments –

**MR COOKE QC:**
Yes.

**ARNOLD J:**
– and apart from that the Minister can effectively suspend the operation of, well can –

**MR COOKE QC:**
Not just suspend, but suspend, amend or revoke in whole or any parts, so it's a fairly flexible broad power as well.

**ARNOLD J:**

Right. Okay.

**MR COOKE QC:**

But you can see – sorry, the reason why I'm going through this in part is because we're asking the question, well, is the red zone measures within this field, and I would have thought, well I'm hoping I'm demonstrating that Parliament has turned its mind to exactly the kind of –

**WILLIAM YOUNG J:**

But not the – a recovery plan couldn't do any of the stuff in the red zone, could it?

**MR COOKE QC:**

Yes it could. The use of the recovery plan is broadly described. It can deal with any social, economic, cultural, environmental matter –

**WILLIAM YOUNG J:**

No, but because it's effect is, in terms of planning instruments, does it have any other effect? Does it have any other statutory effect than amend, revoke, change, run over the top of other planning instruments?

**MR COOKE QC:**

Yes, yes, and that's what the red zone did.

**WILLIAM YOUNG J:**

No, no – well, maybe, but does it? Say you want to do something short of going over the top of the planning instruments?

**MR COOKE QC:**

Yes, that's still the mechanism by way –

**WILLIAM YOUNG J:**

But that's the Court of Appeal's approach which you disagree with?

**MR COOKE QC:**

Yes. It is still the mechanism by which you do. If you say that you're, that the residential occupation in the residential zone in these areas are now subject to the red zone measures –

**WILLIAM YOUNG J:**

But that wouldn't – the recovery plan wouldn't have done what the Government wanted it to do because it would still have to go on and use 27 powers as well because otherwise everyone would just, could use their –

**MR COOKE QC:**

Existing-use rights.

**WILLIAM YOUNG J:**

Existing-use rights.

**ELIAS CJ:**

Why could a recovery plan not establish where the Chief Executive may make offers of purchase under section 53?

**MR COOKE QC:**

The whole red zone scheme could have been put in –

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

– a recovery plan because it's not, none of this is supposed to be tying, it's a broadly expressed thing –

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

– so it's for the purposes of recovery. So even if it's true, although of course we say it's completely artificial, even if it was true to say the Government was not trying to end residential occupation in these areas, but make residential occupation now

qualified in the sense that the infrastructure would no longer be fully restored, the normal community expectations would no longer exist, then you would do that by amending the normal expectations under the Local Government Act and the RMA. Now it's all slightly artificial but if you're, if you're still actually seeking to do that sort of measure, these provisions are broad enough for you to do that.

**WILLIAM YOUNG J:**

But it can't, sorry. Where does, where is there anything in the statute that confers statutory effect on a recovery plan otherwise than in relation to other planning instruments?

**MR COOKE QC:**

There isn't but the residential red zone measures do have an implication for the way that councils go about things like deciding which infrastructure to provide, where the libraries will be, where swimming pools will be –

**WILLIAM YOUNG J:**

Yes, of course, I mean they – part of the red zone package could have been accompanied by, or signalled in, or associated with a recovery plan, but more was required.

**MR COOKE QC:**

Well it depends what you mean by "more" but –

**WILLIAM YOUNG J:**

Sorry, the recovery plan wouldn't itself authorise acquisition of land. Wouldn't address acquisition of land.

**MR COOKE QC:**

But it could have contemplated that.

**WILLIAM YOUNG J:**

Yes. It wouldn't be expressed in terms like control the actions of the Chief Executive because that's not really the function of a planning instrument.

**MR COOKE QC:**

But in terms of transparent planning of earthquake recovery it could easily have –

**ELIAS CJ:**

It's planning for the purposes of the Act.

**MR COOKE QC:**

That's right.

**ELIAS CJ:**

This instrument can be used for any of the purposes of the Act. It does have consequences.

**WILLIAM YOUNG J:**

Well –

**ELIAS CJ:**

Well that's the –

**WILLIAM YOUNG J:**

I've actually –

**ELIAS CJ:**

– of section 11.

**GLAZEBROOK J:**

Otherwise why would you have a plan?

**WILLIAM YOUNG J:**

Because it's, you might have, look, I don't know. You might have a plan so that you can get right over the top of existing planning instruments without going through the –

**ELIAS CJ:**

But it does that as well, but it's not –

**GLAZEBROOK J:**

Why would you have a plan that says you can't put anything in it that has an effect? I mean it has an effect overriding the planning instruments but surely you could also say this plan we should do X and it's obviously going to be subject to –

**ELIAS CJ:**

Particularly when it has social and cultural and goodness knows what other objectives.

**MR COOKE QC:**

The point is actually more easily identified. If you think about the recovery strategy, because the recovery strategy is, as it says, the mega plan. It's the overarching long-term strategy for the reconstruction, rebuilding or recovery of greater Christchurch. Now we, I've accepted here that because of timing you might need to bring your, use your plan before you finalise your strategy, but these planning instruments together are supposed to be the plan for recovery of Christchurch where the measures that are going to be taken, how we're going to rebuild Christchurch, in what way, what powers are going to be used, such that rezoning is plainly within this province.

Now I accept that because of timing you might have to do the plan before the strategy but nevertheless these instruments are supposed to do this. And they're supposed to be developed in conjunction with the community, with community buy-in, cross-party forum, community forum, consultation. And, yes – and they do contemplate the kind of things that the red zone, even with the artificiality that the Crown says about, we're not trying to interfere with people's residential occupation at all. There is an artificiality about that, but even if you were to accept that awkward position, that would be covered, within the scheme of the Act, in my submission.

**GLAZEBROOK J:**

Well, actually just looking at the recovery strategy, if it says you can sequence repairs –

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

– you can't possibly say that if you have a plan that says, "First of all you're going to repair A, then B, then C, that you could say, "Oh well, I don't have to because there's nothing that tells me I've got to."

**MR COOKE QC:**
Yes.

**GLAZEBROOK J:**
It must be implicit in the nature of a plan that if you've got something that says you sequence repair that you can't say, "Oh, well I don't think I'll bother repairing at all."

**MR COOKE QC:**
Yes.

**GLAZEBROOK J:**
"Or certainly not in that order and I think I'll do something totally different." Now that's obviously going to be subject to the proper mechanisms for having the funding for those things, but that doesn't mean that you can't say, "Well you've got to do this, that's what the strategy or the plan says," I would've thought.

**MR COOKE QC:**
Yes. If you read these provisions together you can see what they're supposed to be achieving, in my submission.

**GLAZEBROOK J:**
And that will override the planning documents but the planning documents don't tell you to repair this. they might stop you repairing it or do something that doesn't enable you to site something there and therefore need overriding, but…

**MR COOKE QC:**
And we'll come to the Cabinet paper in a moment, but the key driver to that decision was a decision that the area-wide damage was too extensive for it to be economic to repair the land and repair the infrastructure that was damaged underneath it. And that was the driving factor in the red zone decisions, which is precisely the type of thing that the Act contemplates, in my submission.

So, I mean one of the things about this case that is puzzling is we really don't have an explanation, a clear explanation for why the statutory powers weren't utilised in this way, and in some ways we pick that up by inference, and it's interesting, if I can invite Your Honours just to go to volume 3 in the case on appeal, there was a CERA document that looked at the options for how the residential red zone measures might

be implemented, and in a sense it's quite revealing in terms of the table of options that's revealed. So that's in volume 3, tab 66. And you'll see that, and we see from the preceding document that it's the beginning of June. Heading up is, "Mechanisms for implementing decisions on land to be retired."

**GLAZEBROOK J:**
So June – what date's this? June –

**MR COOKE QC:**
June 2011.

**GLAZEBROOK J:**
June 2011.

**MR COOKE QC:**
It says, "Following Cabinet decisions on land to be retired within the worst affected suburbs there are a number of implementation options to be considered." Now, the Cabinet hasn't yet made that decision so it's obviously a document prepared in anticipation of that, and the options are interesting. The one that perhaps is most relevant, I'll go to the others but is D "The Minister could direct that a recovery plan be produced setting out amendments required to the city plan and other relevant RMA documents." The pros, "Ensures a more formal, transparent process with an opportunity for community engagement, greater linkage to overall recovery strategy, including input into future land use options." Cons, "Longer timeframes to complete process" and the interesting one, "community expectation that their views may change decisions." Which is –

**WILLIAM YOUNG J:**
Can I just – they've probably missed out the next one which is the top of the list, because it – this wouldn't address existing-use problems, would it, option D?

**MR COOKE QC:**
Well it –

**WILLIAM YOUNG J:**
I know it's not mentioned in this but it's mentioned in the next one.

**MR COOKE QC:**

Yes. They haven't put that in that column, so – of course the Government says it wasn't trying to do that, but if it was doing that then you would use section 27 in conjunction with section 16.

**WILLIAM YOUNG J:**

Yes. Which is C?

**MR COOKE QC:**

Yes, C and D together. And they – the cons of section 27, "Removes existing-use rights without any input from those directly affected," yes community whereas – and if you go up the page –

**GLAZEBROOK J:**

Well of course it wouldn't – you'd have community input if you'd done it through a recovery plan.

**MR COOKE QC:**

Yes. Yes, as part of it.

**GLAZEBROOK J:**

Because it would have been a necessary implication.

**MR COOKE QC:**

Yes. If it used section 27 in conjunction with section 16.

**GLAZEBROOK J:**

Yes.

**MR COOKE QC:**

Yes. So because we found this table, it was very interesting to know, well, given that there was obviously some – someone turned their mind, as is somewhat obvious someone –

**ELIAS CJ:**

What is this? It's just – it just floats there. I presume –

**MR COOKE QC:**
It's attached to the email that's behind 65.

**McGRATH J:**
Oh, so that gives the date?

**MR COOKE QC:**
Yes. So it's just an internal CERA document considering the options for this contemplated decision. Now, one wouldn't normally scramble around draft documents or final documents to try and find the reasons, but we don't have clear affidavit evidence explaining why a decision was made to not follow the Act.

**WILLIAM YOUNG J:**
It's sort of implicit in Mr Brownlee's affidavit that they were under time pressure, isn't it?

**MR COOKE QC:**
Well, that's – I –

**WILLIAM YOUNG J:**
I mean I'm saying it's implicit. I mean it's – there's a reference to the pressure of events.

**MR COOKE QC:**
Yes. I agree that there's that reference, that they were under time pressure, but that's – it's really not a full and frank explanation about why a decision was made and obviously a decision was made not to use the statutory machinery but to use the third source. Now, it's – someone's come up with this idea and there must be reasons for that idea and we just don't know why. And in respect it's quite important to understand why that decision was made and what…

So that might be an appropriate time to look at the Cabinet paper itself in relation to the decision, and that's in volume 4 of the case on appeal. Tab 108A. Your Honours will have understood the flurry of anxiety around this document because it was only discovered after we'd had the Court of Appeal hearing. Because no copies of it were discovered until after that hearing, and so –

**ELIAS CJ:**

It was produced to the Court of Appeal?

**MR COOKE QC:**

After it's hearing –

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

– and they took it into account because written submissions –

**McGRATH J:**

A few days before the decision was reached?

**MR COOKE QC:**

Just before – I think they were about to release it and there was a bit of frustration I imagine that suddenly this arrived.

Now, I probably need to spend a bit of time going through this. I won't do the executive summary because that just repeats it in a later document, but if I could go through to page 802, paragraph 20, that's the reference to services from the Minister to the other Ministers. I've called it a Cabinet paper but that's not quite right. It's a committee of Ministers. "The damage in greater Christchurch is unprecedented. It's damage on a scale and severity that has not been experienced in New Zealand before. It has occurred in an area of significant population. Makes significant economic contribution to the country. As such I consider the loss of confidence and property damage is of a scale to warrant a central Government response. A circuit paper is required to rest confidence." And –

**ELIAS CJ:**

Sorry, where are we?

**MR COOKE QC:**

Paragraph 20 on page 802 of the case. This is the background. And then sort of last sentence of that that I really drew attention to, and then 24 across on the other page, "I consider there is an urgent need to provide a reasonable degree of certainty to

residents in these areas in order to support the recovery process. Speeding up the process of decision-making is crucial for recovery and in order to give confidence to residents, businesses, insurers and investors. This is particularly the case in the worst affected suburbs where the most severe damage occurred."

And then if you go over the page to page 805 of the case, paragraph 35 with the heading, "Criteria for determining the Government's role in land remediation" and perhaps 37, "Criteria for determining the areas where rebuilding is unlikely to be practicable over the short to medium term, noting boundaries of such areas need to be drawn on a sensible basis. There is area-wide damage, thereby implying some sort of area-wide solution. Engineering solution will be uncertain." Next bullet point, "be disruptive", and interesting under disruptive, "For landowners as the commencement date is uncertain both in terms of confidence in the land settling sufficiently to begin remediation, and the need to sequence the many areas where remediation would be required, and the length of time they would need to be out of their homes to allow remediation to occur. Not be timely, substantial replacement of infrastructure required, land level needs to be significantly lifted, effectively requiring work equivalent of the development of a new subdivision and would probably lead to significant social dislocation for those communities in the short-term and in turn would not be cost effective on a perception basis. The cost of remediation is greater than the value of the land."

The table is quite interesting. The box at the top is the EQC contribution to the land remediation. The betterment costs, that's things like raising the land level, and then infrastructure removal and replacement costs, so those are the costs involved in repair, and then in the left-hand box, "If the cost of the above exceeds the value of the relevant land the area is to be classified as a red zone," and then on the other side, "If the cost of the above is less than the value of the relevant land then the area is to be reclassified as a green zone but may require some land repair work."

So in the end it's a cost drive assessment of what it's going to cost to fix up all this land compared with the value of the land. And then in c), "The health or wellbeing of residents is at risk from remaining in the area for prolonged periods," which of course is exactly what the case was in terms of the Quake Outcasts.

Going on to 39 and 40, "In some areas of significant land damage there maybe isolated pockets of land that have fared reasonably well. However, without a full,

area-wide land remediation solution, the largely undamaged properties, may be at risk from the works involved in the substantial amount of landfill and compaction that neighbouring properties may require. In addition, the social impacts of widespread treatment options must also be considered. Large-scale remediation programmes are likely to take from three to five years if not longer. During that time all of the residents of the affected areas will need to be relocated as area-wide remediation requires all improvements on the land to be removed to allow the work to occur. It is also uncertain whether private insurers will offer insurance to properties on land requiring this level of remediation."

And then across the page we get the table of zones. So the green zone is the go zone where repair, remediation can occur. Orange is hold zone, further assessment required. Red zone, obviously, is the stop, stop box, stop residential occupation in my submission, where infrastructure needs to be completely rebuilt and then over the page, paragraph 47, "Even in small localised areas of relatively low damage within the red zones, the horizontal infrastructure is severely damaged and would need to be completely rebuilt."

And then down the bottom of the page, this is paragraph 51, "As the status quo does not meet the Government's objectives, the Government should act to provide the certainty, simplicity and confidence that insured residential landowners in the red zones require. I consider that the best mechanism for doing this is for the Crown to make an offer to purchase insured residential red zone properties. As a result of these offers there is unlikely to be an justification in the near to medium term for the infrastructure and services in these areas to receive any more than emergency repairs. The relevant councils will be asked to discuss any proposed maintenance and repair plans for the infrastructure in these areas or any proposed regulatory interventions for the areas."

And then we get, on page 809, the reference to the offers to be made to the insured and you'll see after setting out the two versions of the offer, paragraph 57, "These offers will ensure that, as far as possible, insured residential landowners will have the equity in their homes preserved. As I have repeatedly stated, it has always been my intention to preserve this equity to the extent possible." And then option A, second sentence, "This will allow landowners to make a fresh start at the soonest possible opportunity, while the Crown continues to pursue insurance settlements directly, but for its own benefit.

Then there's the reference to the uninsured at the bottom of the page. "Uninsured residential properties and vacant lots. Neither uninsured residential properties nor vacant lots are covered by EQC land or improvements insurance. For residential owners, the risks of not having insurance were risks that ought to have been considered when making the decision to invest in the property. Residential owners should have been aware of the risks when choosing not to purchase insurance. Vacant lot owners were not eligible for EQC or private insurance cover. Consideration will need to be given over time to the position of these people." And that's it. That's the only consideration or assessment.

Their position, page 811, paragraph 72, under the heading, "What does this mean for landowners' businesses?" the red zones, "The decision to identify areas as red zones allows the landowners of these areas to move on and make decision about their futures," 74 and 75, these red zones areas, "The time required to assess the land and design engineering solutions carried undue risks for the occupants. There are risks around likely further land damage, uncertainty of the future plans of these areas, ongoing social impact, fractured or displaced communities. The Government has determined that it is neither practical nor reasonable for these communities to stay in the red zone areas during the extensive time required to fully design remediation solutions. For the residents in these areas this will mean progressively relocating out of the area and that new permanent infrastructure should not be installed there until this uncertainty is resolved."

And then perhaps on a few pages to page 814, "Financial implications." There was an issue about the difference between this paper as it finally emerged and the subsequent advice to Cabinet of the decision, because in the financial implications there's no estimate of the recovery the Government could expect from the assignment of EQC and insurance costs, there's no reference to that in this paper, paragraph 88, "Funding for the recovery in the worst-affected sectors, suburbs of Greater Canterbury, will come from a number of stakeholders. Inevitably some costs of recovery will also be borne by residents in budget 2011," the Crown had set aside the 5.5 billion over six years for recovery so it just, it comes within that budget.

Now, in terms of working out why this was or wasn't done under the Act, there's interesting references, perhaps in paragraph 91, "Human rights implications. The proposals in this paper are not –

**WILLIAM YOUNG J:**
What para, sorry?

**MR COOKE QC:**
Para 91, on page 814, first reference, "The proposals in this paper are not inconsistent with the Bill of Rights Act 1990 or the Human Rights Act 1993," check. And then 95 is interesting, "Any recovery plan coming from these proposals in this paper will be developed with regard to the New Zealand disability strategy." Now that's an isolated reference in this Cabinet paper to what appears to be the statutory mechanism, but otherwise there's no explanation why this was done by the third source rather than the use of the statutory –

**ELIAS CJ:**
You mean the reference to "recovery plan"?

**MR COOKE QC:**
Yes.

**WILLIAM YOUNG J:**
In terms of what we're talking about, in terms of the red zone policy, do you include the green and orange and white zones as well?

**MR COOKE QC:**
Well, that was an important part of the decisions that the Government was making, because they were identifying, green, "You can go ahead," and –

**WILLIAM YOUNG J:**
How many properties were there in Christchurch? About 150, 180, or something?

**MR COOKE QC:**
Your Honour might know that better than I do.

**WILLIAM YOUNG J:**
Yes, but it will be of that order.

**MR COOKE QC:**
Yes. And –

**WILLIAM YOUNG J:**

So it was effectively a – it was a signal, just from a personal recollection, a signal to insurers –

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

– that it's worthwhile and you should get on with house repairs or replacements in the green areas, "We'd tie-ho if we were you in the orange and white areas and –

**MR COOKE QC:**

And –

**WILLIAM YOUNG J:**

– and don't do it in red areas."

**MR COOKE QC:**

That's right. That's what the Minister says in his affidavit. He says that the urgent need to sort out insurance was one of the prime guides for this.

**WILLIAM YOUNG J:**

And that was accentuated with the 13 June earthquake that occurred between the paper and the decision?

**MR COOKE QC:**

Yes. It's what – again, the Minister says that in his affidavit.

**WILLIAM YOUNG J:**

Yes.

**ELIAS CJ:**

Are you going to take us to that at some stage?

**MR COOKE QC:**

I was planning to take Your Honours to that at some stage, yes. But before I do that I guess I can round up, because I was going to do that in the part of the submissions that deal with the factual issues about –

**ELIAS CJ:**

That's fine.

**MR COOKE QC:**

What I can say after going to the Cabinet paper and having also gone through the legislation, as if we step and ask ourselves why we're going, doing this, and the question is we're asking ourselves whether the Act covers the field in a manner that would exclude the residual power, and I would respectfully suggest that, as His Honour Justice Pankhurst said, it's hard to imagine a clearer case where –

**WILLIAM YOUNG J:**

Well say something like the red zone policy had been announced as a notified recovery plan wouldn't there be a very substantial likelihood of litigation in relation to the notified plan, saying along the lines that you are saying, well how is this ensuring the – the repair of Christchurch and the, I suppose, looking after of communities, and you can't do this because you're forgetting us or you're too generous for them. Might that not have been a factor?

**MR COOKE QC:**

Well that's asking me to speculate about something that hasn't been put forward by the Crown.

**WILLIAM YOUNG J:**

Yes, but it would be a realistic problem wouldn't it?

**MR COOKE QC:**

Well I'm not sure if I agree with that. It may well have – I certainly agree that the proposals, once they have been put forward, would have been subject to considerable community interest –

**WILLIAM YOUNG J:**

And likely litigation.

**MR COOKE QC:**

And possible litigation although I have to say that there is a lot more litigation that could have come out of Canterbury earthquake affected people that has not taken place because literally people are too punch drunk to engage in it. So if you're asking for my opinion about whether litigation was inevitable, I just don't know about that.

**WILLIAM YOUNG J:**

The arguments you have advanced is the process wouldn't have been available because the earthquake plan, the statutory process would have been used and the third source of power not invoked.

**MR COOKE QC:**

And that avoids –

**ELIAS CJ:**

It's accepted by –

**WILLIAM YOUNG J:**

But a lot of the other arguments you've made would be available, wouldn't they?

**MR COOKE QC:**

They would have been arguments that were legitimately pursued in the community engagement process. Now whether that would have resulted in litigation, I just don't know, because if the thing had been done properly, in accordance with the proper processes, the points that people might want to make about whether it was fair that they were on the wrong side of the road, and whether the properties should have been in or out of the red zone, could have been done in the way that was appropriate, as the Act contemplated. Now yes I accept that there's always a possibility that someone will want to challenge that but that doesn't, that's not a good reason for you to say we shouldn't follow the Act. I think it's just –

**ELIAS CJ:**

It is supervision for legality after all.

**ARNOLD J:**

Yes. I must say it seemed to me to be a most unattractive argument that if you have a statute which contains processes and creates rights that people can exercise, it seems to me a little difficult to argue that it's, you're justified in using the third source as a mechanism to avoid all that.

**MR COOKE QC:**

Well thankfully that argument hasn't been actually advanced although there is – the problem with all of this is that there is obliqueness and obscurity as to what really was the motivation for acting, because you have to say about this case, it just strikes you as being so extraordinary that they would have decided, let's do this outside the Act. There must be some explanation for that. There can't have been – this is not an accident. Someone has turned their minds to why they would do it outside the legislative regime. What is missing in this case is some explanation about why they would do that. The concerning inference is that they've done it, I suppose as it partly follows from what Justice Young is saying, they've done it to avoid the disadvantages that might be arising from people exercising their rights to be engaged, including litigation, as that table said, and the problem with consultation is that people might think it might change their view. I mean if that's really part of the thinking that it is constitutionally questionable but the real difficulty we have here is we just don't have any real explanation for it. We're struggling by getting bits and pieces out of documents to work out what was the true thinking of the Crown because it's just not apparent.

**ARNOLD J:**

And it goes back, I think, to the, arguably anyway, to the discussion you had earlier with members of the Bench, could this have been done under the Act. Nobody has said we did this because we couldn't do it under the Act and there were all of these circumstances that made it necessary for us to do it.

**MR COOKE QC:**

Mmm.

**ARNOLD J:**

Nobody said that.

**MR COOKE QC:**

No.

**ARNOLD J:**

So, I mean ultimately one would have thought some justification was required.

**MR COOKE QC:**

And I've referred in my submissions to the *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) case where the Court of Appeal was critical of the lack of full and frank explanation for ministerial decisions and that it was inappropriate that the Court had had to scramble through documents and make inferences from what's available, and we have relied on that principle to say, well, look, especially when you have these issues where the Crown say they're doing no more than providing information and engaging in contracts of acquisition.

**WILLIAM YOUNG J:**

Providing information is a process under the Act, though, isn't it?

**MR COOKE QC:**

Yes, it can be, because I didn't go through those – I've skipped over those provisions in the Act, section 53 acquisition, but in fact I shouldn't have done that. There were those provisions about the Chief Executive commissioning reports and obtaining information, disseminating information. I mean to skip over that but they're also within that framework. But I accept the point my learned friend makes, well, that wouldn't prevent the Minister answering questions at a press conference and I accept that because it's just a normal interaction of politics.

**WILLIAM YOUNG J:**

But issuing in a sense issuing the red zone announcement was disseminating information, wasn't it?

**MR COOKE QC:**

In a sense it was, but also –

**WILLIAM YOUNG J:**

You say it goes more than that. I know that.

**MR COOKE QC:**

It's a measure. It's an earthquake recovery measure. It's the type of measure contemplated by the Act.

**ELIAS CJ:**

Just on that litigation point, of course, Parliament decided to limit rights of appeal but it didn't exclude judicial review.

**MR COOKE QC:**

No.

**ELIAS CJ:**

I just don't see that it could. It's not been put forward and it would be a most unattractive argument as has been put. I don't think we need to waste time on it.

**MR COOKE QC:**

Just to round off, the question is what are the arguments for saying, well, this does not occupy the field, and there are really two that have been put forward and maybe both were accepted by the Court of Appeal. The first was the Court of Appeal saying, well, what the Government wanted to do didn't actually correspond neatly with what the Act contemplated. I think the expression that the Court used, if I go to the Court's judgment, is in paragraph 122 of the judgment. Although we believe that the recovery plan mechanism could possibly have been adapted to provide a statutory mechanism for the June 2011 decision, we do not think that it is sufficiently aligned with what actually occurred in this case to be able to say it was the intention of Parliament that the recovery plan was the mandatory mechanism. Now, as we say in our written submissions, that is not a reason why the Act does not occupy the field. What it is is an explanation and a bad explanation why a Government might choose not to follow the Parliamentary regime. Just because they want to do something different from what the Parliamentary regime contemplates is not a reason, a proper reason, for them to do it as a first proposition and certainly it doesn't mean that the Act doesn't occupy the field.

**GLAZEBROOK J:**

All they wanted to do, if we're saying from the Crown, is to say it's up to you whether you leave so they didn't want to override the planning documents but what's to stop

them saying we don't want to override the planning documents but we think it's a good idea that you all leave. That's what the recovery plan might say. So just because it doesn't use all the mechanisms it's allowed to under the Act doesn't mean that it's not a recovery plan, I would have thought.

**MR COOKE QC:**

That's in a way my second point because the Court appears to have suggested that the section 16 powers of recovery plans and the section 27 powers could only have been used in their fulsome way that destroyed residential occupation and removed existing use rights. In my submission, those provisions – and I'd involve the recovery strategy as well – were actually broad and flexible in terms of how recovery was to be effected, so even if we were to accept the stance the Crown has taken that we just wanted to give people a choice, the mechanisms would have existed for that. Now, whether that so-called choice was a real choice or a Hobson's choice and whether the suburbs were in reality still being completed eliminated is a separate point, but in terms of the recovery of the scope of the Act, in my submission it's clear that it's within the field. So those – I think I've therefore dealt with the two arguments. The one is that it's not quite what the Government wanted to do. I said, well, that's not an answer for the field proposition and secondly that the sections didn't have within them the flexibility that would have allowed the Government to do what it does and I say they were sufficiently flexible to have allowed that to have been implemented.

So that deals with the first of my four points – and don't worry, the other ones will be faster – that the third source can't exist where the legislation exists to occupy the field. It's the one I've dealt with first because it does, with respect, seem the most obvious. The second recognised limit of the third source is it doesn't apply when then there is already applicable positive law, and I've taken that proposition from Your Honour Justice McGrath in the *Ngan v R* [2007] NZSC 105, [2008] 2 NZLR 48 case and Justice Underhill in the *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* ([2007] EWHC 2279 (Admin)) case at first instance, and also it's referred to in the academic writings. And what I say about that is, even without the CERA Act there was existing positive law, and His Honour Justice Pankhurst identified that when he referred to Your Honour the Chief Justice's observation in the *Discount Brands Limited v Westfield (New Zealand) Limited* [2005] NZSC 17, [2005] 2 NZLR 597 case that the whole object of district plans was to allow people to make decisions about the orderly conduct of their lives with a degree of certainty about what the plan was. And it's not just the district

plan but it's all those regulatory instruments that interlink with each other, and they're established by a participatory process, that is, the community is engaged with the plans that are established under the Local Government Act and the Resource Management Act, and under that regime people know where the activities are, where the communities are, what the permitted uses are, and form in fact a community, and that is, with respect, positive law and which is regulated by those regulatory and statutory regimes where they include things like long-term plans, annual plans, regional policy statements, all that sort of thing, so where libraries are going to be, where swimming pools are going to be, where your local transport is going to be, your sports grounds, they're all established under this regime.

So the whole shape of local communities is formed under this positive law, and what happens with the red zoning decisions is that those, you can either view those as being completely undermined, or at least severely truncated, in terms of their effect, and this is where we get into this kind of factual issue about what is the real characterisation of the red zone declaration and what is the real factual characterisation of the effects of the red zone declarations. And in a sense my response to the argument, the proposition, that we were merely providing information and providing choices, is partly a legal answer, because the positive law regime that I have just been describing is not simply a matter of strict legal rights. The regulatory regime which is created, after community engagement, also creates expectations and understandings about how the community operates. So communities are not just little bundles of legal rights, they are people living together in accordance with established practices and processes, and that is in fact why the Act, when it came to turn its mind to how you might deal with that sort of situation, actually has provisions in it that cross-referenced all those kinds of instruments and plans, so that when things were done under the Act it was appreciated that amendments and changes would be required to that sort of mechanism.

But even apart from that, the idea that the Crown was merely providing information and providing choices is just untenable in terms of a matter of fact, and there will, there are a couple of documents that I'd like to take Your Honours to. I've already taken Your Honours to the draft land use recover plan, which talked about urban activities being prohibited in the residential red zone, which is slightly inconsistent with, more than slightly inconsistent with, the idea that we're merely providing information. But even if we just look at the purchase offer sent to the occupants, that's pretty significant, and I invite Your Honours to go to volume 6 of the case on

appeal and to tab 264. So this is the uninsured improved properties in the residential red zone document accompanying the offer, and I just wanted to draw Your Honours' attention to some of the parts of that offer, and perhaps on page 1994 and the heading, "What will happen to my property if I decide that I do not want to accept the Crown's offer?"

**ELIAS CJ:**
Sorry, is this tab 264?

**MR COOKE QC:**
Yes, tab 264, page 1994.

**McGRATH J:**
November 12, that's 2012 it says?

**MR COOKE QC:**
Yes, this is the document that went out with the offers to the Quake Outcasts and others in their position. So what, the heading I'm looking at on page 1994 is, "What will happen to my property if I decide that I do not want to accept the Crown's offer?" And you have to be aware that (1) the council will not be installing new services in the residential red zone. You have to compare that with statements made by the Crown that matters of infrastructure were for the local councils, not for them. Secondly, if only a few people remain in the street and/or area, "The council and other utility providers may reach the view that it is no longer feasible or practical to continue to maintain services to the remaining properties." So be aware that your services may no longer be provided. "Insurers may refuse to issue insurance policies for properties in the residential red zone." And then lastly, "While no decisions have been made on the ultimate future of the land in the residential red zones, CERA does have powers under the Canterbury Earthquake Recovery Act 2011 to require you to sell your property to CERA for its market value at that time. If a decision is made in the future to use these powers to acquire your property, the market value could be substantially lower than the amount you would receive under the Crown's offer."

So those are the practical implications advised in the actual document and if I invite Your Honours then to go on to page 1997 to other interesting observations. What is described there is the properties around will be cleared so which properties will be cleared first. A timetable to clear properties will be determined based on the dates

which sales of properties to the Crown are settled. It will likely mean that the early stages of the costs to the properties to be cleared will be scattered around different neighbourhoods.

Further down, "How can I keep myself safe in areas where properties are being cleared?" In fact it's two paragraphs down. "Neighbourhoods will become work zones. Please take notice of traffic signage and roading changes and be aware of the presence of heavy vehicles. Police reassurance patrols will also increase."

Over the page, "Will the council maintain services to the residential red zones while people are still living there? Your local council will not put in new services but will fix what it can. Areas are expected to become less populated over time. The council will need to continually review as appropriate."

So the realities of what is happening is that it's not merely providing information. It is telling you that the infrastructure is not going to be replaced. As we know this was the area where the, infrastructure where the area widens significant. New services wouldn't be provided. People were vacating. Insurance was unlikely. Services may be withdrawn and the Government may in the fullness of time compulsory acquire you for less money. So it's difficult to see that as either A, merely providing information or B, providing you with a choice, because it's Hobson's choice as Justice Panckhurst said.

It's also illuminating to on the eve of the date by which the offers were to be accepted, what the Prime Minister said, and that's in volume 7 of the case on appeal, tab 306. So this is a transcript from the Prime Minister's press conference on the 2nd of April and the question is put to the Prime Minister, the offer for Christchurch people in the red zone, "What's the risk to those who don't take up the Government offer?" I'll just take this and go to a Cabinet meeting. Two things, one is I think you have to say that the Government's red zone offer has been successful and largely endorsed by most Cantabrians. So broadly 6500 people have accepted and settled or are about to settle. Only 213 have not and some of those are bare land so by any definition it has been successful. It is a free world so if you don't want to take up the Government's offer we have always said it's voluntary and so in the end they will have to make their own rational decision about what they do next. But if they have a built property that they are living in it's really important that they understand that the Government, and effectively the Council, will no longer be supporting the

infrastructure that's there, and that means water and sewerage and electricity and roading, so it would be quite a bleak environment to be living in, but in the end we can't force people. We're not forcing people to take the offer. It's voluntary. It's up to them."

So again the realities of what is happening here are being emphasised by the Prime Minister in that answer.

**McGRATH J:**
Is there anything in Mr Brownlee's statement of the same day or the following day?

**MR COOKE QC:**
There is something similar actually. If you look at the last – if you go behind tab 307 maybe the last answer has something where Mr Lush – I think it is Mr Lush asked the question, "So what do you think will happen long-term?" Minister, "Well, you know, we've made it very, very clear that you can't maintain infrastructure in those areas. There's too much movement in the ground and certainly the rating base of Christchurch is not going to want to maintain local roads to isolated properties inside that area. So people who stay there will need to make some other arrangements about access and about services that are, you know, usual for residential occupation these days.

**McGRATH J:**
Thank you.

**MR COOKE QC:**
Now, in terms of the Minister's – I refer there in answers to Your Honours to the fact that the Minister in his affidavit had stressed that one of the reasons for the red-zoning was to sort out this question of where or insurance would be provided by the insurance companies. In other words, where identifying the green zones to give the indication to the companies that that's where they could insure. Does Your Honours want to actually go to that text? Because I'm conscious that I'm taking up time by going to every reference, but that is what the Minister indicates.

**ELIAS CJ:**
Yes. I would like to go to that.

**MR COOKE QC:**

Yes. Well that's in volume 2 behind tab 27. And if Your Honours go to paragraph 16 of the Minister's affidavit there's a heading about concerns about availability of insurance. 16, "The availability of insurance was vital to the rebuild of greater Christchurch. After the September 2010 earthquakes and aftershocks insurers have become very wary of insuring properties in Christchurch. New insurance markets restructured cover and assessed future New Zealand engagement. And then perhaps picking up paragraph 19, "It was therefore essential and necessary for the purposes of earthquake recovery in terms of the Act to take steps to provide the certainty needed by insurers and property owners in Christchurch. The informal identification of the worst affected areas signalled to insurers that properties located outside of those areas suffered comparatively less damage then in many cases that damage could be repaired if the property owner chose to do so without area-wide remediation. The zoning classifications and the huge amount of engineering work that underpinned them has meant that insurance continues to be readily available for properties in many areas. For this and other reasons described in this affidavit I remain satisfied that classification of areas in this way was absolutely essential for the rebuilding of Christchurch.

**GLAZEBROOK J:**

It must be said that zoning classifications doesn't sound like information provision, does it?

**MR COOKE QC:**

No. No. And I'll –

**GLAZEBROOK J:**

Sorry, I –

**MR COOKE QC:**

I think one of the things I should go to next is relevant to that, which is the actual recovery strategy, which has – so the point about this was to say well the zoning affected whether you were going to get insurance or not, in effect. Because it was identifying areas where insurance would be made available and by inference therefore the red zones where insurance would not be available.

But there is also reference in the recovery strategy itself, and I invite Your Honours to go to volume 5 of the case on appeal,

**ELIAS CJ:**

Tab? Because we've got different volume numbers.

**MR COOKE QC:**

184. Now, this is the final recovery strategy that subsequently came out. It – the recovery strategy was consulted on and developed during the period of late 2011 and early 2012, that is, the period where we say the position of the Quake Outcasts needed to be addressed. There was nothing in the draft recovery strategy about the red-zoning but there is a reference in the final strategy that is of significance. And if I can invite Your Honours to go to page 1550, the page numbers aren't necessarily very easy to read on this, page 40 of the strategy, 39 and 40 of the strategy, and I should first explain about this that, as the Minister says in his affidavit, there is a part of this document that is the statutory document and the part that is not in the statutory document. So only parts of this document are regarded as the statutory recovery strategy. And the other parts of it are not regarded as the statutory recovery strategy. What we're in here is a non-statutory part of the recovery strategy. And on page 39 of the –

**ELIAS CJ:**

What is – are you going to explain that a bit more?

**MR COOKE QC:**

Well, perhaps I should take Your Honours back to page 1512. And you'll see a heading, "Status and effect of the recovery strategy". And on the next column over in the middle of the page, "Only sections 3 to 8 of this document are the statutory recovery strategy. The rest of the document provides additional information. It covers the context for the strategy, Government's arrangements, financial and funding issues and the programmes of work through which the strategy will be permitted." So that's the best explanation that I can provide, that only part of the document was regarded as the actual formal strategy.

**ELIAS CJ:**

So what was the date of this? This is last year is it or…

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

I thought the rest sounded like plans which came under the strategy though.

**MR COOKE QC:**

May 2012 is the answer. Well, that is not how they're treated.

**GLAZEBROOK J:**

No, no, I understand that.

**MR COOKE QC:**

Actually what –

**GLAZEBROOK J:**

I would've thought under the statutory scheme that was supposed to – you have the strategy and then you have the implementation coming in the plan.

**MR COOKE QC:**

The plans, yeah. Another – while we're on that page there's a really striking – on the first of the columns on that page, second paragraph in, "And when the CERA Act was passed in April 2011 it was thought that the recovery strategy might address", and we've got those areas, "the areas where rebuilding or other redevelopment may or may not occur. Possible –

**ELIAS CJ:**

Sorry, where is this?

**MR COOKE QC:**

I'm on page 1512 on the left-hand column, second paragraph down. "When the CERA Act was passed it was thought that the recovery strategy might address…"

**ELIAS CJ:**

Oh yes, this is in the judgments.

**MR COOKE QC:**

Yes. Where all the things that come from section 11 that we think are significant. And then carries on, "The strategy has not been able to address all of these issues, partly because of ongoing seismic activity. It's also a huge and complex task to make decisions about land zoning and the location and timing of rebuilding. Similarly it's not yet clear where recovery plans, which are statutory documents with power, will be the most appropriate and effective way to provide direction."

So interesting that the strategy says we can't make decisions about this yet and yet the red-zoning declarations have been made.

But then, going back to where I was before on page 1549 and 1550, in the non-statutory part of this document, and these matters were not in the draft but you'll see on page 1549, page 39, far right-hand column, "The land and land use programme includes the following activities: land zoning decisions. The Government is continuing to assess the state of the land damage across greater Christchurch. It is using this information to make policy decisions about the land on which rebuilding is practicable in the short to medium term. Red zones cover over 7400 properties. In these zones there is area-wide damage and an engineering solution to remediate the land damage would be uncertain, disruptive and not timely and cost effective, and the health and wellbeing of residents is at risk." As I say, none of us was consulted on as part of the draft strategy. And then over the page at page –

**ELIAS CJ:**

Because it's in the non-statutory part, is it?

**MR COOKE QC:**

And it wasn't actually in the draft to be consulted on either, if Your Honour…

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

So that there was a non-statutory part in the draft consulted on though –

**MR COOKE QC:**

Yes, I believe –

**GLAZEBROOK J:**

– was there, or…

**MR COOKE QC:**

I believe there was, yes. I'll check that over lunch. And just on the next page and the second bullet point down, "Residential red zone land clearance," is, "Overseeing the clearance of residential red zone properties and the return of the land to open space. It consists of three stages over two to three years. The first stage is to remove built structures and services, the second will involve larger-scale land clearance and grassing, the final stage will be to liaise with the utility providers to remove public infrastructure no longer needed. After that, Land Information New Zealand will manage the open space where, if possible, these activities will preserve significant trees, and will keep their options open for the way the land will be used in the future.

And then – perhaps I can just end before lunch by then also referring in Mr Tsao's supplementary affidavit, the late filed affidavit, the Government recently announcing that they're engaged in a programme to decide what the future use of the red zoned land will be. So that's in Mr Tsao's supplementary tab 16.

**McGRATH J:**

What volume are you in?

**MR COOKE QC:**

This is the new affidavit that's come in, this – so, in that supplementary affidavit, tab 16, you should find a letter from the Chief Executive to a resident in the red zone dated 17 April 2014, "Dear Resident, Future use of residential zones. I am writing to let you know that today the Prime Minister announced that there will be a public engagement process to determine the future use of the residential red zones across greater Christchurch," and the two paragraphs down, "I acknowledge that you still reside in a property in the residential red zone and that you may have a number of questions about today's announcement. Until decisions are made about future use it is difficult to confirm exactly what this might mean for you," and then two paragraphs on, "I realise this may be unsettling for you," but then there's some contact details given for them. So the evidence, with respect, is clear, that these are zoning decisions, and now a process has just been commenced, again outside of the Act, under which the, what will be the use of this land is now to be assessed outside the statutory process. And obviously it is unsettling for those people because they want

to live in their residential area and now has said, well, we're now deciding what the future use of this land is going to be.

**ELIAS CJ:**
Is there a document that tells us what the public engagement process is?

**MR COOKE QC:**
No, as far as I know. So, I'm sorry I've crept over 1 o'clock, but that might be a convenient time…

**ELIAS CJ:**
Yes, thank you. We'll adjourn and resume again at 2.15.

**COURT ADJOURNS: 1.04 PM**
**COURT RESUMES: 2.18 PM**

**ELIAS CJ:**
More paper.

**MR COOKE QC:**
Yes, I'll come to that in a moment. Just so you know where we are, I'm about to finish the second of the four reasons why the third source is excluded. And then the last two I should be able to deal with much more quickly than the first two. But before I conclude on the second of them, and you'll recall the first was a statute occupies a field, the second was that the third source can't be used when there was positive law that was in the area, and that was the – where I was at. And I was taking Your Honours through the evidence about how the red zone measures did indeed displace the normal regime operating under the positive law, the Resource Management Act, Local Government Act, and one of the matters I took Your Honours to was the statement by the Prime Minister and the Minister of Canterbury Earthquake Recovery on the eve of a deadline for accepting the offers and the reference to the bleak environment that was the choice when rejecting the offer.

And the document I have just handed up is a replacement for what is in volume 6 at page 271 of the case on appeal, which we had the wrong, we have the wrong document in that divider. We have the redacted version of this document. This document was before the High Court at least the unredacted version. It is –

**GLAZEBROOK J:**
Can I just check the tab again? Tab…

**MR COOKE QC:**
271.

**ELIAS CJ:**
Tab 271?

**MR COOKE QC:**
Yes. And what this is, is a paper about the potential for extending the settlement date for some residential red-zoned property owners in terms of the settlement of their transaction to sell to the Government, which is agreed to. But what I wanted to take Your Honours to was the communications part of this paper, which is at – near the end, paragraph 48, page 11 of the document. On the right-hand side you'll see page numbers, right-hand side at the bottom.

**ELIAS CJ:**
Sorry, page…

**MR COOKE QC:**
Page 11. The number's on the bottom, right-hand side. And there's a heading on that page, "Communications". And I just wanted to emphasise that what the Prime Minister and the Minister said the following April, this is a paper in December 2012, was actually a planned communication strategy because what's referred to in 46 and 47 of this paper is taking care about the extension for individual settlement dates on a case-by-case basis not to be regarded as a carte blanche extension.

But then in paragraph 48, "Communications between now and April 2013 will highlight the need to move forward with the recovery of the residential red zone areas, focusing on the following key themes: high cost of maintaining infrastructure, services will be discontinued once the Crown becomes the owner of the property," 48.3, "the increasingly bleak environment of the residential red zone from a residential and health and well-being perspective as a majority of peoples are vacated and demolitions and clearances proceed apace," and four, "the support available to RRZ property owners and tenants to vacate their homes. We

recommend releasing a public statement on this decision as soon as possible in order to provide maximum notice and information."

So the statements by the senior Ministers were not off the cuff. They were actually part of a planned communication strategy in relation to the measures that were implemented. Which rounds off really what I want to say on the second proposition, and that is that you can't use the common law or the third source when there is a positive law regime that regulates how communities exists, how they relate to one another, what their expectations and rights are, and that is exactly what the residential red zones purported to do.

The third of the four reasons why the third source can't be used is very closely related, and there's a reason why I won't spend as much time on it, and that is that it can't be used to interfere with the rights and liberties of the subject. Now, I'm assisted in this matter of course by the fact that the Human Rights Commission has filed extensive written submissions with this Court on that issue and I'm very grateful for that and agree with what they submit. The particular rights that I want to emphasise are the ones in article 12 of the Universal Declaration and article 17 of the International Covenant, which is the right to be free from arbitrary interference with the home. Now – and the protection of the law from such interference.

Now, the thing about this limitation on the third source powers, as Your Honour Justice McGrath said in the *Ngan* decision, is that you don't engage in any balancing of the rights as against the interests of the state. Because it's a third source and it's only residual there can be no interference with the right at all without counterbalancing the interest of the state. So you can't justify the intrusion upon the right because of the interest of the state under the third source, and so from this point of view –

**GLAZEBROOK J:**
Is that giving the covenants the force of law in New Zealand? Or what is it doing?

**ELIAS CJ:**
The covenants? Oh, sorry, yes.

**GLAZEBROOK J:**

Well, yes, because there can't be any interference with the rights and liberties of the subject, and I mean some of those rights are fundamental common law rights as well in terms of interference and no expropriation –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– so I suppose you could be relying on the common law rights in that way, but you're relying on international covenants which, after all, I suppose you could say that's okay because that means the executive can't operate inconsistently with them because they've entered into them. is that the argument or what's the argument?

**MR COOKE QC:**

Well – I mean after the Bill of Rights itself says that it's not a complete code of the rights in New Zealand, that other rights continue to exist, and these are rights recognised at international law, and when it comes to statutes this – the common position is taken that New Zealand should interpret its statute in a way consistent with international obligations. And when we don't have a statute, this is the point about the third source, you can't use the residual power in a way that would interfere with a right recognised at international law in which New Zealand has agreed to as a fundamental right. Even though it's not enshrined in our Bill of Rights Act, it's still recognised as a fundamental right at international law. So I guess it has – it's not giving those international rights a same status as rights under a Bill of Rights Act but when you're dealing with the residual authority of the executive, that can't be used in a way that conflicts with rights above.

**ELIAS CJ:**

Well is that any different than saying that the common law should be developed in accordance with international obligations wherever possible.

**MR COOKE QC:**

That's another consistent principle with that, yes. And so what the authorities say about the third source is that the third source can't –

**ELIAS CJ:**

There aren't really any authorities very much about the third source, except –

**MR COOKE QC:**

Justice McGrath.

**ELIAS CJ:**

Yes. And I keep saying, it's the first source really.

**MR COOKE QC:**

Yes. I have to say, I'm not quite sure what Your Honour means by that.

**ELIAS CJ:**

Well that's the prerogative. That is the medieval monarch whose powers were taken over by statute, but anyway, we're not going to be drawn into that. Yes.

**MR COOKE QC:**

Won't go there, yes. Because –

**ELIAS CJ:**

It just sets my teeth on edge.

**GLAZEBROOK J:**

Well you would say the prerogative is different though, from this third source.

**MR COOKE QC:**

Yes I would, I would.

**GLAZEBROOK J:**

That would be the argument. Whatever the source of this third source, you would say it's different from the prerogative.

**MR COOKE QC:**

That's right.

**GLAZEBROOK J:**

In fact it might derive from the prerogative as much as from statute –

**ELIAS CJ:**

Well it does. It's the –

**GLAZEBROOK J:**

– if the implication – no but if the necessary implication of powers is the right explanation.

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

That's what I would say. It's not a source.

**MR COOKE QC:**

We won't get diverted by this but I have to say, having – I did find Professor Joseph's analysis of this in his text persuasive because it does say, "Look, it's implied from not just your statutory powers and your prerogative powers but your functions." So if you give what you need to make those powers and functions work, that gives you a good explanation for how the residual authority should be justified. But I'm not here to cure the world's problems in terms of the third source. But in terms of these exceptions, I realise it's Your Honour Justice McGrath's judgment in *Ngan* but also Justice Underhill in *Shrewsbury and Atcham*, it talks about this non-intrusion into fundamental rights. So that is a fourth, a third reason why third source can't be used.

And in terms of this, the interference with home life, it's a practical question and it does depend on the facts, and what I've already covered in terms of the facts, what actually is the practical effect of the red zone measures, are – they speak for themselves. The reality is that a person's ability to enjoy home life in their suburbs is now being severely truncated by these measures. And the fact that you can't balance that against the interest of the state means that there cannot be any justification for the truncation of those rights, and therefore that the third source can't be used to undermine one's freedom from interference from home life, as in effect it does.

And in addition we say it's arbitrary precisely because there is a statutory regime for dealing with questions of this time that could be made available if there was, it was thought necessary or appropriate to truncate the rights, and that – in the absence of some positive law being utilised and the balancing under the Act, whether it being reasonably necessary to fulfil the purposes of the Act, it was an arbitrary interference with home life.

And really just to summarise that practical effect, there are two evidential references I'd invite Your Honours to go to. One is in the Chief Executive Mr Sutton's affidavit and –

**GLAZEBROOK J:**
Can I just check that when you say the interference with home life, you're not relying on minimum standards of housing or anything of that kind. You're actually saying that this was an interference with the right to live in the community that was actually derived from the fact that you had planning permission to be where you were et cetera, is that the – I just want to understand what the interference is.

**MR COOKE QC:**
I haven't relied on this, the right to minimum standard of housing of that kind. I'm content to leave it on the basis of the home life in the way Your Honour's just described but in terms of your community and the protections of the law for your community and the expectations of it, I'm conscious in saying that that the Human Rights Commission has drawn attention to the fact that there are other instruments that might be relevantly considered, but for the purposes of my argument I don't need to take it further than that, I don't think, in my submission, to exclude the application of a third source, in any event.

Just in terms of the practical effect, at Mr Sutton's affidavit, volume 2 tab 17. It's paragraph 54 of his affidavit where, again, the true position is revealed where he says this. "So looked at in terms of financial cost, insurance and EQC entitlements reduce significantly the cost of the Crown's offer for insured residential properties. More importantly, the social costs would be intolerable if whole communities or, at least, those who could not afford to leave, were stuck in damaged houses on munted land," and that is exactly the situation that the quake outcasts are in. A similar statement was made by the Minister but not in his affidavit for this case, but in the affidavit in the Independent Fisheries case, and I would briefly like to take Your

Honours to that. That is in volume 5 tab 199. Just to give Your Honours a bit of context for this, what was in issue in the Independent Fisheries case was the Minister's use of section 26 to direct changes to the regional policy statement and to district plans to free up new areas for residential housing and if you look at paragraph 50 of this affidavit of the Minister's in this case, the Minister said this. "I was faced with the prospect of significant numbers of people being unable to find appropriate accommodation in the reading. That was not going to assist the recovery. I had to create a situation where there were significant opportunities for significant numbers of local population to move to appropriate housing within the locality. That would not occur if there was rampant land inflation due to restriction on supply. Along with these economic recovery factors, the social consequences will be terrible if people in the residential red zone were not able to move." So its social cost will be terrible, he says in this affidavit. It's an observation he doesn't repeat in his affidavit for the present case.

So I really don't need, I don't think, to elaborate on the argument I make in that respect because I've covered the facts and I've covered the principle, that is, you cannot use the residual authority to interfere with fundamental rights including those recognised in international law. So unless Your Honours want to ask anything about that, that brings me to the fourth and final limit that we say.

**ELIAS CJ:**
What was the order or what was the measure that was taken under section 27 in this?

**MR COOKE QC:**
What happened was that land – the Minister directed that land and particular district plans be rezoned for residential use so that people could resettle.

**ELIAS CJ:**
Yes, I see.

**MR COOKE QC:**
That wasn't the controversial part of that case. There was another controversial part which the Minister also directed that there be, in effect, a new regional policy statement. The Court set that aside because section 10 hadn't been applied.

So the final limit – and I'm conscious that I'm getting closer to the academic debate – is that the third source cannot be used for Governmental decisions.

**ELIAS CJ:**
What do you mean by that – substantive decisions?

**MR COOKE QC:**
Well, it may be the best way of identifying the nature of it is by going to the decision of the UK Supreme Court in *New London College Ltd v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358. The version of that decision in the casebook is, unfortunately, only the unreported version and also has pages missing from it, which would have been irritating if Your Honours –

**ELIAS CJ:**
Yes, I did.

**MR COOKE QC:**
I'm sorry. If I could hand up a reported version of that.

**ELIAS CJ:**
Did you supply the electronic one or did we turn it into an electronic version? Because that had irritating gaps, too. It might have been us.

**MR COOKE QC:**
Well, I can't claim responsibility for that but potentially the electronic errors are in the originals, so it's really paragraph 28 of this judgment addresses the third source and Your Honour the Chief Justice observed that there's not much said about the third source in the authorities but this is a recent observation, so in paragraph 28, "It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of Government which are not exercises of the Royal Prerogative and do not require statutory authority. The extent of these powers and their exact judicial basis are controversial and in two cases the Court of Appeal held that the basis of a power with the Crown's status is a common law corporation soul, with all the capacities and powers of a natural person subject only to such peculiar limitations as are imposed by law. Although in *Hooper v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, Lord Hoffman thought there was a great deal of force in this analysis, it is open to question whether the analogy with a

natural person is really apt in the case of public or Governmental action as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring, or disposing of property, hiring, firing staff and the like," and then he goes on to say it doesn't need to be resolved in that case and Lord Carnwath –

**ELIAS CJ:**

Maitland says that the Crown's not accurately described as a common law corporation sold by a common law corporation aggregate. I'm not quite sure what that means but anyway, I just thought I'd throw it into the mix.

**MR COOKE QC:**

There is certainly a lot of academic interest in this area and I've got three papers from Professor Harrison, my learned friend's casebook with some interesting – even Professor Harrison struggles with the limitations on it and I think in the second of these three LQR articles he suggests that the third source should only be there for unforeseen circumstances and a last resort, I think is the way he puts it, but in any event the point about this is to say the third source is really this ancillary authority to carry out the day-to-day business and to do things that anyone could do to that effect, but you can't do things that anyone couldn't do. You couldn't do Governmental action through a source.

**WILLIAM YOUNG J:**

Is it not possible to say we're thinking of doing this and giving you notice?

**MR COOKE QC:**

Well, it depends what "this" is.

**WILLIAM YOUNG J:**

Say "this" is exercise of Governmental powers, if necessary. If necessary, we are going to compulsorily acquire your land but in the meantime we're prepared to buy it from you for this price, and I know that that's not the ideal thing because there are procedures for that in the Act, or close to the point. We don't want to – we have the power under section 27 of the Act to cancel all existing use rights in relation to housing. You don't want to do that. We're prepared to offer you this.

**MR COOKE QC:**

We immediately start thinking about the other arguments rather than the main one but in terms of –

**WILLIAM YOUNG J:**

But what's the power? Does the Government need a power to do something like that? I mean, it is a Governmental power but it's sort of implicit in the statutory regime and the realities of life, isn't it?

**MR COOKE QC:**

Well, this is perhaps where Professor Joseph's advocacy for the implied incidental powers gets more substance because you might say that if you've got the power to compulsorily acquire it's obvious that you can advise people you have that power and enter into discussions with them in advance. So I don't think you need – as, perhaps, Your Honour is suggesting you don't need a source of power to engage in that kind of discussion. It only becomes controversial when you actually start doing things with your third source authority of a Governmental character.

**WILLIAM YOUNG J:**

You may not have to do it. You just may have to threaten it or refer to it. I mean, in a sense – it's obviously not the way you would categorise it or some of my colleagues, but one way of looking at what the Government did was this is what we're going to do if we have to, but here's a better offer from your point of view. That is a way of looking at it.

**MR COOKE QC:**

Yes. I understand that, but even if that's a fair characterisation you still need to do that under the Act's regime, I submit.

**WILLIAM YOUNG J:**

What's the difference between that and my compulsory acquisition, for example?

**MR COOKE QC:**

Well, your compulsory acquisition, for example, is if it's outside this Act there will be some other Act that empowers compulsory acquisition.

**WILLIAM YOUNG J:**

Yes, but to just say, look, we can compulsorily acquire it but let's just have a nice easy negotiation and this is what we'll pay.

**MR COOKE QC:**

And as I say, that's why Professor Joseph will probably say that there must be an incidental power to do things associated with your express powers that allow you to make them work in a sensible way.

**GLAZEBROOK J:**

Whether you could just compulsorily acquire it without having gone through recovery strategies and things in terms of the CERA Act I wouldn't accept anyway. Whether you could just say, well, we're going to compulsorily acquire all of these places and that's the end of it, whether that has to be read in terms of having a proper recovery strategy.

**MR COOKE QC:**

It's quite important to keep these four points separate from one another because I imagine that –

**ELIAS CJ:**

It also turns, in part, on what the characterisation of the area was. One might be able to do that if you're looking at separate bits of land and making offers in the circumstances but if you are making a blanket offer and you have a statutory mechanism which allows you to set up those sort of zones that might be different. It might be a question of what's the substance and what's the form.

**MR COOKE QC:**

That is a lot behind some of the issues in this case, whether you look at the substance or the form and, of course, we say you've got to look at the substance of things. I know it's a little bit artificial the way I'm dealing with each of these four points but this is the closest I get to bubbling down to what is the true nature of the third source authority and what I'm really saying is, wherever it comes from, whether it comes from the powers of a natural person or it's implicit, it is just the incidental administrative authority to make things work on a practical basis on a day-to-day level. So you don't need to point to a statute or a prerogative every time you do anything. It's a theory that has its basis soundly based in pragmatism, but what it

doesn't authorise is measures of the kind that we have in here and this is what Lord Sumption is saying here. It really is not apt to talk about the powers of a natural person when you're talking about public or Governmental actions. That is another way of putting the reason why we say the third source will be inapplicable in this case.

**ELIAS CJ:**
Of course, Lord Carnwath was even less –

**MR COOKE QC:**
Yes, Lord Carnwath had delivered the – so that's paragraph 34.

**ELIAS CJ:**
Yes, he delivered the oral judgment.

**MR COOKE QC:**
Yes, the majority.

**McGRATH J:**
He had to live with what he'd written earlier.

**MR COOKE QC:**
He did, and unsurprisingly he agreed with it.

**ELIAS CJ:**
You don't have to, you know.

**MR COOKE QC:**
Actually, what he says at paragraph 34 at the second point of that paragraph, "Mr Swift did not seek to rely on the possible third source of powers by reference to the controversial line of authority mentioned by Lord Sumption. In my view, it is wise not to do so for the reasons given by the majority judgment." So although it would be very interesting to get drawn into the third source on a greater level on that, all I say is that it has that incidental day-to-day administrative steps wherever it comes from, that's the limit of the third source.

**McGRATH J:**

Was it extended to the sale of shares by the Government, I'm thinking of the *Commercial Radio* case.

**MR COOKE QC:**

Yes.

**McGRATH J:**

Is that the – because people own shares, it's just a sale by an individual or –

**MR COOKE QC:**

Yes.

**McGRATH J:**

– because it's a Government asset, it's a governmental action.

**MR COOKE QC:**

Well I mean we get these actions that are close to the borderline. I don't see any reason in itself why the Government selling shares that it holds, even if it's a lot of the shares, wouldn't be authorised by the third source. It's interesting, one of the things that Professor Harris said in his second law quarterly review article was, look, it's inappropriate for all the law to be codified by statute but we should be trying to codify it as we go along as much as possible and if you look into the Public Finance Act you'll see more and more provisions added to that Act about what the Government can and cannot do with assets. You know, can't borrow without authority, certain things it can't do, subscribe to shares without – so the law in this area is being subject to a greater and greater statutory regime. So where the third source sits with that is an interesting question in a way. In a sense what has actually happened on the ground is consistent with what Professor Harris says, that the third source only exists now for truly unforeseen events and we only revert to it as a last resort really when there's been an unforeseen event.

**McGRATH J:**

I think *Ngan* was concerned with cleaning up after a car accident, what powers the police have at that.

**MR COOKE QC:**

Yes.

**McGRATH J:**

I think the statutory power to do just that was in the Act within the year if I recall correctly.

**MR COOKE QC:**

It was a good example of it. I didn't quite understand in that case why the focus wasn't on the powers of the police officer as a person because it was a bit strange –

**ELIAS CJ:**

Well it was in the other judgment.

**McGRATH J:**

On the prerogative power of a police officer or the –

**ELIAS CJ:**

No.

**MR COOKE QC:**

The power of the police officer as a natural person to pick up a wallet lying on the road because it was a bit – in some ways it's a bit odd to think about the Crown exercising a power of a natural person to pick up a wallet because it was a police officer who did it. So the analogy with a natural person was a bit odd because it was a natural person who picked it up so. So it may actually, the third source may not truly really be an issue in that case but, of course, we have the benefit of having some judicial dicta on the extent of it.

**ARNOLD J:**

You mentioned that the Public Finance Act had been added to some specified further powers but you mustn't forget that in the late 1980s there was a sort of review of departmental statutes and the underlying principle in relation to that was that a lot of the powers given in departmental statutes in earlier times were unnecessary. They were very detailed but, in fact, you didn't need them because the Crown had those powers anyway.

**MR COOKE QC:**

Yes.

**ARNOLD J:**

And so there was a focus on getting departmental and other statutes to concentrate on areas where powers were needed.

**MR COOKE QC:**

Yes.

**ARNOLD J:**

So there's that, sort of, underlying approach I think.

**MR COOKE QC:**

Yes, well I have to accept that Government circles of New Zealand the third source probably has been a recognised aspect of an appreciation of the Crown's powers. Whether truly the best way of saying the origins of that is in fact the powers of a natural person or body corporate or whether it is, as Professor Joseph says, actually better for rather than implied. Again we don't have to go there because I think however you call it, whatever you call it, for the purposes of this case it just doesn't apply.

**ELIAS CJ:**

No, but for other cases it may matter a great deal.

**MR COOKE QC:**

Yes, it might.

**ELIAS CJ:**

And that's why sloppiness in language here can cost lives.

**MR COOKE QC:**

Yes, I'm grateful it's not going to be my sloppy language.

**ELIAS CJ:**

But I think it was, I can't remember now because my head is bursting with all these old writer's I've been reading, but I think it was Maitland who made exactly the point

that Justice Arnold makes, that too many statutes are actually conferring powers that the Crown has in any event.

**MR COOKE QC:**
Yes.

**ELIAS CJ:**
And so there was that reaction.

**MR COOKE QC:**
And it's what Justice McGrath said in *Ngan*, that to seek everything to be codified in statute would be an absurd requirement.

**ELIAS CJ:**
Yes.

**MR COOKE QC:**
But then I go back to what I read in Professor Harris who said, well but it's a good thing that that happens and so it should be an incremental process of the statute dealing with the area where appropriate in a modern democracy. So –

**ELIAS CJ:**
Well it depends on the view of law really.

**MR COOKE QC:**
It does. it does.

**McGRATH J:**
But that happens anyway. I mean, Parliament won't leave anything to the third power for long.

**MR COOKE QC:**
No.

**McGRATH J:**
Once it's identified.

**MR COOKE QC:**

No. And I guess all I need to say is it certainly didn't here, because you couldn't imagine a more comprehensive regime for earthquake recovery than what we have.

**ELIAS CJ:**

The – does – the 1688 revolution was to bring the executive under control. The idea that it somehow created an independent source not amenable except through direct – well, anyway.

**MR COOKE QC:**

Yes, the way I've thought about it is that Parliament's role is not to constrict the sovereign. The object of Parliament is to actually pass the laws, so the problem with regarding the Crown as being free to do everything unless it's prohibited puts it the wrong way around, in my submission.

**ELIAS CJ:**

That was the effect, I think, of the revolution, but anyway.

**MR COOKE QC:**

So that I think has dealt with the first question in the appeal, which is whether the third source could be used to impose the red zone measures, and my submission for the reasons I've advanced it couldn't.

So that brings me to the second question for which leave has been granted, which is whether the different treatment of the people in the position of the outcasts is lawful, and just to identify where we've got to in terms of the two decisions, the High Court and Court of Appeal had different approaches to this, as I indicated. The High Court Judge indicated there was considerable force in the proposition that unequal treatment was inappropriate, and that's in paragraphs 95 and 96 of the High Court judgment. And that was because of a factor that we particularly emphasise. What His Honour Justice Panckhurst said at paragraph 95 of the judgment, case on appeal 1, tab 6, it's, "The lack of even-handedness argument however, has I think considerable merit. Clearly, the main impetus for the June 2011 decision to make 100% offers to insured property owners was the need to provide certainty and create the confidence necessary to enable people to move on with their lives".

And then at 96, “Yet it is apparent that payments of 50% of the land rating value will not enable many property owners to make a fresh start.” And His Honour indicated that that was apparent from the questionnaires and that he was, “satisfied that the plight of this relatively small group has not been adequately considered in light of the purposes of the Act.”

Now, I did, we did initially seek an order in the nature of an order requiring the 100% orders offers to be extended. His Honour made it plain he wasn’t going to go that far, and that led to the relief that’s then set out on the following page of the judgment, under paragraph [102](b), “A direction that the Minister and the chief executive reconsider and reach a new decision to purchase the applicants' properties, such decision to be made in accordance with law” as required by the Act, “with regard paid to the reasons contained in this judgment.”

So that was closer to 100%, the possibility to get 100% than nothing but still the – it was a carefully phrased order in that sense not going quite that far.

Now, what happened in the Court of Appeal is that my learned friend for the respondents contended that that relief was inappropriate and the Court of Appeal agreed that it was inappropriate and that the appropriate relief was that the Court should simply declare that the offers had not been made in accordance with the Act and in particular that section 10 of the Act hadn’t been appropriately applied against the indication that the Crown would respond appropriately to that declaration. Unfortunately there has been no further offer advanced to the outcasts, notwithstanding that indication and the substitution of that declaratory relief, and the outcasts are still awaiting the further response to the success in first the High Court and then the Court of Appeal on this question.

**WILLIAM YOUNG J:**
Well it’s the Minister’s position that he won’t make an offer until he knows the outcome of this case.

**MR COOKE QC:**
It is now. It was earlier that he advised Quake Outcasts and indeed this Court that an offer would be extended by, it was mid-May at the latest.

**WILLIAM YOUNG J:**
Right.

**MR COOKE QC:**
That date came and went and now we're advised that the Minister, or the Government is awaiting the outcome of this decision. Now that does put the Quake Outcasts in a very, continuingly awkward position. It's been a long time since June 2011 when the first red zones were announced and the first offers were made and there is continuing oppression in terms of their position. But in terms –

**WILLIAM YOUNG J:**
How many are still living in the red zone?

**MR COOKE QC:**
I did ask that. I'm not sure how many of them are but there will be some of them that still are. There are some that have, there was an agreement that they could accept their offers on a without prejudice basis. I'm instructed that most of those with homes are still in those homes but there are some that have accepted the offer on a without prejudice basis –

**WILLIAM YOUNG J:**
Right.

**MR COOKE QC:**
– that being they could advance this judicial review even if they accepted the offer but –

**GLAZEBROOK J:**
And I mean presumably the bare land people aren't on the bare land.

**MR COOKE QC:**
No, that's true.

**McGRATH J:**
The main effect of the Court of Appeal judgment is to take out paragraph B.

**MR COOKE QC:**

It is. They were more – the Court of Appeal said two things. They said section 10 hadn't been applied, in terms of the decision made about the offers in September 2012 but they also held that there was a rational basis to distinguish between insured and uninsured and in that sense the reasoning of the Court is different from His Honour Justice Panckhurst who indicated more strength than the lack of even making this argument.

**WILLIAM YOUNG J:**

I mean that's the critical issue of the case, isn't it?

**MR COOKE QC:**

Well for the purposes of – from my people's purpose, yes.

**WILLIAM YOUNG J:**

What's the relevance to that of the issue whether the red zone decision was correctly made?

**MR COOKE QC:**

Well, we're saying that they're inherently inter-related because the purchase of all the properties in the zone is part of the red zone measure, it's part of the mechanism by which the red zones were evacuated, for want of a better phrase, or retirement, whatever you say, from occupation, and we say that those measures should have been implemented and planned in accordance with a statutory regime, consulted on, engaged with the community, like you to find how you'd be in or outside the red zone, what the terms of the offers would be, all those sort of things, whether there would be compulsory acquisition –

**WILLIAM YOUNG J:**

Sorry, just so I understand this, your position is that a recovery plan should have made provisions for the purchase of land?

**MR COOKE QC:**

Yes. If that was going to be part of the Government's red zone measures, where if they were going to say, we're going to remove this area over time from residential occupation, because it's too expensive to fix, and the mechanism for achieving that is by purchasing all of the properties in that zone, and if they don't accept our offer,

reverting to compulsory acquisition, and then we'll clear it, revert it to open space, that's all thats needed to be planned and consulted on under the Act's regime.

**WILLIAM YOUNG J:**
Well what – well I suppose you won't probably accept the analogy, but something like it wouldn't be in a planning instrument under the Resource Management Act, I think what –

**MR COOKE QC:**
Well it wouldn't be –

**WILLIAM YOUNG J:**
It would be signalled by saying designation, that there would be a later a compulsory acquisition but it wouldn't, you wouldn't have that sort of level of detail?

**MR COOKE QC:**
No but you would in a Canterbury earthquake recovery strategy, plan, whatever you want to call it.

**WILLIAM YOUNG J:**
Well you probably would in a strategy, I think I'd agree with that.

**MR COOKE QC:**
You probably would?

**WILLIAM YOUNG J:**
I'd agree with you as far as strategy is concerned. I'm not so sure about the plan.

**MR COOKE QC:**
Yes, I understand. There's a timing issue because in this case it may have been that you needed to get the plan before the strategy and then reconcile with it.

**ARNOLD J:**
On this question of the existence of a rational reason for differentiating between the insured and the uninsured, is there any explanation in the materials of why no distinction was drawn between those who held only basic EQC cover and those who held top-up cover?

**MR COOKE QC:**

No and I suspect – not as far as I can recall, and I suspect it is because, contrary to what they later decided, that it was recognised you had to just have a one size fits all approach: to try and deal with individual circumstances was going to be too difficult.

**ARNOLD J:**

Well is there anything in the materials that tells you what number of people have top-up and what number had basic EQC?

**MR COOKE QC:**

No not that I can recall.

**ELIAS CJ:**

But you'd need to know adequate top-up too, wouldn't you?

**ARNOLD J:**

Well that's right.

**ELIAS CJ:**

Because under-insurance might –

**ARNOLD J:**

Because the same moral hazard argument, it seems to me, applies to people who don't have top-up insurance –

**MR COOKE QC:**

Yes.

**ARNOLD J:**

– as it applies to people who have no insurance at all.

**MR COOKE QC:**

Yes.

**ARNOLD J:**

And if you're going to regard it as a rational basis of differentiation in one context you would think logically at least you would think about it in the analogous context.

**MR COOKE QC:**

Well I can't recall there being any, there's nothing in the affidavits where I recall, I can't recall anything in the documents that suggest that was analysed in that way.

**WILLIAM YOUNG J:**

They must have had some sort of figure because they come up with a, what the net, what they think the net exposure is going to be –

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

– which allows for, well, around eight or nine hundred million dollars for recoveries from the insurers.

**MR COOKE QC:**

Yes, yes that's right, and that is the gross versus net as well because they have got to take into account the recovery from EQC and insurance.

**WILLIAM YOUNG J:**

Yes.

**MR COOKE QC:**

They certainly knew that in September.

**WILLIAM YOUNG J:**

So they must have a, they must have – someone must have done something on the back of it, at least on the back of an envelope.

**MR COOKE QC:**

Yes.

**ARNOLD J:**

Maybe the assumption was everyone had top-up.

**ELIAS CJ:**

You've – your arguments are segmented into the red zone determination and the offer.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

I meant to check your pleadings to see how it was done but it occurred to me that in fact it's more that the baggage of the zoning is the necessary background to the offer.

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

So that it isn't really necessary to look at a standalone remedy in respect of the zoning decision.

**MR COOKE QC:**

No, that is true. I've only addressed it in two parts, in part because the leave was given in two parts but –

**ELIAS CJ:**

Yes, well I wasn't very happy –

**MR COOKE QC:**

But for reality I see it as they coalesce in our view and what, the relief that we sought in the High Court, although there was a misunderstanding about whether we were still seeking or not, was simply declaratory relief in relation to the –

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

– red zone but what the actual relief was, we wanted, was for the offers to be subject to be made lawfully.

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

And part of the illegality that we said tainted the offers that had been made was that they had been made by this unlawful process outside the Act where the zones had been created –

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

– where there'd been this threat of compulsory acquisition which gave us no real choice and where our offers have been cut in half for no earthquake recovery purpose.

**ELIAS CJ:**

So the gravamen of your case is that the offers haven't been made in accordance with the law.

**MR COOKE QC:**

With the law, yes.

**ELIAS CJ:**

And that includes both because they are made on a blanket basis on a zoning arrangement that has been decided not within the statutory scheme –

**MR COOKE QC:**

Yes.

**ELIAS CJ:**

– and because in themselves they are not reasonable because unequal?

**MR COOKE QC:**

Yes. So the blanket bit that you started that question with is correct except it was "blanket except us". So there was a blanket offer for all red zone occupants but we were excluded from being able to accept that offer so.

**WILLIAM YOUNG J:**

But you want that offer extended to you?

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

As opposed to individual consideration?

**MR COOKE QC:**

Yes, I mean I will take the best I can but that is – once it's been decided that the suburb is going to be zoned red, is going to be phased out, that everyone has to move, there is going to be a one size fits all offer to enable them to take money and move on with their lives, it's irrational and contrary to the purposes of the Act to exclude one category of person and give them their money, it means they can't move on with their lives.

That's the essence of the point and I guess that rolls, I was about to say there were four points but I guess I've really just covered them in a sense. We say the illegality is not limited to a failure to apply section 10 but involves all the other aspects of it, including the failure to engage in the community, the failure to do it in the planning instruments. We say that different treatment by itself is contrary to the purposes of the Act because the very purpose of this measure, the red zone measure, was to get people to move on with their lives by moving out of the suburbs. So discounting the offer undermines that very earthquake recovery purpose, which was the very point of it, what was necessary to ensure earthquake recovery.

**WILLIAM YOUNG J:**

But say someone had a really bad house so that payment of its value wouldn't enable them to get on with their lives. You wouldn't say that has to be topped-up would you?

**MR COOKE QC:**

No because, and the Government has decided a one size fits all approach. All we're asking for is to be within that one size fits all approach.

**WILLIAM YOUNG J:**

Yes, I mean the very simple point is, and it's made by Mr Goddard, is that in a sense, in a very rough sense the offers do correlate to the value of what's being acquired.

**MR COOKE QC:**

Yes, but that is a different point. That's where I think the real thing bites because the purpose of the acquisition is not so that the Crown gets something, and it's not a contract – in fact once they get these properties what they're going to do is they're going to knock them down and turn them into open spaces so it's not actually a commercial bargain. The purpose of the payment is to allow people to move out and to move on with their lives. So I accept that the individual circumstances of each recipient of the offer will vary. For some they're going to find it harder than others but when in deciding for the uninsured to give them 50% only of the land value, you thereby undermine the very object of the measure, and you're contrary to the purpose of the Act, bearing in mind the purpose of the Act, section 10 and section 3, is to ensure that people recover from the impacts of the earthquakes –

**WILLIAM YOUNG J:**

Communities.

**MR COOKE QC:**

Communities recover from the impacts of the earthquakes. So we say that that is irrational and contrary to the Act, to take that into account, and the actual application of that principle, to discount the offer so heavily, is unlawful in itself. And I should point out that the different treatment doesn't just start with the September decision, it actually starts back in the June decision, because it's at the June decision where the Crown decided to exclude the uninsured from the offer that was going to be made from everyone else and Your Honour's will recall when I went through that decision paper that it was just that paragraph explaining what, why that decision had been made, and it was a very brief explanation. But it's from that point in time that the uninsured are treated differently.

**WILLIAM YOUNG J:**

Are you saying that bad June decision, bad delay, should be compensated by, as it were, mopping up any residual uncertainty by telling the Government to do something concrete, in a way in which the Court deals with the September offers?

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

I thought you were.

**MR COOKE QC:**

I'm doing it, I've come up with two ways. First I say that differential treatment in of itself is contrary to the purposes of the Act and then secondly, even if the Court doesn't accept that, that the illegality that has been established means that the only effective remedy the Court can give now would be to require the Government to extend the 100% offers because anything else would involve the adversity created by the illegality still to bite because if they're given discounted offers now different from everybody else, that would mean the effect of the illegality on them will continue to operate. So the only effective remedy for them now would be to allow them to have the same offer as everybody else.

**WILLIAM YOUNG J:**

If the Government were to make an offer to your clients, and it felt that it therefore had to make a more generous offer to others, I'm not sure but perhaps the commercial insured owners for instance, would that ex gratia payment have to fall to be assessed in the context of the Act or would it be third source of power stuff?

**MR COOKE QC:**

Well obviously I'd have to say –

**WILLIAM YOUNG J:**

Don't care.

**ELIAS CJ:**

Ex gratia payments are within the prerogative.

**MR COOKE QC:**

Well, I mean, I think I would say that it's something that should be assessed under the machinery of the Act. But whether, I find it hard to consider whether, that the more pertinent question is people in the same position as a Quake Outcasts who actually aren't on the list of the scheduled applicants for judicial review, there will be others.

**WILLIAM YOUNG J:**

Is that who the Minister's, well you don't know who he's talking about I suppose. I assumed he was possibly talking about there and possibly talking about commercial insured owners.

**MR COOKE QC:**

Yes, I'm not sure I know what Your Honour's referring to?

**WILLIAM YOUNG J:**

Well I thought the owners of property, commercial properties who are insured got basically the value of improvements plus 50% of the land value, is that right?

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

So I thought that the Minister might have had those people in mind.

**MR COOKE QC:**

He might have. I mean I accept that they, the position of them would have to be considered and, but I think it should be considered under the framework of the Act because that seems to me that that's what it's there for.

**WILLIAM YOUNG J:**

Well there's an interesting case, I think it was in the Supreme Court last week about giving funding, legal aid on an ex gratia basis for UK citizens facing the death penalty in overseas jurisdictions, in this case a woman in Indonesia, and I think they did treat the ex gratia payment as being a prerogative issue.

**MR COOKE QC:**

Well the reason why I – I'm not sure if it's correctly referred to as ex gratia, it's part of the earthquake recovery strategy or plans. It seems to me that's a measure under, for it to secure earthquake recovery rather than truly treating it as a prerogative ex gratia payment outside that concept.

So if the Court were to conclude the residential red zones had not been lawfully established and the measures imposed to implement them hadn't been and would give declaratory relief to that effect and then send the question of the offers to the Quake Outcasts back to the Minister with the directions that I'm advocating should be done. It seems to me that what would need to be – would happen then would be for the position to be regularised because the red zone is still this amorphous, uncertain beast out there. We now see announcements being made that their future use of the red zone is now going to be assessed, again outside the Act and, with respect, that shouldn't be done. All of this needs to be regularised, brought within a legal framework.

**WILLIAM YOUNG J:**

Well again sort of a debating issue but it might just be the Crown wants to address it as a landowner.

**MR COOKE QC:**

Well for some of them they certainly are but of course they are writing to the non-Crown landowners saying, "We're conducting a review it's going to affect you," obviously this is disturbing but here we are. So I think all of that needs to be brought within the Act's framework and what Your Honour has described as an ex gratia payment, I'm not sure if I accept it is an ex gratia payment or if it is regularising what earthquake recovery measures need to be implemented to fulfil the purposes of the Act.

Now going to the facts in terms – I've mentioned the June 2011 decision and the fact the Quake Outcasts weren't dealt with in it. There is a lack of real explanation why the uninsured weren't dealt with at that time and then there's a lack of real explanation why things were delayed for so long after the June decision and contrary to what my learned friend says in the written submissions, it's always been part of our case to complain about the adversity created by the delay. The only inference in the affidavits is from the Minister's affidavit, if I could just briefly take the Court to that, in

volume 2, tab 27, paragraph 29 and the second part of paragraph 29, "We focused on the position of owners of insured residential properties because that group included most residents in the residential red zone."

**GLAZEBROOK J:**
We're volume 2, tab 27, paragraph 29, I think?

**MR COOKE QC:**
Yes, I'm sorry, yes. So that's paragraph 29. "We focused on the position of owners of the insured residential properties because that group included most residents in the RRZ, residential red zone, so offering to buy their properties would address a large part of a social need to give people an opportunity to move out of the residential red zone." And then the only explanation for the delay is at paragraph 49, "The first priority for Ministers had been to address the position of a vast majority of homeowners in the worst effected areas and offer to insured homeowners that had done that. We were conscious that there were other property owners in the residential red zone and we asked officials to do some work on options for those properties. CERA necessarily had to prioritise its work so an assessment of the more difficult issues that affected fewer people had to wait." And that's the only explanation for the delay of nearly a year and a half before the offers were received by those in a position of the Quake Outcasts.

It's interesting to see some of the contemporaneous documents within CERA at the time, and if I can invite Your Honours to bundle 5 of the case on appeal and to tab 185. You can see this is an internal, at the bottom of the page, internal CERA email about, dated 31 May 2012, about uninsured red zone property owners and there's been a meeting with the community wellbeing this morning regarding issues raised by the email below. To date there's been no official message to uninsured property owners in the red zone. What the Government's position on the situation is." I think it's about 30 or 40 property owners. "The Minister has indicated to officials clearly that he doesn't intend considering extending any offers to these property owners." And, the lack of, the concern around the lack of messaging, regardless of what the message is, and issues are raised, "The lack of clarity is causing (1) increasing stress and anxiety for these property owners as they feel they are in limbo. There have been suicides and the contact centre are receiving more calls from suicidal property owners as a result of not knowing what will happen." And then further down, the next four paragraphs, "I don't see that there is a policy decision required here,

simply an official communication to go out to clarify the Government's position of uninsured property owners ASAP to enable people to move on and enable the people of Christchurch to benefit from the generous organisations who are already waiting to contribute to the rebuild." And it's interesting that the email response up the page, back over the page, 31 May, the same date, back, "Thanks Emma. As discussed I don't think this requires a policy decision. The policy seems clear."

So we submit that the, that at the very least the Government were making, taking this approach knowing that the adversity was being created within the residential red zones as a consequence but one can go further than that and say that the Government was actually seeking to utilise the pressure that was being created because it would increase the uptake of the offer when it was made because it gave people very little option but to accept that offer.

I've already taken Your Honours to the document that went out with the offer that had all those things in it about the infrastructure not being repaired, the services potentially being withdrawn, and if you don't accept compulsory acquisition for a less amount would occur, and also the Prime Minister's and the Minister's statements on the eve of the offer about the bleak environment and the other paper I've taken to you about that, being an overt communication strategy.

It's appropriate, I think, to go to the actual decision itself, the September decision, which is in bundle 6 at tab 242. Perhaps on page 1857 and there's the heading, "Properties with no insurance." Paragraph 32, "There were strong arguments for not extending an offer to these property categories on the same terms as insured properties. It would compensate for uninsured damage. Be unfair to other red zone property owners who have been paying insurance premiums and it creates a moral hazard in that the incentives to insure in the future, where insurance is available, are potentially eroded. However, there are costs associated with property owners remaining in the area. While property owners remain the area there is little scope to decommissioning infrastructure which is costly to maintain." And then over the page, paragraph 34, "Properties with no insurance in the red zones are also in a different situation to similar properties in the green zones. Red zone properties are in the areas of severe infrastructure damage. Many surrounding neighbourhoods have either left or are planning to leave, as evidenced by the high take up, and there is considerable uncertainty about what will happen to these areas in the future. Therefore, I do not support the option of no offer being made as there are good

reasons to support the exit from the red zones." And then they deal with each category, red zone, vacant land. Then paragraph 40, "I consider the loss of 50% of the rated value and ensure that the offer is below the earthquake value and help support the signal that the Government wants to encourage property owners to move on from the red zone." And then uninsured improved properties. Perhaps paragraphs 44 and 45," I recommend that an offer for purchase of properties made with reference to reduced rateable value for land only for the same reasons outlined for vacant land I consider an offer of 50% rateable value should be made." And then 46, "The offer supports the signalling, the objective for the red zone, while providing some support for recovery elsewhere, acknowledging that the owners are not fully insured throughout the whole process."

So the real reasons for the reduced offer are those summarised – in fact in paragraph 32 it would compensate for uninsured damage, be unfair to other red zone property owners and creates a moral hazard. Now the first point I'd say about that is, again I go back to what the Act required. What the Act required is that decision-makers ensure that communities recover from the impact of the earthquake and section 10(2) required those decisions to be reasonably necessary to fulfil those purposes. So the problem with discounting in that way is it undermines the very objective of the exercise and puts them in a less compliant with the Act position because they're less able to recover from the impact of the earthquakes. But in terms of those factors that are identified, the observation that it will compensate people for uninsured loss, I say is irrelevant because what is being engaged in here is not a payment to compensate people for loss. What is being made is a payment to enable people to relocate. So it's irrelevant to – and the relocation is the purpose that has to be fulfilled under the Act so it's irrelevant to that purpose. The relatively unfair point is similar. It's irrelevant if the whole object of this measure is to allow people to relocate and given that there had been a one size fits all approach, where individual circumstances would not be taken into account, then this factor, by itself, is again irrelevant to what the Act requires.

And then finally on the moral hazard argument, there's, of course, considerable debate about what real validity that can really have. That people will really not get fire insurance because they suspect that the Government in the future will come to their rescue. It seems to be a long bow. But more significantly in terms of the Act this Act is concerned with this particular disaster and to the recovery from this disaster. It's not within the proper framework of this Act to start thinking about what

might happen in the future in relation to other disasters in other places. It's just an extraneous –

**WILLIAM YOUNG J:**
Did it look at what had happened in earlier, in a case of earlier disasters, is that right? I've got a feeling there was something I saw about someone who went back to see what had happened in relation to some earlier disasters.

**MR COOKE QC:**
I personally can't remember that.

**WILLIAM YOUNG J:**
All right.

**MR COOKE QC:**
It doesn't mean it's not there. But the purpose of this Act is to recover from this disaster and I guess this comes back a wee bit to that debate we had earlier in the day about what the real significance of those provisions in section 10 were. Whether, how much they constrained the decision-makers purposes and perhaps this is an example of it, that section 3 and section 10 read together don't allow these kinds of extraneous considerations to actually be the reasons for decisions, because the decision-makers have to ensure that the purposes of section 3 are met, and section 3 is directed to the recovery of communities from the impacts of these earthquakes. So moral hazard, in my submission, is irrelevant to that legal framework for the decision-maker.

Now if Your Honours are not with me in the sense that the unequal treatment per se is unlawful, I've referred to the recent Supreme Court decision in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] 3 WLR 179, it's a completely different framework. Again there's been a glitch in the photocopying so I have got fresh copies of that decision if Your Honour's would like it.

**ELIAS CJ:**
Yes please.

**MR COOKE QC:**

The only real point of that is to say that that was a case where the Court, and this again was Lord Sumption for the majority, recognised that there was a rational connection between that bank, Bank Mellat, and Iran's nuclear weapons programme, but indicated that whilst there was a rational connection the unequal treatment of singling out that bank to have its licence revoked was disproportionate and accordingly irrational and that's paragraph 27 of that judgment if Your Honours – I don't necessarily need to take Your Honours to it but the reason for identifying it is to say, is to identify that just because something is rationally connected with a decision, doesn't mean that it can't be disproportionate and therefore ultimately irrational on terms of its application and that's what we say here. Even if the lack of insurance is a relevant consideration to take into account, that now it would be quite inappropriate for that to be a reason why such a dramatic discount was made to prevent people moving on. So that it's disproportionate and irrational in its application in the circumstances of this case.

Now the final aspect of this argument is to say that even if Your Honours were against me on those two propositions, the final one is that given the extent of the illegality that has been established, in terms of the Government acting outside the regime, the only remedy that can justly be given now, given the illegality established, would be orders under section 4 of the Judicature Amendment Act requiring the same offer to be extended to the Quake Outcasts and that is essentially because any other offer now would involve the Government taking advantage of the adversity created by the illegality in the regime that's taken place thus far.

Now the only other thing I wanted to say about remedy is the awkwardness that arises from the fact that we have both the High Court decision, where relief was ordered and no action was taken, then we had the appeal where my learned friend suggested that the orders under section 4 be replaced with a declaration on the basis that the Crown would do the right thing if a declaration were made, and an indication that an offer would be forthcoming by May this year at the latest, and that's now gone, we have no offer. It's in those circumstances that whatever relief the Court were to give to do justice in this case, I do ask that leave be reserved to come back to this Court in relation to whatever offer emerges, precisely because where are now in a position where we've had orders, or declarations, requiring the offers for some time. Quake Outcasts have actually been waiting a very long time for relief from the adverse impacts of this earthquake and this concern that no further offers have been

forthcoming and now a decision has been made to await the decision of this Court for any further relief, and in those circumstances we don't want to be faced with a situation where we have to go back again to the High Court to start fresh judicial review proceedings for any new offer. We really do want a final answer to this really difficult situation in which they are now in hence the request the leave be reserved to come back to this Court. Now if it was, well it had transpired meant that it wouldn't be appropriate for this Court to deal with it then we would have to accept that but I would ask for that leave in any event.

**WILLIAM YOUNG J:**
Can I just ask one question, well just really for a document? Mr Tsao applied for review of the zoning decision, and I think a decision was given to him I August 2012 but, it's referred to in the affidavit but I couldn't actually find it in the bundle, does it ring a bell with you or not?

**MR COOKE QC:**
The review of a zoning decision?

**WILLIAM YOUNG J:**
Yes.

**MR COOKE QC:**
It does ring a bell somewhere in the distance.

**WILLIAM YOUNG J:**
Well don't worry, perhaps someone might be able to identify it for me later.

**MR COOKE QC:**
So unless Your Honours have any questions those are the submissions for Quake Outcasts.

**ELIAS CJ:**
Yes, thank you Mr Cooke. Yes Mr Rennie.

**MR RENNIE:**
Your Honour, as you probably will anticipate I gratefully adopt the submissions of my learned friend, Mr Cooke, who has covered the field and you have my written

submissions and I really only wish to make, address one point and that is my learned friend Mr Goddard's argument as set forth in clause 7.9 of his submission. There he makes an analogy that really drives at Your Honour Justice Young's point about the value of the transaction.

The background to this is that this is a purchaser which, as my learned friend Mr Cooke has said, is not really an arm's length purchaser in this case. It also includes the fact that the Government has already made a 100% RV offer despite the fact that land may not have been damaged, despite the fact that there may be no EQC land claim and with the EQC entitlement being confined to eight metres within the dwelling.

So it's against that background I want to test what is in clause 7.9 with the example of a dwelling under construction. The dwelling under construction received 100%.

**WILLIAM YOUNG J:**
Just so I – so that's the land value but, and presumably whatever the insurance policy work?

**MR RENNIE:**
Yes.

**WILLIAM YOUNG J:**
So they got 100% land value plus whatever the insurance paid them?

**MR RENNIE:**
Yes.

**WILLIAM YOUNG J:**
Okay.

**MR RENNIE:**
So assuming that A here is an uncompleted home and that B is a vacant landowner, if you compare those two situations then neither has made an EQC contribution, nor could they, neither insured the land, nor could they and the Crown makes no recoveries against the land in either case. But the dwelling under construction will

receive the full value for his land whereas the vacant landowner is only going to receive half.

So that is an additional reason in my submission why this decision is obviously arbitrary and unreasonable and Your Honour has already picked up my point made in my submission that the Crown in any event pay for land beyond the eight metre circle around the house.

So we say that the original decision of the Chief Executive at volume 5, tab 181, to pay vacant landowners 100% of their rateable value was correct and that the subsequent reasons advanced in the record for changing that position are irrational.

Now as I said –

**WILLIAM YOUNG J:**
It's not irrational in the sense that there isn't a reason for it.

**MR RENNIE:**
Correct.

**WILLIAM YOUNG J:**
It's irrational, you would say, in the sense that there is insufficient reason for –

**MR RENNIE:**
Insufficient reason, yes. So Your Honours as I said that was my point. Unless you have any further questions for me out of my submission.

**ARNOLD J:**
The $100,000 limit in the EQC Act exclusive of GST applies to the dwelling. Does it also apply to the land? Is there a separate – what's the limit that you can recover for land?

**MR RENNIE:**
$100,000.

**ARNOLD J:**
$100,000 as well.

**MR RENNIE:**
Yes, that's area based.

**ARNOLD J:**
So it will be a varying sum depending on the area.

**MR RENNIE:**
Yes.

**ELIAS CJ:**
Yes, thank you Mr Rennie. Ms Casey, we'd like to hear briefly from you just enlarging on a few points, in particular in summary why you contend that rights are affected. Secondly, the reporting that's been made to the UN Human Rights Committee on this matter and there was another point that someone, if you can think of it.

**McGRATH J:**
It was some clarification of why the breaches of the rights referred to was caused by the red zoning decisions rather than by the actual earthquake.

**ELIAS CJ:**
Yes. We have read your submissions, thank you.

**MS CASEY:**
I'll do my best to address those three issues and I appreciate the indication that the written submissions have been read.

On the first question of why are the rights engaged. That is the primary reason why the Human Rights Commission is of course here and that is the key aspect that I would like to address in terms of the Crown submission as well that the rights are simply not engaged.

So we start from the more general proposition that I think it is uncontroversial that human rights are key to, and central to the relationship between the state and the individual and that the particular human rights that the Commission says are at issue in this case are fundamentally important rights and I've touched on that very briefly in

the written submissions at 18 and 20. So, for example, the article 17 right in the ICCPR concerning the right to respect for their home. On their equivalent provision the European Court of Human Rights have said, "It concerns rights of central importance to the individuals identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community," and that's from the *Connors v United Kingdom* (2004) 16 BHRC 639 (ECHR) case and on article 11 which is the right to housing under ICESCR the UN Committee on ICESCR and general comment 4 describes this, "The human right to adequate housing is of central importance for the enjoyment of all economic, social and cultural rights. It should be seen as the right to live somewhere in security, peace and dignity. The right is integrally linked to other human rights and to the fundamental principles on which the covenant is premised, including the inherent dignity of the human person."

General comment 4 confirms that the right includes security of tenure, access to services and infrastructure and habitability. General comment 9 from the ICESCR which relates to the nature of the progressive realisation obligations of the state confirms that, "The states must take steps by all appropriate means to the maximum available resources to protect, respect, and fulfil these rights and any retrogressive step must be clearly justified. So in my respectful submission, it is easy to see why the rights are very important to the earthquake recovery approach from the Government. It is obvious that recovery efforts and decisions around the rebuild of Christchurch including the areas which will and will not be remediated engage the obligation of the state to ensure and to have close regard to respecting and protecting these rights to the maximum extent possible. They are clearly part of the rebuild decisions.

The Commission considers that its view on this has been confirmed by the United Nations and in my written submissions I've referred in particular to the recent commentary of the United Nations on the rebuild efforts. I note that the Government has accepted in full the recommendation from the presentation of New Zealand's recent UPR.

Also in the submissions I've referred to the fact that the CER Act itself recognises the significance of these rights within the Canterbury rebuild, and I've covered that in some detail in my written submissions, but critically section 3 itself refers to the economic, cultural and social wellbeing, and as I've noted in my written submissions,

the Government has stated to the international supervisory body in the UN that where those words are used in legislation the principles of the language apply. That's a clear representation from the Government on that point. That is the materials and the reference in my submissions as at paragraph 41.

This comment was made to the ICESCR committee in response to concerns that have been repeatedly stated by the committee, and I've listed some of those statements from the committee in footnote 41, concerned about New Zealand's compliance with article 41. The human rights commission has filed its own bundle of authorities and that includes all the UN documents that I've referred to in my written submissions. I should note that the common bundle of authorities purports to include a number of UN documents but they are frequently not what they say they are so the commission has hence filed its own bundle.

The ICESCR committee has been raising concerns with New Zealand for a number of years about its compliance with article 2, as has the committee responsible for the supervision of ICCPR, raising with New Zealand how are we implementing into domestic law those rights that are not already implemented through the New Zealand Bill of Rights Act. This is one of the responses in paragraph 41. One of the responses back from the New Zealand Government to the UN and it's the second part of the quote. "Several pieces of legislation directly incorporate the concept of promoting economic, social and cultural wellbeing as an explicit part of the statutory framework. In this type of legislation, the applicable principles in the covenant will be directly relevant to the interpretation and implementation of the statute." So in a long-winded response, the first part of my response to that question of what are the rights engaged and why they are engaged is that both article 2 ICESCR and article 2 of ICCPR require domestic implementation of these rights into New Zealand. The CER Act did so. Specifically and on its face, the statement that the Government made or that New Zealand made to the UN was made in April 2011, only a few months before CERA was introduced into the House. So in my respectful submission, Parliament intended decisions as to whether rebuilding or other development may or may not occur, which is an express matter covered in section 11. Parliament intended that to be subject to the ICESCR and by statutory presumption to the ICCPR, so the first part of the response is article 2 as an interpretation of CERA that covers the field is more consistent with article 2 of ICESCR and ICCPR.

**McGRATH J:**

Which provision of the New Zealand statute is this directed to? Did you say section 11?

**MS CASEY:**

Section 3 refers to the economic, cultural and social wellbeing. Section 3(g). The reference to section 11 was merely the topic of the red zone decisions being as to where rebuilding or other development may or may not occur. So in terms of Parliament's intention, how does that play out, what difference does it make whether ICESCR and ICCPR are just –

**ELIAS CJ:**

I'm looking at the reference to the third periodic report to look at paragraphs 18 and 27 that you've particularly drawn attention to and I'm just not sure that I've found the right one. Is that under tab 22 in your bundle?

**MS CASEY:**

It will be tab 21. The trick with this list is that it's in date order but there are a number of different bodies that we're reporting to. So this is the third periodic report to CESCR of 17 January 2011, so tab 21. So in terms of article 2 of ICESCR and ICCPR, what difference does it make, is that decisions to compare the situation that we're in now with the situation we would have been in if decisions had been made under the Act, the Government through the appropriate decision-maker had to consider economic, social and cultural wellbeing including all the principles of ICESCR and had to act in accordance with article 17 of ICCPR so that interference with home life had to be justified and this is the difference between justiciable and non-justiciable rights. Government must justify.

Secondly, Government under CERA had to follow the statutory processes including community engagement and consultation, and the process could be compressed but only if transparently justified by urgency.

Thirdly, the delineation of zones, who is in and who is out, and the difference in treatment between various classes of residence would need to be based on robust evidence and demonstrably justifiable, and I'll come back to that issue because that is where the commission considers that the rights bite in terms of the second question on appeal. All that would, of course, be subject to review and supervision.

Contrasting the position with the residual power, as the commission understands the Crown submissions, the Crown is arguing that the red zone decisions are not susceptible to review at all because they were only made at Cabinet level. The Crown is comfortable not addressing economic, social and cultural rights and the Crown is comfortable with the position that unless legal property rights are engaged those people directly and fundamentally affected by the decisions have no right of challenge. So that's in terms of the articles 2 of both treaties.

In terms of the article 17 of the ICCPR, the right to non-arbitrary and – to, the right to be free from arbitrary interference with home life, my learned friend Mr Cooke has I think taken the Court through the factual analysis there and I won't repeat that. That is, I think, very similar to the analysis laid out in the written submissions.

In terms of the right to adequate housing I'd step back and say the issue from the Commission is that the right is engaged and needs to be considered, and needs to be part of the planning and response of the Government to the earthquake recovery.

There is the secondary issue which is touched on in my written submissions, is that the Commission's view is that for these particular, this particular group of people, these individuals, three years after the announcement of the red zone the right looks to be well past infringed. We have actual serious deterioration of housing conditions. Mr Sutton in his second affidavit talks about looting, fires, abandoned property, increasing rodents. There is evidence that if, and I think if anybody needs to do it's probably the Human Rights Commission, needs to stand back and say, "We need to do a reality check here." We don't normally in New Zealand get into issues with adequacy of housing. It's taken for granted in this country that our policy and our decisions don't get anywhere near a retrogressive step under that right. But Mr Sutton's description of the condition of these areas is chilling reading. The internal CERA email that my learned friend Mr Cooke has just referred to is chilling reading and it is not what I think New Zealand presents itself in the international stage as condoning.

Taking back and doing a reality check here, the only thing that this group of people did wrong was to not have insurance. So in terms of a proportionate response, three years after the announcement of the red zone decisions, without questioning or analysing their individual circumstances of a very small group of people. So we don't

know if they're truly feckless or unfortunately or a lot of different possibilities. In my respectful submission the impact of these decisions and non-decisions on their particular right to adequate housing, access to infrastructure, has been disproportionate to the single issue that has been put forward as an explanation.

So that, Your Honours, is my rather long way of explaining why the Commission thinks the rights are engaged and then, in terms of the right to adequate housing, why there is a serious issue in the more general picture that the right's actually been infringed.

So the Commission wishes to directly respond to the Crown's response that the rights aren't even engaged. We think that that is an unsustainable and incorrect position. I'd be quite happy to take Your Honours through each reason why the Crown doesn't think so but I'm not sure that that would be particularly helpful.

**ELIAS CJ:**
No, I think you've answered the – in fact you've answered all three questions I think that I put to you. because you've taken us to the materials and you've also indicated why it's the handling of this offer that you say infringes the rights, not just the impact of the earthquake. I think – did you have any further questions on that? No.

**MS CASEY:**
Thank you Your Honours.

**ELIAS CJ:**
So thank you very much Ms Casey. Now Mr Goddard, I don't know whether you want to get underway. We can't sit late because I have something at 4.30, but…

**MR GODDARD:**
I don't know that I can usefully embark on anything substantive. I could perhaps clear up a couple of small practical –

**ELIAS CJ:**
Yes.

**MR GODDARD:**
– issues that have arisen in the course of the day so that I am not distracted by those in the morning.

The first is just to pick up, although I think it was partly addressed, a couple of questions from Your Honour Justice Arnold, the first about the way the EQC legislation works in relation to land. Under section 19, which deals with residential land, there is no dollar cap. Rather, the land is insured on an indemnity basis rather than a replacement basis to the lesser of certain sums, which are listed, and they are basically either the value of a minimum lot size in that area, because the purpose is to enable people to move if not to a comparable dwelling – if one has park-like grounds it's not EQC's concern to replace those, but to provide –

**ARNOLD J:**
Right. So is that the eight-metre rule? There's –

**MR GODDARD:**
Yes, well it's, there's two different limbs. One is the minimum lot, value of a minimum lot in that area, or in the alternative, if it's less, yes, the value of the land eight metres out from the building plus access-ways and certain other –

**ARNOLD J:**
I see.

**MR GODDARD:**
– parts of the land. So there are two caps. There's the dollar cap on the cover for improvements and then there is the area-based cap in relation to land.

Your Honour also asked about how these offers worked where there was no top-up cover. To the best of my knowledge and of those from whom I've been able to obtain instructions today that issue did not arise but the way that the offer – and Your Honour also asked about inadequate cover of the improvements. Until the Christchurch earthquake most top-up – most policies that cover for fire also provided top-up cover, and most provided cover on a replacement basis without a cap, so the issue didn't arise. And I think members of the Court will probably have gone through the enormously annoying process that counsel will probably all had to go to through recently of trying to work out what sum insured to specify on houses now that most

insurers require that, which used not to be necessary. But that is – for many insurers, most insurers, a post-Christchurch innovation requiring that a sum insured be specified.

There were some insureds who had – some insured persons who had sums insured. Or who had square metre limits their cover. That was the exception, not the rule. The way that the offer worked, the original June 2011 offer, in terms of the detailed design, was that where there was material under-insurance the amount paid was abated, and there were detailed provisions in the agreement for sale and purchase which provided that in the event that a person who accepted option 1 had insufficient cover because it was capped by reference to a sum insured which was less than the rateable value of the improvements of less than the square metres of the actual improvements, then there would be a reduction. So that did feed through.

**GLAZEBROOK J:**
Reduction in what, in the purchase price?

**MR GODDARD:**
Yes Your Honour. In the amount paid for improvements. So it's not as if there was a bright line division, either you got everything or you got nothing. There was indeed an adjustment where there were insurance but under-insurance. And Your Honour said, well the same issues about moral hazard, and I think one might say fairness and precedent value would bite in the event of under-insurance. Your Honour's exactly right and that was reflected in the offers made under option 1.

**ELIAS CJ:**
Do we have any evidence of that?

**MR GODDARD:**
I – there are references to it in one of the papers in the case on appeal. My learned friend is trying to find as much assistance on that as we can –

**GLAZEBROOK J:**
Can you just –

**MR GODDARD:**
– in the bulky paper.

**GLAZEBROOK J:**
Remind me what option 1 was?

**MR GODDARD:**
Option 1 is where the owner of the property transferred their rights to insurance recoveries in respect of improvements as well as the land. This is another very important –

**GLAZEBROOK J:**
Well is it because option 2, wasn't it you could just take the price with no abatement?

**MR GODDARD:**
But that was you only got the value of the land, so the issue of under-insurance in the sense of having specified a sum insured didn't arise. What did arise was the question that some members of the Court raised, Your Honour the Chief Justice I think earlier in the day about the fact that the EQC cover didn't necessarily extend to the whole of the land and I will come back to that tomorrow, I don't have time to deal with it sensibly now. But the critical – the only difference between what was sold under option 1 and option 2 was insurance rights. In both cases the land and the improvements were sold to the Crown. That's not explained very clearly in the original June 2011 Cabinet paper but it's very clear from the offers that are made which are in the case on appeal it's very clear from the fact sheets. One had to sell the land and the improvements.

The only difference was whether you also – and everyone had to assign in order to take up either offer, their rights to land insurance recoveries from EQC. The difference was whether you assigned your insurance rights in respect of improvements as against EQC and your private insurer. So the whole structure of the original offer turned on what insurance you sold as well as the property and the more insurance rights you transferred the more you got paid, and this is something I will need to come back to tomorrow.

The distinction based on the extent of insurance rights held and transferred is actually fundamental to the basic structure in the original offer in June 2011 and one of the difficulties with what my friend is arguing for at the top of his shopping list is that he is looking for wholly uninsured owners of improved properties to be paid more than option 2 vendors of an equivalent property who didn't transfer their improvement

insurance. So in other words, he is saying they should receive 100% of the rateable value of land and improvements which is actually more than people got under option 2.

**ELIAS CJ:**
Is it 50% less or, I'm sorry, or is it more?

**MR GODDARD QC:**
It will vary.

**ELIAS CJ:**
Is the 50% –

**ARNOLD J:**
Presumably the people who took option 2 have made a calculation that they would be better off by taking the lesser offer from the Government and negotiating with the insurers for the rest.

**MR GODDARD QC:**
Yes.

**ARNOLD J:**
It's a bit artificial to compare that with, I mean they only get less from the Government, they may not get less overall.

**MR GODDARD QC:**
Your Honour is exactly right but of course if we're looking at overall outcomes then it's relevant to step back and say are they better off overall as a result of the two Government decisions. And this is another point I need to come back to tomorrow but it is not - the information before Ministers when they made their decision suggested that most recipients of the 50% offer would be better off as a result of the two sets of decisions than they would have been if the Crown had done nothing at all.

So what we have – and there's no challenge to that. So one of the difficulties in the appellant's case that my learned friend hasn't really confronted head on is that there is no claim that the information about damaged land received by Ministers and published by them was incorrect. So the Court must ,in my submission, proceed on

the basis that the assessment of damage was correct or at least unchallenged and there is no argument that the value of any of these properties has been reduced as a result of the decisions made in June 2011 and September 2012 below the level that it would have been if no such decisions had been made at all. So this is not a claim –

**ARNOLD J:**
I thought there was a suggestion made as between some of the properties anyway.

**WILLIAM YOUNG J:**
Mr Tsao I think would say that –

**MR GODDARD QC:**
But there's no evidence.

**WILLIAM YOUNG J:**
There's quite a – I've still been unable to find the decision letter but there's a lot of discussion about his property in Dr Kupec's evidence.

**MR GODDARD QC:**
I was about to refer Your Honour to that. Dr Jan Kupec's first affidavit, the one in the – no second affidavit –

**WILLIAM YOUNG J:**
Second affidavit.

**MR GODDARD QC:**
– the Quake Outcasts proceeding deals in detail with Mr Tsao's land and explains why there is significant land damage.

**WILLIAM YOUNG J:**
Well he says it's sunk between half a metre and one and a half metres.

**MR GODDARD QC:**
Yes I think that's right, that one, yes. And there is a similar affidavit in relation to Fowler Development's land in that proceeding from Dr Kupec.

**ARNOLD J:**

Can I just check one other thing before we finish. Those refinements that you described to us earlier to deal with the problems of some people having only EQC cover and some people having to-up and so on. Those refinements aren't addressed in the Cabinet paper so were they subsequent refinements that the Chief Executive made?

**MR GODDARD QC:**

One of the things I want to do tomorrow is to go through the Cabinet decision in considerable detail because much turns, as the Court has observed, and it hangs on how one characterises the decision. What was Cabinet actually doing and I don't think that's been adequately addressed yet but one of the points that I will be drawing to the Court's attention is that the question of transaction design was deferred for later, and that includes what powers would be exercised, what refinements were needed, all those things and there was a series of Cabinet papers on transaction design after this, most of which are certainly in the bundle. Whether the one that's particularly relevant to this issue has exceptionally, because it is the only relevant one, found its way out of the bundle is something we'll sort out overnight.

But this Cabinet made a policy decision. It made a decision that certain information would be provided to the public and that happened the next day. The Prime Minister communicated with the public, the Minister communicated with the public. What the Cabinet also made was a policy decision that this offer would be made and it then, as those of us who have been on the receiving end of instructions like this know only too well, sent people away to work out how that would be done and what powers would be exercised, whether indeed further empowering legislation might be needed were all issues that were up for grabs as is so often the case following a Cabinet decision and I'll deal with that tomorrow.

**ELIAS CJ:**

All right, thank you. We will take the adjournment now and resume tomorrow at 10, thank you.

**COURT ADJOURNS: 4.07 PM**

**COURT RESUMES ON THURSDAY 30 JULY 2014 AT 10.05 AM**

**ELIAS CJ:**
Yes, thank you Mr Goddard.

**MR GODDARD QC:**
Your Honour. Your Honours should have some more paper. Let me run briefly through what it is. For the most part it's better copies of things the Court already has. The exception to that is my two-page road map at the top. I suppose if I'd printed these pages side by side it would have been an A3 but I wanted to resist the view

**ELIAS CJ:**
Well the versions we have aren't A3. It's most disappointing.

**MR GODDARD QC:**
They're not. They're shrunken A3s.

**ELIAS CJ:**
They're A4s.

**MR GODDARD QC:**
They are. Half an A3. And almost impossible to read as a result. But this is two A4s. Then attached to that is a better copy of the material that's in volume 4 of the bundle of authorities under tab 86, so it's the LAC departmental statutes report that His Honour Justice Arnold referred to yesterday. I am going to go that, which is why I –

**GLAZEBROOK J:**
Sorry, volume 4…

**ELIAS CJ:**
This is the one that was written by Professor Brookfield, you say?

**MR GODDARD QC:**
That's exactly right, Your Honour.

**ELIAS CJ:**
I did read it in the form you had.

**MR GODDARD QC:**
It's really annoying because the right-hand margin has fallen off the edge of the world in the one that's –

**ELIAS CJ:**
You can in fact –

**MR GODDARD QC:**
Infer.

**ELIAS CJ:**
Infer.

**MR GODDARD QC:**
What is likely to have been said in the last word of each line but it's an unnecessary guessing game. This is the original version.

Then there is the judgment that Your Honour Justice Young referred to yesterday from the Supreme Court of the United Kingdom on 16 July which contains a few observations on common law and prerogative powers, and I will refer briefly to that.

Then in this collection of material there is a readable and coloured copy of the paper which records the June decision. So this is the critical decisions paper. It's in volume 4, tab 120, so it's 4|120, but there are difficulties in reading the version in the bundle and slightly frustratingly for something that turns on the colours of the legend of the maps, it's black and white in the bundle. This is a colour version. Easier to work with.

Then there is a Cabinet minute. This is the minute that I touched on in answer to questions from Your Honour Justice Arnold yesterday. It's one of the subsequent papers in relation to transaction design. It should be under volume 7, tab 363. The covering letter attaching it is there. One of the attachments is there and then there are some mystery bits of paper, press releases and things like that. I have no –

**ELIAS CJ:**

Sorry, 363?

**MR GODDARD QC:**

363 Your Honour. So this should be one of the attachments to 7|363, and then last there is –

**McGRATH J:**

So was it before the Court of Appeal or not?

**MR GODDARD QC:**

I don't know, Your Honour. I don't know whether the copying error emerged before or after that, and my friends aren't sure either.

**GLAZEBROOK J:**

Was it this or the High Court though?

**MR GODDARD QC:**

That all depends on when the copying error emerged.

**GLAZEBROOK J:**

Okay.

**MR GODDARD QC:**

It was – the letter attaching it was before the High Court. Other attachments were before the High Court.

**GLAZEBROOK J:**

All right. I mean…

**MR GODDARD QC:**

I'm sorry.

**GLAZEBROOK J:**

No, no, just…

**MR GODDARD QC:**

It's a question – there's been a process of preparing a High Court bundle in some haste, because the matter was heard urgently. That was done by the plaintiffs. Then there was a process of preparing a case on appeal, for which the Crown was responsible. We may well have contributed some errors. Then there's been a process of preparing the case for this Court, which again has – the gremlins have been present at each stage and I can't attribute those gremlins I'm afraid.

And then lastly there is something which is in fact in the case on appeal but we couldn't find it last night. The Court need, doesn't need the letter dated 24 August 2012 from CERA to Mr Tsao in relation to the review because it is in volume 6 under tab 237. I'm indebted to my friends for that reference. But Your Honour Justice Young was asking about the response to Mr Tsao. This is it and it is, in fact, already in the bundle. And I will touch on it later.

So, with those preliminaries, I'll begin with my road map. I want to begin by looking very carefully at what was actually decided by the Ministers with power to act in June 2011. So this is the document that I handed up this morning. It's 4|120 but this is the colour version, and I think it's probably easier to work from that.

My learned friend Mr Cooke took the Court to the Minister's paper for this meeting, the one that was located extremely late in the piece. But what has consistently been before the Courts is this memorandum, which is a record for Cabinet for noting of what the Ministers actually decided. And at the risk of stating the obvious, it's what they decided that is either susceptible of challenge or not. So this is the key document. And it begins by setting out for noting a series of policy questions that have been made in relation to land damage.

A few things I'll note in the executive summary. The September 2010 and 22 February 2011 earthquakes and their aftershocks it's noted represent an incomparable natural disaster in New Zealand's history. And then there's a reference to the aftershocks on Monday 13 June, and the context for that of course is that power to act was conferred by Cabinet on these ministers on the 20th of June. That's recorded in paragraph 13. One week after that further earthquake. And power to act was conferred, as it's noted in paragraph 13, for one week until Monday 27 June, reflecting the perceived urgency on the part of ministers of decisions being made in a shorter timeframe even than that which would be accommodated by regular weekly

Cabinet meetings. So – and so paragraph 2, "The aftershocks on Monday 13 June including another 6.3 only served to emphasise the repeated nature of the events and the fact that the end-point cannot be predicted."

And that I think is also an important part of context here, that the significant earthquakes were continuing. This was continuing in the middle of the events. The ground was still literally moving under the people of Christchurch and that was what the ministers were attempting to respond to.

Reference to the Government being committed to supporting a speedy recovery in paragraphs 3 and 4. "Residents in greater Christchurch are eager for information about the status of their land," and the Court will see that this is very much a response to that, "in particular in relation to the green zones where over 100,000 households were given the reassurance that the character of their land was such that they could get on with rebuilding. And insurers were given confidence to pay out on claims and to continue writing new cover. And that was a fundamental part of these decisions as the Court will see. That in my submission was wholly consistent with the role of Government and did not require any statutory support and was not precluded by the legislation.

So, "Residents in Christchurch are eager for information about the status of their land so they can plan for the recovery of their homes, neighbourhoods and businesses. Particularly so for those in the worst-affected suburbs where liquefaction, flooding and disruption to services have repeatedly wreaked havoc, including after recent large aftershocks. I consider the loss of confidence and property damage is of a scale to warrant speeding up central Government decisions and announcements."

There's a reference to the objectives of Government, "In determining where rebuilding can occur or is unlikely to be possible to occur in the short to medium term. The certainty of outcome as soon as practicable. Create confidence for people be able to move forward with their lives. Creating confidence in decision-making processes (for homeowners, business owners, insurers and investors.)" That's a very important part of it. (d), "using the best available information to inform decisions," and that's relevant of course both to ministers and to people on the ground. And (e), "having a simple process to provide clarity and support."

In six, "The distribution of the impact of natural –

**ELIAS CJ:**

Sorry, can you just remind me, what was the date of enactment of the legislation?

**MR GODDARD QC:**

April 2011. I can't –

**ELIAS CJ:**

April 2011.

**MR GODDARD QC:**

Exactly, it was April, Your Honour.

**ELIAS CJ:**

This is after that –

**MR GODDARD QC:**

This is after that.

**McGRATH J:**

18 April.

**MR GODDARD QC:**

So after that was enacted there was this further very significant aftershock on 13 June. Very significant damage again. One death following the earthquake and, and Mr Brownlee deals with this in some detail in his affidavit, very significant pressure, especially after that 13 June event, to provide information to provide a basis for more confident decision-making by all the players in Canterbury.

**ARNOLD J:**

Well, but it also reflected decisions by the Government, didn't it? I mean, that's what it says in paragraph 4. "While speeding up essential Government decisions and announcements," so there were Governmental decisions being made, not simply …

**MR GODDARD QC:**

A number of things were happening. A decision was being made to provide information. Information was provided. A decision was made to make an offer to

acquire properties, which was a very significant decision and I'll come to that. But the centrality to what was done of gathering information and providing it to enable to people to make decisions is, I think, important to an understanding of what Ministers were doing and to any assessment of the challenge to the legality of it because, of course, there are, in principle, three possible answers to the challenge. One is that it's wholly lawful. The other is that what was done was wholly unlawful. The third is that what was done could, in part, be done but that other steps required different measures. For example, it's difficult to see how there could sensibly be a challenge, even on the basis of the argument advanced by my learned friend which, in my submission, is wrong but I'll come to that. To exactly this information being gathered, exactly these areas being identified, and then Ministers saying, "We are minded to make an offer to purchase. We will direct the preparation" – my friend says of a recovery plan – "which canvasses that possibility, and we will release the Cabinet paper with the areas in them.

**ARNOLD J:**
But isn't this a statement of Government policy? Government is saying, "We're not going to support a rebuild in the red zone areas. That's a policy statement."

**MR GODDARD QC:**
No, it's not, Your Honour.

**ARNOLD J:**
Well, how could you give confidence to the insurance industry and get them going and do all the things that you've just taken us to in paragraph 5 if this wasn't a policy announcement?

**MR GODDARD QC:**
Because in relation to the green zones which is, in particular, where things were to get going, nothing was required except to provide people with the reassurance that on the basis of good geotechnical information the land did not require area-wide remediation, that it was possible to deal with things property by property, so for the vast majority of people to whom this was addressed, nothing was required except information. That's fundamental to what was being done here.

**ARNOLD J:**
So you say this does not reflect any Government policy decisions?

**MR GODDARD QC:**

No. There was a policy decision in relation to the offer to purchase red zone properties. That was the policy decision in here. Otherwise what was being done was gathering information and releasing it to support decision-making.

**ARNOLD J:**

I must say, I find this sort of hard to understand. It seems to me that Governments are in the business of governing. One of the things they do is make decisions about how resources are going to be allocated. That's particularly important in situations, scarcity or national stress, which was obviously this situation. The paper is quite explicit about what it's trying to achieve in all various constituencies that you've identified, and I just don't see how it doesn't reflect a policy decision about where rebuild resources will be allocated. They will not be allocated in red zone areas.

**MR GODDARD QC:**

Let me go through the detail of the paper because, in my submission, that's not what's decided there. In fact, what's very clear is that no decision is being made about whether there will be rebuilding or not in those areas. Rather, what is happening is that the advice that if that were to happen area-wide remediation would be required, which would involve removing improvements, and it's not going to be possible to design that work and to make those decisions for some time as being notified, so the process that's about to begin of engagement in relation to the future of the red zones is the process that will ultimately determine whether some areas are or are not to be rebuilt. That decision has not been made, and there's going to be a process of community engagement.

**ELIAS CJ:**

You say it hasn't been made even yet?

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

But to the people who've actually been moved out of the red zone, it's been made for them. It may not have been made as to what's going to happen in the future and whether future people will be going there but it's really just using words in a way that

they can't be stretched to, isn't it, to say that the decision hasn't affected the people already in the red zone, those who have accepted the offers to purchase and those who are still stuck there.

**MR GODDARD QC:**

Of course there's been a practical effect.

**GLAZEBROOK J:**

A practical effect has arisen from what has to be seen as a policy decision. It's not just information.

**MR GODDARD QC:**

The offer to purchase properties is certainly a policy decision. There's no doubt about that. But, with respect, the bulk of the consequences, the practical consequences, that have followed in terms of depopulation of the red zone are the result not of any policy decision that's been made by the Government but of the effect of the earthquake and the Government conveying information, the accuracy of which is not challenged, about whether it is possible to rebuild there in the short to medium term. I do think it's worth going through the paper in some detail, but in a nutshell, the point was that because of the character of the land, not damage primarily to the houses but the character of the land, and the impact on infrastructure, it was not practical to rebuild in the short to medium term and any rebuilding that was going to happen was likely to involve the removal of all improvements. What that meant –

**GLAZEBROOK J:**

But that's a policy decision based on the effects of the earthquake, but it still has that effect as a policy decision, doesn't it?

**MR GODDARD QC:**

It's the diagnosis of a condition that existed, if one likes, not the bringing about of a condition. I will go through this and I do want to emphasis also the importance –

**ELIAS CJ:**

You know, on that basis judgments are simply diagnoses.

**MR GODDARD QC:**

No, Your Honour. They actually create a new legal obligations where, for example, damages are awarded that didn't exist before and they have legal consequences.

**ELIAS CJ:**

That's your main thrust, that this didn't affect any legal interests.

**MR GODDARD QC:**

There are two steps to that. The first is that this decision of itself didn't and couldn't do that. In that sense, it's different from the exercise of a statutory power, which, as soon as it's exercised, has legal consequences. Cabinet decision-making is not of that character. The consequences, even the practical consequences, of this stemmed from the announcement the following day, and then from the offers that were made a few months later following a series of other Cabinet papers, as well.

**ELIAS CJ:**

I understand that, which is really why I was asking some questions of Mr Cooke about the offer bringing into it the Cabinet decision rather than the sequencing, and he answered quite fairly that he'd addressed them in sequence because that's the way the Court had posed the questions. But I don't see why the policy decision isn't an integral part of the offer that's made.

**MR GODDARD QC:**

It's an essential backdrop to it, yes. I agree, Your Honour. The identification of the seriously damaged areas and the policy decision to make an offer to purchase the properties of insured residential owners is a critical part of the framework within which in September 2012 a decision was then made to make an offer on particular terms to the quake Outcasts and similarly affected persons, so yes, that decision makes no sense independent of what had been decided in June 2011 and acted on over the next few months.

**ELIAS CJ:**

And it furthers the Government's wider policy of removing the buildings within the zone to allow remediation options to be further explored. So it's within a much bigger framework.

**MR GODDARD QC:**

There is no policy of removing all buildings in the red zone.

**ELIAS CJ:**

Sorry, I thought you just said that – I thought you'd said that the remedial work – maybe you should go through the paper – was to, in order to permit – that the remedial work would entail removal of improvements.

**MR GODDARD QC:**

If it's to be carried out.

**McGRATH J:**

Clearance of buildings I think.

**ELIAS CJ:**

Yes, yes, clearance.

**MR GODDARD QC:**

And only perhaps in certain areas, but that's my point, is it didn't require the removal of all buildings.

**GLAZEBROOK J:**

Well sensibly we're not going to leave derelict buildings there for looting and for people to move into and have all of the problems of crime, so seriously they're not going to leave derelict buildings just sitting there are they? If nothing else, for the look of the city.

**MR GODDARD QC:**

That was certainly –

**GLAZEBROOK J:**

If you've travelled through recently there's no way you're going to leave that looking like it is in a first-world city, are you?

**MR GODDARD QC:**

That was certainly one of the concerns that prompted the decisions the ministers made to offer to buy the properties, because they were concerned that the

counterfactual was precisely – most of the houses were seriously damaged, most people would leave in any event, either because of the damage to their properties or because of infrastructure issues. Those people would often not have the means or the incentive to demolish those properties so there's an obvious interest for those who remain and for the wider public interest in trying to address the consequences that would otherwise arise. Your Honour's exactly right and Mr Sutton deals with that in his first and second, particularly second actually, affidavits. But again – so those are obvious concerns.

**GLAZEBROOK J:**
And one of the ways you do that is to get people out as soon as possible, hence the purchase offers, because there's no point leaving people there for a length of time for it to deteriorate. So the whole point of this was to clear the red zone, wasn't it?

**MR GODDARD QC:**
No, I don't accept that, Your Honour, and there's no reference to that in this paper.

**GLAZEBROOK J:**
Well it's just clear isn't it? because if you're giving purchase offers to people to enable them to get out and get on with their lives because it can't be remediated, then the purpose of it must be to clear the red zone. It's a sensible purpose. I'm not suggesting there's anything stupid about it, in fact it's a very sensible thing to do.

**MR GODDARD QC:**
It is a perfectly sensible thing to do. Nonetheless it was not, certainly not at the forefront and not really even a material goal of what –

**GLAZEBROOK J:**
Well you'll have to show me that because –

**MR GODDARD QC:**
I will.

**GLAZEBROOK J:**
– because if you're giving, if you're actually giving people a good valuation to get out then the incentive is for them to get out, and then you don't have to fix the infrastructure or have any of the difficulties that you've got. I can't see –

**MR GODDARD QC:**

Yes, no Your Honour's –

**GLAZEBROOK J:**

– how you can say it's not a central view that you're trying to get them out.

**MR GODDARD QC:**

Because –

**GLAZEBROOK J:**

Because you don't want to fix it up, it's not economic to fix it up, their little diagram shows that the costs are going to be, on an area-wide basis are going to be prohibitive, it will stop the rest of the rebuild if you start doing that so that you can't do a rebuild in a sensible way.

**MR GODDARD QC:**

The primary concern was for people rather – in the short run. It was to meet the urgent needs of communities, not the medium- to long-term objectives. It's quite clear that what exactly was going to be done in relation to this land was all for later decision, and I'll take the Court to that in this paper, but the reason for making this decision and making it in the very short timeframe within which it was made by this group of senior ministers rather than an ordinary Cabinet meeting just a matter of days later was to respond to the needs of people in – very short-term needs of people for information and for certainty. And I'll go through the paper and then come back to some of these issues. I think that's going to be the most useful way to deal with it.

So I'd got I think as far as paragraph 6 on page 2. There's the observation that the distribution of the impact of natural disasters, especially earthquakes, is uneven and therefore inherently unfair, and again I'll come back to this later, but the goal of the decisions to alleviate this impact, to diminish but not eliminate some of those adverse impacts, some of those unfairnesses. The worst-affected suburbs are identified.

Then factors that influence specific engineering solutions are noted. Two critical factors that, which are thin crust, which reduces the load-bearing capacity of the land and is both the cause and result of falls in land levels. And this is – and lateral spread, where land splits and sides towards the weakest point, away from built or

buildable areas. So these again are both land issues that may or may not materialise in damage to a particular building in a particular event but which create risk, and this is explained further on.

Then there's an analysis of criteria for determining areas where rebuilding is unlikely to be practicable over the short to medium term. Area-wide land damage, implying some sort of area-wide solution. "An engineering solution to remediate would be uncertain in terms of detailed design success and possible commencement given the ongoing seismic activity." That's part of why no decisions were being made. The earthquakes were still happening. The problems were significant. There hadn't been time to study them properly but it was clear that just waiting even to get these things straight was going to be a problem, so be, be disruptive for landowners as the commencement date's uncertain both in terms of confidence and land settling sufficiently to begin remediation and the need to sequence, and the length of time they need to be out of their homes to allow remediation to occur and new homes built, and not be timely. For example there's also substantial replacement of infrastructure required and/or land level needs to be significantly lifted, effectively requiring work equivalent to the development of a new subdivision. It would probably lead to significant social dislocation for those communities in the short to medium term and not cost effective. And, (c), health or well-being of residents at risk from raining in the area for prolonged periods. Where these criteria are met, having regard to some boundaries being drawn on a sensible basis, the Government should consider how it can best support recovery in these areas.

10.4, zones have been identified, and I want to emphasise the word identified. This was an expert assessment based on factual criteria and not some sort of political or policy judgement. Four zones have been –

**ELIAS CJ:**
Some of the zones were identified, we've seen in some of the materials, by reference to where roads ran and things like that, so it wasn't entirely – I mean it wasn't policy-free, was it? Those assessments.

**MR GODDARD QC:**
There's reference later in this paper and other papers to the relevance of roads in terms of services and compacting of land under them and things like that and the point that any area-wide solution is going to probably run along roads, and so again

in terms of identifying where these impacts occur there is a practical relevance of roads as well. But –

**ELIAS CJ:**
Well isn't that a policy –

**MR GODDARD QC:**
Well it's –

**ELIAS CJ:**
There is some policy content in this.

**MR GODDARD QC:**
The exercise of practical judgement about where area-wide remediation is required but there's a difference between policy and judgement, and it was reasonably clearer.

**ELIAS CJ:**
A difference between policy and judgement? What is it?

**MR GODDARD QC:**
Whose judgement is the key thing. In particular the judgement –

**ELIAS CJ:**
Oh, you're using policy in terms of Government policy alone?

**MR GODDARD QC:**
Yes. As opposed to engineering judgement, for example.

**GLAZEBROOK J:**
Many decisions are going to be based on facts. I mean if you have a storm and it knocks the top off something, and the Government decides that it's not worth repairing so you're going to knock it down, that will be based on the fact that it's more expensive to repair than it is to knock it down, and talking about just ordinary decisions that are made and to say they're not decisions or not policy because in fact you've just had to say it's more expensive to do this than that just seems –

**MR GODDARD QC:**

I'm not saying –

**GLAZEBROOK J:**

– odd.

**MR GODDARD QC:**

It would be odd if that's what I was saying, Your Honour. But I'm not.

**GLAZEBROOK J:**

Well perhaps you need to articulate what you are saying then.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

Because the decision was based on it's not – because you have to do so much to these things and people are going to be out of their homes for so long it's not cost effective to do it here. We could do it, but it's not cost effective, and we're better concentrating on the areas where you get more bang for your buck and it's going to be safer for people.

**MR GODDARD QC:**

The difference between the example Your Honour gave me and this decision is that you've got the factual identification of the problem and then a decision not to do something. I cannot emphasise too strongly that no decision was made here not to remediate any of these areas.

**GLAZEBROOK J:**

But that's a policy decision in itself isn't it? That we'll leave it till later. In the meantime we'll clear the area but we'll leave it till later to decide what we're going to do.

**MR GODDARD QC:**

Because –

**GLAZEBROOK J:**
So you may decide went the storm drops the thing off that you won't decide what to do because you'll wait and see whether in fact prices are going to come down or…

**MR GODDARD QC:**
Let me go through the paper and then come back to what was and was not decided and the sequencing of it, because that is important.

So then we've got 10, the summary of the four "zones", and the word is perhaps unfortunate, as the Court of Appeal observed, because of its planning connotations. It could equally well have been areas but "zones" is the name which has been used.

**ELIAS CJ:**
It's just an English word.

**MR GODDARD QC:**
It's an English word but like so many words it has baggage. When we come to the question of what the Crown can and cannot do apart from statute I think a lot of the debate actually is driven by the baggage that certain words carry and by different uses of terms such as power as opposed to capacity and one can get very Hohfeldian about it very quickly if one wants to be precise but it often seems a little bit artificial.

So all zones identified. In the green zones there are no significant issues which prevent rebuilding in these areas based on current knowledge of seismic activity. For the orange zones further work is required to determine if land repair is practical," so that is where, we just don't know yet. "In the red zones rebuilding may not occur in the short to medium term because the land is damaged beyond practical and timely repair, most buildings are generally rebuilds, these areas are at high risk of further damage to land and buildings from low levels of shaking, flooding or spring tides and infrastructure needs to be rebuilt."

**ELIAS CJ:**
Now "may not occur" in that sentence means cannot occur?

**MR GODDARD QC:**
It means is unlikely to occur. It's an –

**ELIAS CJ:**

Well it's not a permissive use of “they” is it in the context of that sentence?

**MR GODDARD QC:**

It's not a prohibition, no.

**ELIAS CJ:**

It's not a permissive use. Now I think it's a –

**McGRATH J:**

Means “will”.

**ELIAS CJ:**

Yes, will not occur.

**MR GODDARD QC:**

Yes it's an observation that it's very unlikely because it would be a foolish thing to do. Bearing in mind again that a lot of these decisions are to be made by a range of other participants in the provision of services.

**ELIAS CJ:**

Yes they’re, the Ministers can't usurp decisions which are by statute conferred on other officials –

**MR GODDARD QC:**

Or which –

**ELIAS CJ:**

– or local bodies.

**MR GODDARD QC:**

– are to be made by private service providers like the owners of electricity lines and telecommunications facilities subject to the point about –

**ELIAS CJ:**

Directions.

**MR GODDARD QC:**

– directions which I will come back to because that's important. There's always a risk in anticipating where one's going to go, but the, my central submission in relation to the Canterbury Earthquake Recovery Act will be that it confers supplementary powers to be exercised where necessary not an exhaustive set of powers for providing for recovery and that's apparent both from the scheme of the legislation from its context and from the legislative history. But to take –

**ELIAS CJ:**

And otherwise you'd have started with the statute –

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

– in the conventional way.

**MR GODDARD QC:**

Yes. But you've got a whole range of actors here, you've got local authorities with a whole range of powers which can be exercised to support recovery, the statute doesn't supplant those but if it's necessary for the Minister or Chief Executive to override them in certain respects and necessary, it's a strong test as my friend said, they can.

**GLAZEBROOK J:**

Although realistically the fact that the Ministers say we've got zones where something is not going to be done then people can be quite, all of those providers can be quite happy saying, "Well, if somebody asks me to do it I can say, 'No I'll actually do it in the white or the red zones,'" because the whole point was to say to insurance companies, "We'll go ahead with the rebuild in the white" –

**MR GODDARD QC:**

In the green zone.

**GLAZEBROOK J:**

– "green zone but don't worry about the red zone."

**MR GODDARD QC:**

It's unwise to proceed in the red zone and, again, I'll come to this when I come to later papers but one of the concerns –

**GLAZEBROOK J:**

But then the practical effect is that people won't proceed in the red zone, isn't it, and with –

**MR GODDARD QC:**

If you give them –

**GLAZEBROOK J:**

– with impunity really.

**MR GODDARD QC:**

If you give people accurate information about the difficulties that attach to doing work in the red zone, including if you put new infrastructure in, it's likely to have to be replaced anyway if it's going to be used for residential occupation later because the remediation work will destroy that new infrastructure. When you add soil you compact, so you put in new pipes, they might only be there for a couple of years if the land is going to be remediated because the remedial work will destroy that infrastructure.

So again in my submission it's about, and this is apparent from the paper, providing information which the Government, because of its resources, was best placed to gather and share with the public to support and informed decision making about all participants, but there's an important difference between supporting informed decision making and deciding that certain things won't happen. The Crown had the tools in some circumstances to require work to be done or to prohibit from being done. Where necessary the Act enabled it to come in over the top of the normal decision making process and do that but in many cases that wasn't, to use the section 10 test, necessary because the simple fact of providing good quality information enabled people to make decisions outside that framework and that's a really important part.

**ELIAS CJ:**

At some stage you will have to address what for me is a troubling feature of this case which is that, I'm using the word term here, but that it is slightly or it may appear slightly disingenuous to say that Government is providing information when it carries such a big stick and there is, that the Court has to be alert to the reality and the substance of what is going on here not just the form.

**MR GODDARD QC:**

Absolutely Your Honour, but the reality is much more nuanced than the picture that the appellants seek to paint –

**ELIAS CJ:**

That may well be so.

**MR GODDARD QC:**

– and that's what I'm going to attempt –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– to portray by going through what was actually decided and, in particular, the decisions at the end but it's worth going through the reasoning for it first and then looking at what actually was done.

**ELIAS CJ:**

But the document itself is a nuanced document –

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

– and I've addressed your attention to this may not occur which is an odd choice of words in a document which is indicating that it won't be occurring.

**GLAZEBROOK J:**

For very good financial reasons.

**MR GODDARD QC:**

And practical reasons. It's not just financial, it's part of it but it's not just –

**GLAZEBROOK J:**

Well, no, it's the cost benefit analysis and the practicalities, yes.

**MR GODDARD QC:**

That was a necessary if not a sufficient limb of the decision.

**GLAZEBROOK J:**

Understand, understand, it was shorthand. Shorthand for saying an understandable decision in the circumstances.

**McGRATH J:**

Mr Goddard, would you accept that the statement in C would have been intended to create an expectation that there would be no rebuilding in the damaged zone in the short to medium term? The Government publicises information for a purpose, it's –

**MR GODDARD QC:**

Yes I think that's right, I think that's a fair way of putting it that in the light of the information that is provided the expectation would have been that all the relevant decision makers, home owners, insurers, local authorities, would proceed on the basis that it was not sensible to carry out remedial work. And that was one of the concerns of the Crown, and we'll come to this when we come to a later paper, but some people perceiving what they thought was simply superficial damage in properties in this area were proceeding to spend their own money on repairing houses in a way which could well be thrown away.

**McGRATH J:**

So the Government is at least endeavouring to create that expectation in the community.

**MR GODDARD QC:**

I don't think it's quite right to say, Your Honour, that the Government was endeavouring to create that expectation. The Government had that expectation and it was explaining why it had that expectation and it of course would anticipate that that expectation would be shared by others but it wasn't –

**McGRATH J:**

But you don't, you won't accept that it was clearly intended to try and achieve that expectation in the community as well. I wouldn't have thought it was a huge step for –

**MR GODDARD QC:**

I don't think, I was going to say I don't think there's any daylight really between what I said and what Your Honour just put to me, I think that must be right.

**McGRATH J:**

And that that would be the basis for the future Government policy decisions.

**MR GODDARD QC:**

For some future Government policy decisions but those policy decisions could well involve a decision to rebuild in those areas once the seismic activity had settled down and there was more knowledge so –

**McGRATH J:**

I'm just trying to keep our focus on short to medium term here.

**WILLIAM YOUNG J:**

I suppose there might have been an earthquake that lifted the whole area a metre and a half in which case a lot of the problems were being resolved.

**MR GODDARD QC:**

There's actually –

**WILLIAM YOUNG J:**

I mean part of the problem was that it did subside a lot.

**MR GODDARD QC:**

Yes. And some areas did go up.

**WILLIAM YOUNG J:**

Yes.

**MR GODDARD QC:**

And in fact there's another case which is wending its way through the Courts at the moment in relation to EQC's obligations in relation to land damage involving increased flooding vulnerability and increased liquefaction vulnerability, where there are some issues about what EQC's obligations are where something's subsided and then went back up again, and does it have to pay in respect of the first event if nature, it says, fixed the problem? So Your Honour's right, that not only can happen in theory, it did happen in some areas. But I'm getting ahead of myself.

So then 11, a staged approach to announcements and communications on worst affected areas, beginning with the, "The Prime Minister and I," Mr Brownlee, announcing the red, orange, green and white zones to the public on Thursday, 23 June, and the development of more detailed advice on the mechanics for implementing options to present to Cabinet in a subsequent paper, and in fact there's a series of papers, paragraph 13, which I've already mentioned, refers to the power to act conferred on a small group of senior Ministers –

**GLAZEBROOK J:**

And your options are the purchase ones, are they? Because that's quite a wide statement. Because it's implementing options that's…

**MR GODDARD QC:**

Yes – options. Yes. In practice what was meant by that was the purchase proposal, and associated issues, there were some other issues as well and I'll come to those, because they're identified in more detail further on in the paper. But it's not completely open-ended. Then –

**ELIAS CJ:**

What are you saying in answer to that? That at this stage the options have been identified as the purchase proposals?

**MR GODDARD QC:**

By the time we get to the end of the paper it becomes apparent that a decision's been made to purchase –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– and the implementation focus is primarily though not exclusively on the implementation of those. There are also some other issues that are identified to be brought back to Cabinet. There's a more detailed list later on.

Then again, the background is set out, 17 a reference to the challenges being addressed day and night, they're probably the largest team of geotechnical engineers and scientists ever to work on a single project in this country, an explanation of, in 18 of the damaged infrastructure among other things. In February 19, again, a statement about the extent of damage in the last few lines, "As such, I consider," said the Minister, "the loss of confidence and property damage is of a scale to warrant a central Government response. A circuit-breaker is required to arrest the current decline in confidence and to form a solid basis for recovery." So that concept of a circuit-breaker to arrest the decline in confidence as an important part of the urgency with which Ministers decided to act.

The recovery and rebuilding objectives are set out, and in 21 there's a discussion of businesses and, five lines down, and note that certainty about land issues will allow longer-term decisions to be made for business premises. 23, there's an urgent need to provide a reasonable degree of certainty to residents in these areas in order to support the recovery process, speeding up –

**ELIAS CJ:**

Well, I'm sorry, just in the paragraph above, "Waimakariri, all land remediation works have been put on hold," how was that effected?

**MR GODDARD QC:**

The Government was carrying out certain land remediation works – EQC, I think, to be precise, was funding certain remediation works in conjunction with others, because of an assessment that – and there was a Spencerville pilot project, which is also referred to.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**
And what happened following the June earthquake was a realisation that probably that work was not going to be sufficient, and so there was a pause while options were reassessed.

**ELIAS CJ:**
So that's EQC had stopped funding remediation, is that what that's a reference to?

**MR GODDARD QC:**
I think that's right, but I'd have to check. Paragraph 22, last few lines.

**ELIAS CJ:**
It's just that, I mean, we are quite interested in what decisions were being made and what powers were being exercised.

**MR GODDARD QC:**
And I'll ascertain that over the break.

**ELIAS CJ:**
Yes, thank you.

**MR GODDARD QC:**
But my understanding is that EQC, and I think with some participation, at least on a consultative basis, by councils, it's likely that CERA will have been in the mix for the short time that it existed, which was not the whole of the life of these projects, so that's how it began after the first earthquake in September before CERA came into existence.

We're looking at options in terms of land strengthening, but what became clear following February, and even more so following June, was that some of those things just weren't going to work, so it was back to the drawing board, and there was no point continuing to spend money. And that's a theme that comes through in relation to a number of aspects of this announcement, is to say, "In these areas, yes, you can go on spending your money with confidence, it is worth rebuilding your homes, but in these areas pause, because it's possible that any expenditure you incur fixing what appears to be superficial damage will be wasted," and –

**ELIAS CJ:**

Yes, except put on hold doesn't look as if it's a provision of advice and you might well think that you should pause.

**MR GODDARD QC:**

This one, no.

**ELIAS CJ:**

No.

**MR GODDARD QC:**

Clearly, someone who was doing this work has decided not to do it, and I think it was ECQ, but I'll check.

**ELIAS CJ:**

Yes, thank you.

**MR GODDARD QC:**

And then 24 sets out the objectives again. 25, "To ensure these objectives can be delivered on officials have worked with Tonkin & Taylor to ensure the damaged land is mapped and informations available to allow the Government to decide how it can best intervene. Tonkin & Taylor has pulled together information from a variety of sources and analysed across that information." Just pausing there. I don't think the appellants are suggesting that it wasn't open to Ministers to gather this information and discuss it in Cabinet, and it would be astonishing if that was seriously being argued. But that's important when we come to looking at the legislation and how it fits with the rest of the Crown's powers, because it's quite clear that before Cabinet called for this sort of information about the extent of damage to New Zealand's second largest city, in my submission it didn't have to go through the CER Act processes and ask whether the necessity test in section 10 was satisfied. In the absence of that Act, plainly Cabinet could call for this sort of information, and nothing in the enactment of the legislation prevented that.

**GLAZEBROOK J:**

Well, I think there's specific information-gathering things in the legislation that wouldn't require you to decide it's necessary, would it?

**MR GODDARD QC:**

Under the legislation it would, and –

**GLAZEBROOK J:**

Well, I doubt it, but…

**MR GODDARD QC:**

– I'll come to that. But the point is, to exercise the power –

**GLAZEBROOK J:**

I mean, information is always necessary anyway, so it's probably a stupid, a silly distinction, because information before you make a decision is always necessary, especially of this type.

**MR GODDARD QC:**

It's always desirable, and there comes a point at which getting more information is not productive.

**GLAZEBROOK J:**

Oh, absolutely.

**MR GODDARD QC:**

So you always have to make a call. And –

**GLAZEBROOK J:**

But you don't say, "Oh, I don't need information, I think I'll make a decision without any at all."

**MR GODDARD QC:**

No, but you do always have to make decisions at the boundary. Again – and I'll come to these powers in the Act – but the only sensible way to read those powers, which are conferred on the Chief Executive, is as an additional tool in the toolkit to ensure that appropriate information is obtained and to require it, even if it's otherwise confidential and would be withheld, but not as removing the ability of all the other actors on behalf of the Crown to commission information. So, other Ministers, other Government agencies, obviously can still procure information that's relevant to the recovery. You know, for example, in the education sector, obtaining information

about population movements and what school facilities will be needed and things like that, was never envisaged that all education sector recovery activities would be shoved into this framework, likewise health sector. So it's quite clear, when one thinks about the broader Crown context and all the things that were being done to contribute to recovery, that the legislation was not a comprehensive, an exhaustive, set of tools to be used to support the recovery. It was an additional set of tools, exercisable by particular agents, particular servants of the State, where necessary, but without displacing all the other tools that were available under legislation and common law/prerogative – and I'll come to the very careful decision of the Supreme Court not to decide which was engaged in last week's decision, which may be a helpful precedent for not making that decision here. But it's – in the absence of the 2011 Act there were a whole range of things that the Crown could've done to support recovery in Christchurch, of which, and Your Honour Justice Glazebrook said, the most basic is to get good-quality information both to support central Government decision-making but also to support decision-making by all the other affected persons. And getting that information is something that could have been done without statutory support. The enactment of the 2011 Act did not take away any of the other abilities the Crown and its servants had to gather information and analyse it. I'll come back to that. So, information pooled together, information analysed. Then there's a discussion of the worst affected suburbs.

Over the page at 27, importantly, the reference not only to damage already created but to the further future risk posed by earthquake damage. I should perhaps have drawn attention back in paragraph 16 to the last few lines where it's recorded that after the aftershocks on Monday 13 June GNS has indicated the chance of a quake of magnitude between six and 6.9 in the region over the coming year is around 34%. These were huge adverse odds of further events, and that's an important part of the backdrop to the decision-making. "If no significant aftershocks or triggering events occur in the next month that likelihood falls to around 17%." So a very uncertain environment in which to be trying to make some progress.

Back to 28. The reference to the low-lying areas, which are characterised by a combination of current land damage and future risk. The reference to the Port Hills which is not dealt with here. Heading, "Land damage". Again that point about the district –

**GLAZEBROOK J:**

There is a recognition that you do a central city plan though isn't there?

**MR GODDARD QC:**

That was required. That was the one recovery plan that was required by the statute. Yes.

**GLAZEBROOK J:**

Right. And so the others were all optional were they?

**MR GODDARD QC:**

Yes. That's right Your Honour.

So there was a direction –

**ELIAS CJ:**

What's appendix A? Is it all these maps? Or is it –

**MR GODDARD QC:**

It's the legend and the maps, yes. So appendix A, just jumping to that, it's important, is the legend and the one, two, three attached maps. So this is the information received by Cabinet on the basis of expert advice. Noted by it, as the Court will see when we come to the decisions, and shared with the public. And an important part of my argument is that it was entirely proper, entirely lawful for ministers to seek to obtain information about the areas of Canterbury that had suffered different degrees of damage and what that meant for the practicality of rebuilding, entirely proper to discuss it and entirely proper to share that information with the public, both by announcing it and by proactively releasing the paper. And the question is, what over and above that was done here that could be the subject of any challenge?

**ARNOLD J:**

This paper was released, was it?

**MR GODDARD QC:**

Yes Your Honour. And just dealing with that, Your Honour will see if you've got, if you're still open at the legend page, on the page immediately before that, the one with the Minister's signature on it, recommendation 2.46 under the table.

**ARNOLD J:**

Okay. Thank you.

**MR GODDARD QC:**

And this is important because again a lot of this is about transparency in what Government was doing. And it would be surprising for the conclusion to be reached that ministers couldn't commission this information, that they couldn't have a discussion about these issues at Cabinet, and that they couldn't release –

**ELIAS CJ:**

I really think this is a man of straw. Nobody is suggesting that the information could not be collected. That the critical thing is, what decisions were taken in consequence and with what authority? And if you look at the legend, the go zone is where repair and rebuilding process can begin. The inference must be that it can't begin in the hold or the red zone, or the white zone.

**ARNOLD J:**

Well that's even stronger when you look at paragraph 74 of this paper. Because the papers says, "The Government has determined that it is neither practical or reasonable for these communities to stay in red zone areas during the extensive time required to fully design remediation" and so on, so it does reflect a Government decision about the red zone areas.

**MR GODDARD QC:**

And – yes. And evaluation about what that means for people.

**ARNOLD J:**

Not an evaluation, a decision that it is not practical or reasonable for people to stay in these areas. And I just – I just don't see how you can avoid accepting that. It's what it says.

**MR GODDARD QC:**

And I'm not trying not to accept that. again, I'm trying to situate what was done on a spectrum of steps that were taken, which is important when it comes to assessing, first of all what is and is not challenged here, because there's a very careful distinction drawn by the appellants between challenging the identification of the zones but not the offers made, because they don't want those offers held unlawful,

they want those offers. And that's quite important, the structure of the argument where I get to later, but also because much of the practical effect that is complained about by the appellants and raised by the Human Rights Commission flows simply from the accurate identification of the condition of the land and the impracticality of taking steps to do remedial work until the seismic activity has slowed down until better information is available and, probably, if it's going to happen, with major disruptive effects.

**ARNOLD J:**

But aren't you saying that this wasn't the result of a Government decision? Which is what is recorded in there. The Government has made a decision about this. And you're saying, "No, no, that wasn't the cause. What the cause was, was the underlying earthquake." Well of course it was. It was the background for the Government decision.

**MR GODDARD QC:**

But the land would have been no more suitable for remedial work in the absence of this paper than it was with it and I think it's really important to distinguish between diagnosis and cause, and critically, here, what was happening was identification of a combination of the thin crust and lateral spread issues. The extent of damage to infrastructure and what that meant about the likely nature of any remediation activity if it were to take place and the sort of timeframes that would be involved, and if you convey to people that this land is extremely vulnerable to future adverse events, that if it can be brought to a standard that's safe for occupation that's likely to involve a long process, the commencement date for which even is not known, the techniques for which are not known, but which is likely to involve removing all improvements, that has obvious consequences for people. Now that even in itself is important. The Government didn't stop there. It went on to make certain consequential decisions. But getting to that point, which is simply identification of the practical consequences of the earthquakes, is the essential element of the categorisation in these maps and it then provides a basis for decision-making by a whole raft of people.

I mean I think one way to test this, Your Honour, is to say, suppose that all that had been announced was the green zones. Could there be any challenge to that? In my

–

**ELIAS CJ:**

If the consequence was that no remedial work could take place in the rest, yes, probably it could.

**WILLIAM YOUNG J:**

Say that it was left for people to make their own decisions.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

Well but isn't the point that they didn't want to leave it to people to make their own decisions, but also in any event, even if it is damage from the earthquake, if human rights issues arise from damage from the earthquake, the fact that no decision was made to help those people would actually be in breach of human rights obligations. So if you're leaving people in rat-infested, non-remediated area with looting and crime, then whatever the cause of that is you're still in breach of your human rights obligations. You can't say, "Oh that's not our fault." Because most of those won't be the Government's fault.

**MR GODDARD QC:**

Your Honour is of course right, but in order to assess that one doesn't look just at one policy, which is the purchase arrangements –

**GLAZEBROOK J:**

No, I –

**MR GODDARD QC:**

– but all the other –

**GLAZEBROOK J:**

– understand that, obviously, but…

**MR GODDARD QC:**

And what I wanted to emphasise there is – and this is, I think, one of the problems with the approach taken, with respect, by the Human Rights Commission – is that

you can't assess compliance with the human rights obligations of the Crown without looking at the whole set of interventions that were made available –

**GLAZEBROOK J:**
Agree with that.

**MR GODDARD QC:**
– including a whole range of forms of temporary accommodation assistance, support for employees, support for businesses, because it's important to bear in mind again, a lot of the people who were most adversely affected were tenants, not owners, and where land is owned by an investor the investor's human rights are not engaged, put slightly over-simplifiedly, but basically that's not the issue, the issue is the person living there, and the question is, what do you do about finding them somewhere to live, and that's not about buying out the landlord. So, Government implemented a whole range of measures designed to address the concern about people – and we'll come to refer to some of them in this paper later on. But it's just not possible to carry out that broader evaluation of consistency with human rights obligations in relation to adequacy of housing, for example, by looking just at this one policy, that would be a mistake, and that's a mistake that the Commissioner's submissions make.

**McGRATH J:**
Mr Goddard, I really would like to get to the guts of this paper, without going into statutes and things, because what I'm really looking for is some elaboration of the reference to the Government wanting a circuit-breaker, which you took us to in paragraph 19. I think what the paragraph Justice Arnold's just pointed to you is starting to get close to that, but at some stage I really, well, I hope soon we'll get to that –

**MR GODDARD QC:**
Yes.

**McGRATH J:**
– because we really need to assess what the substantive effect of this paper was, in my view.

**MR GODDARD QC:**

Absolutely, Your Honour. I have anticipated quite a lot of other issues on the way through, so –

**McGRATH J:**

Indeed.

**MR GODDARD QC:**

– we'll…

**McGRATH J:**

I just don't want to do the – the question of the effect of the paper is really something I really would like to have clearly in my mind –

**MR GODDARD QC:**

Yes.

**McGRATH J:**

– before we move to the legal question.

**MR GODDARD QC:**

Absolutely, and that's why I thought to begin with it. The criteria are set out in 36, and then there's a reference in 37 to the Government considering how it can best support the recovery in these areas, reference to isolated pockets of land that have fared reasonably well, and again the point that without a full area-wide land remediation solution those properties may be at risk from works involved in landfill, and then the social impacts and infrastructure issues, and then last, paragraph 39, uncertainty about private insurance being offered to, on land requiring this level of remediation, social disruption.

So then the heading, "Where does the Government have a role?" which I think is getting to Your Honour Justice McGrath's point that, well, it's the guts of it, what's the Government going to do in the light of these facts on the ground, under the ground. Based on the criteria in 36 and the two key factors in 33, four zones have been identified by Tonkin & Taylor, and that's important they've been identified, and they've been identified by the experts, and they're set out here, and this is the legend repeated in the attachment, the go zone, the repair and rebuild process begin. And

so this is communicating to over a hundred thousand households in Canterbury that, based on high-quality information, it's possible and sensible to get on with doing remedial work. And land damage can be repaired on an individual basis, as part of the normal insurance process insurers can continue claims settlements on repairs and rebuilds on individual properties. Orange hold zone –

**ELIAS CJ:**

Could I just ask, at 42, that's based on the criteria described in 36 and the two key factors described in 33. So were those the, were those identified by the Government in…

**MR GODDARD QC:**

33 is the thin crust and lateral spread –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– factors that affect timeliness of rebuilding, that's just an expert assessment.

**ELIAS CJ:**

Yes, yes. But 36…

**MR GODDARD QC:**

36 is a set of criteria which –

**ELIAS CJ:**

They must be Government policy.

**MR GODDARD QC:**

– I think must have been worked up by officials talking to experts, so it's a process of identifying some criteria. One of the things that this paper does further on is approve those criteria, agree to those criteria, so they're being adopted here –

**ELIAS CJ:**

They're adopted here?

**MR GODDARD QC:**

Yes –

**ELIAS CJ:**

They haven't –

**MR GODDARD QC:**

– they haven't been adopted previously –

**ELIAS CJ:**

All right, thank you.

**MR GODDARD QC:**

– formally by a decision-maker.

**GLAZEBROOK J:**

Well, paragraph 43 actually sets out how they set the zones, which is basically what's said at 36. So in a – in getting the information they must have had an idea what they were getting and their agents were the engineers.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

But translating engineer into English usually requires some intermediary too.

**MR GODDARD QC:**

At least. And sometimes miracles. But – yes. I think they would say the same about lawyers unfortunately.

**GLAZEBROOK J:**

I'm sure they would.

**MR GODDARD QC:**

But certainly the translation process involves considerable communication and checking and clarification.

This is – what is being reported here is the work that's being done by officials with the engineers to develop a proposal for the Minister to take to his Cabinet colleagues. The proposal involves both some suggested criteria and the consequences of applying those criteria. And what Cabinet, through ministers with power to act, does here is approve the criteria and agree to certain publications and certain consequential steps.

So – but the key point that I wanted to make about the table is that it – what the criteria are designed to do is to inform an assessment of whether it is practical to undertake repair and rebuilding work in the short term. So green, go zone, you know, deliberate traffic – the repair/rebuild process can begin. Orange, hold zone. Pause. More works needed. Not that more policy decisions are needed but that more information is needed. And red, saying, "Land has suffered significant and extensive damage. Most buildings are uneconomic to repair. High risk of further damage. Infrastructure needs to be completely rebuilt. Land repair solutions would be difficult to implement, prolonged, and disruptive for landowners." And those are all factual observations about the state of the land.

**ELIAS CJ:**

Can you really say that further policy decisions weren't envisaged when the green go zone is, contains the policy decision that the rebuild process can begin. Surely the further assessment is preliminary to further policy decisions about timing at least.

**MR GODDARD QC:**

It's not a policy decision that the repair and rebuild process can begin. It's information. This really is information to people.

**WILLIAM YOUNG J:**

This is for homeowners, building owners and insurers to act on.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

Not for the Government to do anything more about.

**MR GODDARD QC:**

The Government did nothing more about this. It simply said, "We have gathered this information and we can tell you based on this information –

**ELIAS CJ:**

That you can go ahead.

**MR GODDARD QC:**

– that it is safe for you to go ahead.

**GLAZEBROOK J:**

Well but that was against a concern about the insurers worrying about the Government decisions. So they were really saying, "Don't worry, we're not going to make any directions in the green zone despite having the powers under CERA to do so," weren't they? Because that was one of the concerns, that the Government would come in and disrupt this process in some way, wasn't it?

**MR GODDARD QC:**

No I don't think –

**GLAZEBROOK J:**

Well I think it's explicitly stated to be so somewhere here. Because…

**ELIAS CJ:**

There may not be in this paper –

**GLAZEBROOK J:**

No it was in this paper –

**ELIAS CJ:**

– but we've certainly read that.

**GLAZEBROOK J:**

– because I saw it this morning. Oh, well, at least – actually I shouldn't say that because one reads so much that one…

**MR GODDARD QC:**

I keep – we can come back to that. There's the note about horizontal infrastructure being severely damaged in 46.

**ELIAS CJ:**

It was the paper that was earlier redacted.

**GLAZEBROOK J:**

Sorry, paragraph 22. "They are uncertain of the nature and extent of the Government's role." Third line from the bottom.

**MR GODDARD QC:**

Yes, there is that note. I didn't read that as referring specifically to Government interventions but you're right, that is broad enough to encompass that possibility as well.

**GLAZEBROOK J:**

Well otherwise what else can it mean?

**MR GODDARD QC:**

Financial support, basically. Because there were those pilot projects, for example, where through EQC the Government was pouring a lot of money into land remediation, and again it makes no sense for insurers to start the process of rebuilding buildings if the Government is going to do significant things to land first. So it's also about financing. But, yes, Government action one way or another.

Then we get to the Crown offer to purchase properties in the red zones in the paper. At 50 the alternative is described. Government could allow the various insurance schemes and policies in place in the red zones to play out without any intervention. So this is contemplating the possibility that you'd identify these areas but then just leave people to sort it out. You've provided confidence to the people in the green zones and then you just say, "Look, here's some information." Similarly in the red zones, "Go for it, sort it out." What the Crown says is this may – what the minister says is, "This may result in protracted individual settlements for affected occupants given great uncertainty regarding when or if or on what terms repairs or rebuilds could take place in these areas giving ongoing uncertainty on risk management in respect to underlying geotechnical state of the land. This simply would not meet the

Government objectives of certainty, confidence for landowners or a simplified process."

So this is where a policy response comes into play. Up to this point it's about what is the lay of the land? This is where the Government says, "Okay, this is the land of the land." Simply providing this information in relation to the green zones solves the problem there. You don't need to do anything more. But in relation to the red zones, identifying them doesn't solve the problem and it doesn't solve the problem because it leaves the problems described in paragraph 50.

"The status quo doesn't meet the Government's objectives. Government should act to provide certainty, simplicity and confidence insured residential landowners in the red zones require. I consider the best mechanism for doing this is for the Crown to make an offer to purchase insured residential red zone properties. As a result of these offers there is unlikely to be any justification in the near to medium term for infrastructure and services in these areas to receive any more than temporary repairs. Relevant councils will be asked to discuss any proposed maintenance and repair plans for the infrastructure in these areas or any proposed regulatory interventions." That's not saying that it won't happen; it's saying that there's unlikely to be a justification and it should be discussed.

"I propose the following offers be extended." Then there are the two options. Here they're described as A and B. they're later relabelled 1 and 2 and reframed slightly but basically there's the buy the whole property for its 2007 rating valuation and take an assignment of all insurance rights or option B, which became option 2, again, although it says purchase the land only it was later clarified that this was indeed purchase the whole property, that's in one of the subsequent transaction design papers, and take an assignment of land insurance but not improvement insurance.

**McGRATH J:**
Does the policy in 52 include then a suspension of anything other than temporary repairs to infrastructure?

**MR GODDARD QC:**
No Your Honour. That is not a policy that's adopted here. There's – it's noted that it is unlikely that anything more than temporary repairs will be justified and then a call

for any proposal to do otherwise to be discussed, so the anticipation is that will be dealt with on a case-by-case basis.

**McGRATH J:**
Doesn't –

**ARNOLD J:**
Didn't the Cabinet decision ultimately say that there should be discussion with CERA about any proposed –

**MR GODDARD QC:**
Yes.

**ARNOLD J:**
Right. And CERA would be expected to advise consistently with the position the Government's adopted.

**MR GODDARD QC:**
Of course.

**ARNOLD J:**
Which is expressed in this paper to be that the people are going to be moved out of the red zone. Now, as an infrastructure provider it's not a Government direction but it's the next best thing, isn't it? I mean, why would an infrastructure provider in the face of advice like that go and build infrastructure?

**MR GODDARD QC:**
It's all going to depend on the extent of uptake of the offer, which of course was not known at this stage and could be expected to vary depending on areas. So as a basic proposition Your Honour's right, but it's not an accident that it was to discuss on a case-by-case basis, because circumstances could vary over time and over space.

**ARNOLD J:**
Well it's to be discussed against a position recorded in here as being that the Government's determined it's neither practical nor reasonable to leave people in that area.

**MR GODDARD QC:**

Yes.

**ARNOLD J:**

Right. Well…

**MR GODDARD QC:**

The –

**McGRATH J:**

Again, Mr Goddard, coming back just as far as this paper's concerned, it's a clear, there's a clear message, isn't there, here? If we come back to what is – the Minister's trying to convey an expectation that there will be no new infrastructure in these areas.

**MR GODDARD QC:**

In the short to medium term.

**McGRATH J:**

In the short to medium term?

**MR GODDARD QC:**

It's unlikely to be sensible to invest in infrastructure in these areas unless, for example, it's clear that it's going to serve some future purpose, but yes.

**McGRATH J:**

You refer, as does the author of this paper, to euphemism, but isn't the real message intended to create an expectation there will be no new infrastructure?

**MR GODDARD QC:**

I hope that I was reverting to precision rather than euphemism, Your Honour, but there's a clear expectation that there will not be new infrastructure in this area in the short to medium term. Absolutely accept that. But it was not a blanket decision that it would not be rebuilt, and there's issues both of geography and timing in that, which are very important.

Then there's a list of, after the process for the offers in the 60s, 71 notes a number of matters to be addressed in subsequent Cabinet decisions. This is part of my answer to Your Honour Justice Glazebrook about what was outstanding, treatment of commercial properties, dispute resolution processes, mechanics of process to support insurance claims and rebuilding. This is why I said it was wider than just the machinery of the purchase. Detailed transaction design, continuing discussions underway with banks on support for residents in the red zones, CERA work in relation to the offers, separate advice for Ministers being prepared by the Ministry of Social Development on whether there's a need to provide additional temporary financial assistance for families in the red zones who need to move into rental accommodation. This, again, picks up part of my answer to Your Honour Justice Glazebrook earlier is that there were multiple streams of support being provided in relation to housing in this area, and it would be a mistake to see this as the only strand, or to think that the Government's compliance with humans rights obligations could be assessed looking only at this.

Some of them will face two sets of housing costs as well as relocation costs they may not be able to afford. Existing entitlements provided by the Canterbury earthquake temporary accommodation service and accommodation supplement are currently unavailable to many of these families, so there are some measures. Additional measures are being flagged for report by MSD. An analysis on likely new housing, when it will be available, pricing, and barriers to bringing forward further housing developments so, again, broader responses to housing needs than just the purchase.

What does it mean for landowners and businesses? Red zone is not likely to be practicable for rebuilding in the short to medium term, again, a reference to identifying areas of red zones.

**ELIAS CJ:**
Is there any identification of what short to medium term is?

**MR GODDARD QC:**
The best guide to that is –

**ELIAS CJ:**
Just a contemporary reference to it.

**MR GODDARD QC:**
The comments that people might have to move out for three to five years if rebuilding is to happen, but there's not, and that's partly because Ministers didn't know the earthquake activity was going to continue.

**ELIAS CJ:**
Yes, I understand that.

**MR GODDARD QC:**
So there's explicit reference to not knowing when you could start and then you've got three to five years from whenever you can start but that was up for grabs.

Again, 73 is important in shedding light on the character of decisions. Decisions on land is not likely to be practicable for rebuilding in the short to medium term is based on the best information we have to date on the engineering requirements and cost estimates. Process of designing and analysing possible engineering solutions for the land is not complete and cannot be completed, fully completed, in a reasonable time for the decisions to be made.

**ELIAS CJ:**
You've jumped over 72 a little, haven't you? The decision.

**MR GODDARD QC:**
Yes, to identify.

**ELIAS CJ:**
Yes, it may be a decision to identify but it's a decision.

**MR GODDARD QC:**
Of course it's a decision.

**ELIAS CJ:**
This is a Government decision.

**MR GODDARD QC:**
Yes.

**GLAZEBROOK J:**

And there's a decision in the following paragraph as well that it's not likely to be practical to – that might be based on information but all decisions are based on information and in my storm it's not the Government's fault there's a storm but it's decided that it will or will not repair.

**MR GODDARD QC:**

Absolutely, but the nature of the decision is critically relevant to the – first of all, to whether it is something that should have been done within a particular statutory framework or not.

**GLAZEBROOK J:**

Yes, but we're getting to that later so don't jump ahead.

**MR GODDARD QC:**

I'm not. I wouldn't want to be disagreeing with Your Honour about the fact that decisions are being made here. Of course decisions are being made. It's the nature of the decisions that's important and whether – and that's relevant both to the application of the legal framework and also to the criteria that are relevant for the judicial review.

**GLAZEBROOK J:**

Don't you say there are only two decisions, one is to release information and the other is to buy properties? I'd understood that to be your submission.

**MR GODDARD QC:**

Yes, those are the two key decisions, to release information about the feasibility of rebuilding.

**GLAZEBROOK J:**

To release information about the decisions about the red zone and green zone area?

**MR GODDARD QC:**

To release information about the state of the land in those areas as described in the – I mean, the information contains evaluations, of course, but it's one thing to release information based on evaluation of practical circumstances. Now they have to decide what to do about it and those have different implications in terms of source of legal

powers and in terms of criteria for review, and in particular in circumstances where information is provided to the public and there is no challenge to the accuracy of that information, it's most unlikely, in my submission, that that decision is going to be reviewable. I'll come back to that, but it's not easy to think of any previous judicial review decisions where the release of information, the accuracy of which is not challenged, has been held to be unlawful.

**GLAZEBROOK J:**

Well, because there are evaluations contained in it, it's not just the release of information, is it? What it is saying is that because of this, these are the practical implications and a rebuild won't occur in it, and everybody should move, and our policy is effectively to move everyone out, which is what it says at 75.

**MR GODDARD QC:**

What it says at 75 is that the facts on the ground mean that people will have to progress and relocate out. That would be the case even if this paper had not been written. I think it's important –

**McGRATH J:**

It's not so much the facts on the ground. It says "this will mean", that's referring back to the Government's determination, isn't it, in the previous paragraph?

**MR GODDARD QC:**

No, Your Honour, it's referring to the impracticability of rebuilding and the time required even to plan for it, so it's referring to the matters described in 73 and 74.

**ELIAS CJ:**

If you had statutory authority for doing all of this that you could pin it too, there's no way we'd be listening to this argument. I mean, nobody is criticising the steps that were taken and the process of decision-making. The only issue for us is whether there was authority to do it without also doing the consultation and everything else, so it's not to be critical of this process. It's only because – I mean, if you were able to say here's a decision that says we're invoking this power, we wouldn't be in this position.

**MR GODDARD QC:**

I think the important part is understanding what was done or to understand the source of the power to do it and its intersection with the legislation.

**ELIAS CJ:**

But it's ex post facto rationalisation, Mr Goddard, that's what's bothering me about this. It's because of the position that we're in. We're not starting with the statute, which would be the correct way to start. We're starting with the entirely understandable and reasonable processes that the Ministers were following here.

**MR GODDARD QC:**

And that's important, in my submission, because if they're understandable and reasonable processes which could have been undertaken in the absence of any relevant legislation.

**ELIAS CJ:**

Well, that's the issue.

**MR GODDARD QC:**

Yes. I'm going to come to that, but –

**ELIAS CJ:**

But you're trying to say that these were not decisions that were taken.

**MR GODDARD QC:**

No, they were decisions to provide information to support decision-making.

**ELIAS CJ:**

But the reason you have to characterise it like that is because of the difficulties you're in with the authority for taking these decisions.

**GLAZEBROOK J:**

What they were saying, the decision was because of the situation we're going to categorise the city of Christchurch into zones and that's based on information and the best information we have at the time. We're doing that because it's very important that people know where they are. Because people in the red zone are not really going to be able to stay there, there's no point putting resources into them so we'll

make sure we move them out. We won't do it compulsorily. We'll just provide information with the expectation that we'll make sure that people don't put resources in there and we'll get them out, but we won't do it compulsorily because we don't want to go that far, or for whatever reason it is and that's the decision that's very sensible, a very quick decision, no one could – apart from at the margins, probably, at the red zone criticise it.

**MR GODDARD QC:**

I think that that is essentially a fair characterisation of what was done and one might quibble at the edges about some choices of words, but yes, in essence that's what was done. I accept that. I agree with that. I'm not trying to suggest otherwise and it's really a matter of responding to suggestions that decisions were made not to remediate, which have not yet been made. The decisions have been made about the future of this area.

**GLAZEBROOK J:**

But they are in the short term. I don't think you can say that the decision hasn't been made not to remediate in the short to medium term for very good reason. But logically, there is no way you'd remediate in the short to medium term in those areas if the information – and we're accepting it is accurate – is accurate.

**MR GODDARD QC:**

Certainly a decision is at least implicit is this, that Crown resources are not going to be devoted to remediation and that the Crown is going to be discouraging of other people like local authorities wastefully invested in remediation, picking up Your Honour's point earlier. I accept all of that, absolutely, and it's intended also to assist individuals who might otherwise be putting money into remedial work to know that that's probably not the smartest thing to do, and one of the transaction design issues that occurs later on is what you do with people who've had an insurance payout and actually spent it on remedial work in this area. The decision that was made was that that wouldn't then be deducted from what was paid, whereas if they had the cash still sitting there it would be deducted, so there are a whole – above all, what is not desirable was that people continue to pour money into fixing something that was built on literally sand in many cases. I see it's after half past.

**ELIAS CJ:**

All right. We'll take the adjournment. We should let you finish this, but could you bear in mind that I would like you to find that reference because I'd like to marry it up with this document to the pressure that was being put on by the insurance companies and the comfort that these decisions would give them.

**GLAZEBROOK J:**

I think that may have been in the earlier paper, the one that was late.

**MR GODDARD QC:**

In the Minister's affidavit there was some detail and I was going to go to that.

**ELIAS CJ:**

All right. Go to it in sequence. It's just that if you're addressing the effect of what was decided here, it was, depending on the timing of that, it does seem that it was taken with the expectation that it would give comfort to the insurers in meeting their contractual obligations to say sorry, you know, or whatever they were able to do. It was traffic lights that were being provided here.

**MR GODDARD QC:**

Particularly in relation to the green zone and that's explained in the Minister's affidavit.

**ELIAS CJ:**

Yes, thank you.

**COURT ADJOURNS: 11.34 AM**
**COURT RESUMES: 11.56 AM**

**MR GODDARD QC:**

Your Honour, so just a couple more minutes on the paper and then I'm going to be able to move quite quickly through the first page of my note.

**ELIAS CJ:**

If necessary we can sit tomorrow morning, I will just give you that indication.

**MR GODDARD QC:**

I'm indebted Your Honour. I'm in the Court of Appeal fixture that I had on these two days and it was moved to be two days later when this fixture was set down so.

**ELIAS CJ:**

This case may have to take priority. I'm just indicating to you that.

**MR GODDARD QC:**

That's helpful Your Honour.

**ELIAS CJ:**

And in any event Mr Goddard you wouldn't need to be here for the reply if we get to that point.

**MR GODDARD QC:**

Your Honour's quite right.

**ELIAS CJ:**

Yes, thank you.

**MR GODDARD QC:**

I wanted to pick up the review of the paper at paragraph 77 under the heading, "The green zones rebuild can begin." "Rebuild process can begin in the green zones with reference to the following," and there's then part of what Your Honour would have been referring to, "Insurers can continue claim settlements on repairs and rebuilds on individual properties." It's expanded on by Mr Brownlee in his affidavit, I'll come to that in a moment and then the orange zones.

Then announcements, 82, "I propose a staged approach to announcements and communications on the worst affected areas. This will give clarity to residents across Canterbury about the status of their land and allow the recovery to proceed in the green zones," and that's another very important limb of what Ministers were seeking to achieve.

Then there's a timeframe for steps to be taken and then, "Next steps," over the page. "Proposed announcement on Thursday the 23rd." This was for a meeting of ad hoc Ministers on the 22nd so the announcement was to happen the next day and it was in

fact done a day before the date of this report back, so the tenses have got a little strange here.

Then 84, "Subsequent advice will be prepared for Cabinet for decisions on mechanics for implementing decisions on red zones, details of packages, further support available for homeowners." That point again that this is not all that's being done for homeowners. "Issues for business owners, issues for the uninsured in orange zones."

Over the page, again importantly, financial implications. "The Crown has incurred, because the decision had been made and by then announced, an obligation to purchase all insured residential properties in the red zones. Council rating database indicates the gross cost of purchase is up to 1.7 billon, however, the Crown can also recognise insurance receivables as long as a supportable estimate can be made, exact quantum of receivables yet to be confirm but we've previously estimated that the net costs of purchase may range from 485 to 635 million." So the expectation was that more than half of the cost would be offset by insurance recoveries.

Just pausing there, this is a report to Cabinet of what was discussed and decided by Ministers with power to act and we will see further on the appropriation decisions that were made. My friends pointed out that the paper prepared by Ministers didn't have these figures in it but said numbers will follow to Cabinet on the 27th but it's quite clear from this record of decisions that were made that by the time the discussion took place on the 22nd, which this report's on, the figures were available to Ministers and the appropriation decisions incorporating those numbers were in fact made on the 22nd and reported on the 24th.

**GLAZEBROOK J:**
So the 1.7 billion was home and improvements, land and improvements was it?

**MR GODDARD QC:**
Yes.

**GLAZEBROOK J:**
So they were only expecting to get half of land and improvements back on insurance?

**MR GODDARD QC:**

A little over, yes.

**GLAZEBROOK J:**

A little over.

**MR GODDARD QC:**

And in fact what happened was that more people took option 2 than originally expected. So the gross cost was less but also the recoveries were less.

**WILLIAM YOUNG J:**

Do we have figures or not?

**MR GODDARD QC:**

I don't think there are, there are figures as at June last year in Mr Sutton's affidavit. I think his second one, let me just check that. I'm wrong, that's in his first affidavit, paragraph 70. "As at 28 June last year 6131 properties had settled. So an offer was made to purchase just under 7000 properties. As at June last year 6131 had settled at a total cost of 1.224 billion to the Crown. There were another 734 properties whose owners had accepted an offer but were yet to settle and another outstanding offers on 130 properties."

**ELIAS CJ:**

Can you – sorry I haven't got that in front of me.

**MR GODDARD QC:**

Sorry, that was Mr Sutton's first affidavit which –

**ELIAS CJ:**

Which is?

**MR GODDARD QC:**

– is under tab 17 in volume 2 and it's paragraph 70 which is on page 224 of the bundle.

**ELIAS CJ:**

Thank you.

**MR GODDARD QC:**

I can provide updated figures if that would be of assistance.

**GLAZEBROOK J:**

It just seems there wasn't then a relationship between the 50% offer and what was likely to be recovered because that was on house and improvements. I mean where did the 50% come from?

**MR GODDARD QC:**

It came later of course.

**GLAZEBROOK J:**

Well I understand it came later but how was it calculated?

**MR GODDARD QC:**

As both Mr Sutton and the Minister –

**GLAZEBROOK J:**

Sorry, it was really, was it correlated with the financial costs of insurance recoveries?

**MR GODDARD QC:**

The Minister says broadly this was.

**GLAZEBROOK J:**

Well it doesn't look like it, does it, if it's house and improvements is only going to be 50% insurance recovery or is there more insurance recovery on the improvements than on the land?

**MR GODDARD QC:**

Yes that's what one would expect but it depends on the extent of damage. Again, and this is a point that my friends make very fairly, this is done on an aggregate basis. It's not the case that you would have that relationship property by property and I fully accept that. But on an aggregate –

**ELIAS CJ:**

Which ties it back into the zoning determination. A blanket approach.

**MR GODDARD QC:**

An area wide approach because of area wide damage.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

If you have to remediate areas they have continuous areas more or less by definition whereas the offer could have been broken down by the particular damage suffered.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

Again, just to respond to Your Honour Justice Glazebrook, if you have a house that was a rebuild and it had full replacement cover then you'd be getting full recovery in fact for the cost of rebuilding.

**GLAZEBROOK J:**

Well I understand, I understand that.

**MR GODDARD QC:**

Which would often be –

**GLAZEBROOK J:**

That's why I just asked whether there was any – right.

**MR GODDARD QC:**

But there's no mathematical analysis of this and the Minister says, look, judgment was required. It was going to be something less –

**ELIAS CJ:**

So where do we find that in his –

**MR GODDARD QC:**

I'll come to the affidavit.

**ELIAS CJ:**

You'll come to it, okay, thank you.

**MR GODDARD QC:**

I'm going to go to the affidavit. So there's then a discussion of how the costs will be dealt with and at 89, because the assets have a minimal value, that's the land assets as opposed to insurance recoveries, insurance recoveries were dealt with earlier. Officials advise it's prudent to expense them at this point. The Crown may be able to recover some value from the properties at a later date when we have a better idea about the future of the red zones. There is no further opportunity to obtain parliamentary appropriations for this expenditure in 2011. We're almost at the end of the Government's financial year in late June obviously. So the gross cost of purchase will need to be validated and the appropriations –

**ELIAS CJ:**

Sorry, where are we?

**MR GODDARD QC:**

89 Your Honour.

**ELIAS CJ:**

Yes, thank you.

**MR GODDARD QC:**

In the interim, however, the gross costs of purchase can be met against impress supply and that –

**McGRATH J:**

Standard.

**MR GODDARD QC:**

– standard, but important because of course the Chief Executive can't go out and make any offers at all in the absence of money to do it with, that would be a breach of the Public Finance Act because obligations would be incurred, they would be unlawful in the absence of that. So this was a necessary precondition for any offer to be made. Any contract, for any contract to be entered into because at that point the expenditure is incurred for the purposes of the Public Finance Act and declared to be

unlawful in the absence of an appropriation, so this decision to meet the costs out of impress supply was the necessary precondition.

Legislative implications. None were identified. No regulatory changes, 93. So Cabinet didn't think it was changing the regulatory status of any land and we will see in the decisions that it doesn't, and then the recommendations over, beginning on page 17. So what's recommended is that Cabinet note that certain decisions were taken by the ad hoc group of Ministers, that's two. Then those decisions are set out in the whole of paragraph 2.

**ELIAS CJ:**
What recovery plan are they referring to in 95?

**MR GODDARD QC:**
The potential recovery plan in relation to development of the red zones. So it's positively anticipated, I'm going to come back – you're right, I should have gone to this.

**GLAZEBROOK J:**
Where's that sorry?

**MR GODDARD QC:**
Paragraph 95, any recovery plan coming from the proposals in this paper will be developed.

**GLAZEBROOK J:**
Okay.

**MR GODDARD QC:**
So what's contemplated is that there may be a recovery plan in relation to future work in the red zone areas.

**ELIAS CJ:**
Why is it, why do you say that the paper suggests that a recovery plan coming from the proposals in this paper would be limited to future proposals to be developed in relation to the red zone?

**MR GODDARD QC:**

That's my understanding of this paragraph based on the context in which it was happening and the absence of any parallel suggestion that a recovery plan would be prepared in relation to the purchase. It just doesn't feature so I understand this to be –

**ELIAS CJ:**

Well what about in relation to the zoning?

**MR GODDARD QC:**

But there wasn't one in contemplation which is why –

**ELIAS CJ:**

But why is this not a, sort of an indication that that was still available?

**MR GODDARD QC:**

It was of course still available and I do – perhaps I went too fast on that. What we have here is Cabinet gathering information, deciding to publish information, and making certain policy decisions and I've explored with the Court, the Court's explored with me, I should say, this morning. It certainly felt more that way round, what those policy decisions were, what their scope was and there were a range of policies identified in relation to what would happen in the red zone and then as usual once a policy decision has been made officials are sent away to work out how to implement it. There was one step that could be taken by Ministers and was taken by Ministers which was the announcement of the policy and I wondered over the adjournment whether I wasn't at, causing linguistic difficulties in some of my responses to questions from the Court in the way I was using the term "information" because that includes information about policy decisions.

It's a common, it's common of course for Cabinet to make policy decisions including policy decisions that may require legislation to implement them and for those policy decisions to be announced. That is the provision of information but it's information about a policy decision. It doesn't change anything and that's what I was trying to get at in my distinction between information and legally affective decisions, and I wasn't trying to suggest that when information was published it was merely the reporting of facts. Of course the information that was published including information about

policy and that may be what I should have said and more coherently in response to some of the questions from the Court this morning.

So Cabinet gathered information, it accepted the advice it received and it made policy decisions and then it announced what information it had received and the policy decisions it had made. Of course the making of a policy decision by Cabinet has no legal consequences. Steps then have to be taken to give legal consequences and it doesn't always come to pass, there are many policy decisions that have been made by Cabinet that ultimately cannot be implemented for practical reasons or for legal reasons. Legislation may be needed and there may not be the numbers in the house for the matter that I'm going to be –

**ELIAS CJ:**
Well the implementation is what we're concerned with here.

**MR GODDARD QC:**
Yes.

**ELIAS CJ:**
But the implementation of the policy in issue here was the offer made on a blanket basis based on a zone.

**MR GODDARD QC:**
It was two things. It was the making of announcements, which in themselves had practical consequences, in particular in the green zone, people got on wit stuff, nothing else was needed from Government in relation to those matters, but it was a very important step for the reasons identified here and expanded on by the Minister in his affidavit. And then there were various policies announced in relation to the red zone, its identification, and how the Government proposed to responsible to the plight of people in that zone.

**McGRATH J:**
Which were also intended to have practical consequences.

**MR GODDARD QC:**
Yes.

**ELIAS CJ:**

Stop.

**MR GODDARD QC:**

Yes, you would be unwise to do anything.

**ELIAS CJ:**

Well, stop.

**MR GODDARD QC:**

Government made pretty clear throughout that it wasn't actually making anyone stop, and that it didn't want to, that an important part of this policy was to let people make choices, but it was certainly creating a very attractive alternative to stay in.

**ELIAS CJ:**

Well, I thought you a moment ago were saying to us that these were policy decisions which were announced and then left to be implemented. So why was not how to achieve the stop in the policy something that was being left to be implemented and there were a range of options available?

**MR GODDARD QC:**

Yes, exactly. I accept that and –

**ELIAS CJ:**

Including recourse, as we had, to section 53.

**MR GODDARD QC:**

Yes. So it was then for officials to go away and come back and say, well, either just to do it if, except to the extent that further Cabinet decisions were required –

**ELIAS CJ:**

Well, they'd have to have some authority to do something.

**MR GODDARD QC:**

But they might have gone away and done the work and said, "Well, we have this power under this Act –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– or we have this common law power and this is what we're going to do. But –

**ELIAS CJ:**

And we have no indication of that sort of advice in the materials, do we?

**MR GODDARD QC:**

Of a conscious selection of mechanisms –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– and how that was made? No. After this decision there's no record of that process.

**McGRATH J:**

This decision, however, is leaving for the future, the future the mechanics –

**MR GODDARD QC:**

Yes.

**McGRATH J:**

– for implementing the decisions on the red zone.

**MR GODDARD QC:**

Yes, so that –

**McGRATH J:**

So isn't that the form, the decision on substance has been taken, the decision on form is set to be made?

**MR GODDARD QC:**

The decision on how it's to be done, yes, which includes what legal powers can be invoked. And it was of course always open to officials, if they formed the view that there wasn't the necessary legal power, to come back and advise Cabinet of that and identify what legislation would be needed, or it was open to officials to come back and say, "Your timeframe is unrealistic because you can only do this with a recovery plan," if they had adopted the same analysis that my friends are now suggesting. Those were all things that could have happened, and the short point I want to make is, first of all, that it's not that the Cabinet decision is liable to be set aside or declared unlawful in any sense, the question is whether what was done downstream was unlawful.

**ELIAS CJ:**

Well, I don't disagree with that.

**MR GODDARD QC:**

It's important only because the, at first instance declarations were made that this was an unlawful decision and that, I think, can't be right, with respect to the Judge.

**GLAZEBROOK J:**

Well, it may be, if the only way you could make a decision like this was under a recovery plan. So if you had to promulgate a recovery plan and have – now it will be implementation of the decision that's nevertheless wrong, but it's splitting hairs rather.

**ELIAS CJ:**

Yes, the offer under section 53 against constraint –

**MR GODDARD QC:**

Backdrop.

**ELIAS CJ:**

– and that gets imported into the section 53 offer.

**MR GODDARD QC:**

Yes, exactly right, Your Honour. So where what happens is that Cabinet makes a policy decision and someone implements it –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– the validity of the implementing action is assessed by reference to the powers available to that person and to the extent that it is done by reference to policy adopted by Cabinet the question became, if it's done for the purpose indicated by Cabinet –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– then the question is, is that a permitted purpose –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– for example.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So if Cabinet were to decide that Maritime Tower should be evacuated, for example, because it's full of troublesome barristers, then that decision wouldn't be unlawful, it would be completely ineffective because Cabinet just doesn't have the power to do that. If someone then tried to implement it, if the Commissioner of Police sent people down to remove me and my friends from our chambers, then that would be an unlawful action.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So what one has to do is look at the policy adopted here and then look at what was done in the light of that, and that's where –

**McGRATH J:**

And what the effects of the policy were.

**WILLIAM YOUNG J:**

Can I just say, I think the issue that's being addressed indirectly is that all of this should be in a recovery plan.

**MR GODDARD QC:**

That is now my friend's argument.

**WILLIAM YOUNG J:**

Was it not the argument earlier?

**MR GODDARD QC:**

There was more of an emphasis on section 27 at first instance, and that's what the Judge found, that section 27 should have been used to do this, and, with respect, that seems to me plainly wrong for the reasons the Court of Appeal gave. Section 27 powers would have changed zonings, would have removed existing use rights and compensation would have been prohibited, both by section 27 and by another provision later in the Act that I'll come to in a moment.

**ELIAS CJ:**

Well, there would have been no entitlement to compensation, it's not a prohibition. There would have been no legislative authority for it.

**MR GODDARD QC:**

I think it goes a little bit further than that actually. I'll come to the Act in a moment.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

But the short point is that, first of all it would have been mandatory, everyone would have had to do whatever it said, there would have been no choice, as there was with making of an offer, and, second, the statute at least proceeds on the basis that there won't be compensation, whether outside the statute you could provide compensation in the exercise of, you know, a common law –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– power is another matter that I'll come to later.

**WILLIAM YOUNG J:**

So there's no, because of the way the case is run, there's no explanation why the recovery plan process wasn't embarked on, is that your position?

**GLAZEBROOK J:**

Well, I think there were things about delay and we don't want to have public consultation because people might think that something might change.

**MR GODDARD QC:**

That was a note prepared by, I think, a non-legally qualified person within Treasury at an early stage, there's no – I don't believe that was ever seen by any Minister and there's certainly nothing to suggest it was. But, yes, there is that thinking.

**WILLIAM YOUNG J:**

Well, you're going to be analysing the recovery plan provisions later?

**MR GODDARD QC:**

I am, Sir.

**WILLIAM YOUNG J:**

Okay, thank you.

**ARNOLD J:**

Just before you go on, can I just be clear about one thing. You said earlier that the giving of information could include information about policy. Can I just be clear, the policy about which information was given was, what, that we're going to make offers, or what?

**MR GODDARD QC:**

It certainly was a policy that offers would be made in the red zone.

**ELIAS CJ:**

To those within the red zone.

**MR GODDARD QC:**

Yes, who have ensured residential buildings, with the question of how others will be dealt with to be considered later. So that was the policy announcement. To the extent – and this is what I thought I was also recognising – to the extent that there is a policy judgment embedded in the identification of the zones that also was being announced.

**ARNOLD J:**

Okay.

**MR GODDARD QC:**

But again –

**GLAZEBROOK J:**

Can I just – if a policy decision purports to announce zones and purports to be doing so according to whatever power it has, because there are policy decisions to say the Government is going to do X that are made, which clearly have implementation, but if the policy decision is, "Here are the zones," why is that not unlawful, if it's purporting, if it should have been – sorry, I should put, it's obviously dependent on it should have been put into a recovery plan. But if it should have been put into a recovery plan and the decision itself is the policy decision there are zones, which should have been in a policy plan, why is the decision not unlawful in itself?

**MR GODDARD QC:**

The decision –

**GLAZEBROOK J:**

Because there's, obviously there are implementation things down, but the decision itself to zone, if it should have been in a recovery plan, has implications, practical implications, and possibly legal implications.

**WILLIAM YOUNG J:**

But if it should have been in the recovery plan then it will be illegal.

**MR GODDARD QC:**

And I think that's…

**GLAZEBROOK J:**

Oh that's all right, as long as – all right.

**MR GODDARD QC:**

Not – I would –

**ELIAS CJ:**

There is potential illegality.

**MR GODDARD QC:**

I would perhaps –

**GLAZEBROOK J:**

Well it's just I wouldn't have wanted to leave the view that it's only the implementation if in fact the zoning itself which was purported to be done in this paper couldn't have been done absent of –

**ELIAS CJ:**

The implementation rolls up the policy decision and is unlawful if the policy decision wasn't reasonably available, effectively.

**MR GODDARD QC:**

Yes. I think the way I would put it is that if a classification of land of this kind could only be effected through the publication of a recovery plan, then the Cabinet decision still would not be unlawful but he announcement made by ministers the following day would –

**GLAZEBROOK J:**

Well that would be –

**MR GODDARD QC:**

– my hypothesis –

**GLAZEBROOK J:**

That would be the promulgation of the zoning.

**MR GODDARD QC:**

Yes, so that would be the action –

**GLAZEBROOK J:**

Yes, so they – all right.

**MR GODDARD QC:**

Yes. So that's the –

**ELIAS CJ:**

Yes. I would –

**MR GODDARD QC:**

– only respect in which I quibble at the edges about there.

**GLAZEBROOK J:**

Yes, no I think that must be right, because if it's just a decision in house then it can have no effect.

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

I would – yes, I would not want to foreclose the view that something which inevitably had effect on announcement and was intended to have effect, so that insurers knew where they stood and people in the green zone knew where they stood, was not something that was amenable to judicial review. I mean I don't think it's necessary to

get there because you have an implementation decision which necessarily imports that determination.

**MR GODDARD QC:**
The Courts tend in this area to adopt the never say never approach.

**ELIAS CJ:**
Yes. Exactly.

**MR GODDARD QC:**
And I don't think that it's necessary for the decision of this case –

**ELIAS CJ:**
No.

**MR GODDARD QC:**
– for the Court to say never, but I think there is considerable authority about the nature of Cabinet as a body that exists by convention and not by statute that doesn't exercise any legal powers – that for example in *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) makes policy decisions which are then implemented by other actors, which is why in that case the challenge was properly brought against the Governor-General in Council, why in other cases it would be brought against a minister or an official, to say that it would be extraordinary for there to be judicial review of a Cabinet decision and –

**ELIAS CJ:**
But as you say, this wouldn't be of the Cabinet decision. This would be of the public announcement intended to have consequences.

**MR GODDARD QC:**
Yes. And plainly there can be announcements which are unlawful. And the fact then that it has been approved by Cabinet doesn't give it any protection from assessment against the framework, and that's –

**McGRATH J:**

Can we, however, treat such decisions made by the group of ministers in a colloquial sense as in law the decisions of the minister who signed the paper on the 24th of June?

**MR GODDARD QC:**

No Your Honour, because that minister didn't have the ability to make these decisions. In particular, the decisions about expenditure and use of impress supply. The Minister could not do this by himself.

**McGRATH J:**

Do it subject to the – I'm not sure that the appropriation/impress supply matters are not really just a strategy to in all of this. And I acknowledge that they can have very important mandatory requirements, but if a decision is made perhaps implicitly subject to them by the Minister in his report I don't really see why that can't be done, even if at a sort of colloquial political sense there are six ministers behind him making it.

**MR GODDARD QC:**

This may be part of the never say never thing. There may be decisions which are in substance made by a minister and are canvassed with other ministers and, particularly where the minister has the decision-making power and there is no other occasion on which it's exercised one might read, I suppose, events in that way. But that is not this case. This was a very significant issue and Cabinet delegated power to act to a group of very senior ministers in the expectation that all of those ministers would be actively engaged in the decision-making on the policy.

**ELIAS CJ:**

But that could all be internal –

**McGRATH J:**

Yes.

**ELIAS CJ:**

– in terms of the Act where the buck stops. It's signed by the Minister as Minister for Canterbury Earthquake Recovery. Is that –

**MR GODDARD QC:**
The proposal is.

**ELIAS CJ:**
– pursuant to the legislation? Is that –

**MR GODDARD QC:**
No, not pursuant to the legislation.

**ELIAS CJ:**
No.

**MR GODDARD QC:**
That's the thing, the Minister didn't think he was exercising any statutory powers and Cabinet didn't think it was exercising any statutory powers, or – and didn't form a view on what powers would be used to implement its policy decisions. It left that to be sorted out later.

**McGRATH J:**
Cabinet delegated to the other, the group of ministers Cabinet's functions in this area.

**MR GODDARD QC:**
Yes.

**McGRATH J:**
So that's fine, it's just as if Cabinet had –

**MR GODDARD QC:**
Met.

**McGRATH J:**
– decided them. And the Minister's report to Cabinet is about the decisions are taken. I don't for my own part see that the Cabinet processes come into it really as a matter of legal form in terms of who implemented decisions when the implementation is over the signature of the minister. That seems to me to be the appropriate – here's the appropriate public actor who is subject to judicial review.

**MR GODDARD QC:**

I don't know that they're implemented over the signature of the Minister. This is simply a report back from the group of what had been decided and of implementation action that had been taken already in some respects in relation to the announcement, and of course the announcement, Sir, was made by the Prime Minister and the Minister. I think it's a little bit artificial to describe the Prime Minister as implementing Mr Brownlee's decision.

**McGRATH J:**

I think he was helping Mr Brownlee implement his decision.

**MR GODDARD QC:**

I think the Prime Minister and the Minister were together conveying a decision that had been made by ministers collectively. And in circumstances where –

**McGRATH J:**

At a Cabinet context, yes, but as a matter of constitutional legal form, no. It was the Minister's – the Minister was the actor.

**MR GODDARD QC:**

The actor in which respect, Sir?

**McGRATH J:**

The person who was taking the decisions referred to in the final section of the report, just above the signature, "The mechanics of how these decisions will be implemented" and so forth. Now to the extent that these decisions actually were in substance having legal effects it seems to me it's the Minister who is responsible for that. I'm suspicious of trying to drag in the Cabinet processes. They are informal. I think the Court of Appeal aptly summarised those. We can put those aside. The reality is it's the Minister who stands up. It's the Minister who's the public act. It's the Minister who's subject to judicial review to the extent that there were legal consequences of the Cabinet process that followed that. The Cabinet committee process.

**MR GODDARD QC:**

The only reason I pause on that is – well no, there are two reasons. One is the role of the Prime Minister in making the announcement. He was as much an actor.

**ELIAS CJ:**

But not in terms of the decisions that are made. Not in terms of constitutional responsibility.

**MR GODDARD QC:**

Yes, Your Honour, because there's no statutory power conferred on the particular minister that's being exercised here. Rather what we have is a whole of Government –

**ELIAS CJ:**

Well that's an issue. That's an issue.

**MR GODDARD QC:**

Yes. Well that's right. But one can't pre-judge that issue by –

**ELIAS CJ:**

I mean you –

**MR GODDARD QC:**

– it becomes a little bit circular otherwise.

**ELIAS CJ:**

Your argument is simply that no rights were affected by the decisions taken here, but if rights were affected the person responsible is the Minister.

**MR GODDARD QC:**

Depends on which actions one focuses on. If it's the announcement it's the two ministers acting together for what – that matters, and if it's the offers that were made by the Chief Executive, not the Minister, then it's the Chief Executive whose decision is challenged and the legality of which is assessed in the light of the policy that informed it.

**McGRATH J:**

Again, as a matter of legal form, the Minister – he took the decision. It doesn't matter so much that he was taking it under the imperatives of the Cabinet decision.

**MR GODDARD QC:**

If there was a particular power conferred on the Minister that fell to be exercised here then I would accept Your Honour's proposition. But that assumes that there is a power conferred on the Minister that is being exercised. My case is that there was no relevant power conferred on the Minister to do the things that were done, that in fact there is no – if –

**McGRATH J:**

I accept that the Chief Executive took certain decisions, not the Minister, in relation to the sales because that was where the statutory power lay for the first offer which was subject to the – and that's why he's the second respondent, but I'm not sure what you're bringing the Prime Minister into it for, but it seems to me that the right two respondents in respect of the decisions are before the Courts and that we should treat the decisions as respectively taken by them.

**MR GODDARD QC:**

It might be better to come back to that when going through the Act. I think there's a complaint that a decision wasn't taken by the Minister to progress a recovery plan.

**ELIAS CJ:**

Well, that he purported to take decisions.

**MR GODDARD QC:**

Well, there's a complaint that the Crown did things that should only have been done as a result of the Minister taking actions that he didn't, in fact, take and I don't know that we need to pin down too much who was responsible.

**ELIAS CJ:**

I thought you were trying to.

**McGRATH J:**

I think you're saying something I'd relate to now, Mr Goddard.

**MR GODDARD QC:**

I'm regretting it immediately. Let me come back to that in the context of going through the Act.

**ELIAS CJ:**

It is likely, one would have thought, to be quite hypothetical in this case but however – because we do have an offer made under section 53 which imports this policy.

**MR GODDARD QC:**

Yes, and there's no question about that at all. There's more – this has a bearing, if it has a bearing, more on the announcement that was made on what must have been, I think, was the 23rd of June 2011, and the question is whether that announcement could be made by the two Ministers who, it was decided, would make it and who did, in fact, make it, rather than the Minister for Canterbury earthquake recovery announcing an intention to pursue a recovery plan which would deal with these questions. That, it seems to me, is the way that the challenge to declaration identification, call it what one will, of the red zones has developed. In that context, there is some illumination to be had from the fact that there were Ministerial actors when we come to look at whether the Act was exhaustive of powers that could be taken, and that's all I think I need to say, that they were Ministerial actors when the power to provide information, published information in the Act, as we'll see, relates only to the Chief Executive again. That sheds light on whether it was intended to be an exhaustive statement of what could be done to support recovery.

I'm edging towards acceptance of Your Honours' proposition but I'm just not quite sure.

**ELIAS CJ:**

I hope we don't have to go anywhere near that.

**MR GODDARD QC:**

I think that the – all I need to do is to draw the Court's attention in general terms to the contents of paragraph 2, which set out a record of what it was that the ad hoc group of Ministers decided, paragraph 2 of the recommendations. I've almost finished 1.1 but the rest will go fast. It begins on page 17. There is a heading, "Decisions taken by the ad hoc group of Ministers," and then paragraph 2 noted that on Wednesday 22 June, the ad hoc group of Ministers, then there's a long list of what

they did, so if the Court is looking for a statement of what was decided by the Ministers, this is it, and this is what was decided by that group on 22 June being reported back to Cabinet for noting.

This includes, for example, on page 20 there's the adoption of the criteria. Your Honour asked about that, 2.17, agreed criteria for determining areas where rebuilding is likely to be practicable, and then in 2.19 noting the four zones based on those criteria. The High Court Judge said it was odd to describe this as noting, but in submissions there's nothing odd about this because some criteria have been identified and then Ministers are noting how that plays out when you apply those criteria, where you end up noting the position of the green zone, noting 2.21 in the red zone rebuilding to occur, and then 2.25, agreeing the status quo does not meet Government objectives and 22.26, agree that the Crown makes an offer to purchase. So those are the key policy decisions.

2.31, in terms of what was decided about infrastructure, I think this is important, noted that infrastructure and services in these areas are unlikely to receive any more than temporary repairs, so there's no positive decision that this would not happen, but when one reads the paper as a whole, the expectation that that's unlikely I accept fully comes through but again what did Ministers actually decide after this background? They didn't decide that any work wouldn't be done. They just noted that it's unlikely to resume any more than temporary repairs for good reasons, as canvassed with the Court earlier, and then agreed that councils would be asked to discuss proposed maintenance and repair plans, so that's how the Crown would express its views consistent with policy, as Your Honour Justice Arnold put to me, about whether and where and when that would be done, and then certain other matters to be noted, then financial implications, including noting of the estimated costs and expected recoveries, so that clearly was part of what was covered on 22 June.

I've already drawn the Court's attention to 2.46, agreeing to publicly release the memorandum following the announcements, and 2.47, mechanics of how the decisions will be implemented and details of offers to be determined, some subsequent decisions required on treatment of commercial properties and uninsured properties, including vacant lots.

**ELIAS CJ:**

Given that these offers agreed to in 2.7 were implemented by Mr Sutton, who indicated that he felt bound by these points and under the powers in section 53, what's the status of this?

**MR GODDARD QC:**

This is obviously relevant, first of all, as Your Honour said, as background to the fact that he considered the exercise of the power. It's relevant because I think one can proceed on the basis that his purpose was to give effect to the objectives identified in the paper so if one's trying to understand what his purpose was, it's a relevant source of that information. It's also relevant because it provides the financial authority for him to take steps he otherwise wouldn't have.

**ELIAS CJ:**

Leaving aside for the moment the financial authority, he took this as a direction. Is there power to direct him under the Act?

**MR GODDARD QC:**

The basis – it's not conferred in separate Acts. The general requirement that Chief Executives –

**ELIAS CJ:**

No, no, leaving that aside. In this Act, is there a power for the Minister to direct except via the strategic recovery plan and the plans?

**MR GODDARD QC:**

The relationship between Ministers and Chief Executives is not dealt with in separate Acts. There's a generic provision in the State Sector Act 1988 which says you can.

**ELIAS CJ:**

I understand all that, yes.

**WILLIAM YOUNG J:**

Which section?

**MR GODDARD QC:**

Sections 32 and 33 deal with this and say that Chief Executives are accountable, responsible to Ministers for the way in which they administer the Department, including matters of statute and Government policy, but then there's a carve-out in relation to employment matters.

**GLAZEBROOK J:**

I'm really reluctant to say that means ministers can tell chief executives what to do in terms of effectively overriding functions in the –

**MR GODDARD QC:**

Of course they can't.

**GLAZEBROOK J:**

– in their individual –

**ELIAS CJ:**

Well they can't, they can't override discretions directly conferred by Parliament, no.

**MR GODDARD QC:**

No and I'm not suggesting that, they can't override them.

**GLAZEBROOK J:**

Well you're almost suggesting that though, you can say, he can direct them to use the section 53 powers even if the Chief Executive himself did not think he should be using those powers. I don't think the State Sector Act provision has ever been –

**MR GODDARD QC:**

No it doesn't do that.

**GLAZEBROOK J:**

– understood as saying that Ministers are effectively running the departments.

**MR GODDARD QC:**

Ministers have a high level of control over the way in which statutory functions are performed and certain statutory powers are exercised but ultimately, and it's not the case, and this is explored in *Archives and Records Association of New Zealand v*

*Blakeley* [2000] 1 NZLR 607 (CA). It's not the case that every statutory power conferred on an official must be exercised independently of decisions, directions by Ministers. It's a matter of interpretation in each case, having regard to the nature of the power, the nature of the office and that's a very –

**ELIAS CJ:**
And the powers under the particular statute.

**MR GODDARD QC:**
That's what I mean Your Honour.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
So you look at who it's being conferred on, you look at the nature of the power and you ask as a matter of ordinary statutory interpretation, did Parliament intend this to be exercised independently or not. There is increasingly a practice of making it express in modern statutes where a power is forced to be exercised independently and I have included some examples in my submissions and in the casebook, and in my submission the modern practice today means that the Court should be slow to find that a power that's not expressly identified as an independent power is required to be exercised independently, but I don't think the Court needs to go very far down that path for the purposes of this case either.

**McGRATH J:**
Well I have no trouble with what you've just said.

**ELIAS CJ:**
But this particular statute read as a whole does provide the Minister with powers to direct CERA through the plans.

**MR GODDARD QC:**
More than that because –

**ELIAS CJ:**
And more than that.

**MR GODDARD QC:**

Because it's a Government department and CERA is a Government department Your Honour.

**ELIAS CJ:**

I'd just like to know in the legislation itself what powers the Minister has to direct CERA.

**MR GODDARD QC:**

There's nothing about directions by the Minister to the department in –

**ELIAS CJ:**

Except –

**MR GODDARD QC:**

– this Act at all.

**ELIAS CJ:**

Except through the planning process.

**MR GODDARD QC:**

Even that's not a direction to CERA.

**ELIAS CJ:**

Well but it has to be conformed.

**WILLIAM YOUNG J:**

Not by CERA.

**MR GODDARD QC:**

No not by CERA, it doesn't even say that Your Honour.

**ELIAS CJ:**

Doesn't it? Okay.

**MR GODDARD QC:**

This –

**ELIAS CJ:**

That's what you said.

**MR GODDARD QC:**

Yes. This Act like I think all modern Acts deliberately does not repeat machinery provisions that are found in the State Sector Act. In the same way that there's been a policy of creating a Crown Entities Act 2004 and putting all the governance rules in that Crown Entities Act rather than as we used to, saying them in 20 different ways, 20 is probably an underestimate, in each separate Crown Entities Act. So all that's been stripped out and centralised but it's the backdrop against which all new legislation creating a Crown entity. Similarly here where a new department is created as CERA was created the starting point is the whole framework in the State Sector Act including a high level of ministerial control over action taken by the Chief Executive and officials to the extent that statutory functions are conferred on that Chief Executive one then needs to carry out the analysis that one sees the Court undertaking in *Archives and Records Association of New Zealand v Blakely.*

**ELIAS CJ:**

I think you're going to have to take us to that because that's not a decision of this Court.

**MR GODDARD QC:**

No it's a decision of a five Judge Court of the Court of Appeal.

**ELIAS CJ:**

Yes.

**McGRATH J:**

Written by Justice Keith?

**MR GODDARD QC:**

Yes, which is in my submission is entitled to great respect not least for that reason.

**ELIAS CJ:**

I saw that in your submission.

**MR GODDARD QC:**

Yes, I wonder if I am going to need to go – let me see if that's –

**ELIAS CJ:**

All right, but really what you're saying is then it does come back to the Minister.

**McGRATH J:**

Yes.

**ELIAS CJ:**

That the critical decision which Mr Sutton was constrained by was taken by the Minister.

**MR GODDARD QC:**

This is where I run the risk of going on the loop I just went through with Justice McGrath. I would say rather that it was constrained by the Cabinet decision which reflects the policy of the Government of the day and there's explicit –

**ELIAS CJ:**

But then you're going to have an Alsatia if you don't have a responsible Minister.

**MR GODDARD QC:**

No Your Honour because what one does is, if you're talking about judicial review –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– bring the proceedings against the statutory decision maker saying that if they were required to exercise their discretion independently they failed to do so. If they did it and pursuant to a direction you look at the reasons, you look at what was taken into account. If they give it no independent thought at all first of all there's a question of whether they were required to.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**
Sometimes they will, sometimes they won't; it depends on the statute. If they do you look at what they did. If they didn't and they simply blindly did what they were told then in order to understand what factors were and were not taken into account, what the purposes were, you go to the decision paper which led to the direction because there was no additional analysis. It's as simple as that but it certainly doesn't lead to an Alsatia and that would be, I mean that would be quite wrong but it doesn't happen.

I think I've covered 1.2, 3 and 4. My 1.5 of my roadmap just very quickly, one of the papers I handed up this morning was the attachment that should have been behind 7.363 and this is Cabinet minute 11.27.12 and this is just really completing my response to Your Honour Justice Arnold's question about further decisions that were taken. This is an example of a raft of issues that were considered by Cabinet about transaction design including in paragraphs 45 through 47, the approach that was taken to underinsurance which was to not worry about underinsurance if it was less than 20% but after that to effect a pro rata reduction.

**ARNOLD J:**
So how did that treat the failure, the whole top-up earthquake cover, that was treated as underinsurance was it?

**MR GODDARD QC:**
That would just be one facet of under-insurances, if in fact it led to an underinsurance. If your improvements are only worth 100,000 the absence of top-up cover doesn't lead.

**ARNOLD J:**
Yes.

**MR GODDARD QC:**
Yes. There was a tiny number of properties affected by this. I was told it yesterday by my learned junior and I've completely forgotten it but it was – I'll check it over the luncheon, it was something like 17. Fourteen? Fourteen.

And the review mechanism for property classification, that's discussed by Mr Sutton in his first affidavit at 43 to 44. It's discussed by Dr Jan Kupec in his affidavit and I've provided the reference, and there is also, and I handed this up but didn't need to, in

volume 6, tab 237, the letter to Mr Tsao advising him that the review had been completed. Perhaps worth just looking at that because this also underscores the fact that the decisions that were made about the classification of properties in June were not final decisions. There was continuing research on seismicity on the characteristics of land and there was a review process and what we have in volume 6, tab 237, is a letter in August 2012 to Mr Tsao advising him of the result of the review of flatland zoning. Saying, "As a result of that process we confirm the appropriate zoning of your property is red. It's been confirmed it's appropriate after an extensive view of area wide geotechnical investigations and assessments, it's found that rebuilding is not feasible for a considerable period of time and that remediating the land would be expensive and highly disruptive." There's a reference to a website, a page devoted to zoning review. There's extension of offer periods, so that's what was done there. So it wasn't a final classification, it was a matter which could be and was subject to review, and there were –

**GLAZEBROOK J:**

This doesn't sound like an individual review, it sounds more like an area wide review but is that not right? It's just if I got that I'd be thinking, well they, haven't come to look at my property and they haven't explained to me why my property is not able to be remediated.

**MR GODDARD QC:**

And Dr Kupec goes through in his affidavit the fact that these were area-wide decisions because, by definition, it was about an area needing remediation but that it involved – I think the reviews were triggered by requests for reviews from particular people, but the analysis that was done was area-wide analysis, because that was the issue that was being investigated.

**GLAZEBROOK J:**

And I can understand that from that point of view, but it wasn't an individual assessment of individual properties then?

**MR GODDARD QC:**

No, because the whole point, as Dr Kupec explains –

**GLAZEBROOK J:**

Yes.

**MR GODDARD QC:**

– is that that would be a mistake.

**GLAZEBROOK J:**

Yes.

**WILLIAM YOUNG J:**

But would it involve an individual property if it's right on the margin of the red zone?

**GLAZEBROOK J:**

Which I understand Mr Tsao's was actually.

**WILLIAM YOUNG J:**

So, for instance, Mr Tsao is, I think.

**MR GODDARD QC:**

Well, it would necessary involve reviewing where the line should be drawn and on which side of the property, yes. Dr Kupec explains why, having carried out the review of this property, the assessment was appropriate in terms of the geotechnical characteristics and the amount of damage that had been suffered and the risk of future damage. But ultimately, I think, when you're at the edges of the zone it has to be layer by layer –

**GLAZEBROOK J:**

No, there has to be, has to be a decision, but…

**WILLIAM YOUNG J:**

Well, some of the – I mean, some of the zones are, have quite narrow areas, don't they, particularly by the rivers?

**MR GODDARD QC:**

Yes, Your Honour. And so necessarily, when you're reviewing, you're looking at how thick that layer should be, whether it's –

**WILLIAM YOUNG J:**

Yes, it might only be one or two house wide.

**MR GODDARD QC:**

It could be one or two houses deep, yes. That, I think, brings me to what Ministers were seeking to achieve, that's substantially recorded in the paper –

**ELIAS CJ:**

Sorry, has the local council – I'm just looking at this affidavit – has the local council made any decisions on infrastructure and services in the red zone? I just see that the affidavit says –

**MR GODDARD QC:**

Which –

**ELIAS CJ:**

– all of that's a matter for the local council.

**WILLIAM YOUNG J:**

Well, it'll have made thousands, but normally sort of one at a time, I suspect. But – isn't that right.

**MR GODDARD QC:**

Yes, Your Honour.

**WILLIAM YOUNG J:**

I mean, for instance, there are, infrastructure's still provided, but not on a very sort of permanent substantial basis.

**MR GODDARD QC:**

Some of it – there's been a lot of temporary patches. There have been other decisions that have been made, depending on where, you know, it can be as specific as which side of a road services run down. If you've got services on a side of a road that's in the red zone off which you've got branches going to people in the green, I mean, all these are going to have to be taken into account, and there will have been, as Your Honour Justice Young says, literally thousands of individual decisions about what to do about infrastructure.

**ELIAS CJ:**

But Mr Kupec is talking about a more generic decision. He says, "As far as I'm aware no decision has been made by the Council as to the ongoing provision of services in the RRZ, the Council's position is it's going to continue to provide services to occupied properties but is waiting on the Government's decision on what will happen with the red zone that it has purchased, by the Crown, before making further decisions.

**MR GODDARD QC:**

I think that depends on how far into the zone you're going in relation to these matters. Any areas where there are no residents left and the Crown is the sole landowner –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– then obviously what the Crown intends to do with the land it owns will drive what infrastructure is desired and therefore needed. In areas where there are people, that will be a factor that will have to be taken into account by councils as well. But there are, you know, these are quite large areas, and the number of people still in the residuary zones is very, very small now, and there are very large areas in which there is, all the land is Crown owned, and a decision remains to be made on what will happen with that land, and I might come back briefly to that later.

So, my 1.6, this is perhaps as logical a time as any to go to the Minister's affidavit, which is under tab 27 of volume 2. And the Minister begins by setting out the background to his appointment and the earthquakes. An important point in paragraph 3 that I'll come back to, "It probably goes without saying," halfway down, "the resources of the Government are not infinite and we have had to determine priorities among many competing claims for Government intervention and Government financial assistance. In doing so we have had to make judgments taking into account the social and economic importance of earthquake recovery, financial constraints and fairness to those directly and indirectly affected and to all New Zealanders." These are classic high policy issues for Ministers with accountability to Parliament and they have an important bearing on the second issue, in respect of which leave was granted, to which I will return.

The Minister sets out the – it begins at paragraph 8, discussing the decision to identify the zones, red zones, orange, white and green zones, explains where matters have got to. There's a reference at paragraph 14 to the Spencerville land remediation pilot project, not the other one in Waimakariri that Your Honour was asking about earlier but, which the Crown-funded project –

**ELIAS CJ:**
The pilot…

**MR GODDARD QC:**
– ECQ was managing, and that is described and the decisions not to proceed with it are explained. 15 is important. Minister's considered in light of the advice he'd received that remediation would not be possible in the worst-affected areas and that where remediation might be possible it would be most effective if the relevant areas weren't occupied. "Nevertheless, we prefer to avoid Draconian solutions that would require the use of powers of compulsory acquisition provided by the Act or the Public Works Act. So far as possible we preferred to offer people in the worst-affected areas choices which would give them control over their future." So that value of autonomy in individual decision-making was one which the Minister emphasises here. Then, I think this is the passage Your Honour Chief Justice was remembering early today, concerns about availability of insurance, explanation that it's difficult from September 2010 onwards to obtain new policies for domestic insurance and likely insurers would decline to renew, AMI became insolvent, other insurers withdrew from the Christchurch market, and at 18, "The availability of insurance was essential to the rebuilding of greater Christchurch for two main reasons. The first, without ongoing insurance cover banks would not be prepared to lend against Canterbury properties and without an insurance market funds wouldn't be available for repairing damage cause by further aftershocks," so this is the importance of insurance being available, if you're going to get any rebuilding at all. 19, "It was therefore essential and necessary for the purpose of earthquake recovery in terms of the Act to take steps to provide the certainty needed by insurers and property owners in Christchurch. The informal identification of worst-affected areas signalled to insurers that property located outside of those areas suffered comparatively less damage than in many cases, that damage could be repaired without area-wide remediation. 20, "The zoning classifications and the huge amount of engineering work that underpinned them has meant that insurance continues to be readily available for properties in many areas." That's why the Minister says he's satisfied that classification of area in

this way was absolutely essential for the rebuilding of Christchurch, to get that information out about the, as I say, ultimately I think something like 180,000 green zoned properties in Christchurch, once the orange had played out.

Then, importantly, 21, "Staff officials have been working on the best way forward following the February earthquake when the areas hit by the aftershock of 13 June 2011 the urgency of the situation became even clearer and, at the foot of the page, the Minister's needed to consider how best to respond to the needs of Canterbury residents and the concern is they were expressing direct to Government and in the media, "One of the many issues we need to address will be whether the Crown should offer to purchase some affected properties and, if so, on what terms." 26, it would be difficult to overstate the time pressure under which decisions had to be made by Ministers in the first half of 2011 as events continue to unfold, "We did not have the luxury of normal timeframes for policy processes in the preparation of comprehensive policy papers," paper to Cabinet at 24 June 2011 was put together in a very tight timeframe, "I consider that it reflects the reasons for the decisions we made reasonably accurately," and then there's a description of that, the absence of any legal effect is emphasised at 28, and the Minister emphasises at the foot of that page that he wants to emphasise, perhaps a little bit repetitive, "That we made the decisions about identification of various zones on the basis of the best available geotechnical engineering information about remediation options."

**ELIAS CJ:**
Just on that point, legal status not affected, it's legally possible to seek a building consent. Are any granted?

**MR GODDARD QC:**
My understanding is that some have been granted, yes.

**WILLIAM YOUNG J:**
Or have to be granted?

**MR GODDARD QC:**
Yes, the Council –

**ELIAS CJ:**
Ah, because of the -

**MR GODDARD QC:**

– has a statutory obligation to grant them. It would be fair to say that the Council –

**WILLIAM YOUNG J:**

Might drag its feet.

**MR GODDARD QC:**

– dragged its feet for a while while the dust was literally settling, but my understanding is that certainly now building consents have been granted, and if they weren't one could, I suppose, through mandamus compel the Council to do so.

It's 1 o'clock. I wonder if…

**ELIAS CJ:**

Yes, we'll take the adjournment now. We'll resume at two.

**COURT ADJOURNS: 1.01 PM**
**COURT RESUMES: 2.04 PM**

**MR GODDARD QC:**

Your Honour. I was looking at some key passages in the Minister's affidavit, which is in volume 2 under tab 27, and I think I can begin, pick up rather, on page 9, heading, "Implementation of Crown's offer to purchase ensured properties in the residential red zone". And so the Minister says, "As well as providing information about the condition of land in different areas the other key aspect of the June 2011 decisions was the Crown offer to purchase insured residential properties." So there's two limbs.

"We focus on the position of owners of insured residential properties because that group included most residents in the red zone, so offering to buy their properties would address a large part of the social need to give people an opportunity to move out." That picks up Your Honour Justice Young's point that the focus of the legislation is around communities and the concern for moving on is a concern for communities rather than on an individual basis. It was simply not possible for every individual's recovery needs to be addressed by the Government.

**ELIAS CJ:**

When you say the focus was on communities, that's derived from the legislation?

**MR GODDARD QC:**

In the legislation. But also the Minister is saying more generally the Government's policy was directed at the vast majority of residents at this stage.

30, "Moreover, a large part of the cost to the Crown in purchasing these properties would be offset by money from insurance claims and EQC entitlements. Those estimates are set out." And then at the foot of 30, "Finally, offering to buy these insured properties did not raise the difficult fairness and precedent issues that uninsured properties presented."

Then at 31, and this I think is important in responding to my friend's submission that the financial position and the offset were not an important fact for the Ministers when they made the decision, the Minister very clearly says that they were. "The expected recoveries from insurance claims and EQC entitlements were an important factor for me and my Cabinet colleagues when we considered the overall financial impact and fairness of the offer." The Minister explains the EQC scheme very briefly and says at the foot of the page, "I was conscious that this meant that owners of insured residential buildings would generally have land cover for a substantial proportion but not the whole of their land."

And then there's a reference to top-up cover in 32. 33, "What this meant in practice for the Crown offers to insured homeowners was that if they accepted the option 2 offer to buy their property at the rating valuation of the land only the Crown would pay out the rating valuation and would expect to recover a substantial proportion of this cost through EQC land cover entitlements. If they accepted the option 1 offer the Crown would also pay the rating value of the improvements on the land and would expect to recover a substantial core portion of this cost from EQC land and building cover and private insurer top-up building cover, with the proportion recovered varying depending on terms of private cover and damage suffered by the house. At the time we made the 22 June 2011 decision and when we came to make the later decisions on uninsured commercial properties we were very conscious that although we were authorising an offer to pay 100% of rating value for these properties the effective cost to the Crown was expected to be less than half of that amount after allowing for EQC insurance recoveries."

And then 34, the reference again to making the offer intending to give people the option of moving out of the zone. It's an offer, no compulsory acquisition. The information provided by CERA is set out.

And then at 37, "Even now no decisions have been made about use of Crown-owned land in the residential red zone. Christchurch City and Waimakariri District Councils have not made any decisions about what services will be appropriate. It would be unrealistic to expect infrastructure such as roads and sewers to be repaired or upgraded in areas where no one is living but in other areas it may be practical and appropriate to provide the usual urban services to people living in red zone properties. In some cases compulsory acquisition of property may be required for a particular purpose but it's worth restating that other than the desire to promote a speedy earthquake recovery the Crown has no desire to own properties in this zone. It is offering to buy that land only to give owners a choice about moving out and continuing their lives elsewhere. If people do want to continue living in the red zone the Crown offer does not prevent them doing so."

In response to the allegation that there was some sort of clearance strategy, the explanation there's not. In 39, the Crown doesn't require owners to sell their land. The Crown doesn't want these properties and doesn't know what it will do with the land it ends up owning in these areas, and my friend referred to the engagement process that was beginning and in fact illustrating the continuing flow of information on these matters, my understanding is that there have been further media releases about that engagement this morning, including announcement and releasing an associated Cabinet paper which contemplates an initial phase 1 of public participation and consultation about what might happen in the residential red zones, followed by a phase 2, planning and implementing, "in which Cabinet will consider preliminary future use options informed by Government objectives, the councils' preferred infrastructure requirements and engagement with Treaty partners, and then there will be an identification of suitable –

**ELIAS CJ:**

Sorry, what are you reading from?

**MR GODDARD QC:**

Sorry, I'm just advising Your Honour –

**ELIAS CJ:**

I see.

**MR GODDARD QC:**

– of an announcement that was made today and picking up my friend was critical of the fact that engagement was happening. I'm just, so that it doesn't come as a surprise to the Court –

**ELIAS CJ:**

To read it in the paper.

**MR GODDARD QC:**

– to read it, saying that there's been further announcements in relation to that this morning and that phase two of this process explicitly includes identifying suitable legal mechanisms to implement the proposed options, for example, a recovery programme or recovery plan. So it's not that the Government's made a decision –

**ELIAS CJ:**

A recovery programme.

**MR GODDARD QC:**

And I don't know what that is either, but one option is a recovery plan. So my friend was critical of the suggestion that this process was happening outside the framework of the Act, rather the point is that a decision on how to proceed has not yet been made, preliminary consultation has taken place and then a decision on how to proceed will be made in the light of community views and this –

**GLAZEBROOK J:**

In relation to the already cleared red zone –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– properties.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

Where there wasn't a strategy to clear them, despite the clear indication that paragraph whatever it was of that Cabinet minute.

**MR GODDARD QC:**

There was a strong desire to enable people to move out recognising that that would mean because of the mechanism that was adopted that the Crown would end up owning the land and that you don't leave crumbling infrastructure there for the reasons explained by Mr Sutton, but what the Minister has just said in the paragraphs that I've taken the Court to is that the Crown had no positive desire to own and clear the land in these areas, that was a consequence of the option it provided to people to move on with their lives.

**GLAZEBROOK J:**

Okay.

**McGRATH J:**

So is that in relation to paragraphs 38 and 39?

**MR GODDARD QC:**

And 37, Your Honour.

**McGRATH J:**

And 37 because I must say I myself had, in particular in relation to 38 and 39, had problems relating what was said by the Minister there to what was said by the Minister in paragraph 74. "The Government's determined it's neither practical nor reasonable for these communities to stay in the red zone areas during the extensive time required to fully design remediation solutions." Isn't that what a clearance strategy is?

**MR GODDARD QC:**

No Your Honour, a clearance strategy is where you positive want people to move out, whereas what the Cabinet decision was doing was recognising that it was almost

inevitable that they would have to whatever the Government did and so the Government should provide support to enable them to do that.

**McGRATH J:**

The subtlety is escaping me a bit. Perhaps it's the afternoon session.

**MR GODDARD QC:**

There are situation where the Crown positively wants to acquire and remove improvements for a particular area, for example, to build a park or something like that. The Crown didn't want this land is what the Minister is saying. It didn't have any goals for it. It didn't have any desire for it.

**ELIAS CJ:**

It was a recovery plan for Christchurch.

**WILLIAM YOUNG J:**

I don't think it is a recovery plan.

**ELIAS CJ:**

Well it is a recovery plan. I'm not saying it's –

**WILLIAM YOUNG J:**

Not with a capital R and P.

**ELIAS CJ:**

– a recovery plan under the Act but it is a recovery plan.

**MR GODDARD QC:**

It was part of the response I think –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– would be a neutral word to the earthquake.

**ELIAS CJ:**

I don't see why we need neutral words. To much neutrality –

**MR GODDARD QC:**

When we come to the legislation –

**ELIAS CJ:**

– in the, in a lot of this language I think.

**MR GODDARD QC:**

When I come to the legislation the reason why it matters –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– will perhaps be important, become apparent. Let me leave it for now.

**GLAZEBROOK J:**

Well if you need to resort to such subtleties then you might have a problem with the legislation. So if you need to resort to subtleties of language in order to weasel out of the legislation that might suggest there's a problem with the legislation as I think Justice Panckhurst found.

**MR GODDARD QC:**

And I don't need to do so and there's no weaselling out of the legislation happening. I am going to go through the legislation, in particular some provisions that my friend moved over rather briefly but again the short point is that the legislation does not set out to be an exhaustive statement of how the recovery is planned and how Government decisions are made in support of it. Rather it provides exceptional powers that can be used only when necessary, and that applies to all the recovery plans other than the central city recovery plan. The Minister can require a recovery plan to be prepared only if that is necessary for the purposes of the Act whereas if there is some – and the decision of the Court of Appeal in *Independent Fisheries* was that it's not necessary to use a particular power under the Act if there are other less intrusive mechanisms, in that case also under the Act by which the same goal can be achieved. Here there were other less intrusive mechanisms outside the Act that

were available to the Crown that could be used and that's what was done. I'll come to it.

**ELIAS CJ:**

Well except it wasn't because section 53 was used.

**MR GODDARD QC:**

For the purchases not for the announcement.

**ELIAS CJ:**

No but the purchases were made against the background of the announcement as you've said and they are posited on zones in which clearance is clearly an object.

**ARNOLD J:**

Well the object you might say is that people would not be living there. The clearance is a consequence of that but there was a clear Government policy to get people out of those areas.

**MR GODDARD QC:**

To enable people to move out because of the conditions they would otherwise be living in.

**ARNOLD J:**

That's right.

**MR GODDARD QC:**

Yes, but it was an enabling goal not a directional goal and that's the distinction –

**ARNOLD J:**

Well that depends how one reacts to the alternatives that were put to people when the offers were made and, I mean, what you're saying is that people had a real choice not a "Hobson's choice."

**MR GODDARD QC:**

No what I'm saying I think is that the option provided by the Government was so attractive that you would expect most people to accept it.

**WILLIAM YOUNG J:**

And the options prior to the red zone announcements were not that different.

**MR GODDARD QC:**

They were not that different. So it's not as if –

**GLAZEBROOK J:**

Well the options would be that you either stick it out because you can't afford to move because you can't get enough money to move or you cut your losses and move if you can afford to move before this announcement. The options afterwards were that you get an incentive to move because you get the 2007 valuation.

**MR GODDARD QC:**

Yes so it became much easier for people to do what the –

**GLAZEBROOK J:**

But that's what, that was the aim of the Government was to make it much easier. Now for very good reason, for reasons for thinking of the community and thinking of those people but I don't know that you can get around the fact that that was the reason they made those offers otherwise if the didn't want people to move they could have left them there.

**MR GODDARD QC:**

Yes I suppose the only reason that I even hesitate on that is that this wasn't getting people out to pursue some objective different from the interests of those people. So it's not getting them out to build an Olympic stadium or –

**GLAZEBROOK J:**

But nobody is –

**MR GODDARD QC:**

– something like that.

**GLAZEBROOK J:**

– suggesting that was the case, well I certainly wasn't suggesting that was the case.

**MR GODDARD QC:**

And so, and that's the flavour of the argument that there was some sort of clearer strategy pursued and when one looks at the sort of international human rights material relied on by the Commission, for example, and the eviction scenario, first of all you're talking about evictions for the most part but second, you're talking about circumstances where clearance is pursued for some independent or ulterior Government objective in many contexts, and the only point I'm seeking to make here is that all that Ministers were attempting to do was to identify what my friend quite rightly described as a desperate situation that tens of thousands of people were in and provide those people with good information about their position and a real choice to move out rather than wait in conditions of uncertainty while they haggled with insurers and waited to see what happened with future earthquakes and what happened with those various claims.

So to give people more options in their life than they otherwise had, to make it easier for them to do what looked like being inevitable anyway, this offer was made but it was deliberately made as an offer to enable people, as the Minister says, to take control of their own lives and to make that choice rather than have it done to them, and that's actually a very important issue in terms of respect for autonomy and respect for decision making, and it's wrong in my submission to equate making a very attractive offer which significantly improves people's choices with compulsion to take what's chosen.

**ARNOLD J:**

The offer did say, "Take this and of course if you don't we can compulsorily acquire you at the market value."

**MR GODDARD QC:**

We might if we need the property. But that's again part of – I mean that is true.

**ARNOLD J:**

Seems to me you're requiring of people an extraordinary degree of sophistication in the face of what was said in that offer.

**GLAZEBROOK J:**

Plus you won't have any infrastructure.

**MR GODDARD QC:**

You'll have infrastructure that's likely to undergo temporary repairs but not new infrastructure inserted. Likely, yes.

Come back to the affidavit.

**ELIAS CJ:**

There is a quote that I can't quite put my finger on but someone may be able to identify it, which does talk about the realities of when big Government moves, that it's not just a neutral actor. And that sort of reality is behind all of this. That if Government says, "Well, you might end up being compulsorily acquired at market rates," it's hard not to see the stick in that."

**MR GODDARD QC:**

There was no desire to bring any stick to bear here.

**ELIAS CJ:**

There was a big carrot, I agree.

**MR GODDARD QC:**

There was a very big carrot –

**ELIAS CJ:**

Yes, yes, I understand that.

**MR GODDARD QC:**

– to respond to very real needs in relation to roughly 5% of the people who were affected by this decision with the vast majority of course being affected by it by being told they didn't have a problem and the Government wouldn't be doing anything. Of course you've got the green zone, which is an important part of the announcement. Then you've got the red which says, "You need to know that this is what we're being told about your land and we recognise that this creates a huge problem for you so here is an additional choice, a carrot." And in my submission the information that was provided about likely availability of insurance, likely availability of infrastructure, the potential for compulsory acquisition if a property was required for a particular purpose, such as flood management along a river, but, you know, only if that occurred, was all information which was properly provided and which the Crown

could have been criticised for failing to provide if people made different choices without that warning and those steps were subsequently taken. Ministers had a responsibility when providing this information to make sure that people did understand as best they could the consequences of not accepting the offer, and this was a genuine attempt to do that, not a stick.

And again, when I come back to powers and timing of announcements, I think it's important to bear in mind that once ministers knew that it was likely that in these areas rebuilding was not practicable in the short to medium term, they could have been quite properly criticised if they had not shared that information with the public and allowed people to go on making decisions about spending their scarce savings on repairing homes that were likely to be write-offs anyway. So I really do want to emphasise that this was not an easy choice, for ministers, that there were really urgent factors in play, and that it is more likely, certainly no less likely, that I would be here dealing with a different claim on behalf of the Crown if ministers, having received this information, had sat on it for several months while officials worked out some sort of plan before putting it in the public arena. Certainly they would have been exposed to significant criticism. That is a common feature of our public debate, that the failure to share information relevant to individuals and their fate has been withheld by central Government and not shared with them. I'll come back to that, but that's a very important part of the timing issues here.

So, at paragraphs 42 through 48 the Minister discusses the development of the recovery strategy, notes at 44 that the residential red zone is based on an engineering assessment of the extent of damage and financial and social costs of remediation doesn't affect owners' legal rights. The Minister says, "If it had been intended to affect owners' legal rights as some sort of town planning zone I would have used the powers in the CER Act to override or amend documents issued under the Resource Management Act," the super RMA document, as Your Honour put it.

**WILLIAM YOUNG J:**
Well I think he's thinking of section 27 actually.

**MR GODDARD QC:**
Well also the recovery plans, because that's also what they do, Your Honour.

**WILLIAM YOUNG J:**

Yes, although recovery plans are a rather clunky way for a Minister to do something.

**MR GODDARD QC:**

It's slower.

**WILLIAM YOUNG J:**

And also the –

**MR GODDARD QC:**

But –

**WILLIAM YOUNG J:**

You would expect – well we'll get onto this in due course.

**MR GODDARD QC:**

We will, Sir. The Minister has of course been told by the Court of Appeal in the *Independent Fisheries* case that he can't use section 27 if it's not necessary to do that rather than use the recovery plan mechanism, which involves more consultation.

**WILLIAM YOUNG J:**

Which presumably in that case he would be directing the Regional Council or what's left of ECan, the commissioners, to –

**MR GODDARD QC:**

Or multiple councils.

**WILLIAM YOUNG J:**

– prepare a recovery plan or alternatively the Chief Executive.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

He doesn't prepare it himself.

**MR GODDARD QC:**

No. But he does approve it, ultimately. So he directs someone to prepare it.

**ARNOLD J:**

Well, I mean wouldn't – all that might have changed from the current process is that there would have been a notification of a draft and people could have made written submissions. And presumably that could have been done on a truncated timeframe.

**MR GODDARD QC:**

One of the points I foreshadowed earlier in terms of the range of conclusions the Court might reach about this is that the Court could conclude – if the Court concluded that a recovery plan should have been used the Court might say that what should have been announced on the Thursday the 23rd I think of June was the information that ministers had received and an intention to consult on that and determine – well, the impact ministers could have announced the information, a proposal that the Crown purchase the properties, and direct the Chief Executive of CERA to prepare a recovery plan which addressed those issues.

**ELIAS CJ:**

Took into account the – yes.

**MR GODDARD QC:**

And if that's right then that has important implications for relief, because it means that almost everything that's complained about could've been done lawfully anyway.

**ARNOLD J:**

Through the recovery plan mechanism?

**MR GODDARD QC:**

If it could've – yes. So that is very important when we get further down the track.

My primary submission is that it's not necessary to use the recovery plan mechanism but in any event my submission is that if the sort of truncated recovery plan that Your Honour just foreshadowed is a permissible use of the power, if the Minister erred in law in failing to conclude that that was necessary, in my submission that's quite a high test, because you could only use the power if it's necessary, so he

would've had to err in law by not concluding that it was necessary to do a recovery plan.

**GLAZEBROOK J:**
Well, I'm – oh well. You'll get to the Act eventually, no doubt.

**MR GODDARD QC:**
I will. I'm hoping to. The – at 47, so again in terms of the reasons for doing this, announcing the Crown offer was a key part of providing certainty and could be done much more quickly than developed in the recovery strategy, which was not finally released until May 2012. So that's almost a year after these decisions were made. The Court will recall that the Act contemplates a draft being prepared within nine months and then a consultation process and then final adopt. And I think my friend accepts that it would be unrealistic in terms of timing to deal with this in a recovery strategy. And then the absence of a conflict touched on.

Then we get to the offer to purchase vacant, uninsured and other land. Although this is relevant to a subsequent part of my submissions it's probably sensible to deal with it while we're in the affidavit. Then I can move very quickly through that last part of my submissions.

First priority for Ministers had been to address the position of the vast majority of homeowners in the worst affected areas and the offer to ensure homeowners had done that. Conscious there are other property owners and we asked officials to do some work on options for those properties. CERA necessarily had to prioritise its work so an assessment of the more difficult issues that affected fewer people had to wait. The process by which the material was developed is discussed.

And then turning over a few pages to page 17, paragraph 63, the Minister notes the cost to the Crown was also a significant factor and, 64, the Minister says there's a tension between these different factors, "While a more generous offer would assist the landowners and satisfy the first two factors and the fifth one, a less generous offer would better satisfy the third and fourth factors." Wrapped into the third and fourth factors was the risk of creating expectations the Government would step in to pay for uninsured losses caused by other natural disasters, "We had to find a way to balance all of these goals and ensure that the net cost to the Crown was prudent fair," and in my submission again that is a proper considerations for Ministers, and –

**McGRATH J:**

Mr Goddard, can I just say that in relation to the extent that you're saying that the absence of insurance, assignables, was a key factors in the decision, I would like at some stage to see something more than just what's said in this affidavit. I'd like you to be at some stage referring us to anything in the materials, the contemporary materials, that indicated that was a factor.

**MR GODDARD QC:**

I was –

**ELIAS CJ:**

Sorry, that what was factor?

**McGRATH J:**

That the absence of insurance assignables for those who were not insured –

**ELIAS CJ:**

Yes, yes.

**McGRATH J:**

– was a key factor in the 50, in deciding on the 50% offer.

**ELIAS CJ:**

Yes.

**WILLIAM YOUNG J:**

Well, it's the only factor, isn't it?

**McGRATH J:**

Well, I'd just like us to see something –

**WILLIAM YOUNG J:**

I mean, it's the only point of distinction.

**McGRATH J:**

– that points to it. It's a distinction, but I'm not really sure – well, I haven't yet seen where it was part of the contemporary feeling, and why they got to 50%, as well.

**MR GODDARD QC:**
And…

**McGRATH J:**
It may be it's the only the Minister's statement, well, that's fine, but if there's more that's, I'd certainly like to see it.

**WILLIAM YOUNG J:**
Well, you've got the cost, the net cost analysis in the decision paper.

**GLAZEBROOK J:**
Yes, although that might just be – that didn't say, "This was the real reason we were doing that," that may well just have been, "This is the cost." Because you'd want to know what the cost is before you…

**MR GODDARD QC:**
In this –

**GLAZEBROOK J:**
And there was a, because it was in the context of a discussion about what you expensed and what you didn't, which of course is very important for – the public find this, especially since it was near the end of the year.

**MR GODDARD QC:**
What you have in the September 2012 paper, which was the relevant decision paper for this, is a reference to the various factors which include fairness and precedent factors and recoveries. But I was going to tackle this issue more on the basis of whether it's a factor that it's open Ministers to take into account, and the reason I was going to do that, Your Honour, is that the September decision has already been declared to be unlawful, and the Crown, and the Chief Executive in particular, accepts that it will need to be remade, there's no doubt about that. So whether it was unlawful for this reason as well as because of a failure to exercise, to turn, for the Chief Executive to turn his mind to section 10, is really of academic interest so far as that decision is concerned. The practical relevance of the insurance status issue is to the future decision-making that will need to happen in the light of this Court's determination, because there will have to be a decision, whatever the outcome of this appeal, the Crown accepts that. The Chief Executive will need to make a new

decision about what offer to make to these people, and that's been recognised, so the real issue here is is it open to Ministers in deciding funding allocation, is it open to the Chief Executive in exercising the section 53 power, to take insurance status into account.

**McGRATH J:**
I'm not so sure that's the issue for us. Our issue is the historic situation, isn't it? I mean, we're not giving an advisory opinion here.

**MR GODDARD QC:**
Well, this is –

**WILLIAM YOUNG J:**
I think this is really the point that prompted the appeal though, isn't it, whether, in making a further offer, which the Court of Appeal has required, the Minister's entitled to take into account insurance status?

**MR GODDARD QC:**
Yes, it's he reason we're here. If the –

**WILLIAM YOUNG J:**
And that's actually the point, second point, isn't it?

**MR GODDARD QC:**
Yes, and that's the – well, the way it was put was, was the offer unlawful because it was taken into account? But, with respect, the offer was unlawful, and the Crown hasn't cross-appealed that. So it's already been declared to be unlawful.

**ELIAS CJ:**
But there were two bases on which the offer could have been unlawful. The Court of Appeal has decided it was unlawful because section 10 wasn't taken into account, but the issue we have been taking a lot of time over is whether it was competent to the Ministers to make an offer without proceeding in accordance with the statute. And if we accepted that, the result would not be, "Go ahead and do it again," and, "Yes, you can take into account insurance," it would be, "You need to put this process on the rails."

**MR GODDARD QC:**

Yes, and again, in the course of putting the process on the rails, Ministers would need to understand, the Chief Executive would need to understand, whether the Court of Appeal was right to find that a relevant factor in the decision-making is insurance factors.

**ELIAS CJ:**

Oh, yes, I don't disagree with, yes.

**MR GODDARD QC:**

I mean, I think that's really, if I may say so, the most important issue from a practical perspective before the Court.

**ELIAS CJ:**

But it may be that we – but there is a wider issue, and it does depend on the statute, which we must come to soon, because if in fact Parliament envisaged that there would be community participation, that there would be a measure of parliamentary oversight, that this was the way forward for Christchurch, then that is the process that needs to be set on the rails, and it's not just a question of making an offer in which you may or –

**MR GODDARD QC:**

No.

**ELIAS CJ:**

– may not take into account insurance.

**MR GODDARD QC:**

I agree, Your Honour, but it would still be the case that in conducting the process the question of whether this is a permissible criterion – my friend argues that –

**ELIAS CJ:**

Yes, I agree, yes.

**MR GODDARD QC:**

– it's an impermissible criterion under the Act, that's really what matters for whichever future process gets underway. One way or another, it's clear that at least something has gone wrong.

**ELIAS CJ:**

No, but if there was a public process, it may be that the designation of particular properties would be revisited.

**MR GODDARD QC:**

Yes, but –

**ELIAS CJ:**

So –

**MR GODDARD QC:**

– the applicants don't want their properties unzoned –

**ELIAS CJ:**

No, I understand that.

**MR GODDARD QC:**

– with the exception, I think, of Mr Tsao –

**ELIAS CJ:**

Might score an own goal.

**MR GODDARD QC:**

– but – yes. And that's one of the – there is a bit of disconnect between the first argument and the desired outcome, whereas the second argument is intimately linked to the applicant's desired outcome, but through future decision making, not through what Ministers actually thought about in September. It's really the issue the Court of Appeal dealt with by saying, "It is open to Ministers to take this into account." And that's why there has been no offer to date. I don't know if the Court say the letter that was attached – it's one of my friend's recent affidavits – the second supplementary affidavit of Richard Lynn attaches the letter dated 4 June 2014 from the Chief Executive top the solicitors for the Quake Outcasts, and what the Chief

Executive says is, “In the light of the Court of Appeal decision I have carefully considered whether an offer should be made under Act to acquire the properties. I have also discussed the approval of funding with Ministers.” He says he considers the terms of the September 2012 were appropriate, “On the basis of the information that was available to me at that time. However, on the basis of the information that’s currently available to me my preliminary review is that it may be appropriate to make a revised offer.”

So the Chief Executive is signalling that he’s inclined to offer something different from what was offered last time. But what he goes on to say is, “I have also formed the preliminary view that any revised offer that I might make should, like the previous offer, take into account, amongst other things, the insurance status of the properties. The Court of Appeal has held that it’s open to me to take this factor into account and I consider that the insurance status of the properties is relevant to the net cost of the offer to the Crown and thus taxpayers, the fairness of the terms of the offer having regard to the position of others affected by the Canterbury earthquakes and other natural disasters, and the precedent effect of that offer.” And then what he goes on to say is, “But that's one of the issues that’s before the Supreme Court in just two months and, as for that matter, is my ability to make ex gratia payments outside the framework of the Act,” which is what would happen in relation to the large number of people who have sold their properties on these terms if there was to be horizontal fairness, and that he’s therefore decided to wait. And that's actually a central practical issue here.

**ELIAS CJ:**
But what’s the submission directed at? Just at the affidavit, saying that they expected –

**MR GODDARD QC:**
It was partly responding to –

**ELIAS CJ:**
– an offer before now, or the submission?

**MR GODDARD QC:**
It’s –

**ELIAS CJ:**

Because it's not really relevant to what we have to decide. I think we can all accept that there are reasons why no revised offer would have been put out pending determination of the appeal.

**MR GODDARD QC:**

There was criticism of the further delay by my friend, and I am responding to that. I am also indicating that the Chief Executive is minded to make a different offer, so at least there's no magic in it.

**ELIAS CJ:**

There's another "may" in there.

**MR GODDARD QC:**

There's no magic in the 50% number, exactly, but that will –

**GLAZEBROOK J:**

Well, I wonder. Practically you could have made the offer. He could have made the offer subject to the result of this case, couldn't he, on the basis of the Court of Appeal decision, and then people could have accepted or not as they wished.

**MR GODDARD QC:**

It's a little difficult to know how you'd frame that when you don't know what the outcome of the case would be, particularly given, as Her Honour the Chief Justice said, that the answer may be not we just revisit these particular offers but that some broader process has to happen first. But anyway, let me come back to …

**GLAZEBROOK J:**

Well, I wonder whether you would make a decision that affects a whole pile of other people without hearing from them to say that you start a process again, even if you decide a different process should have been followed. But it would be an odd thing to say, well, the whole thing goes out the window, you start all over again without thinking what happens to the people who we haven't heard from who've accepted offers.

**MR GODDARD QC:**

Absolutely, Your Honour.

**GLAZEBROOK J:**

So practically that wasn't going to happen, was it? Unless the Court did call for everybody else to come before the Court to say why shouldn't it start all over again?

**MR GODDARD QC:**

I'm sorry, I'm not sure I completely follow.

**ELIAS CJ:**

Well, it's a point in your favour, Mr Goddard. We can probably move on.

**MR GODDARD QC:**

I will then emphasise that in the Minister's affidavit there is the passage from paragraph 72 through 79 dealing with why a distinction was drawn and that conveys, I think, that there was no magic in the 50%, for example at 72. Cabinet agreed the Crown should provide an offer that would assist the landowners to leave the residential red zone but didn't want to make an offer that would amount to providing compensation for uninsured risks. On the information that we had, the value of the land would, on average, be likely to be about 10 to 20% of its pre-earthquake value, so an offer at 50% should be attractive. Then the factors not to go further are set out, including at 74 the expectation of recovering more than half the cost, the absence of offsetting recoveries in relation to these properties, the rough equivalence between the two offers, foot of 75, the precedent issues at 76. The Minister explains in the second half of that there are often calls for the Government to provide compensation following natural disasters, especially if people don't have insurance cover. It's simply not feasible for the Government to provide full compensation for these losses and the Minister says in his view it wouldn't be an appropriate use of taxpayers' money, on which there are many claims. Then the issues of –

**McGRATH J:**

That doesn't really help us understand why they moved to 50%, does it?

**MR GODDARD QC:**

Why it was precisely 50, no, Your Honour.

**WILLIAM YOUNG J:**

Well, as opposed to 59.

**MR GODDARD QC:**
Or 40 or 60.

**McGRATH J:**
It's disproportionate, I suppose is my question.

**MR GODDARD QC:**
What the Minister says is that this was way more than the land was worth, in our view, and we thought it would be attractive but it left some of the risk with the people who were uninsured, and how much is a matter of art, not science. I mean, that was the Minister's view. Again, you see that in 78 –

**McGRATH J:**
It may be the Minister's view, but we don't have any real understanding of where it came from.

**MR GODDARD QC:**
And then it's picked up in the broad language at 79 about the range of difficult and multi-faceted decisions, don't have limitless funds to spend, need to prioritise, and looked at striking a balance that contributed to the recovery objectives and it was fair and prudent, and that's as precise as it gets, and where there are no hard edges by which to make decisions is precisely where we often give those things to Ministers to decide as a matter of policy judgement. Things where there are hard edges can be left to mere lawyers.

So that deals with my 1.6 and as I say there it's clear that what Ministers are seeking to do was to alleviate the adverse impact of the earthquakes for people in each of these areas, green zones, because they'd have more certainty and be able to move ahead, the red zones, because they would know their position and they would stop incurring expenditure that would be wasted and they would have new options they didn't otherwise have, and that it's wrong to confuse identification and partial alleviation of harm caused by earthquakes with an affliction of the remaining harm.

I can move very quickly through the next few points. In the absence of the legislation, in my submission there could be no challenge to the steps that were taken as a result of the June 2011 decisions. The Crown is a legal person. It provides information. I could perhaps add announces policy, if that's something

different. I was treating that as included within the prior submission but the Crown provides information, announces policy, and enters into contracts in many fields without express statutory authority. I won't go to all of these authorities. I don't think this is especially controversial. I do want to particularly emphasise the departmental statutes report which Your Honour Justice Arnold referred to earlier. It was published in 1989. It's been enormously influential in relation to the design of legislation in New Zealand since the early 1990s. There is a standard practice of not conferring powers to publish information, to gather information, to enter into contracts on the Crown or on Ministers or on public servants because of a base understanding that the Crown has those powers in any event and that it only causes confusion and uncertainty about the purpose of including a boilerplate clause in different terms each time, often in legislation to that effect.

Your Honour Justice McGrath said to my friend Mr Cooke yesterday Parliament doesn't leave things to the third source for long. That's been true in some areas like taking possession of property, the known issue, but actually we've seen the opposite trend in relation to the powers of the Crown because a conscious choice was made in the early 1990s following the departmental statutes report to strip out this sort of boilerplate from departmental statutes and indeed for the most part not to establish departments by legislation at all, so now typically a department is established by the issue of an Order in Council which includes it in the schedule to the State Sector Act. Often there is nothing else. Yet the Crown in respect of those activities plainly has all these capacities, and then what you see is the State Sector Act identifying who can act for the Crown but one of the problems that pervades this area is confusion between the capacity of the Crown to act and the authority of particular persons to act on behalf of the Crown. In a nutshell, the capacity of the Crown arises as a matter of common law to do this range of activities. It's not derived from any statute. The authority of Ministers to act is derived from their constitutional role and from the Constitution Act, and the authority of Chief Executives to contract on behalf of the Crown to take action is derived from the State Sector Act, which confers that authority on them. So when it talks about powers, it's not a source of powers for the Crown. It's a source of authority for those often officials to act on behalf of the Crown. I think that's just a very quick tour of the landscape in that area.

The other text that's particularly helpful is Professor Peter Hogg's text on liability of the Crown, which is under tab 11 of my material. I won't go to it now, but it provides a very helpful overview of the common law powers of the Crown, notes the ongoing

but rather arid debate about whether it's prerogative or common law, a point the UK Supreme Court picked up just the other week, and it also – one of the reasons it's particularly helpful is that in federal jurisdictions –

**ELIAS CJ:**
Prerogative is common law, of course.

**MR GODDARD QC:**
It is an aspect of the common law. So there's the debate among writers about whether one should describe as prerogative only those powers which are peculiar to the Crown.

**ELIAS CJ:**
I know.

**MR GODDARD QC:**
But, as Your Honour knows, especially having been reading –

**ELIAS CJ:**
Depends whether you're a Diceyan or a Blackstonian.

**MR GODDARD QC:**
And that's exactly what the Supreme Court said in *Sandiford, R (on the application of) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44, [2014] 1 WLR 2697 last week at paragraph 49, discussing the provision of legal funding, "assistance, including legal funding, for British citizens facing capital charges abroad."

**ELIAS CJ:**
Sorry, which – was that handed –

**MR GODDARD QC:**
I handed this up today. *Sandiford*. It's the judgment that His Honour Justice Young drew attention to yesterday.

All of Their Lordships except Lord Sumption – it says, "There was no material dispute as to the existence or source of the power of the Secretary of State to provide

assistance, including legal funding, for British citizens facing capital charges abroad. It is immaterial for the present purposes to consider whether this is properly described as a common law or a prerogative power (see *Wade and Forsyth*)." And I had thought that rather mirrored some of Your Honour the Chief Justice's comments yesterday about the aridity of that debate.

What is also noted in this judgment which is helpful at paragraph 65 by the plurality is that the fact that powers are prerogative powers doesn't mean they're not susceptible to review on plain but other judicial review grounds. And that's one of the key constraints, one of the key reasons why there should be no concern about recognising that the Crown has a range of common law…

**GLAZEBROOK J:**
Sorry, where are you now?

**MR GODDARD QC:**
I was at 65, Your Honour.

And finally, just in terms of contributions to the rather sparse jurisprudence in this area, the Court may wish to note Lord Sumption's brief concurring judgment that begins at paragraph 78. The relevant passage is at 83. And from line 6 onwards what His Lordship says is, "Ministers have common law powers to do many things, and if they choose to exercise such a power they must do so in accordance with ordinary public law principles, ie fairly, rationally and on a correct appreciation of the law." And that's a rather neat summary of something about which people have written a really great deal.

**ELIAS CJ:**
The last prize of the revolution, as it has been said, the prerogative under control.

**MR GODDARD QC:**
Yes. And it's under control but that's not the same thing as saying it doesn't exist.

**ELIAS CJ:**
No.

**MR GODDARD QC:**

And in particular in New Zealand it is fundamental to the design of our statute book that the common law powers to do all the things which a natural person can do may also be exercised by the Crown. That's not the same as saying the Crown is a natural person. As some of the commentators say, that's an unhelpful analogy. But in the same way that we can say in the Companies Act 1993 that a company has all the powers of a natural person, even though a company isn't a natural person and is unlikely ever to get married or vote or do any of those things, so too we can sensibly say that common law corporations from the first one to set foot in New Zealand, which I suppose actually that would be the Crown, would be – but then the New Zealand Company established by charter, a common law corporation, has unrestricted corporate capacity and the powers to do things which a natural person can do. But they're subject to judicial review and to a whole range of other accountability mechanisms, as Your Honour Justice McGrath pointed out in *Ngan*. Ombudsmen, Official Information Act 1982, review by the Auditor-General, accountability to Parliament.

And I give some examples which are really redundant, I think, except to note that the suggested distinction by, from some authors and by my friend Mr Cooke that you can't use these powers for action of a governmental character certainly does not match practice in New Zealand. And the examples I give in 2.3 and 2.4 include many acts of a governmental nature. All the information the Crown provides through .govt.nz websites, much of which relates to governmental matters…

**WILLIAM YOUNG J:**

Or decisions as to where the Court building's going to be in Christchurch.

**MR GODDARD QC:**

Yes. Which was done outside the recovery strategy and recovery plan mechanism. Decisions about where schools would be in Christchurch, a major factor in the recovery of Christchurch, sits outside the Act. All sorts of things that can be done. And then in terms of contract examples, one which I thought – there's a lot there ranging – but the Air New Zealand rescue is quite a good example of something which would only make sense if you were a Government, and just short of a billion dollars was spent acquiring shares and entering into a range of contracts to support Air New Zealand when it was about to go under water, if that's the right phrase for an

airline. And that was not done with any statutory support at all, but it was in my submission wholly lawful.

So the fact that major action of a governmental character can be taken by the Crown without statutory, express statutory authority, is in my submission not really open to question in contemporary New Zealand. There's no authority to the contrary and there is a huge amount of practice recognised by, for example, *Ngan* and other decisions to the contrary.

So – and nor should this be a matter for concern. This is what I deal with in my 2.6 and the paragraphs of the submissions there referred to. This is not some Alsatia, to use Your Honour's, the Chief Justice's term, which – of unconstrained executive activity. It's been brought under control and it is subject to all the constraints we've touched on by Lord Sumption in that very neat sentence there, and the additional accountability constraints that Your Honour Justice McGrath enumerated in *Ngan*.

I mention also the overlap with the rights and freedoms of natural persons acting for the Crown.

**ELIAS CJ:**
It's not just that it's under control in the sense of the supervisory jurisdiction. There are real questions as to whether the power exists in any particular case. That's a question of what the common law power is. And although you've given lots of examples, it may be that those limits haven't been tested in those cases.

**MR GODDARD QC:**
One of the difficulties with the literature in this area is the failure to distinguish between the purposes for which powers are exercised and the existence of the power. It's a distinction that private lawyers in relation to corporations, particularly those of us who operated under the pre-'93 regime and have advised statutory corporations, you know –

**ELIAS CJ:**
Ultra vires.

**MR GODDARD QC:**

Ultra vires issue. So, for example, you've got a statutory corporation with limited objects. It will usually have amongst its powers the power to contract. That's not in issue. The question is for what purposes can that power be used? And there's a great deal of confusion in the literature on that. I think, with respect, that that's a distinction which is not fully addressed in the fourth edition of Professor Joseph's text, which seems to slide between existence of the power and purposes for which it's used. I don't think there's any sensible doubt about the existence of the power to contract. The Crown does that across many areas without section 3. The question is, is there any limit on the purposes for which it can be exercised? And there has been no identification in the New Zealand case law of any such limits. There's been no identification in the case law elsewhere, in my submission, of any workable limit. The, "of a governmental character", doesn't provide you – you can't use it if it's an action of a governmental character. Is entering into a contract with someone who hold an office such as the office of Solicitor-General of a governmental character? I would rather have thought so. And yet it has no statutory support. Are those contracts really invalid? It seems odd to say so. Rescuing Air New Zealand another example. So I don't think that's workable and I don't think it provides the guidance that people need to work in this area and I don't think there's any good reason for it. It seems to me that we can learn a lot from the case law of federal jurisdictions like Australia and Canada that have had to consider the relationship between the spending and contracting powers –

**ELIAS CJ:**

But those jurisdictions confer direct authority on the executive. That's what happens within a federal jurisdiction, so there is an independent source of executive authority. In the British and New Zealand constitutions there is the prerogative, there are statutes, and the prerogative as has been authoritatively said is not something that the Courts can any longer extend. So, I mean the prerogative is a dwindling bundle of rights and if you're contending for a direct authority in the executive which is not derived historically from the prerogative powers of the Crown then you'd need to come up with better authority than a few academic articles and recent articles.

**MR GODDARD QC:**

I don't want to spend too much time –

**ELIAS CJ:**

No because I think it is irrelevant –

**MR GODDARD QC:**

– on a debate but I do –

**ELIAS CJ:**

– and you really do need to get onto the statute.

**MR GODDARD QC:**

– I should just, yes, I do. I do just want to say that many Judges and commentators would say that it's helpful to distinguish between the prerogative and common law powers, and one of the reasons for that is that heads of the prerogative tend to be in terms of the objects to be pursued or the area of activity as opposed to the powers that are deployed. I think that is a useful analytical distinction so there are areas of activity that the Crown engages in because they are provided for by statute. There are areas of activity such as foreign affairs and defence which are spheres conducted pursuant to the prerogative except to the extent that legislation –

**ELIAS CJ:**

Look I don't think we should take time on this but it does seem to me that they may not marry very well with the submission you're earlier making about the difference between powers and means, but I really don't think we need to develop that.

**MR GODDARD QC:**

The only reason it matters at all is because the starting point for my submission is that there was no legal impediment, there is no legal impediment apart from the Act to Ministers making the announcement they made on the 23rd of June and no legal impediment apart from the Act to, proceeding with the policy that was there announced.

So what is the impact of the Act? My authorities, tab 1, the legislation, it was enacted as the Hansard, which my friend took the Court to, records in great haste and it bears some marks of that but its basic scheme is apparent. The context of course is that a state of emergency had just ended, this was a forward looking statute designed to support recovery. In Christchurch it was enacted against the backdrop of a huge range of activity being undertaken by the Crown and other actors, local authorities

and a range of organisations directed to supporting recovery in Christchurch and certainly as we will see as we go through, there are no express provisions which say these powers exist to the exclusion of any other powers. My submission is that it is inherently unlikely that what Parliament was seeking to do was to limit the ability of the Crown or any servant of the Crown to do anything that it could previously have been done to support the recovery. These were additional powers designed to add tools to the toolbox and they were, because some of them were extraordinary, to be used only where necessary and the Hansard first reading speech that my learned friend took the Court to actually makes the points about the inadequacy of powers being the reason for this and the only necessary powers being conferred as opposed to the wide range of desirable powers.

So purposes have already been considered. "To provide appropriate measures to ensure Greater Christchurch and councils and communities respond to and recover from the impacts of earthquakes. Community participation. The Minister and CERA to ensure recovery to enable a focused, timely and expedited recovery and (g), "To restore the social, economic, cultural environment or wellbeing of Greater Christchurch communities." So that focused on communities, and then, (h), "To provide adequate statutory power for the purposes stated in (a) to (g)."

Part 2, "Functions and powers to assist recovery and rebuilding." At the risk of stating the obvious, they are there to assist it not to do the whole thing. Community forum. The Court asked when the community forum first met. My instructions are that its first meeting was on 7 July 2011 and then section 7, the cross party forum, and my instructions are that the first meeting of that forum was on 3 May 2011.

**ARNOLD J:**
3 May –

**MR GODDARD QC:**
Yes, Your Honour, and 7 July for, of the same year for the community forum.

The functions of the Minister. These are – the only point I want to note about this is that these are functions for the purpose of giving effect to this Act. So these are the functions under this Act, they are not an exhaustive statement of the Minister's functions and, similarly, under 9, "The Chief Executive has the following functions for the purpose of giving effect to this Act." But of course both the Minister and the

Chief Executive had functions by virtue of that office from the moment they were appointed as Minister and Chief Executive even though that preceded briefly the enactment of this Act.

Section 10 is the provision I wanted to dwell on for a moment. Powers to be exercised for purposes of this Act. Subsection (1) is in my submission as Your Honour Justice McGrath said, no more than a restatement of the ordinary public law requirement. That power is to be exercised for the purposes of the Act.

Subsection (2) sets a higher threshold and this is where the point that these are additional powers, in some cases quite extraordinary powers that should only be used where it's necessary to do so comes into play. The Minister has – may exercise or claim a power, right or privilege under this Act where he or she reasonably considers it necessary. So before the Minister can do anything under this Act he, as he currently is, must form the view that it's necessary to act under this Act, and as the Court of Appeal said in *Independent Fisheries*, to exercise the particular power in question under the Act rather than some other less intrusive power, more intrusive, no, sorry, less intrusive power.

**ARNOLD J:**
There seems to be a sort of dysfunction between the purpose of the statement and section 3 and this confined view of the Act if I'll call it that or the supplementary power view of the Act, because when you look at the purposes they are stated quite broadly and on the face of it extend much more broadly than simply in relation to supplementary powers because they talk about appropriate measures to ensure that there's a response to an recovery from and so on and so on. So they seem to be taking a big picture view and you're – but the interpretation of the Act that you're advancing is a much more limited and specific one.

**MR GODDARD QC:**
Yes.

**MR ANTUNOVIC:**
A supplementary power one.

**MR GODDARD QC:**

Yes and I think when one reads those purpose provisions and when one reads the recovery of the strategy they do, on a first reading, sound very broad and wide ranging but then I think when one reflects on the context in which this legislation was passed and in the huge range of activities that the Crown was always going to undertake and that Parliament would have expected the Crown to undertake to support the recovery, it becomes quite clear that this could not be a comprehensive statement of everything that would be done and the examples that have been given by some members of the Court and in submissions, I think illustrate that very well. Central to an effective recovery must be the provision of ongoing justice services but it could hardly be sensibly suggested that this Minister would deal with that in a recovery plan or in the strategy. The provision of school facilities, enormously important part of recovery for the community.

**GLAZEBROOK J:**

But all of those are subject to statute because I'm sure under the Education Act 1989 there is all sorts of powers in relation to schools that are being exercised in this case, aren't they? We're not talking about the third source of power I wouldn't have thought.

**MR GODDARD QC:**

I think that – I haven't checked how much detail there is in the Education Act 1989, I'd be rather surprised if the provision, if the acquisition of temporary facilities, for example, for schooling activities, was –

**GLAZEBROOK J:**

Well, not expressly, but it must be certainly an implied power under the Education Act that if you're going to educate children there has to be somewhere to do that. And there are actually – actually, come to think of it, there are quite detailed provisions in there because, now I remember, because having been on a university council there are very detailed provisions there on properties, et cetera.

**MR GODDARD QC:**

But certainly, I was going to say, in relation to Court premises, for example, the steps that will have been taken by the Crown acting through the Secretary of Justice to procure those wonderful temporary building in which my learned friend and I had a

number of appearance in Canterbury, will not have been the subject of any expressed power and –

**GLAZEBROOK J:**

Well, again, I suspect that they're certainly implied powers. Because if you're told you've got to run a Court system – I haven't looked at the Act – but I'd be very surprised if there weren't express powers to, has building for that purpose.

**MR GODDARD QC:**

And in the same – that gets back then to –

**ELIAS CJ:**

They have to be gazetted under the Judicature Amendment Act 1972.

**McGRATH J:**

Mr Goddard, could I just – one thing that bothers me a bit about this, we're now dealing centrally with a policy to implement recover rather than some of these other specific areas you've been touching on, and we do have restrictions on the powers in section 10 in terms of "necessary", whatever that means. Now if the sort of general power of the Crown, if I can call it that to get away from controversy, wouldn't it be, if that's used, wouldn't that be avoiding the restrictions? And this is the sort of concern that the *de Keyser* had, that you cannot have a statute, a specific statutory provision, with protections for the citizen entailed in it. If you've got that, you can't allow the more general power to be used, because it would be to disregard Parliament's policy of restrictions in this area.

**MR GODDARD QC:**

And I think that's the central interpretation issue in this case, Your Honour, or at least on this limb of the case, because the question raised by cases such as *Attorney-General v de Keyser's Hotel* is whether the legislation was intended to regulate the exercise of powers in that field so that those things could only be done in the future subject to those safeguards, or whether it sits alongside the powers, and that's a question of interpretation. And it's –

**McGRATH J:**

I agree, but doesn't section 10(2) point fairly clearly to an implicit meaning, that that's, those protections are to be available in this area?

**MR GODDARD QC:**

No, Your Honour, in my submission the reason that those protections are available and that the power to issue a recover plan can only be exercised where necessary is because of the very significant legal consequences that follow from a recovery plan in this Act in terms of overriding other instruments. So –

**GLAZEBROOK J:**

Well, only if that's included in the recovery plan, isn't it?

**MR GODDARD QC:**

But then that raises the question, is it necessary to include in a recovery plan matters that can be done by other means? So, for example, the provision of grants to businesses to enable them to continue employment supports recovery, but it's not necessary to do that under a recovery plan because the Crown can do it simply by writing cheques, spending money, so that's an example of something which –

**ELIAS CJ:**

Well, is there any power though in this Act to provide that sort of assistance?

**MR GODDARD QC:**

No, not explicitly. So that raises the question of how wide are the recovery plans, are they confined to the exercise of powers in this Act or do they range more widely, as my friends argue to any measure of –

**WILLIAM YOUNG J:**

Well, they could be narrower than that, they could be intended to be confined to effect on the instruments referred to in sections 24 and 26, which are the only effects which they are specified as having?

**MR GODDARD QC:**

Yes, Your Honour, and that's why also we see in a recovery strategy a statutory part and a non-statutory part, because the statutory part has a range of significant legal consequences, people are required to act consistently with it, so that compulsion should be exercised only where it's necessary.

**GLAZEBROOK J:**

So where are they required to act consistently with it? Let's not – can we –

**ELIAS CJ:**

Do you want to go through any of the other provisions before we get there?

**WILLIAM YOUNG J:**

It might be best if we go through it actually.

**GLAZEBROOK J:**

I think so, because…

**MR GODDARD QC:**

So we've got section 11, recovery strategy, which must be developed by the Chief Executive, it's made by Order in Council, section 3, it's an overarching, long-term strategy, which may without limitation through provisions to address certain things, so it's not required to address those matters but it may. Now –

**GLAZEBROOK J:**

Well, I would have thought if you were going to say you don't rebuild somewhere, that's a must. I mean, it says "may" because you've no idea at the time of the Act whether there are going to be areas like that, are you?

**MR GODDARD QC:**

And no decision has been made on that yet.

**GLAZEBROOK J:**

No.

**MR GODDARD QC:**

But that's, I mean, that's not a decision that was being made by Ministers, that there would be no rebuilding and CERA –

**GLAZEBROOK J:**

Well, we've gone through that –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– and I don't agree, so let's just move on.

**MR GODDARD QC:**

I think it's just a timing…

**ELIAS CJ:**

Just looking though at 11, where the Chief Executive "must" develop a recovery strategy, that doesn't suggest that it's, it has to be – I mean, your emphasis on the powers being used where it's necessary, I mean, this makes it necessary but –

**MR GODDARD QC:**

It does, for a strategy, yes, unlike – and that's where –

**GLAZEBROOK J:**

Well, it also says it's an overarching long-term strategy for the reconstruction, rebuilding and recovery of greater Christchurch. That doesn't sound overly limited to me.

**WILLIAM YOUNG J:**

Yes, but I don't think the argument is that this was done without a recovery strategy, the argument is –

**GLAZEBROOK J:**

No, no, I understand that, but the argument is this is a supplementary thing that you can sort of make as narrow as you like and the only thing the recovery strategy does is override instruments –

**WILLIAM YOUNG J:**

No, no, the argument –

**GLAZEBROOK J:**

– well, that doesn't sound like it.

**WILLIAM YOUNG J:**

– the argument is it's the recovery plan to override instruments.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

Well, I'm sorry, I must have misunderstood. My understanding was that the argument – and I thought that's what you were in fact saying – that all that happens here is that recovery strategies and recovery plans, both of them, all they do is override existing instruments, they're no wider than that, which can't be the case for the recovery strategy.

**MR GODDARD QC:**

I agree, with relation to the recovery strategy.

**WILLIAM YOUNG J:**

I agree too.

**GLAZEBROOK J:**

All right, well, I must have misunderstood, I'm sorry.

**MR GODDARD QC:**

There's –

**ELIAS CJ:**

Well, and then you've got recovery plans that may be related to the recovery strategy. So why would you then confine recovery plans? Perhaps we need to see why you have confined those.

**MR GODDARD QC:**

So you've got this very broad statement of the scope of the recovery strategy. It has –

**ELIAS CJ:**

Which specifically identifies area where rebuilding –

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

– may or may not occur.

**MR GODDARD QC:**

But it also, the Act also contemplates that –

**GLAZEBROOK J:**

Well, the direction must specify the matters to be dealt with in the recovery plan for any, "Social, economic, cultural or environmental, any particular infrastructure, work or activity."

**MR GODDARD QC:**

Let me just finish, Your Honour, on recover strategies, and then I'll come in one minute to the plan. So the strategy has this broad scope but still not, in my submission, exhaustive of everything the Crown will do in the area to support recovery. There will be a range of measures that will be taken by the Crown outside it, but there are certainly a range of issues that are contemplated as being addressed, and this is a required document, so the necessity test doesn't arise in relation to whether or not you have a strategy, as Your Honour said, there must be one, Parliament has said so. But then we come to recovery plans –

**ELIAS CJ:**

But the most important thing, the right-up-front, is areas where building may or may not occur.

**MR GODDARD QC:**

Yes, and –

**ELIAS CJ:**

So doesn't that suggest – and I know that the plans can proceed ahead of the strategy and then be reconciled with the strategy – doesn't that indicate that the scheme of this legislation is that Parliament intended that there be some overall public strategy which will in particular identify where buildings may remain?

**MR GODDARD QC:**

And that is a long-term view, not a short-term view. So again, coming back to the question of whether –

**ELIAS CJ:**

I know, but in order to have a short-term – and that's why they permit a plan, even though you haven't yet got your long-term – but you've got to know what direction you're going in.

**MR GODDARD QC:**

But sometimes you have to do things before it's possible –

**ELIAS CJ:**

Yes, yes, and –

**MR GODDARD QC:**

– to know what the ultimate direction is.

**ELIAS CJ:**

– the Act permits that.

**MR GODDARD QC:**

It does, Your Honour.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

And the recovery strategy –

**ELIAS CJ:**

But it doesn't suggest, what I'm saying is it doesn't suggest that you can come up with a plan outside, for this, outside the statute.

**MR GODDARD QC:**

Nor, in my submission, does it suggest the contrary. I'm not arguing that this "could not" be the subject of a plan when one has enough information to start planning for the long term.

**ELIAS CJ:**

But you can do it on a tentative basis under this legislation.

**MR GODDARD QC:**

But the question is, are you obliged to? So I'm not arguing that it was impossible to have a recovery plan that provided for what would happen in these areas. If the Minister was satisfied that it was necessary to deal with those matters by means of a recovery plan, then it is within the scope of the statute.

**GLAZEBROOK J:**

But the Minister was definitely satisfied it was necessary to deal with these measures. That's what the whole Cabinet paper says. We have to deal with this. It's urgent. We've got to deal with it. So it was certainly necessary to deal with the content. Now, if you're saying having decided it's necessary to deal with the content, he can say, well, I'd rather not do it by a recovery plan. I'd rather do it some other way, then that is a relatively unattractive proposition.

**MR GODDARD QC:**

That's not how I would put the argument but that is the argument. The argument is that where a range of powers are available the Act is not intended to exclude other powers that existed before it was enacted and that under section 10 the Minister is required to turn his mind to whether it's necessary to pursue those measures by means of a recovery plan or not. This is –

**GLAZEBROOK J:**

So why wouldn't it be necessary to pursue them by way of a recovery plan? Because the only thing a recovery plan – I mean, he could have decided, and possibly did, that it was necessary to do them outside of the Act because he had to do them quickly, but I'm not sure that that gets him out of the Act.

**MR GODDARD QC:**

I think in relation to –

**GLAZEBROOK J:**

I think what you have to argue is that he has powers outside of the Act to do it outside of the Act.

**MR GODDARD QC:**

Yes, and that is my submission, that before the Act was passed he had powers to do these things and that the passage of the Act did not change that.

**ELIAS CJ:**

What do you mean, before the passage of the Act? You just say this is your common law power, you say.

**MR GODDARD QC:**

Yes. So if there was a major earthquake in Wellington next week and no similar legislation was passed, it would be open to Ministers to get Tonkin & Taylor to do the same sort of work in relation to Wellington. It would be open to Ministers to make an announcement that –

**ELIAS CJ:**

Because it's only providing information and not affecting rights?

**MR GODDARD QC:**

And announcing policy and so certainly in my submission the Minister will say, look, here is information about the state of the land. We think it's unlikely, for example, that Customhouse Quay is going to be salvageable but, you know, Northland is fine and we are going to – and our policy is to provide the following forms of support and we will work through the details of how that will be done and, in my submission, one thing that could be done, although it wasn't done here so I shouldn't let myself be distracted by it for long, is that a whole range of –

**ELIAS CJ:**

We're not dealing with that. We're dealing with we've got an Act. Does it occupy the field?

**MR GODDARD QC:**

That's the central interpretation. Obviously if there's no power absent the Act you don't reach that question. If there's no power outside the Act, if this couldn't be done in relation to Wellington –

**ELIAS CJ:**

Well, you're only saying that it can be done outside the Act because of the way you characterise what was done.

**MR GODDARD QC:**

Well, plainly what was done by Ministers on the 23rd of June was not done in the purported exercise of any power under the Act, that announcement. The only power to provide information in the Act is in section 30 and it's conferred on the Chief Executive. These provisions are quite neat examples of how the Act is supplemental. If we go back to 29, requiring information to be given, the Chief Executive made, by notice in writing, require any person to give the Chief Executive any information. Now, that's an additional power which can be exercised only where it's necessary, so the Chief Executive shouldn't exercise that power if someone is happy to provide that information voluntarily, for example, an obvious example. If it's not necessary to exercise the power, you don't exercise it. Section 30, dissemination of information, the Chief Executive may disseminate information and advice relating to work and activities in this Act. Why is that there? That's there because, not because otherwise the Chief Executive couldn't disseminate information. All Chief Executives can disseminate information relevant to their work. It's there because the Chief Executive has the power to require, compel information under 29 and there would be doubt about the ability to publish it in the absence of an express power. But again, the Chief Executive has to consider whether it's necessary to do so. If what's being exercised is this power, if the Chief Executive is simply providing information to assist the community in relation to responding to the earthquake, this power doesn't come into play so there are, in my submission, parallel powers, the power that the Chief Executive has in common with every other Chief Executive under the State Sector Act to publish information on behalf of the Crown, but also this additional power, which will be necessary where obligations of confidentiality and restrictions on the use of compelled information would otherwise arise.

So that and again commissioning reports and investigations on the face of it looks like a sort of provision that is inconsistent with where the departmental statutes report got to, but it's important because of the powers that are conferred, for example, in sections 33 and 34 to enter premises where a function is being performed under the Act, so this is linked to powers to enter, take samples, carry out investigations, for example, to go onto land and drill holes using cone penetrometers, so you can test the quality of the land. That, in my submission, is why we find provisions like this in here which would otherwise be unnecessary but again what you've got is a range of powers. The Chief Executive may disseminate information and advice, must exist in parallel with an ability on the part of the Minister, for example, to make public statements about earthquake recovery. It must exist in parallel with the ability of the

Prime Minister to speak about these matters. Parliament wasn't intending to make exhaustive provision for the way in which information about recovery would be provided to the public.

**ELIAS CJ:**

I'd really like us to look at the structure of these powers.

**McGRATH J:**

The way you put it, this being an exercise in conveying information, that seems to me to be key to your argument, but if the Court or some members of the Court were to take the view that the whole purpose of the rezoning exercise was really one of obtaining ownership of the land, clearing the area, controlling future use of the land, you're right into the central subject matter of the Canterbury Earthquake Recovery Act. Then it seems to me that you've got a problem with section 10 because the restrictions that are imposed there on the exercise of all powers by the Minister and Chief Executive will be avoided if a policy within that central theme of the Act is implemented outside of the statutory power. It seems to me that's just what Lord Atkinson was talking about in the passage from *Attorney-General v De Keyser's Royal Hotel Ltd* that's quoted by the Court of Appeal at paragraph 79. So I just want to put that to you directly and I don't want to get an answer back, please, about how he's just conveying information because there are other ways of seeing the true substantive nature of these decisions.

**MR GODDARD QC:**

However the decisions are characterised, in my submission, they are steps that could be taken in the absence of legislative authority. That's my first step.

**McGRATH J:**

Maybe.

**MR GODDARD QC:**

And it's a necessary step in my argument because otherwise you must be under the Act.

**GLAZEBROOK J:**

But as they are taken via the third source then if the statute covers the ground then that's irrelevant.

**MR GODDARD QC:**

So that's the next step. First of all, we have to do it in steps, basically.

**ELIAS CJ:**

Well, you don't have to. You could just jump to the statute and say does it occupy the field, because equally if it occupies the field you don't have a source.

**MR GODDARD QC:**

That's why when one looks at the scheme of the legislation and in particular the necessity test in section 10 and the very significant legal effects of these powers, so if we look at –

**ELIAS CJ:**

Depending what's in the plan, can we just – have you finished with your one?

**MR GODDARD QC:**

Yes, look at the plan provision.

**ELIAS CJ:**

Have you had an answer?

**McGRATH J:**

I don't think Mr Goddard has had a chance to fully answer it.

**ELIAS CJ:**

No, yes.

**McGRATH J:**

I really would like to hear what you say in response to that.

**ELIAS CJ:**

Yes, if you could answer…

**MR GODDARD QC:**

Of course. So the first step in my answer is that in the absence of this legislation these are steps that could be taken –

**McGRATH J:**

I understand that.

**MR GODDARD QC:**

– by Ministers. Then the question becomes the *De Keyser* question. Did Parliament, in enacting this legislation, intend to regulate those activities so that those things could only be done subject to the safeguards prescribed in the statute and the point that Their Lordships made in *De Keyser*'s *Hotel* was that a statute that provided for taking land with payment of compensation for defence purpose would be wholly undermined if the Crown could assert a prerogative power to take without compensation. It would have been an arid exercise, a pointless exercise, because you'd achieve exactly the same thing –

**McGRATH J:**

That's a fair summary.

**MR GODDARD QC:**

Exactly the same thing, but without the safeguard.

**McGRATH J:**

Yes.

**MR GODDARD QC:**

The reason that that analysis is not applicable here Your Honour is that the safeguards are included here because of the legal consequences that are attached to the invocation of these powers. It is because a recovery plan trumps resource management instruments that Parliament –

**ELIAS CJ:**

If it deals with zoning, if it cuts across them.

**GLAZEBROOK J:**

Well is it actually because if you're looking at the sequencing of rebuilding or other development, that doesn't have to cut across – I'm just looking at recovery strategies sorry, 3(a), the sequencing of building, isn't the public, to be able to come in and say we think the Cathedral should be done before the X, I pick the Cathedral because of the controversy over that, but that enables – and of course it wasn't anything to do

with the Government in terms of that in any event, but isn't that the purpose of this, to have public consultation on what people think, who live there, would be the best for their recovery, so that they don't have people coming in and saying, we think this is the best for your recovery, when in fact they might think something totally different, and that their views should be taken into account by whoever is making these overarching decisions. I mean this was controversial legislation because of the compulsory powers but also because of the need for public consultation, wasn't it? By the very people who are affected who might be thought to have some very good ideas on things like the sequencing of building, the location of future infrastructure, the nature of recovery plans?

**MR GODDARD QC:**
Yes, of course, the fact that action is taken outside the legislation doesn't meant that there cannot be consultation –

**GLAZEBROOK J:**
Well there wasn't here though?

**MR GODDARD QC:**
But there wasn't here and nor is there typically in relation to financial support for people adversely affected by natural disasters. That's not typically something that there's consultation on but –

**McGRATH J:**
Mr Goddard, can I just, I'm taking you back to the point where you gave your third step in answer. Isn't the problem here that under your theory of the law that outside of this Act these steps could be taken but it seems to me it may well be that although they don't legally override RMA instruments, they may make them inoperative in a de facto sense, and that therefore what was said in *De Keyser*, which you've accurately summarised about it being useless and meaningless for the law to be, allowed this to be done, when you have specific safeguards in the statute, has equal application.

**MR GODDARD QC:**
There are two ways the statute can be read. One, is consistent with my friend's argument, one is consistent with my argument. The reading that is consistent with my friend's argument has just been very neatly encapsulated by Your Honour, but in my submission it's wrong because it overlooks the supplementary nature of the

extraordinary powers conferred here. The absence of any express provision for the exclusion of any powers, and the absence of any proper basis for an implication that they are excluded, and the reason there's no proper basis for such an implication is that it makes perfect sense to say that the safeguards prescribed by this Act, attach to the significant consequences contemplated by the exercise of powers under this Act, and if you are not invoking those special powers, then those safeguards are not required. That's the argument.

**McGRATH J:**
I understand.

**MR GODDARD QC:**
That's the argument.

**GLAZEBROOK J:**
What about the more general point that it's for people of Christchurch to have input into what happens to the recovery, and to things like the sequencing of rebuilding, what zones are said not to be fit for building on?

**MR GODDARD QC:**
The strategy clearly contemplates dealing with those issues from a long-term perspective. The long-term decisions have not been made in relation to these areas yet and I think Your Honour –

**GLAZEBROOK J:**
That's why they have recovery plans before recovery strategies so that the plans can deal with the shorter-term in a way that's going to be consistent, hopefully, with the longer-term recovery plan, isn't it?

**MR GODDARD QC:**
Recovery strategy.

**GLAZEBROOK J:**
Recovery strategy sorry.

**MR GODDARD QC:**

Yes. Your Honour is assuming that there will be a more or less complete set of recovery plans sitting underneath the recovery strategy but there will be many things contemplated by a recovery strategy that will not be dealt with by a recovery plan because it's not necessary to do so. A good example, in my submission, would be 3(b) in the recovery strategy provision, the location of existing and future infrastructure. So consider, for example, telecommunications facilities, clearly that falls within 3(b). It's one of things that could be dealt with in a strategy but if what telecommunication service providers intend to do for commercial reasons is entirely satisfactory, then a recovery plan prepared by one of those network operators is not necessary and they will not be asked to provide one. So there are –

**ELIAS CJ:**

But they might be. I mean that's why I would like you to look at the structure of what is provided for her with the recovery strategy which must be undertaken and then the recovery plans which can anticipate the recovery strategy because is it not perfectly plausible that what Parliament has done here, and it's in part to respond perhaps as Justice Glazebrook has put it to you, to the human and social needs of participation by Christchurch people in how they are to recover from this earthquake. To proceed under planning instruments, and they say that they're planning instruments in subpart 3, in a way that hangs together so that, for example, although the only mandatory recovery plan is for the CBD, that may not, in fact, be the – if you look at the sections in sequence, that, in fact, may not be what is being provided for here because section 16 is express permissively because they have to decide whether they're going to get one or two local or responsible entities to do it for a particular area.

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

But there's no logic in having a recovery plan required for the CBD and no recovery plan for other areas unless the recovery strategy is adequate to deal with it. So isn't Parliament really saying, go ahead and come up with recovery strategies and plans in which there can be participation in the process and against which people can work out their lives.

**MR GODDARD QC:**

I think actually in many ways Your Honour the desirability of participation points against a range of issues being dealt with by recovery plans, because the normal consultative processes and appeal processes available under the Resource Management Act will be available – take decision-making in relation to a particular area in Waimakariri for example. If the Council is consulting its community, developing planning instruments, and making progress in a way which appears to the Minister to be wholly satisfactory, then the Minister can and, in my submission, must let the Council get on with it using the ordinary processes. The Council – if the Council is doing a good job on a particular issue the Minister cannot deal with that issue by a recovery plan and direct that Council to prepare a recovery plan on that issue because it's not necessary.

**ELIAS CJ:**

But if you're saying stop which is what the policy has been, stop, then surely that sort of strategy should be undertaken in the scheme that's provided for in this legislation?

**MR GODDARD QC:**

If you're mandating a stop, yes it is likely that it will need to be, for example, if there was a desire to stop the Christchurch City Council issuing building consents in the red zone you would need to exercise an appropriate power under this Act but that wasn't what was sought. There was a desire to change the way in which valuations were prepared in the last round. I haven't got time to go into that in any detail, but the mechanism that was used for that was the Order in Council mechanism for varying primary legislation provided for in section 71.

**ELIAS CJ:**

So was that used – we heard yesterday about a direction that was given to the Valuer-General was that –

**MR GODDARD QC:**

It's not a ministerial direction.

**ELIAS CJ:**

It's not a ministerial –

**MR GODDARD QC:**

My friend's language was perhaps a little bit vague there. It was a section 71 Order in Council which rejoiced in the name of the Canterbury Earthquake (Rating Valuation Act – Christchurch City Council) Order 2013 which introduced a modified method, that's a defined term in that order, by which valuations were to be conducted in Christchurch City and it's quite a complicated modified method that, for example, disregards earthquake damage to the specific building. So the rate, the Valuer-General didn't have to go round and look at each building and work out how damaged it was and it permitted market evidence to include market evidence of sales of the building plus insurance receivables. So there's a whole range of modifications but which still required the Valuer-General to take into account area wide impacts of the earthquakes, for example. So it's in itself quite an elaborate scheme but that's an example of action that was taken by ordering council to modify the Rating Act 2002 to enable a new valuation to be done. It's the second time the power had been exercised in relation to the Act. It was used the first time to defer the ordinary valuation, triennial valuation, and then to modify the way it would be carried out.

So coming back to my example of the local authority. I think this is an important step in understanding how the legislation works. There are a lot of actions that can be taken to support the recovery by local authorities, by the various other entities described as responsible entities in the Act which they can be expected to undertake without any interference by the Minister and on an appropriately consultative basis that involves their community.

What this Act does is say that if that's not working then the Minister can intervene using a range of powers graduated from recommending an Order in Council to modify legislation through recovery plan section 27 and certain other powers, to ensure that action is taken which does not cut across the recovery and which supports it but the expectation in the legislation is that those powers will only be exercised where it's necessary to do so and that otherwise business as usual will be allowed to continue.

**ARNOLD J:**

So what you're positing is the Government has a sort of recovery strategy, it has a range of tools available to it to implement that and only in a particular corner or segment of the overall strategy is it necessary to use the Act?

**MR GODDARD QC:**
Yes, exactly right. So the strategy will be very wide ranging and there will be a whole range of measures that will be necessary to make the strategy work. Some to be taken by the Crown and some to be taken by local authorities and some to be taken by, my friend said Telecom, but I think it will be Chorus now that has the infrastructure rather than Telecom, some to be taken by the local lines company, some to be taken by the transport agency.

Much of that activity, if it's proceeding in a manner consistent with the recovery strategy, will not be the subject of any recovery plan and, indeed, it cannot be because it's not appropriate for the Minister to intervene using the powers in this Act and the curtailed participation processes that for the most part are associated with the use of those powers. There is usually less participation under this Act Your Honour –

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
– than there would be under the Resource Management Act 1991, under the transport legislation.

**ELIAS CJ:**
But if it's not necessary to curtail the Resource Management Act then the plan presumably won't do so?

**MR GODDARD QC:**
Or there just won't be a plan because –

**ELIAS CJ:**
No there may well be a plan depending – well.

**MR GODDARD QC:**
But the question then becomes, why is it necessary? If everything –

**WILLIAM YOUNG J:**

Can we just look at that context. Let us assume that the Minister said, "Okay I'll do this via recovery plan which will, inter alia, amend the Christchurch District Plan as to these areas and I will direct someone to prepare a plan that addresses these. Now that someone could logically be the City Council or it could be the director – the Chief Executive, those are the only likely candidates I think.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

Now the City Council might say, "Well it's not necessary to do so because we're doing an absolutely fantastic job and we're quite happy to supply infrastructure or whatever," that would be one response and, or alternatively might say, "It's not necessary for you to appoint the Director-General because it's our plan, we know all about it and we want to do it." Those are possible responses.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

But the development of the plan would be in the hands of whoever was directed to perform it.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

So the Minister wouldn't be saying, would be saying what it can cover but is not saying what must be in it.

**MR GODDARD QC:**

The Minister defines the subject area and the Minister defines the process but the Minister can't tell the agency preparing it what to include in it. The Minister can say, "I'm not going to approve this."

**WILLIAM YOUNG J:**

Or approve it with amendments but there may be difficulties if the amendments completely go, are inconsistent with –

**MR GODDARD QC:**

Yes I think what –

**ELIAS CJ:**

Twenty-one is it?

**MR GODDARD QC:**

Twenty-one permits –

**WILLIAM YOUNG J:**

So it might be a clunky way to prepare a policy that actually originates with the Minister and is to be implemented by the Minister.

**MR GODDARD QC:**

Yes, and moreover, if the result of the recovery plan was that certain activities were prohibited in an area then under the Act what would cut in is section 67 which provides that nothing in this Act apart from the sub part of sections 40 and 41, confers any right to compensation or is to be relied on in any proceedings as a basis for any claim to compensation.

**WILLIAM YOUNG J:**

But the Minister wouldn't – would then have to, once the plan was promulgated, resort to sections 27 and 48 to give effect to things that can't be done in a planning instrument, for instance, stop the existing use rights and direct councils not to provide infrastructural utility services and so on.

**MR GODDARD QC:**

Exactly Your Honour, so a recovery plan can do certain things but not other things. If what the Minister wanted to do was say, “Stop, don't build infrastructure,” that would have to be a section 27 step. If the –

**WILLIAM YOUNG J:**

But if the Minister doesn't want it to stop then he can't use section 27 I guess.

**MR GODDARD QC:**

Exactly, and that's why the High Court Judges' approach to say that this should have been done under section 27 just can't, as I say, be right and my friend is no longer, I think, pursuing that argument nor does my friend suggest that the recovery strategies are the tool, rather the argument now is that this could only be done by a recovery plan, but in my submission –

**ELIAS CJ:**

Well it could have been by a recovery strategy but it seems to be accepted that a recovery strategy wasn't a practicable option because of the time it would take, so therefore the only instrument that was available was a plan.

**MR GODDARD QC:**

My friend has to argue – in order to argue that it had to be done under the Act my friend has to suggest the vehicle by which it had to be done.

**WILLIAM YOUNG J:**

Well it could be done – if you conflate the Minister and the Minister – the Cabinet and the Chief Executive then it could be done under sections 30 and 53.

**MR GODDARD QC:**

Yes, although there is –

**WILLIAM YOUNG J:**

They disseminate information – I mean I know that's conflating the Minister and the Chief Executive.

**GLAZEBROOK J:**

And it's also accepting it is just the dissemination of information rather than the setting of zones.

**WILLIAM YOUNG J:**

Yes. Well it's true.

**MR GODDARD QC:**

So there's a range of ways in which that might not work. So –

**ELIAS CJ:**

But what bothers me is that Parliament has set out this mechanism to enable people to have a say, set up strategies that people can test the decisions they're making against. What's the – why should that be evaded?

**MR GODDARD QC:**

I don't think there's an argument that the strategy provision is being evaded. It's accepted by the appellants that it was, there could well be action that was more urgent than the anticipated timeframe for preparing a strategy and that it's consistent with the Act for steps, potentially significant steps, in terms of recovery plan, section 27 powers, to be exercised in the shorter run. So there's no argument that it was an error of law not to do a strategy first. Nor is there any more an argument that this should have been done under section 27. The argument in relation to the statute is that what was done, however characterised, in relation to the red zones, had to be done pursuant to the recovery plan machinery, and my submission on that is that the Act does not contemplate that recovery plans will occupy the field. There will be a huge range of work, much of which may ultimately be contemplated by a recovery strategy, but it didn't have to be in June.

**ELIAS CJ:**

But that can be accepted. There can be other powers that are exercised which are not inconsistent with a recovery plan. But what is the purpose of shutting out the public process that is envisaged in terms of some overarching document? The Minister can say what is to go in it, what is to be addressed by it, by the plan. Why is this not what Parliament contemplated? Why is it Cabinet's strategy rather than the strategy Parliament contemplates in the Act?

**MR GODDARD QC:**

That these issues could be dealt with in the strategy is not in issue. But it's also common ground –

**ELIAS CJ:**

Yes. And it could be dealt with in a plan.

**MR GODDARD QC:**

But it's also common ground that it didn't have to be dealt with in the strategy before steps of this kind could be taken in June 2011. That's common ground, that there did

not have to be a strategy first before these things could be done. It's also, I think, accepted, at least tacitly, to say that section 27 was not the right tool. So then the question comes, could these things be done only by invoking the recovery plan machinery? And in my submission it is clear from the scheme of the legislation that apart from the CBD recovery plan it is a matter of exercise of statutory discretion as to whether there should be recovery plans on other matters. That their Minister has been directed by Parliament that a recovery plan should be prepared only where it's necessary, and as the Court of Appeal said in the *Independent Fisheries*, what that means is that the Minister needs to turn his mind, among other things, to whether there are other mechanisms which are available which are more appropriate.

**ELIAS CJ:**

My point is that it is possible to read the scheme of the Act as making it necessary for planning instruments under subpart 3 to be adopted. Before you can do plans like zone areas as stop areas.

**MR GODDARD QC:**

And…

**ELIAS CJ:**

That you can look at the scheme of the legislation to say it's necessary.

**MR GODDARD QC:**

Yes. That comes back to that central interpretation issue that I identified in response to a question from His Honour Justice McGrath earlier, which is, do you read the Act as saying, as contemplating that matters of this kind must be dealt with by the recovery plan mechanism? Or do you read it as providing additional tools over and above the existing tools to enable hurdles that would otherwise exist to be overcome? And in my submission the better reading of the Act is the second one. That this was not an – there was no Parliamentary intention to regulate what could have been done without the support of the Act. Rather there was a Parliamentary intention to confer necessary powers to ensure that where other powers were inadequate, where other powers were insufficient, those hurdles could be overcome, and that's apparent I think from the Minister's first reading speech.

**ARNOLD J:**

Can I just go back just quickly? You made the point that apart from the CBD the Minister has a discretion as to whether he or she orders or requires the development of a recovery plan.

**MR GODDARD QC:**

Yes.

**ARNOLD J:**

But in fact the presence of the discretion is not critical to your argument at all because, as you've said, it is a requirement to develop one of the CBD and, I don't know, I assume there were areas of the CBD that were red zoned, but you would say it doesn't matter?

**WILLIAM YOUNG J:**

I don't think there are, are there?

**MR GODDARD QC:**

No, because that was being dealt with under a separate mechanism, under this recovery plan. So the red zones didn't –

**ELIAS CJ:**

They didn't have to call it a red zone, because they had a recovery plan.

**WILLIAM YOUNG J:**

But I don't think there's many red-zoned, have there, is there?

**MR GODDARD QC:**

There are no red zone areas inside the CBD. Yes.

**ELIAS CJ:**

But that's because it's subject to a recovery plan.

**WILLIAM YOUNG J:**

No. Because – just there's no area that you can't build on.

**ELIAS CJ:**

Oh, I see.

**MR GODDARD QC:**

The same issues –

**GLAZEBROOK J:**

It was just the buildings I think that were difficult rather than the…

**ELIAS CJ:**

I see, I see.

**MR GODDARD QC:**

The same issues don't arise. But…

**ARNOLD J:**

So there are no – I see, there are no – there may be residential bits in there or residential buildings but they're all capable of being –

**ELIAS CJ:**

The land is not…

**ARNOLD J:**

The land is fine.

**MR GODDARD QC:**

I think that's right but I'm not 100% sure that's right. I would have to come back to Your Honour on that after having confirmed that.

**ARNOLD J:**

But anyway, I mean consistently with your argument you could, if it was necessary, red zone an area in the CBD without having a recovery plan. That has to be your argument, doesn't it?

**MR GODDARD QC:**

Yes. That might well be overtaken by the preparation of the mandatory recovery plan which would then deal with what happens next.

**ARNOLD J:**

Later in the piece.

**MR GODDARD QC:**

And that remains a real prospect for the other red-zoned areas as well. As I mentioned to the Court earlier, there is an engagement process in relation to the future of the red zone. One outcome which is contemplated for that is that a recovery plan may be issued in relation to some or all of the red zone. Preliminary consultation is happening. So again I want to –

**GLAZEBROOK J:**

But that still doesn't help the people who have moved out of the red zone. So I don't see how that can affect the issue of public consultation for people who are affected by a particular decision.

**MR GODDARD QC:**

What it means is that the appellants need to successfully argue that measures of this kind which do not involve final decisions on where rebuilding will happen, final decisions on infrastructure and area, decisions that reflect interim states of affairs –

**GLAZEBROOK J:**

Well –

**MR GODDARD QC:**

– must also be made pursuant to a recovery plan. And that's not, in my submission, something which is squarely contemplated by the Act.

**GLAZEBROOK J:**

Well what about section 16(2)? Why is that not sufficient to suggest that they're not having a very restrictive view of recovery plans? If, "any social, economic, cultural, or environmental matter: any particular infrastructure, work, or activity."

**MR GODDARD QC:**

And –

**GLAZEBROOK J:**

Why is that long term or – doesn't – that not interim or…

**MR GODDARD QC:**

But its breadth, Your Honour, supports my submission that it's not every purpose for which a recovery plan may be used that it must be used. There will be large quantities of infrastructure, many works, many activities, in respect of which there will be no recovery plan even though they make a significant contribution to the recovery of Christchurch and that's because they can be perfectly sensibly undertaken without resort to a recovery plan.

**GLAZEBROOK J:**

That might be right, but usually with public participation that's greater than under care, whereas your argument is that even if you get around the public participation altogether by taking a decision outside of the Act that that's perfectly okay. I mean, I can understand the argument that says, well, if the council has already got a consultation process that's actually much better or if you have an individual building and you have a consultation process because it's publically notified in some way, but to say, well, it's still perfectly all right to circumvent the very limited public participation that's allowed through this Act, on the very matters being whether where you rebuild in sequencing that are actually part of the recovery strategy and can be part of the recovery plans that come underneath it.

**MR GODDARD QC:**

There are questions that will arise for the Minister in relation to considering a possible recovery plan, first of all about whether one is desirable and has to at least be desirable as compared with the alternatives, but then the Minister has to go further and say that it's necessary for the purposes of the Act.

**GLAZEBROOK J:**

Well, this, the Minister says, was absolutely necessary for the recovery of Christchurch. That's the whole basis of making that decision, so it's difficult to see that it's not necessary.

**WILLIAM YOUNG J:**

The question is whether it's necessary to do it by way of plan.

**GLAZEBROOK J:**

Well, I can understand that argument but it's not terribly – if it's necessary for the recovery of Christchurch then why don't you use the mechanisms in the Act?

**MR GODDARD QC:**

The other reason that the Minister acted in the way he did, providing information the day after the Ministers with power to act met and proceeding apace with the offers was the urgency that the Minister identified of acting and one of the factors that must be relevant to whether it's necessary to exercise a power is whether the exercise of the power will achieve the purposes in a timely way. There's a lot of references to timeliness of recovery and it would not be necessary for the purposes of the Act to use a mechanism that would involve a timeframe before a certainty was achieved that actually cut across those purposes.

**GLAZEBROOK J:**

But hadn't they dealt with that by allowing truncated timeframes in the Minister to set that out and only written submissions?

**MR GODDARD QC:**

What I think is the Minister has here considered is that these matters were so urgent that they couldn't even wait for the next Cabinet meeting on the following Monday. It was necessary to make the decision on a Wednesday and announce it on a Thursday in order to provide people with the necessary certainty and confidence. If that's right –

**ELIAS CJ:**

Well, they could have made the announcement. They could have directed the creation of a plan.

**WILLIAM YOUNG J:**

It might have been predetermination.

**GLAZEBROOK J:**

Well, you may have had to provide the information in a slightly different way.

**MR GODDARD QC:**

But what it seems to me certainly could have been done on that theory is to say this is – if these criteria are adopted then this is what our engineers tell us about the different areas in Christchurch and we now want to consult on what the appropriateness of the criteria, the way in which they've been applied, and what action gets taken as a result.

**ELIAS CJ:**

On whether rebuilding may or may not occur.

**MR GODDARD QC:**

But Ministers didn't want to consult on that because they want to wait to make that decision until the seismic activity settles down and until more is known about the land, so explicitly Ministers did not at that stage make and did not think they were in a position to make decisions about whether rebuilding would occur in this area.

**GLAZEBROOK J:**

They certainly made decisions they wouldn't recur in the area in the short to medium term, didn't they? They said so.

**MR GODDARD QC:**

They made decisions that it wasn't practical to do so. They didn't stop it. They could have exercised powers if they thought it was necessary. They didn't think it was necessary. I think we …

**ELIAS CJ:**

What other provisions of the Act do you want to take us to?

**MR GODDARD QC:**

I'm conscious that it's 4 o'clock. How does Your Honour want to proceed in terms of timing?

**ELIAS CJ:**

I think perhaps we should sit until 4.15 but I can't sit after 4.15. Carry on.

**MR GODDARD QC:**

Is, with a view to my finishing my submissions overall by 4.15?

**ELIAS CJ:**

Then we'll assess it.

**MR GODDARD QC:**

Yes, Your Honour.

**ELIAS CJ:**

You should take the time that you need.

**MR GODDARD QC:**

Thank you, Your Honour. So the consequences of a recovery plan, the process is set out in the sections 19 and 20. There must be, at the least, a public notification and a submissions process and then the Minister decides whether or not to approve a recovery plan and whether or not to make amendments to it and must give reasons for doing so. Then they must – any plan that's approved must be gazetted. Now, that certainly can't be done in the sort of timeframe within which Ministers were seeking to provide certainty in this case.

**ELIAS CJ:**

But why didn't they issue a direction under section 48 and set up a plan or something like that? I just don't understand that the need to move urgently meant that they had to …

**MR GODDARD QC:**

But they didn't want to stop the council taking any action. Section 48 directions are only councils and council organisations.

**ELIAS CJ:**

I know, but what I'm saying is that if the dealing with the immediate urgency was the critical thing, there was stopgap measures that could have been adopted while a plan was undertaken.

**MR GODDARD QC:**

I don't quite understand how any of those measures would have provided the confidence to people in the green zone that Ministers sought to provide. I think that's a fundamental objective of this decision which could not have been achieved sensibly using any power in this Act. Anything that left that up for grabs, they said we're not sure, maybe you can, maybe you can't, let's consult on it.

**ELIAS CJ:**

Well, what would have – it could have been by specifying that the plan would be confined to those areas on which a preliminary view had been taken that they were

unsuitable in the short to medium term for redevelopment, therefore releasing the so-called green zone.

**MR GODDARD QC:**
And making appropriate statements about the ability to rebuild with confidence in the green zone to get people underway, which implicitly flags, as Your Honour put to me earlier –

**ELIAS CJ:**
That's not a problem.

**MR GODDARD QC:**
If that could have been done, and that's at least part of the announcement, that didn't require and it wouldn't naturally fit within the Act, then we get to the orange zone, what was supposed to be done about that, Ministers' position on that was that they didn't know what should happen there, so they didn't want to direct the preparation of a plan for other contingencies. That was a work in progress. If they'd confined it to the red zone, then all the consequences that are complained about in relation to identification of particularly damaged land on which it's not sensible to rebuild would have flowed anyway. I'll need to deal with that briefly at some stage.

So once the plans are approved, then those plans have certain consequences. Section 23, councils mustn't act inconsistently with them, but that wasn't an issue. There was no question here about councils acting consistently or inconsistently with what was proposed. 24, councils to amend documents if required, but that wasn't something that Ministers were seeking to achieve. They didn't want any documents amended. Section 26, relationship to other instruments. Certain instruments which must not be inconsistent with the recovery plan. Again, the decisions that were made didn't raise issues of inconsistency with those documents which required them to be read under subsection 3 subject to the decision that was made, so this also is not a consequence that was sought to be pursued.

So we've looked at the consequences of a recovery plan, that councils mustn't act inconsistently with it, that certain documents to be amended by councils and that it trumps a range of instruments, not just council plans but also transport, conservation, wildlife plans, things like that. None of those were consequences which Ministers were seeking to bring about. So the argument that this is the tool that should have

been used requires the appellants to argue that it should have been used even though none of the consequences prescribed by the Act for that instrument were relevant to what Ministers were trying to achieve.

**ELIAS CJ:**

Well none of those consequences need have been an outcome of a plan.

**MR GODDARD QC:**

My submission is that you only use a recovery plan where you want to bring about these consequences.

**GLAZEBROOK J:**

Well it may be that after consultation they decided that they would bring in these consequences.

**MR GODDARD QC:**

There's no suggestion that any objective was sought to be pursued in relation –

**GLAZEBROOK J:**

No, no, it's not the Minister's plan, it's a plan that's made by whoever is given the task of doing so after public consultation and, presumably, after public consultation all sorts of decisions could have been made. But it's not –

**MR GODDARD QC:**

But, I mean if there was no – there has to be at least, in my submission there has to be at least a contemplation that consequences of this kind may be appropriate before it can be necessary to put in train the machinery for preparation of a recovery plan.

**ELIAS CJ:**

But they may be appropriate.

**MR GODDARD QC:**

Ministers didn't have the view that they may be appropriate.

**ELIAS CJ:**

Well they still haven't ruled them out.

**MR GODDARD QC:**
And that's why there could still be a recovery plan.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
But that didn't mean that there had to be one before taking the steps that were taken in June 2011. It's why a recovery plan still can't be ruled out, Your Honour's right. That's why in my submission a recovery plan to deal with this red zone land is still a real possibility for down the track. It's not the case that the bus has been missed it's the –

**ELIAS CJ:**
But there's a fait accompli.

**MR GODDARD QC:**
A fait accompli that was accompli by the earthquakes not by Ministers. They were recognising not accomplishing and in the three minutes left today what I then want to draw attention to is section 27 which confers a range of powers to suspend, amend or revoke a range of instruments including RMA documents and bylaws and other matters and that includes, as my friend pointed out in subsection (2), "The ability to suspend of cancel existing use rights." Subsection (7) emphases, "That no compensation is payable under this Act in respect of any action taken under this section." And it follows in my submission that it would be inconsistent with the scheme of the Act for a recovery plan to provide for such compensation to be paid. So to the extent that uses are going to be constrained with compensation are the mechanisms required.

Then lastly, subpart 4. The further provisions, the ability to – now these are a range of powers conferred on the Chief Executive in the next few paragraphs. "The Chief Executive can require information to be provided. Can disseminate information, commission reports and create investigations and has certain powers exercisable in connection with those functions under the Act."

Section 30 the Court of Appeal spent some time discussing and I think tentatively accepted the submission I made that that can't be intended to occupy the field in

relation to the provision by the Crown of information to Canterbury residents in relation to earthquake recovery. That the last thing that the Government thought it was doing in promoting this Bill was to limit the ways in which Ministers could communicate with the public about the earthquake. That's inherently implausible and there's nothing in the legislation to support such a conclusion. That again underscores the parallel nature, supplementary nature of these powers.

There's a range of powers in paragraphs 38 onwards about carrying out works and demolition, the limited circumstances in which compensation will be paid. Sections 40 and 41, certain demolitions and damage to property caused by demolition. A power in 44, "To erect temporary buildings despite any other enactment." So again that's not a power that otherwise exist. "Restricting or prohibiting access to areas, closing and stopping roads and consequential offences."

Section 48 which Your Honour has referred to. "Directions to stop or take stopping action directed to a council or council organisation with certain limits." Can't direct it to rate, for example, and then the flipside of that positive direction, "That it perform a function in 49 and if the council doesn't deliver the ability to call in that power under 50."

Then 52, "Power to direct an owner to act for the benefit of a adjoining or adjacent owners. A power conferred on the Chief Executive they wouldn't otherwise have."

53, "The power that was exercised to make the offers here acquiring or disposing of property. The Chief Executive may in the name of the Crown purchase or otherwise acquire land and personal property." My friend accepts that this is not exhaustive of the Chief Executive's power to purchase property, that, for example, stationery can be purchased without forming the view that it's necessary rather than merely desirable and that must be true. This Chief Executive can't be less able to provide premises and material and publish information by premise of the material than others.

And then there's the compulsory acquisition provisions in 54 through 59 and subpart 5 which is concerned with compensation. "It applies only where land is already acquired under the Act or compensation is payable under section 40 or 41." It sets out a special procedure for compensation and then 67 which I mentioned earlier says, "No compensation except as provided by the Act." Limited appeal rights –

**ARNOLD J:**
So the compensation under the section 64 is market value and that's current market value.

**MR GODDARD QC:**
Yes, so that would be less generous than –

**ARNOLD J:**
Yes.

**MR GODDARD QC:**
– it doesn't apply because there wasn't a compulsory acquisition.

**ARNOLD J:**
Yes, no, no, I know.

**MR GODDARD QC:**
But if it did it would be less generous.

**ARNOLD J:**
Yes, so in its earthquake damaged state.

**MR GODDARD QC:**
Yes.

**ARNOLD J:**
Yes.

**MR GODDARD QC:**
And 67 again expressly says, “No compensation except as provided by the Act.”

So appeal rights and then finally in subpart 7, the delegated legislation power which is the most far reaching power here which enables orders and council to override a long list of Acts in subsection (3) and the safeguards that attached to that are set out in the following provisions.

**McGRATH J:**
Sorry, where's that?

**MR GODDARD QC:**
Sorry Your Honour. Section 71 –

**McGRATH J:**
Yes.

**MR GODDARD QC:**
– orders in council may on the recommendation of the Minister and they can modify, extend provisions of an enactment for various purposes. And then there is a long list in subsection (3) of enactments.

**McGRATH J:**
Yes.

**MR GODDARD QC:**
Including (p) the Rating Valuations Act 1998 which is the one in respect of which that power has been exercised a couple of times. And there's a review panel in 72 which reviews orders in council of this kind and makes recommendations about them.

I don't think there's anything else – in section 88, a quarterly report on the operation of the Act and 93, expiry of the Act on the close of the day that's five years after the date of its commencement and all the orders in council made under 71 drop away at that point.

That's the Act, it's after 4.15. I don't have much to say but I do have more to say. How does Your Honour want to proceed and what shall I communicate to the Court of Appeal?

**ELIAS CJ:**
I think we have to press on with this Mr Goddard. How long do you think you'll be because we could start early tomorrow at nine?

**MR GODDARD QC:**

I don't think I need to deal with anything except the distinction that was drawn now and relief, so that's items 335 on my roadmap. I think I've said about as much as I can about the relationship of the Act to what was decided and whether what was decided could be done outside it.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So what I need to deal with now is the question of whether there was any, whether it was open to Ministers to take into account insurance status in making the decision or whether it was unlawful to do so for any of the reasons identified by my friend and then the question of interference with rights and the question of relief.

**ELIAS CJ:**

Yes, well I think we should resume at nine tomorrow, does that suit you?

**MR GODDARD QC:**

That would be fantastic Your Honour.

**ELIAS CJ:**

Yes, and then we'll carry on with the reply.

**MR GODDARD QC:**

Perhaps if I could have leave then to depart after I finish and dash up the road.

**ELIAS CJ:**

Yes, I'm sorry to put you under that pressure.

**MR GODDARD QC:**

No, no I am sorry I have been so long but it is an urgent matter that I'm in there too because it relates to some decisions that will come into force on 1 December and having begged the Court to allocate an urgent fixture it seem – if I can possibly turn up for it I think that would be better received.

**ELIAS CJ:**

Yes, well the presiding Judge is aware that we are exercising some sort of right.

**MR GODDARD QC:**

A sort of recovery plan override, Your Honour.

**ELIAS CJ:**

Yes, yes, without consultation.

**MR GODDARD QC:**

I think there is probably a statutory power in the Act. There's a specific one in relation to the power of the Courts to extend and shorten time, section 82. I think Your Honour could probably make it so.

**ELIAS CJ:**

Thank you, we'll invoke that. All right, we'll retire now, thank you.

**COURT ADJOURNS:4.21 PM**

**COURT RESUMES ON THURSDAY 31 JULY 2014 AT 9.01 AM**

**ELIAS CJ:**
Yes, Mr Goddard.

**MR GODDARD QC:**
Your Honour, in an endeavour to bring sharp focus to what I'm going to cover and to make sure that I don't absentmindedly slip into telecommunications –

**ELIAS CJ:**
Is this is?

**MR GODDARD QC:**
I've provided a note of the remaining things I'm going to say.

**ELIAS CJ:**
Are you first up?

**MR GODDARD QC:**
I am, I'm afraid.

**ELIAS CJ:**
Oh, I'm so sorry…

**MR GODDARD QC:**
No, no, I'm deeply grateful for the informal communications between the registries, which have meant that the Court of Appeal is starting at 11, it should mean that I can take – I'm aiming for 20 minutes, realistically it means I'll take 30, my targets are always missed, and then I should be able to listen to most of my friend's reply. But I should perhaps say, in case it's necessary for me to slip away, I hope the Court doesn't mind.

**ELIAS CJ:**
That's fine, yes, thank you.

**MR GODDARD QC:**

I should also perhaps mention, Ms Casey has asked me to mention that Mr White is unable to be here this morning.

**ELIAS CJ:**

Yes, thank you.

**MR GODDARD QC:**

So, I'm going to quickly wrap up where I think I landed on the June 2011 decisions and the application of the statute, and deal with my learned friend's four key propositions. One point, one really summarises what I was trying to say in a rather more roundabout way at the end of yesterday. The key issue is whether the Minister had to invoke the recovery plan power before making the announcements of 23 June and implementing the policy of acquiring or making offers for red zone properties. In my submission it wasn't necessary to use the recover plan power, first, because none of the consequences of such a plan that are provided for in the Act were within the contemplation of the Minister.

Second, the Minister didn't want to exercise coercive powers, a positive choice had been made by Ministers to provide residents with a choice, using a mechanism that was not of a kind contemplated by the Act, and which would enable them to receive more for their properties than was contemplated by the Act, the coercive powers, other than compulsory acquisition involving no compensation and compulsory acquisition power involving acquisition at market value, which Ministers expected would, in most if not all cases, be substantially less than the 2007 rating valuation.

Third, and very importantly, the timeframe within which Ministers considered – reasonably in my submission considered – that an announcement should be made and certainty provided, one of the key goals that comes through in the paper and in the Minister's affidavit, were not consistent with use of the recovery plan power. The Act didn't require Ministers to act with less urgency than they reasonably considered necessary, reading the Act in that way would be contrary to its purpose, which was to facilitate recovery, not to impede it, and I've referred in particular to the limb of the purpose provision which talks about community participation without impeding the prompt recovery.

And, fourth, it's wrong to think of this as a decision not to address rebuilding and infrastructure provision and other such matters in these areas. The development of a recovery plan to address those matters remains very much a live option, it hasn't been foreclosed and, indeed, as I mentioned yesterday, it's been positively foreshadowed in decisions that have been made.

So, for all those reasons, the Minister didn't consider, did not in fact consider that it was necessary or even desirable to propose a recovery plan in order to identify the residential red zone and announce the relevant offers, and in my submission that view was open to him. If it was open to him then it wasn't an error of law to refrain from proceeding in that way. That deals with my friend's argument that common law powers weren't available because Parliament had legislated in this field and the only avenue for action was under the Recovery Act.

His next argument was that use of common law powers is excluded where there's existing positive law. The short point here – still with a little more detail in my written submissions – is that the decisions were not inconsistent with any other laws, there was no inconsistency with the Resource Management Act, no inconsistency with the Local Government Act, the steps that were taken did not affect the operation of either of those statutes.

The next point made by my friend was that common law powers were excluded if there's interference with rights and liberties recognised under law. There are two difficulties with that argument. The first is that common law powers are not excluded by unincorporated international instruments, although there may of course be relevant considerations in exercising the powers. This is where he picks up Your Honour Justice Glazebrook's question to my friend, what is the interplay between the common law powers and international instruments that haven't been incorporated. Where legislation – and it comes back partly to the *de Keyser's Hotel* analysis – the Crown has certain powers, they may be excluded where Parliament legislates in a way that occupies the field, because you can't evade the safeguards that Parliament has provided, in relation to the activity governed by that legislation. Where the legislation has not occupied the field, then the common law powers remain, it's not the case that international instruments alter the law of New Zealand in our dualist system, displace a legal power that would otherwise exist, but of course consistent with the jurisprudence that the Court has developed where decisions are being made in an area that is the subject of an unincorporated international

instrument, at least where there's some recognition of it – and this is my friend's point I think – where it's recognised under law, then that may be a relevant factor, and in some cases, depending on context, even a mandatory relevant factor, it depends on the instrument, it depends on the context.

**GLAZEBROOK J:**
Or – sorry.

**ELIAS CJ:**
I was just going to say it may be relevant to necessity, to an assessment of necessity, for example.

**MR GODDARD QC:**
It can in – but that's of course relevant to a statutory appraisal rather than the existence of a power, but Your Honour's absolutely right, the jurisprudence establishes that in exercising statutory powers international instruments may well be relevant, and my friend, Ms Casey, has identified the reference to economic, social and cultural rights in the legislation and the fact that that echoes, and not by accident, ICESCR, so in exercising statutory powers and deciding whether or not they should be exercised, that may well be a relevant factor. I was making the separate point, which my friend sought to go further and say these powers simply drop away, they just do not exist, they cannot be exercised where there is, where that would, in his words, "Interfere with rights and liberties recognised under law but not actually," sorry, Your Honour…

**GLAZEBROOK J:**
No, no – as I understood his argument, it was going further than relevant consideration in saying that the powers have to be exercised consistently with the international instruments, so that if they weren't exercised consistently – and there is that debate as to whether they're mandatory relevant considerations or exercised consistently. For myself I think they mean the same thing, in the sense that if they're said to be mandatory relevant considerations, then that is because that is all they are in terms of the international instrument at play, so the Convention on the Rights of the Child says it is "a" rather than "the" most important consideration. So I just, I'm saying that I'm not entirely sure that his argument was that you, that they're excluded it's just that if you can't exercise them and aren't exercising them consistently with those international instruments then they can't be exercised in that way.

**MR GODDARD QC:**

Whether there is any difference between “must comply” and “mandatory relevant consideration” probably turns on the nature of the instrument –

**GLAZEBROOK J:**

Exactly.

**MR GODDARD QC:**

– and the sort of, and the way it operates which I think is exactly Your Honour’s point.

**GLAZEBROOK J:**

Yes.

**MR GODDARD QC:**

I accept that but if we are talking, for example, about the ICESCR rights, given the structure of that convention and the way that it operates I don't think that it can ever be more than an important factor to be taken into account. Sometimes as a matter of discretion and other contexts as a matter of obligation but there will still be a balance process. There are more difficult issues with applying ISCESR requirement here because of all the other initiatives taken to address to housing that I've mentioned in passing a few times, but I don't think, I don't anticipate that it's going to be necessary for the Court to finally resolve these issues in this case –

**GLAZEBROOK J:**

No.

**MR GODDARD QC:**

– but I didn't want to leave it without some comment because I did understand my friend to go further and actually say the power was wholly excluded and that was, I think the name she used, of common law power is excluded if there is interference with rights and liberties recognised under law and I wanted to pull that back a bit.

And the second reason that that argument can't succeed is that the decisions didn't interfere with any relevant rights or liberties, any that are squarely raised by the proceedings and capable of being assessed in these proceedings certainly and I will come back to that when I deal with that issue in a moment.

And last his fourth point was a submission that common law powers can't be used to implement measures of a governmental character. There is no legal basis for the suggested restriction on use of common law powers to implement measures of a governmental character. They are often used for such purposes and practice in New Zealand and modern legislation in relation to the operation of various agencies if the state assumes that these powers are always available without being expressly conferred.

That was all I was going to say by way of wrap up unless the Court has any questions on that issue. That brings me then to distinguishing between offerees on the basis of insurance cover. As I touched on yesterday, it's already been held and there is no cross appeal that the Chief Executive's decision was unlawful for other reasons and must be reconsidered. So the live issue is whether this –

**ELIAS CJ:**
Unlawful because it didn't take into account –

**MR GODDARD QC:**
Section 10.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
The Chief Executive didn't turn his mind to that test.

**ELIAS CJ:**
Because he was exercising a power under the Act?

**MR GODDARD QC:**
Yes he was explicitly exercising the section 53 power but didn't properly address the Court, both the High Court and Court of Appeal found the section 10 considerations consciously at the time and there is no cross appeal in relation to that.

So there was a declaration that those offers, the September offers were unlawful. There was no similar challenge to the June offers, of course because these appellants want the same sort of offer it would be self-defeating for them to seek and

obtain such relief, and the Court saw the letter from the Chief Executive sent in June this year attached to Mr Lynn's second supplementary affidavit saying that he has given consideration to that and is minded to make a revised offer but has, is also minded to make a revised offer that does draw a distinction based on insurance status given that that issue is before this Court. He decided, after careful, consideration that he should wait for the guidance of the Court before deciding what to do. So –

**ELIAS CJ:**
Can you just pause? You accept, or at least you're not challenging the determination in the Court of Appeal so the power wasn't, under section 53 wasn't lawfully exercised because section 10 wasn't complied with and section 10 refers you back to section 3.

**MR GODDARD QC:**
Yes.

**WILLIAM YOUNG J:**
For the purposes.

**MR GODDARD QC:**
Yes.

**ELIAS CJ:**
Which includes enabling community participation and the planning of affected communities without impeding, et cetera.

**MR GODDARD QC:**
It was set aside because the Court held that he hadn't turned his mind to that and he was required to form that view. So it wasn't because of –

**ELIAS CJ:**
No but he hadn't turned – if he has to turn his mind to it then he has to go to section 3.

**MR GODDARD QC:**

Yes, and he has to consider to what extend community participation is appropriate in relation to the particular decision and that will vary with what's be acquired in the circumstances. If he's acquiring –

**ELIAS CJ:**

And this has to be, this has to facilitate a, this has to be a co-ordinated response that's envisaged by section 3 also.

**MR GODDARD QC:**

Under section 53 a whole range of steps will be taken. Some will be property specific, a particular property will be acquired for a particular purpose, for example and –

**ELIAS CJ:**

But this is going to be – you say that you won't be able to do a blanket offer. I'm just feeling back into how does the Chief Executive exercise his section 53 power if there is no overarching strategy against which he can assess the exercise of the power.

**MR GODDARD QC:**

He exercises it by reference to the section 3 purposes. It's –

**WILLIAM YOUNG J:**

There's a recovery strategy now, isn't there?

**MR GODDARD QC:**

There is a strategy now and there was in September 2012 but it didn't deal with these issues –

**ELIAS CJ:**

It didn't deal with these issues.

**MR GODDARD QC:**

– because Ministers had formed the view that it was premature to be able to do so. It was not yet possible to make decisions about where rebuilding would or would not occur.

**ELIAS CJ:**

But they are content to leave section 53 to be used to achieve the purposes of the Act in the absence of any strategy that impacts on the use of that power.

**MR GODDARD QC:**

There are other aspects of the strategy that could be relevant to its exercise in particular cases. Section 53 is designed to operate in a wide range of circumstances –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– from acquiring a single parcel of land to deal with an immediate and pressing need –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– through to –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– more wide ranging offers such as the one under consideration here. The extent to which a strategy will be relevant to its exercise will depend on context, the extent to which the community participation goals will be relevant will obviously depend on context. But Your Honour is right that one of the things that would be required in exercising properly the section 53 power is in accordance with section 10(1) to exercise it for the purposes of the Act. So that's all of them, orthodox – and in addition must be satisfied that it is necessary to, and it's perhaps that first one really that does the work there. The Chief Executive is required to consciously turn his mind to the section 3 purposes and exercise the section 53 power for those purposes. So whichever of them are relevant to a particular contemplated decision will need to be considered.

But again, what I would emphasise is that there is no suggestion from the scheme of the Act that the section 53 power can only be exercised in ways that are expressly provided for in a recovery strategy or a recovery plan.

**ELIAS CJ:**

Unless you take the view that the structure of the Act is premised on their being that sort of measured response to the Christchurch recovery that's provided for.

**MR GODDARD QC:**

I think for the same reason that the Act expressly contemplates recovery plans being able to be prepared before a strategy, it must be the case that the section 53 power was available immediately from enactment and didn't have to wait. But if it's exercised in the context of a blanket policy based on zoning determinations taken off line as it were –

**MR GODDARD QC:**

Then we take them squarely back to the issue –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– that was canvassed at some length yesterday –

**ELIAS CJ:**

That's fine, I was just –

**MR GODDARD QC:**

– about the extent –

**ELIAS CJ:**

– interested to see.

**MR GODDARD QC:**

Yes, I accept that absolutely. The Court also asked me some questions yesterday about what form relief might take depending on the nature of the area that was identified. I need to come back to that in more detail but of course whatever path is

gone down in the future, one of the questions will be, is insurance status relevant to whatever is done or is it a factor that is, as my friend argues, simply inconsistent with the scheme of the Act, he goes so far as to say that the interplay between sections 10 and 3 requires that only factors directly relevant to recovery from this earthquake be considered and that, for example, precedent effects in relation to other natural disasters can't be considered. That, in my submission, cannot be right, because obviously cost is a relevant factor in making any decision about recovery measures, there are a number of references at various points in the Act to cost, the Act isn't a blank cheque to spend whatever it takes to enable everyone to fully recover, and Canterbury, the New Zealand Government's resources, are not that extensive, the resources of taxpayers can't be called on without limit. And "cost" must mean not just the cheque that you right this week, but also the ongoing cost to the Crown of any expectations that are created –

**ELIAS CJ:**

Are you talking about precedent?

**MR GODDARD QC:**

Yes, Your Honour. So it must be possible for Minister to say, "What does this mean for, as a precedent, in terms of likely costs in the future?" and it must also be open to Ministers to say, "What burden is it fair to ask taxpayers to assume vis-à-vis these people and what is fair for these people as compared, for example, with the owners of vacant land in green zoned TC3 areas who will often – if it's TC3, technical category 3, the most damaged type of green zone land – require extensive foundation treatments now that wouldn't have been required before, that of course has a direct impact on the value of the land, there's no compensation for that loss, no insurance of course for that loss –

**GLAZEBROOK J:**

They do get to stay on their land though and build on it, which is a difference between the red zone. But that gets back to argument yesterday as to whether they were clearing the green zone, clearing the red zone, for good reason, or not, but I don't think it's worth going back –

**MR GODDARD QC:**

No, I think that's right, Your Honour.

**GLAZEBROOK J:**

– over that.

**ELIAS CJ:**

Can I just ask another sort of just factual matter, one of the imperatives in the action taken by Cabinet was to permit the green zone to be able to move on, so that people could get insurance and rebuilt and, you know, going forward. Is it then an inference available to us that in the red zone, given the decision that was made, insurance to those who might be minded to rebuild or build is not available?

**MR GODDARD QC:**

Your Honour's right that that's a factual question, it's not a question which is –

**ELIAS CJ:**

No, but it is something that you verged on us in respect of the green zone –

**MR GODDARD QC:**

It would –

**ELIAS CJ:**

– and so I'm asking whether it's a fair inference, because it goes to your point that people's rights aren't affected and they can continue to apply for building consents and go ahead and build and so on.

**MR GODDARD QC:**

The reason that insurance claims could be settled more promptly and insurance renewed in the green zone was because of the factual reassurance provided by the announcement that, based on the best available engineering evidence, there were no area-wide land issues, that matters could proceed on a section-by-section basis and that the land was suitable, without significant area-wide works, for residential dwellings. So the only –

**ELIAS CJ:**

Well, the converse is –

**MR GODDARD QC:**

The converse is that –

**ELIAS CJ:**

– that the red –

**MR GODDARD QC:**

– factually –

**ELIAS CJ:**

– land in the short to medium term is not suitable.

**MR GODDARD QC:**

Yes, and that was information that was likely to be taken into account, would inevitably, I'd have thought, be taken into account, by a prudent insurer in deciding whether or not to write cover there. But that's exactly the same, in my submission, as the Government, for example, publishing information that an area has been affected by industrial waste deposited 50 years ago and raises certain dangers. That's going to affect people's land values, it's going to affect their behaviour, it's going to affect the behaviour of insurers. But none of that is a legal action, it's just the provision of information to a community –

**ELIAS CJ:**

But this is against the background of a recovery programme arising out of the earthquake. Anyway, that's fine.

**MR GODDARD QC:**

But again, I would – in relation to insurance there was no Government action to affect the ability of insurers to write it, but it is inevitably the consequence that when you provide information of the sort that was provided here people who make rational commercial decisions are very unlikely to want to write new policies in that area.

**ARNOLD J:**

The bankers –

**GLAZEBROOK J:**

And these people were told so in the letters they were given.

**MR GODDARD QC:**

That insurers may not do this.

**GLAZEBROOK J:**

Well, basically, that they'd be very unlikely to get insurance –

**MR GODDARD QC:**

Yes, and that was –

**GLAZEBROOK J:**

– alongside the –

**ELIAS CJ:**

Or building consents.

**GLAZEBROOK J:**

– compulsory acquisition powers.

**MR GODDARD QC:**

And that was –

**WILLIAM YOUNG J:**

I don't think it was said they couldn't get building consents.

**MR GODDARD QC:**

No, it didn't say they couldn't get building consents.

**GLAZEBROOK J:**

Oh, no, I don't think it did. It said no –

**MR GODDARD QC:**

And that would –

**GLAZEBROOK J:**

– insurance, no infrastructure repairs apart from temporary, "And we might compulsorily acquire the land if you don't sell it to us," and –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– and there might have been a fourth one which I haven't, which I've forgotten.

**MR GODDARD QC:**

Yes. But the insurance one was conveying the expected reaction of insurers and that was based in part, as some of the papers record, a lot of discussions were being held with insurers and with banks to understand the implications of different actions that were taken. I mean, another – I don't want to back too much into this – but of course another challenge for Ministers in deciding what to do is that if they exercised a compulsory power to prevent people occupying the land, then insurers would have had a, certainly respectable argument, that the loss had been caused by Government action, not be the earthquake, and –

**WILLIAM YOUNG J:**

And they would also perhaps have had some grievance if it was said that, as a result of perhaps not very serious damage, they weren't able to repair and therefore had to replace somewhere else.

**MR GODDARD QC:**

There were a range of issues about how what the Crown did interacted with entitlements under insurance policies. The *O'Loughlin* decision, which I referred to, *O'Loughlin v Tower Insurance* [2013] NZHC 670, [2013] 3 NZLR 275, which is in the casebook, is a very important decision which confirms that Ministers' action here was successful in not triggering some of those exclusions under insurance policies, not triggering the public taking type regime. Because as His Honour Justice Asher found, the red zone didn't –

**GLAZEBROOK J:**

Is that the *O'Loughlin* decision you're referring to?

**MR GODDARD QC:**

Yes. It didn't affect the availability of building consents, didn't affect zoning, didn't affect the ability to continue to occupy, so the loss suffered in terms of damages still squarely remains caused by the earthquake, and that meant both the people who stayed weren't affected and…

**GLAZEBROOK J:**

That doesn't seem to – did that come through on any of the justifications for the measures? I just don't recall reading about it any – it's certainly a sensible justification but I don't recall reading about it anywhere in our materials. Is there somewhere…

**MR GODDARD QC:**

There are some references somewhere, and I just can't remember…

**GLAZEBROOK J:**

Well, perhaps you could just…

**WILLIAM YOUNG J:**

There was an allusion to insurance, insurers' concerns, wasn't there?

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

There certainly was an allusion to that –

**MR GODDARD QC:**

There's –

**GLAZEBROOK J:**

– because insurers were saying they weren't going to – there was that paragraph in the Minister's affidavit, I think, that said AMI have gone down and then other ones weren't insuring –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– but I just wondered, this particular point –

**ELIAS CJ:**

That's not on that particular point.

**MR GODDARD QC:**

There are –

**GLAZEBROOK J:**

Yes.

**MR GODDARD QC:**

No. There are references –

**WILLIAM YOUNG J:**

I think it's general.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

There are general references in the Cabinet paper to discussions with insurers in relation to the action –

**ELIAS CJ:**

Which were adapted originally –

**MR GODDARD QC:**

Yes, that's right, Your Honour –

**ELIAS CJ:**

– in the materials.

**MR GODDARD QC:**

– because some of those discussions were still happening, I think. And of course one of the other – there were twofold concerns, that people who didn't accept the offer and stayed not have their insurance claim prejudiced by an argument that the loss had been caused by some sort of regulatory intervention which is not an insured event, but also of course for the Crown to make sure that if it acquired ownership of these properties it recovered the maximum amount it could of that cost from insurers, that it not be a windfall to insurers.

**GLAZEBROOK J:**

Yes, there's certainly something in the papers on that. Perhaps if there are references you could just let us know later.

**MR GODDARD QC:**

I'll do that, Your Honour.

**GLAZEBROOK J:**

Specific references to these particular policy exclusion points.

**MR GODDARD QC:**

I'll do that. There are certainly references to discussions and to banks as well and I'll try to find them.

**GLAZEBROOK J:**

Yes, certainly the insurance ones. I just don't recall specifically. Of course, it might have been too delicate.

**MR GODDARD QC:**

There were some very delicate issues and, in fact, I acted for insurers on the other side of some of those conversations. But the other point that's referred to in the Cabinet paper is discussions with banks about how the offer would affect the position of people in working with banks and that was also a very important factor.

**ARNOLD J:**

Is there anything in the contemporaneous papers where there's an explanation given as to why the Act wasn't used?

**MR GODDARD QC:**

No. I would have welcomed being able to find that myself.

**ARNOLD J:**

Right. Well, it's a slight puzzle when you look at the Cabinet paper because it refers to the Act and its purposes and then just doesn't mention it at all thereafter.

**GLAZEBROOK J:**

Apart from the disability strategy.

**MR GODDARD QC:**
Yes, where it says if there's a recovery plan that will take into account the disability strategy.

There was – I mean, I've referred to the subsequent transaction design papers, various issues came back to Cabinet, the choice of legal mechanism and the options that were available is not something that was ever brought back and so we were talking about, I think, the way Your Honour put it was that once we know where it's gone off the rails we can put it back on the rails and it's quite clear that at least at this September 2012 stage things went off the rails. That's where it was. What that means is that there will have to be some measure of re-railing and one of the issues that will have to be considered, whatever rails we're on is whether insurance cover is a relevant factor. So that is very much –

**ELIAS CJ:**
Well, except that if everything is open, really, in terms of section 3 and that exercise has to go through, why would this Court say anything about what may or may not be taken into account?

**MR GODDARD QC:**
That's certainly an approach that's open to the Court and I'll come to the form of relief in a moment. But my friend is asking the Court to say that the Act positively prohibits it being taken into account and that's what I'm opposing.

**ELIAS CJ:**
And the Court of Appeal has said that it may take it into account.

**MR GODDARD QC:**
Yes.

**WILLIAM YOUNG J:**
And Mr Sutton says he proposes to take it into account

**MR GODDARD QC:**
And Mr Sutton has said he proposes to take it into account, and in the – and as well as the group of people on the flatlands who have received this offer, there is a group of residents of the Port Hills, who own vacant land and properties who have not

received any offer because their position was being considered in tandem with the reconsideration of this and the same have led to a pause, so when I come to this it's perhaps important for the Court to know that in relation to the Port Hills offers have been made to insured residential landowners, even though they are not parties to these proceedings. Some have accepted the offer and settled.

**GLAZEBROOK J:**
Are they the same basis as the red zone?

**MR GODDARD QC:**
Yes, Your Honour. Some have accepted the offer and settled. Some have accepted the offer but not yet settled. Some have an offer which has not yet expired and that is open for acceptance. And others, the ones who were in a position analogous to the appellants before this Court, have not yet received an offer. So there are people affected by the outcome of this, I was going to say indirectly but it's not very indirect, actually. It's just that they're not parties and that's very important when we come to relief.

All I need to say about the reasons for the difference in offer, really, is that they're explained by the Minister. I provide a reference to the passage in the affidavit I touched on, and they relate to the bundle of assets being sold from the vendor's perspective and acquired from the Crown's perspective. My friend has emphasised that this wasn't really a purchaser buying something of value, given the intention for the land, but of course the part of the purchase package that was valuable was the insurance rights. That is for most of the purchases the most valuable consideration that the Crown is receiving, the most significant offset to the cost, the most significant factor in determining what the net cost will be to the Crown of this initiative for each category of property. Category, yes, not each individual one.

So what assets are being acquired is the significant distinction from the Crown's perspective the only material distinction between option 1 and option 2 purchases. Your Honour Justice Arnold observed yesterday that it may not make so much difference to the vendor in terms of net outcome because of the evaluation they will make in choosing which to make but in the Crown's perspective the only difference between option 1 and option 2 is what insurance rights it gets. And that is why one might expect the net cost across those two categories to be broadly comparable.

**WILLIAM YOUNG J:**

Would it be possible for those who assigned their properties and insurance policies to say this is a bit unfair, we want our insurance policies and proceeds back?

**MR GODDARD QC:**

Yes. The Minister mentions that in his affidavit. He says, "If I'm prepared to pay this much to someone with no insurance policy, what is my fairness answer? What do I say to someone who says, 'But I've paid premiums all my life for this insurance. I have these valuable contractual rights. Why are you requiring me to hand over something that I've bought in addition to my property?' That would be unfair."

**GLAZEBROOK J:**

Mind you, some of those people have paid insurance rights apart from the four days of the earthquake, hadn't they?

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

So they've paid insurance premiums. I mean, one way of doing it would be to make an assessment if the insurance payments should have been paid and also effectively those people got 50% because the Crown was paying 1.7 and was only going to get back half of that, so they actually got 50% of the value of their properties, didn't they? That's what the Crown was –

**MR GODDARD QC:**

That's what expected at that time.

**GLAZEBROOK J:**

That's land and improvements, not just land?

**MR GODDARD QC:**

Yes, and as Your Honour explored.

**GLAZEBROOK J:**

So 50% of just land apart from those people who are on bare sections doesn't actually give them the same amount of money as the others got, does it?

**MR GODDARD QC:**

It depends on relative recoveries for improvements and land.

**ELIAS CJ:**

But that exercise wasn't done at all.

**MR GODDARD QC:**

No. It was much more impressionistic than that.

**GLAZEBROOK J:**

Well, that's pretty impressionistic. That's saying, well, everybody else got 50% of their land and improvements. Why don't we give them 50% of their land and improvements?

**WILLIAM YOUNG J:**

Wasn't it more 50% is far more than the value of the land which we're taking?

**MR GODDARD QC:**

That's what the Minister was thinking, yes.

**ELIAS CJ:**

That was true of the other offers.

**GLAZEBROOK J:**

But the other offers got 50% more, were going to get only half back, the Crown.

**MR GODDARD QC:**

Yes. The letter from Mr Sutton that the Court has seen talks about the information available to him at the time and talks about the information now available to him and one of the things that's changed, of course, is that the Crown now has better information about what the recoveries have actually been.

**GLAZEBROOK J:**

But they just picked 50% out of the air. They didn't do anything to do with the recoveries that they did have. There was no exercise that we've seen.

**MR GODDARD QC:**

No, Your Honour is right. It was on the basis of the relativity.

**GLAZEBROOK J:**

So they might have better information but they haven't used it.

**MR GODDARD QC:**

Because the primary focus was, as His Honour Justice Young said, on saying our information is that these properties are worth, at most, 10 to 20% of the rating valuation. If we offer 50% that is a substantial contribution from the taxpayer to enabling these people to move on.

**GLAZEBROOK J:**

That was not new information, though, was it? I thought you said that they knew they had no value straightaway from making the decision because that was caused by the earthquake.

**MR GODDARD QC:**

No I was referring to new information available this year in relation to the offer that might be made that Mr Sutton identifies. I'm going to say Mr Sutton identified a number of things and one piece of new information, I'm not – the letter doesn't go into the detail of what it is, what I'm saying is that Your Honour might anticipate that one piece of new information that is available is how cost has played out, is how –

**GLAZEBROOK J:**

But we've got, but there's no evidence that was taken into account whatsoever.

**MR GODDARD QC:**

No and I'm not suggesting it was in –

**ELIAS CJ:**

You're accepting that there is going to have to be a new exercise.

**GLAZEBROOK J:**

You mean there's a new exercise now?

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

Sorry, you're right.

**MR GODDARD QC:**

That's what I was trying to say.

**GLAZEBROOK J:**

Sorry, I misunderstood, apologies.

**MR GODDARD QC:**

And the precedent in fairness concerns and Your Honour Justice Young asked about an analysis of contributions by the Crown in previous natural disasters and that reference in brackets is that. It looks at what the Crown has contributed in relation to other natural disasters and there are varying percentages of payouts that have been paid to people who have been affected by collapse of land at Waihi, to flooding in various –

**GLAZEBROOK J:**

Sorry is that –

**MR GODDARD QC:**

That's at 346 at 425 following.

**GLAZEBROOK J:**

Thank you.

**MR GODDARD QC:**

I just thought it might be helpful to see that.

**ELIAS CJ:**

Sorry, where is that?

**MR GODDARD QC:**

And the Court will see that –

**ELIAS CJ:**

I see.

**MR GODDARD QC:**

– the percentages are very round numbers which do not again suggest mathematical precision.

**ELIAS CJ:**

It is a bit of a shame that offers weren't made on the basis now available so that we could actually see how it was panning out. It is a bit dispiriting to think things are going to go back to a, to be determined on a basis that's quite unknown and which may give rise to further claims.

**MR GODDARD QC:**

The concern –

**ELIAS CJ:**

I know, the concern is that it would have been put on the wrong basis.

**MR GODDARD QC:**

To make offers, have them accepted, settle and then be told that was wrong as well either because they're at whole consultation process and you needed to begin earlier or because certain factors could or couldn't be taken into account or –

**ELIAS CJ:**

I just wonder though, in terms of seeking relief whether it might not have been more helpful for the Crown to indicate how it does propose to go about doing this because then you could have – we're really in a bit of a vacuum in terms of relief.

**MR GODDARD QC:**

I suggest a little further down this page, and I'm almost done, even my 10 minute allowance, I do think that's true, that at 4.4 that it may be best to make appropriate declarations and then seek submissions on relief and that's because of three factors. The first, the appellants aren't seeking relief that disturbs sales that have proceeded or contracts that have been entered into, they have made that clear throughout and that's very constructive and very helpful and very important I should add for the interests of the tens of thousands of people who have taken advantage of the

opportunity to move on. It will be quite wrong for that to be unravelled in any way and most unfair to them.

Second, it seems to me that the appropriate form of relief does depend very much on the Courts findings about what should have been done at what point thing went wrong, whether it was in September 2012 as the Court of Appeal held or whether, as my friends argue, it was at an earlier stage and on the reasons for those findings. For example, my friend Mr Cooke emphasised several times that the purpose of the Act was to enable people to move on, that that was the heart of his argument. Enabling people to move on doesn't apply to commercial property developers, for example. The Human Rights Commission's arguments do not apply to commercial property developers. There is no natural person who is moving on is affected by investments of that kind losing some of their value.

**ELIAS CJ:**
I thought moving commerce along was an object of the recovery.

**MR GODDARD QC:**
There's no reason to think that –

**ELIAS CJ:**
I'm not saying that human rights concerns apply but looking at the overall purpose of the Act.

**MR GODDARD QC:**
There's no reason to think that giving a small number of investors a larger proportion of their land value will have any impact on commerce in Canterbury generally. There would be no rational connection. If a decision was made on that basis I suspect that that would be open to challenge quite properly. The number of people is small, the focus is on communities that's not going to have an impact on commercial.

**GLAZEBROOK J:**
It actually, what certainly would be helpful to me if we could set out the categories of people so when you say commercial property developers are you talking about commercial property developers for residential purposes or the commercial –

**WILLIAM YOUNG J:**
He's talking about Fowler Developments.

**GLAZEBROOK J:**
I know I understand that in terms of the - I mean the difficulty with saying, you know, it depends what the Court finds, it would be useful perhaps to sort of go, well if you find this what would the appropriate declaration be.

**MR GODDARD QC:**
And we don't have the facts in terms of which vacant land falls into which category because the offers were not made on a basis which depended on intentions –

**GLAZEBROOK J:**
Yes.

**MR GODDARD QC:**
– or character. So, and this illustrates my point that depending on what the Court finds and the reasons for that finding it may be necessary to gather information that's relevant to an informed decision on relief. Information that's not held at the moment because of the global approach that was taken. As soon as issues of rights to the home are engaged, for example, if that's a material factor then it's necessary to know where the recipient was using that as their home because it wouldn't apply, in my submission, to commercial property developers even if they are developing residential sections and nor would it apply to an investor who was letting a property because their right to home is not engaged by the level of payment they receive. The tenant's interests are in play.

**GLAZEBROOK J:**
Well of course those distinctions weren't made –

**MR GODDARD QC:**
No.

**GLAZEBROOK J:**
– in the offers that were made to red zone operators because presumably there were a number of landlords.

**MR GODDARD QC:**

Absolutely, but again this is the point, if the Court accepts that that's an issue that should have been taken into account then it would be necessary in relation to whichever category of cases –

**ELIAS CJ:**

We'd only be looking at the offer that was made in September to the uninsured within the red zone.

**WILLIAM YOUNG J:**

That's been set aside though.4

**MR GODDARD QC:**

Yes it doesn't –

**ELIAS CJ:**

Yes but in terms of the relief –

**WILLIAM YOUNG J:**

And it's not challenged.

**ELIAS CJ:**

– that's all we would be tailoring the declarations to.

**MR GODDARD QC:**

There is something a little bit, and this was raised in the leave submissions and leave was granted, it's something a little bit conceptually challenging about granting more declarations about a decision that's already been declared unlawful but because inevitably the Court's reasoning will provide useful guidance for the future.

**ELIAS CJ:**

Well maybe though what we would do is simply make, allow the appeal to the extent that the declaration made in the Court of Appeal should be shorn of the additional words.

**MR GODDARD QC:**

Reasons.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

Yes that's –

**ELIAS CJ:**

So that it would simply be a declaration that it hadn't been determined under the, in accordance with the Act.

**MR GODDARD QC:**

As I attempted to frame submissions that would be helpful for the Court in relation to relief overnight in light of the argument from my friend, well it seems now like an eternity ago and with me yesterday, what I was struck by was the extraordinary number of permutations and combinations that would arise depending on where we are on the ground with the offers that are out there and the steps that have been taken, depending on where –

**ELIAS CJ:**

Why can't it be settled on that basis? You shouldn't answer that question but it does seem a bit odd if you're both agreed that the offer has to go for reconsideration and if I think you're edging towards saying that you wouldn't be terribly distressed if instead of coming up with anything very elaborate in terms of directions we simply excise the reference to insurance and –

**GLAZEBROOK J:**

Actually there wasn't a reference to insurance –

**ELIAS CJ:**

Wasn't there?

**GLAZEBROOK J:**

– in the declaration. I've just – because it was just that they weren't –

**ELIAS CJ:**

Well done.

**GLAZEBROOK J:**

– lawfully made. So you'd probably have to make a declaration –

**WILLIAM YOUNG J:**

It's in the judge – in the text of the judgment.

**GLAZEBROOK J:**

It's certainly in the text of the judgment. I just looked at the declaration and it's not, it's just a pure unlawfully made.

**MR GODDARD QC:**

Yes Your Honour reminds me of that and I think that was part of the argument on leave was but they are unlawful, they've been zapped unqualifiedly, what more is there but the Court obviously considered that –

**GLAZEBROOK J:**

Yes, well one of the difficulties is if there is something that said you can take into account and you can't take it into account then –

**MR GODDARD QC:**

I understand the practical reasons.

**GLAZEBROOK J:**

– it just means it starts all over again.

**MR GODDARD QC:**

But what that means is that that is in a real practical sense –

**GLAZEBROOK J:**

That the issue –

**MR GODDARD QC:**

– what we're talking about here.

**GLAZEBROOK J:**

Exactly.

**MR GODDARD QC:**

Despite what the Court had said to me, entirely understandably, yesterday about not giving advisory opinions, so this is, that's where the rubber hits the road in terms of what happens next, and…

**GLAZEBROOK J:**

Well, it's not really an advisory opinion if it's right –

**MR GODDARD QC:**

No.

**GLAZEBROOK J:**

– because what it's saying is that this wasn't lawfully made on two bases rather than one basis.

**MR GODDARD QC:**

Yes, I accept that.

**GLAZEBROOK J:**

So if the argument is correct it's not an advisory opinion it's really just talking about past, the fact it was unlawful on another basis.

**MR GODDARD QC:**

Yes, it's been – yes. And that's the basis on which I have prepared my submissions.

**GLAZEBROOK J:**

Well, yes, and I'm not suggesting that's, I've come to a concluded view on that, it's just that it doesn't seem to me to be an odd…

**MR GODDARD QC:**

And that's why, as I said yesterday, I didn't spend a lot of time looking at precisely what was considered in the September 2012, because the real issue is whether these factors were open to be taken into account at that time, rather than the exact way in which they were factored into the decision-making then, but I still – and that's how the Court of Appeal's reasoning was framed, that it was open to the Minister to take into account insurance status for these reasons. So –

**GLAZEBROOK J:**

Although there may be an issue about how that's taken into account in terms of proportionality or in terms of rationality, in terms of plucking figures out of the air, et cetera.

**MR GODDARD QC:**

Yes, there could be. In my submission this is quintessentially a matter of policy judgement –

**GLAZEBROOK J:**

Well, but – no, that mightn't be –

**MR GODDARD QC:**

– but –

**GLAZEBROOK J:**

What I was putting to you –

**MR GODDARD QC:**

– if that's not accepted –

**GLAZEBROOK J:**

– is that it may not be a matter of policy, it may be a matter of legality, taking into account the aims of the Act –

**MR GODDARD QC:**

And that's my friend's argument.

**GLAZEBROOK J:**

– but they are taken into account in a particular manner.

**MR GODDARD QC:**

No, I absolutely understand that's my friend's argument, and my argument is that –

**GLAZEBROOK J:**

That it's open slather.

**MR GODDARD QC:**

– that it's, that any certainty of that kind is illusory because the interests of a range of different groups are being balance, that there were all sorts of people in different situations, my friend Mr Rennie referred to people who have begun construction, for example, and had construction works insurance, a whole range of different groups of people with different factors intention, and Ministers had to decide how much taxpayer money it was appropriate to make available to contribute to the recovery by purchasing properties of that kind, and that was of necessity a broad-brush assessment, it was not one which was susceptible of mathematical calculation, and that's the submission.

**GLAZEBROOK J:**

No, I understand the submission.

**ELIAS CJ:**

So you were, on relief you'd made two points before – were there further points that you wanted to make?

**MR GODDARD QC:**

No, I think on relief the key things to say are that – it really is 4.4, in the light of the importance of the Court's findings and the Court's reasoning, the reasons for those findings, and that's really just been underscored by Your Honour Justice Glazebrook's observations about the reasons for the September 2012 offers being unlawful, needing to be teased out and, you know, different actions may be appropriate. It's also the case that the, there are a lot of people who have vested, you know, rights, and who have received money and have transferred their properties already, there are others who are in the process of entering into transactions, including people who are not before the Court, it will be important for the Court to understand the factual position before granting any relief other than declarations, in my submission, and so that's the reason for my submission at 4.4, that the best approach would be to make appropriate declarations which reflect the Court's reasoning, and if any other relief might be appropriate, which is of course a matter for the Court, to seek further submissions on that in the light of the reasons in the judgment and the facts on the ground at that time.

The only thing I haven't covered is 3, no interference with right of residential red zone property owners. It's dealt with reasonably fully in my written submissions but,

critically, the offers didn't involve any measure of compulsion or interference with relevant property rights or human rights, the provision of information, the accuracy again of which is not challenged, about short to medium rebuilding prospects, doesn't interfere with rights any more than a diagnosis of a medical condition interferes with rights to health, rights to the body. The making of an offer to purchase on a favourable basis, that can be accepted or rejected, doesn't interfere with rights, it respects them by giving the person the ability to decide whether or not to sell. And the adverse consequences complained of, the non-repair in the short to medium term of infrastructure other than on a temporary basis, those are consequences of the earthquakes and the state of the land, not of the challenge decisions. The decision recognised the realities of what was happening on the ground, they didn't bring those realities about. Unless there's anything…

**GLAZEBROOK J:**

Although isn't the argument that there's a duty, even in those circumstances, to make sure – well, under the Act, but also a duty in a human rights sense, to make sure that those people are able to move on? Now your answer, I guess, is that they can get the basic level of housing, and so that that – although we don't have the evidence of that, but we don't have evidence to the contrary either, so we can't say anything about that. But there are those other rights about the right to your home, which aren't a basic level of right to any old housing, that's a right to your own home and non-interference with the home. I suppose your argument there is, well, they weren't interfering because that was just the reality –

**MR GODDARD QC:**

Yes, that's exactly right, Your Honour.

**GLAZEBROOK J:**

– but…

**MR GODDARD QC:**

And there is – and I refer to *OJ v Finland* CCPR/C/40/D/419/1990 (6 November 1990) as one decision on that. It's quite clear that that right to the home doesn't confer property rights, and that the basic interference with the ability to enjoy the home as a home was caused by the earthquakes, not caused by the decisions, and that's the point made in the papers, that earthquakes are inherently unfair. Ministers were trying to alleviate that, the offer that was made put the people in a better

position, so the access to, their access to that home was not affected by the decisions, it's usability as a home was affected by the earthquakes. Access to other housing and to a new home was in fact promoted by an offer at 50% if the value, as Ministers understood, was actually 10 to 20%, people were in a better position.

Unless there's anything, I have managed to overshoot by a whole 100% rather than my estimated 200%, rather my 50.

**ELIAS CJ:**
That's fine, thank you.

**MR GODDARD QC:**
I may –

**ELIAS CJ:**
Yes, go whenever suits, Mr Goddard.

**MR GODDARD QC:**
Thank you, Your Honour.

**ELIAS CJ:**
Mr Rennie, we'll hear from you next?

**MR RENNIE:**
(inaudible 09:57:59)

**ELIAS CJ:**
Yes, Mr Cooke.

**MR COOKE QC:**
By way of reply, Your Honours, I want to focus on two issues. The first is the question of the application of the Act and the second is the question of relief.

In terms of the first question, the application of the Act, the key question is, as I think I may have said at the outset of our submissions, whether the Crown has a freedom to act outside a legislative regime specifically enacted for earthquake recover measures and the protections that it included. Now there's been some focus in the

argument about what specific legislative measures we say were involved in the Government's red zoning measures, and I'd like just to clarify this a little bit. Because in terms of the particular measure contemplated by the Act, the one that most obviously squarely fits with the Government's red zone measures is the recovery strategy under section 11, because it's the section 11 recovery strategy that contemplates under 11(3)(a) the areas where rebuilding or other redevelopment may or may not occur and (3)(b), location existing, existence of future infrastructure. So it squarely fits within that concept –

**ARNOLD J:**
So you're saying that that provision contemplates both short and long term – decisions about short and long term rebuilding?

**MR COOKE QC:**
Yes, yes. It's the – and there was another discussion about it earlier on with my learned friend about there being a difference between policy and implementation of policy in terms of legal requirements. The policy is in section 11, that is the earthquake recovery policy. It's the overarching strategy for the recovery of Christchurch. It's at the apex of the Act. And decisions about where there would and would not be recovery, where the infrastructure would or would not be repaired is plainly contemplated by this policy. So this is where the policy becomes legal policy. It has to be engaged with the community, formed with that sort of involvement, getting community buy-in to meet for the purposes of the Act.

**WILLIAM YOUNG J:**
But it can't really be your argument that they couldn't engage in recovery planning with a little R and a little P before there was a recovery strategy.

**MR COOKE QC:**
Oh no, no, in fact it's a key – the point that's been made, is being made is the timing point, because a recovery strategy was contemplated to be developed over a nine-month period, and that's what causes, and I sense Justice Young's points to my learned friend, there's a slightly clunky view in the use of a recovery plan to achieve the red-zoning measures in, that were implemented in June, because it's really the strategy that fits more neatly with this red-zoning measures rather than the plan itself, but it's only clunky because it's done in advance of the strategy.

**WILLIAM YOUNG J:**
That can't be a criticism of it, can it?

**MR COOKE QC:**
That's my point. That is – because the legislation has also contemplated this. It's contemplated that there may be a need, a more timely need to act before you get your strategy, your overarching policy in place. So it has mechanisms for allowing plans to be developed in advance of strategies.

And then – and that's consistent with the purpose of the Act which talks about engagement with the community without impeding a timely recovery from the impacts of the earthquakes.

And I just wanted to spent a little bit more on the question of timing in terms of what the evidence reveals, because of course the offers to the Quake Outcasts were made in a decision in September 2012, and the offers actually went out in late November and December, well after the recovery strategy had actually been finalised. So – and the real issue is whether the earlier decisions in June 2011 can be seen in some way as not being appropriately dealt with by way of a recovery strategy, and my learned friend Mr Goddard did emphasise the 13 June aftershocks as being, aftershock as being a critical moment in terms of how the Government was going to respond to the impact of the earthquakes, and with respect, the 13 June aftershock did not have any meaningful impact on the Government's plan about the residential red zone and I'll demonstrate that from the evidence. in fact you might recall the very first thing I took Your Honours to was the Minister's address to Hansard when he was explaining the need for the Act in – on the 12th of April he referred to why the measures of the Act included things like the gathering of information for making decisions about the viability of suburbs because of the need for people to move on, so it was apparent at that very early stage that that decision would have to be made

And the other document I took Your Honours to, the first of the A3s that are in existence about making the decisions about people being moved out of the worst affected suburbs, that was a document for the purposes of meeting on 9 March. So that – 9 May, I beg your pardon. 9 May. So these – the need to make these decisions about the worst affected suburbs and moving on was apparent even from that earlier stage.

And I did want to take Your Honours to a couple of documents in bundle 3 of the case on appeal, because the other thing that my learned friend mentioned was you'll recall he referred to the delegation of a power to act to a committee of ministers, and he emphasised how that had been done even a week before the relevant Cabinet meeting. Actually there had been an earlier delegation to the committee of ministers at an earlier point of time on 23 May. If Your Honours look in bundle 3, tab 53, you'll see the Cabinet minute delegating to the same committee of Cabinet decisions to make those earthquake recovery decisions on 23 May. And in terms of the relevance of the aftershock, if Your Honours could then look at tab 50 of the same bundle, that's a transcript from a press conference with the Prime Minister the day after that aftershock, and it's very interesting what the Prime Minister says about that and, picking it up in that first paragraph of the transcript where the Prime Minister says, "I mean, the engineers have essentially confirmed that the earthquake that took place yesterday, the two earthquakes, were very much a replica of the earthquake that took place on the 22nd of February, in other words, its footprint has been largely the same, its intensity has been very strong, in certain areas it was pulling both, 2 gs horizontally. It has sustained further damage to land but, again, very much in the areas that were badly damaged on February 22nd. We now have a reasonably clear picture about what land won't be able to be rebuilt on and what land will be able to be fixed up, but the process we need to continue to go through and what we've been working on for quite some time is the process of negotiating with EQC and with the insurers and their reinsurers, and obviously it's been extremely important that we get it right in terms of making sure that there's clarity and confidence that people can take from the process, both those will be asked ultimately to have to abandon their land and those that will be give the option to be able to be rebuilt."

Now, we know nothing about these negotiations with EQC, the insurers, or reinsurers, because they haven't been revealed in the evidence, but what is absolutely plain from this is that the decisions on the red zoning of land and green zoning of land was obviously taken with negotiations with those bodies, and that the catalyst for it was not the 13 June aftershock, it was the February earthquake, and that in terms of timing the Minister could have asked the Chief Executive to deal with a recovery plan almost immediately on the passage of the Act, because it was one of the key things that the Minister explained was the reason for the Act, and so a request for recovery planned to deal with the red zoning decisions, green zoning decisions, in advance of the –

**WILLIAM YOUNG J:**

There's no need for a recovery plan to identify the green zone, is there?

**MR COOKE QC:**

Well –

**WILLIAM YOUNG J:**

Because nothing changes, except reassurance.

**MR COOKE QC:**

Well, that is a fundamental difference between the appellants and the respondents. The declaration of the red zone was the identification of the areas that would –

**WILLIAM YOUNG J:**

No, but the declaration – for the green zone properties.

**MR COOKE QC:**

No, that's true, nothing –

**WILLIAM YOUNG J:**

Nothing changes, it's, nothing legally happens.

**MR COOKE QC:**

No. But for the red zone it does, there's a debate between the appellants and respondents about that, but in substance the red zone is being abandoned as an area for residential use, and so that is a, precisely the kind of measure that's contemplated by the Act.

Now, apart from the point I make about the ability to develop a recovery plan in this period of time, I suppose the other thing to mention about that too is that whilst the decision was made by the group of Cabinet Ministers in June, the actual offers didn't go out until August, so the timing is a little bit more –

**ELIAS CJ:**

This is for the insured?

**MR COOKE QC:**
For the insured.

**ELIAS CJ:**
Yes.

**MR COOKE QC:**
Now, even apart from that point, at the time that consideration was then being given to the position of the uninsured, that was precisely the period of time when the recovery strategy was being developed. So it was developed at some time before it was released under the consultation procedures in September 2011, and that version of the draft recovery strategy is in – I'm not going to take Your Honours to it but…

**GLAZEBROOK J:**
Sorry, September…

**MR COOKE QC:**
2011.

**GLAZEBROOK J:**
2011.

**MR COOKE QC:**
And that's in case on appeal 5.183, and it had nothing in it about the red zoning measures, and it was finalised after the statutory process with public engagement on 31 May 2012. That's 5184. That is precisely the period of time we can see from the evidence where consideration was being given internally to what offers would be made to the uninsured, so it's my submission that is precisely the time when the recovery strategy process should have been engaged in determining what the strategy would be for the red zones. It was actually four months after the promulgation of the strategy, the regular decision on the position of the uninsured –

**WILLIAM YOUNG J:**
Was there a submission made in relation to the development of the recovery strategy that it should address the red zone properties?

**MR COOKE QC:**
I don't know but I doubt it.

**GLAZEBROOK J:**
Well, that mightn't have been because don't you say what you're going to do, or is that just the plan? I thought the Minister directs what it's going to cover but maybe that's the plans.

**MR COOKE QC:**
I don't think there's a direction that the Chief Executive develops –

**GLAZEBROOK J:**
So you've got one and then it …

**MR COOKE QC:**
It goes out for public consultation.

**GLAZEBROOK J:**
Well, I suppose it was thought a bit late by then.

**MR COOKE QC:**
The horse had bolted, yes. So when we ask ourselves, would there have been issues that were involved in the Government's red-zoning measures that should properly have been the subject of engagement with the community and my answer to that is well obviously that is so, and there's one aspect of this that I did take Your Honours to this when I dealt with the Cabinet paper but perhaps it's something that hasn't really properly been focused on. I want to go back to the decision of Ministers in June 2011 to show the kind of issues that would have needed engagement.

Now, Your Honours have been taken to two different papers about this decision. The one I took Your Honours to, which was in tab 108A of bundle 4, was the paper that each of the Ministers had the deciding meeting had before them at the time they made the decision. My learned friend Mr Goddard then took you to the subsequently prepared paper after that meeting where Cabinet was told what the committee had decided. Those two papers are very similar and the other paper is at 4120. Those two papers are very similar but are not identical. Each of us have gone to different parts of it. There's just one aspect of that. This is in both of them so it doesn't really

matter, so if we use 4120 that's fine, it's that table that describes in paragraph 36 how decisions were made about what zone the land would be put in. I just wanted to go back to that because just to identify what this test for red or green zoning is, because what that box is doing in the top half is really identifying what can be described as the costs to the public, so that's the EQC contribution to land remediation, plus the betterment costs that's perimeter treatment, the raising of the land, plus the infrastructure removal and replacement costs, so that's the overall cost to the public of this. Then the boxes at the bottom, "If the costs of the above exceeds the value of the relevant land, the area is reclassified as red zone. If the cost is above, is less than the cost of the relevant land, the area is classified as green zone, but may require some work. So the test isn't just the damage to the land. It's the damage to the land compared with the value of the land. So that means poorer land gets zoned red and richer land gets zoned green. So if Mr Tsao had been in Fendalton, he would have been fine. So would this have been something that the public would have been interested in and engaged in and should have been consulted on? Well, absolutely it should have. Would there have been strongly-held views? Absolutely there would have.

In addition to that kind of factor, at this very time CERA was engaged in thinking about what the terms of the offer to the uninsured should be, and those considerations included recognition that it may be that higher offers than the one that was ultimately made should be extended and can I just demonstrate that by going to the case on appeal volume 5 tab 181. What we have behind tab 181 is we have a paper to the Minister of 10 April 2012. It was noted by the Minister at that time. With CERA's thinking about the offer to the uninsured at that time, now, this only deals with vacant land and other categories including business land. But it's interesting for both vacant land and the business land what CERA were recommending at that time was the same offer as had been made to the insured. So you can see that by going through to page 1413. You see at the bottom, "Red zone vacant land." Paragraph 32, "Should the Crown not extend an offer to purchase vacant land in the red zones, it resulted in an inconsistency in approach in comparison with other red-zoned property owners who would not support the Crown's recovery principles. For the reasons identified in paragraph 27, we suggest that you consider extending the Crown's offer to vacant land in the red zones. This offer will extend most recent rateable value of the land."

Then in the same for commercial and business properties, 1416, I should just mention while I've got the opportunity, in terms of I've mentioned that we have two businesspeople in our group, the kind of businesspeople we have and it's in one of the questionnaires that have been completed, we have a vet's practices so we're not talking about commercial land in that sense. We're talking about the small business operations of that kind, and at 1416 there's a heading in the middle of the page, "The Crown purchase under which the Crown offers to purchase a commercial and industrial property, it's along the lines of its current package for insured residential property owners," and paragraph 52, "CERA considers that this option is consistent with the approach that the Crown has adopted for insured residential property owners and is consistent with the proposed treatment of other red-zoned properties in this paper. It does not extend red-zoned property owners from Government support based on their ability to obtain home insurance. In each case, the Crown's assistance will facilitate a speedier recovery and form protection from losses affecting the ability of red-zoned property owners to move on with their lives with certainty and confidence." So this demonstrates that within CERA there were these views. This doesn't extend to the uninsured, but within CERA there were these views so obviously an engagement process would have legitimately contemplated whether these alternatives would properly have been addressed in the way that was proposed, at least at that time, internally within CERA.

Now, one other thing I wanted to say about that process that I say should have been followed –

**WILLIAM YOUNG J:**
Can I just ask you one question at this point? You're talking about consultation. Are you moving away from consultation?

**MR COOKE QC:**
No.

**WILLIAM YOUNG J:**
Okay, I'll come back to it after you've finished.

**MR COOKE QC:**
Well, I'm not going to address consultation specifically any further.

**WILLIAM YOUNG J:**

Okay, well, it's this, then. You just took us to a document which showed how the cost benefit analysis was carried out and you said it would play out differently depending on whether the property was in Avonside, as Mr Tsao is, or Fendalton.

**MR COOKE QC:**

Yes.

**WILLIAM YOUNG J:**

Now, that sort of argument could have been deployed, perhaps, in a challenge to the red zone decisions as be irrational or inappropriate or inconsistent with the statute. Now Mr Goddard would no doubt say, "Well you can't review the Cabinet." I'm not so sure about that but that would have been a challenge to the substance of the red zone decisions but no one is really challenging the substance of them now, are they?

**MR COOKE QC:**

Well what we're saying is that this has all been done outside the statute.

**WILLIAM YOUNG J:**

But what does it mean, that's what I'm interested in? But I doubt that, well sorry. I didn't understand that the delineation of the red zone was an issue of controversy in these proceedings.

**MR COOKE QC:**

Well it's not a self-standing complaint that's been advanced in this judicial review but what has been said is by stepping outside the statutory regime all the transparency that would one expect of exercise of the powers within that regime have been avoided. So issues like exactly how you go about the deciding where the zones are going to be does become a material issue. What is the test for determining that question should have been subject to transparent community engagement. Now I guess would, could have tried to –

**WILLIAM YOUNG J:**

But it wasn't and the question then is how is this relevant to what offer should be made to your clients?

**MR COOKE QC:**

Well the relevance of the ultimate offer is that the offer is simply the product of this process that has been taken place outside the regime. So the whole process has been an unlawful exercise leading to what we say are the improper and oppressive offers to our people by singling them out from the facto approach that has been applied in –

**WILLIAM YOUNG J:**

Can I just develop this? Do you think, is it your position that a recovery plan notified as you think it should have been and consulted on, would have addressed the terms on which the Crown would acquire properties?

**MR COOKE QC:**

Yes. Because that's –

**WILLIAM YOUNG J:**

Why?

**MR COOKE QC:**

– the means, that's the means by which the Crown was facilitating the evacuation of the suburbs.

**WILLIAM YOUNG J:**

Well would a recovery plan, for instance, led by the City Council in respect of the CBD be expected to address what and how the Government should pay or would the Minister be likely to say, "Well that's none of your business."

**MR COOKE QC:**

CBD plan?

**WILLIAM YOUNG J:**

Well you see the City Council leads the CBD plan, development of the CBD plan.

**MR COOKE QC:**

Yes, and say here that will be the Chief Executive leading a CERA led recovery plan, and I accept there is a clunkiness because it has been done before the strategy but if

it had been done after the strategy it would have fit like a glove because the plan, the policy that was being implement –

**WILLIAM YOUNG J:**
Well you wouldn't need the plan because it would be in the strategy.

**MR COOKE QC:**
Yes, and because of the timing issues you're doing it in advance and under this Acts regime you then have to reconcile the recovery plan to make sure it's consistent with the overarching strategy. But that's what the overarching strategy is for. Where are we going to build? Where aren't we going to build? How do we deal with infrastructure? How do we meet the purposes of the Act in terms of letting people move on with their lives from the impacts of this earthquake? And this was probably the Government's most profound earthquake recovery measure taken outside that regime.

**GLAZEBROOK J:**
Well just in terms of your clients, so if your client – if there'd been a recovery plan and your clients at that stage had known that there was a proposal that they be paid nothing, at that stage they may have realistically challenged the red zone decision. By September 12 there's no point in challenging the red zone decision because –

**MR COOKE QC:**
It's a fait accompli.

**GLAZEBROOK J:**
– you can't put the genie back into the bottle –

**MR COOKE QC:**
Thank you.

**GLAZEBROOK J:**
– people have already moved out so –

**MR COOKE QC:**
And that's one of the awkwardness – sorry. It's one of the awkwardness of this case actually because in seeking relief what do we do. We have been the adverse group

affected by the Government stepping outside the Act. We have been deprived of all of this protection that the Act would encompass if the Act had been used and now we've got to try and seek effective relief given the fact that it is a fait accompli. The red zones have been established, they are being evacuated so what can we do now to try and get justice in terms of what we should, the place we should have been in had the law been followed, and that's one of the awkwardnesses about relief I guess. But it's obvious that we are seeking relief that gets us in as closer position to a fair and just legal outcome given those circumstances.

**ELIAS CJ:**

It's not just consultation either is it, because the scheme of the Act is that there will be Parliamentary interest in what happens in the recovery and it is not inconceivable that if the implications had been laid out in a plan there might have been some Parliamentary involvement too.

**MR COOKE QC:**

Yes. I mean there has been public interest in the plight of the quake outcasts but what there hasn't really been – the reality is, even when I formulated this statement of claim I had no idea what the Government was really saying about its approach to legality. The third source thing came as a complete surprise to me because I just didn't know where the Government was coming from on this because the whole thing has been completely opaque. It took a long time for people to understand that the red zones weren't actually being taken over by statute because they didn't understand that because the Government had declared the red zones and everyone –

**WILLIAM YOUNG J:**

But you would have understood that, that they weren't taking it under the statute?

**MR COOKE QC:**

No that wasn't, that wasn't apparent. It was just – the Government had declared the red zones. It took time for people to understand that the Government were saying, "Well actually these aren't actually legal measures we're just providing information," as my learned friend describes it.

**McGRATH J:**

Papers were made available and said the mechanics will follow.

**MR COOKE QC:**

And the papers themselves, the delicacy in language. I mean bear in mind that that paper was created for public dissemination too. So there's a lot of subtlety in there in terms of what it meant. So I had no idea that the third source of the issue in this case when I formulated this statement of claim because I really didn't understand where the Crown was coming from. So the whole thing has been completely opaque in my submission and it's been coupled with the fact the discovery from the Crown are very vague and unsatisfactory and we had papers coming from all over the place and things like, you know, this reference I've just taken Your Honours to, to the Prime Minister's statement, "Well what was going on is negotiation with insurers." Well we know nothing about this so the whole process has been apparently deliberately kept at a policy level within the machinery of Government and it's that very factor that's caught –

**ELIAS CJ:**

It's the soft law approach.

**MR COOKE QC:**

That's right. And if –

**ELIAS CJ:**

But I wanted to ask you about discovery because it's been accepted by the Crown that the red zone, or the third source powers, or the first source powers are amenable to review. If that was being relied on one would have expected that all material relevant to the decisions that were taken would be disclosed.

**MR COOKE QC:**

Yes. Well –

**ELIAS CJ:**

I mean there's no indication that they haven't been now, is there?

**MR COOKE QC:**

No, well, yes. The problem is I think the Crown says for administrative reasons they didn't have the same record keeping processes as a well established Government department would have and they had difficulty finding all the documents but there is always a different perspective in terms of the parties about those sort of points, but

we found it extremely frustrating to get documents as we went along. We didn't get that paper that was before the Ministers when they made the decision under after the Court of Appeal, it was the most obvious example in the problem. I don't know whether the Crown's discovery is really complete or not. The reference to things like discussions with insurers and the Prime Minister's press statement that I've just noticed would rather suggest that there are other things that we haven't seen, but we've got to deal with the cases that we've got so that's what we've done but really all of this comes out of Your Honours' questioning, would – if it was a bit more than just consultation, yes I say that it was. There's been a complete lack of transparency about this whole process. If there had been a more clear transparent process as the Act contemplated there might have been all sorts of things there were different that would have happened that may have involved more political interest and a dimension, and the difficulty for my clients is now that the water is well and truly under the bridge, and they are still stuck in the red zone, the difficulty for them is how you get them back into the position they should have been in had the law been followed, and that's the real challenge for relief. That means that, with respect, simply making a declaration and asking the Government to get on with it is not going to give a just outcome. It's not going to give a just outcome in terms of the law, because it's the failure to follow the law that results in the situation that they are in. so they need more than simply for yet another Court to say this is unlawful, because that hasn't provided any justice for them, because Justice Panckhurst did that some time ago and we're still waiting for the remedy for these people. And that is why more direct remedy is called for in this case.

**ELIAS CJ:**

So what do you propose? Is that where you're getting to now or you…

**MR COOKE QC:**

Well I've – in my excitement moved on.

**ELIAS CJ:**

Moved on. Perhaps you need to get less excited and go back and finish what you wanted to say.

**MR COOKE QC:**

Yes, I'm sorry, I'll go – I'll calm down and – I – there is one more feature I wanted to say about this legality process before going on to relief, and that is the other point

about saying that the recovery plan measures in the way that they involve changing instruments under the RMA, LGA and other enactments weren't relevant to what the Government was seeking to do that and we simply don't accept that because that buys into the sophistry that we've involved in these red zone measures, because the red zone declarations did fundamentally change in reality the zones. It did change their character. They were no longer going to be supported as residential loans [*sic*]. They were being turned into cleared areas in Crown ownership. Now, you didn't literally change the zoning under the district plans but you had the same effect.

**WILLIAM YOUNG J:**
Well, changing the zoning wouldn't have had this effect at all.

**MR COOKE QC:**
Well, it's true that the measures were more profound than simply changing the zoning. That's true.

**McGRATH J:**
They became inoperative.

**MR COOKE QC:**
That's right.

**WILLIAM YOUNG J:**
Well that's a debateable phrase really.

**MR COOKE QC:**
Well they –

**ELIAS CJ:**
It doesn't apply to Crown land.

**WILLIAM YOUNG J:**
It affected behaviours. It didn't – very profoundly.

**GLAZEBROOK J:**

And you would say too that it wasn't just the character of the land, it was the character of land related to cost, which is primarily a – well, quintessentially a policy decision in terms of it rather than merely an engineering decision.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

So that there might have been other areas that were as badly damaged in terms of land but the land value might have pulled it up and –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

And there were certainly comments from the public at that stage that the poorer areas were being targeted.

**MR COOKE QC:**

And, you know, if this had been subject to the processes of the Act there would have been considerable teeth to that comment, because the Government's measure did in fact involve treating poorer suburbs in a different way from richer suburbs, because you were more likely to be red-zoned if you were at poor land. So that was a decisive factor in deciding what your status was going to be.

**ELIAS CJ:**

So there's a discrimination argument you're running?

**MR COOKE QC:**

Well I'm just saying that's a further aspect –

**WILLIAM YOUNG J:**

Has this argument been advanced earlier?

**GLAZEBROOK J:**

No, no, you're just saying that that would have been something that people would've –

**MR COOKE QC:**

That's –

**GLAZEBROOK J:**

– wanted to have a say on –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– and that that might have changed the decision, but you can't – there's no point in challenging it now for your people –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– because they're already stuck in the red zone.

**MR COOKE QC:**

That's right.

**GLAZEBROOK J:**

Other people have moved out, so realistically there's no undoing that.

**MR COOKE QC:**

That's right.

**GLAZEBROOK J:**

And your clients don't even want to undo it.

**MR COOKE QC:**

Well they can't.

**GLAZEBROOK J:**

Well they might have wished to but they know they can't.

**MR COOKE QC:**

Well, there, you know, there are some of them – you know, there are some of them that still want to stay in their properties and, you know, we'll just have to sit down with them and explain that it really is a fait accompli, but it's most unfortunate that we have to do that by explaining, "This has all been done by this illegal mechanism and the Courts are now going to have to recognise the reality of that and aren't going to be able to fix that problem for you. You're going to have to move." But that is, you know, I am going to have to have unfortunate discussions with people about that. But that's – unfortunately that's the reality of the situation. And the Court can only, the law can only do so much to repair what has been done in the past. But I do say, and I'm foreshadowing my remedy a little bit still, that we do need some effective orders to that effect.

**WILLIAM YOUNG J:**

Can I just ask you, I understand your primary argument is that what was done should have been done by a recovery plan? Just leaving that aside for a moment, do you say that it's not open to the Government to collect and assess information and adopt a policy as to that which, to the extent to which it will affect legal rights formally, will be implemented under statutory powers, but which will inevitably have huge behavioural impacts. This is the third source of power sort of point, isn't it?

**MR COOKE QC:**

I know, and my answer to that is going to slightly quibble with the premise at the start of the question, because the answer to that is that is what the recovery strategy was supposed to be.

**WILLIAM YOUNG J:**

Yes, but – well, yes, I want to leave aside –

**ELIAS CJ:**

Assume no Act?

**WILLIAM YOUNG J:**

Yes, just assume no Act.

**MR COOKE QC:**

Right. The Government wanted to get rid of Karori.

**GLAZEBROOK J:**

But if it's going to implement it, it might announce that but if it's going to implement it by legislation, it has to implement it in all of the select committee processes and all of the other –

**WILLIAM YOUNG J:**

Or it might exercise it by compulsory acquisition of land, for instance.

**GLAZEBROOK J:**

Well, it would only be able to do that under the Public Works Act, so it would have to want to put a power station in Karori.

**MR COOKE QC:**

Yes, but you're asking can the Government policy develop in advance of those statutory steps.

**WILLIAM YOUNG J:**

Yes. Not necessarily by statute, but the exercise of other statutory powers which will require particular exercise of statutory power, which will be independently subject to review.

**MR COOKE QC:**

I'm going to disappoint Your Honour by saying that I think that would really depend on the circumstances. So it's a bit hard to answer that question in a hypothetical.

**WILLIAM YOUNG J:**

Well, say here there wasn't an Act, then it's not so hypothetical.

**MR COOKE QC:**

Well, I don't think these measures could have been – concentrating on these measures, they couldn't have been introduced by the third source without a statute. You couldn't have said –

**WILLIAM YOUNG J:**

Can they not be announced and the Government say, well, we propose if necessary to pass the statute but in the meantime we're going to start buying land? We doubt it'll be necessary but we'll go down the statutory route.

**MR COOKE QC:**

The problem with that question is it doesn't really fairly capture the red zone declaration because the red zone declaration was a little bit more than that. It was, these are there and they're no longer going to be supported for residential occupancy. These are areas where we're not going to fix up infrastructure and where the councils will no longer be expected to do so and they're going to discuss with us whether there's going to be any regulatory intervention in these areas. That's a little bit more than saying this is our general idea for the area.

**WILLIAM YOUNG J:**

This is our firm policy and we are going to implement it pursuant to any legal means we require, but it may be that we don't need to do those because perhaps we can acquire the land voluntarily.

**MR COOKE QC:**

I have *Fitzgerald v Muldoon* [1976] 2 NZLR 615 coming through my head.

**WILLIAM YOUNG J:**

But in *Fitzgerald v Muldoon*, they stopped complying with the law as to deductions.

**MR COOKE QC:**

Well, no, they didn't. The Prime Minister just said that it was his intention that that no longer be continued and the Government's objective was that that will be legislation enacted to that effect and the Court said there was suspending the existing legislative regime.

**GLAZEBROOK J:**

Wasn't it because they said don't make any contributions in the meantime?

**MR COOKE QC:**

Rather like don't do any of the repairs to the damaged areas?

**WILLIAM YOUNG J:**

It wasn't saying don't grant building permits.

**MR COOKE QC:**

Well, you see, in the draft –

**ELIAS CJ:**

No building permits were granted, I think you indicated, until quite recently, is that right?

**MR COOKE QC:**

There's no evidence before the Court about building permits at all, so my learned friend Mr Goddard said that some had been issued. I have to say, we don't know about that.

**ELIAS CJ:**

Recently he acknowledged that none were for many months.

**MR COOKE QC:**

Your Honours will also recall I took you to the draft land use recovery plan, which had been developed by all the territorial authorities and CERA, with urban activities being prohibited in the red zone. Now, that came out of the draft but that was the reality. No one was going to grant a building permit in the red zone.

**ELIAS CJ:**

Well, no one was going to seek them, probably.

**MR COOKE QC:**

For that reason. It's a fait accompli. But the one last thing I was going to – and it's not unrelated to what Your Honour asked, I don't think, is section 27, this thing about infrastructure. You remember the Cabinet minute paper talked about that local authorities will be asked to discuss with the Government any plans for infrastructure or any regulatory interventions in the red zone areas. Now that is a de facto section 27 measure because section 27 talks about giving directions to councils and it's interesting that section 27 is not just about RMA documents. It's a bit broader than that. If you see 27(1)(b), "The Minister may, by public notice, suspend, amend, or revoke the whole or any part of the following, so far as they relate to any area

within greater Christchurch." Now we get an RMA document in (a). But (b), "a plan or policy of a council." Now that's the sort of thing that you would expect that that will be what plans the Council had to repair the infrastructure in the red zone for example. It would include their annual plans where the costs of dealing with infrastructure in the red zone would be involved.

**ELIAS CJ:**
It might turn on how a plan or policy is defined under the Local Government Act.

**MR COOKE QC:**
It may do but what I'm, the point I'm making is that the Cabinet decision was a de facto exercise of this kind of authority because it said rather than doing it through this small process, the councils will be asked to discuss with us any regulatory action within residential red zones. So it's been done under the table so to speak. But that point I'm making is there's been some questioning about which particular statutory provisions that we say should have been deployed, actually it's all of them really, it's the strategy, it's the plans, it's section 27, they're all part of a machinery that Parliament contemplated would be used for these types of measures. And they do involve the kind of things that are within section 27.

So this is the question of relief, the really difficult question in this case, because in the sense we're on the horns of a dilemma because what our case is, is the whole thing has gone off the rails in terms of the process that should have been followed under the legislation for implementing the residential red zone measures and the people in the position of the Quake Outcasts is now being three and a half years since the February earthquake, and three years since the red zones were announced, and they need effective relief, and one of the things about this situation is the Government did adopt a one size fits all approach in the June decisions and that has been applied and so this might be a case where it is appropriate to give an equivalent one size fits all remedy for the Quake Outcasts. Now, as I have emphasised before, we say that the lack of insurance is not a relevant consideration given the Act, because the focus is on the payment that is necessary to enable people to move out of the red zone, rather than the price paid for a contractual bargain with the Crown, and it involves the applications of the criteria in sections 10(1) and (2) and (3)(a), so that the payment must ensure that the communities recover from the impacts of the earthquakes.

Now that, with respect, is not a political judgment, as my learned friend portrayed it, to be exercised in a very broad way. It is actually a requirement that's constrained by these Acts, these provisions, quite deliberately by Parliament, to ensure that that purpose is satisfied. Now I accept the word "communities" is not everyone but the Quake Outcasts are what remains of the community that was in the residential red zone and the measure, the one size fits all measure that was implemented in June, was directed at the applicable community. The problem was that the uninsured were carved out of the measure and so now the question is, what relief can be given to enable these requirements of the Act to be satisfied.

Now there's been some questioning about where the origins of the 50% came from. I think Your Honour Justice McGrath asked that. The one possible table that may assist on that is in bundle 6 at tab 224. Now I've got a better photocopy of this, because it's quite hard to read, I'll hand it up if it's necessary. Now I have got additional copies if anyone finds it too hard to read.

**ELIAS CJ:**
I find it too hard to read.

**MR COOKE QC:**
This is a little bit better.

**ELIAS CJ:**
Thank you.

**MR COOKE QC:**
So what I've handed up is page 1743 which has 9 August 2012 on it. This covers from Mr Sutton's affidavit and it's the best we've got in terms of a rationale for the 50% I think and it's the box in the top right-hand corner of page 1743. And perhaps picking up that box in the middle, "This doesn't lead to an exact figure, so there is some judgement to be applied. 50% upper limit to preserve sufficient difference between insured and uninsured land."

**ELIAS CJ:**
Sorry, I can't find it?

**MR COOKE QC:**

It's the box in the top right-hand corner on the page, it's a double sided page.

**ELIAS CJ:**

Yes.

**MR COOKE QC:**

"This doesn't lead to an exact figure for some judgement to be applied. 50% upper limit to preserve sufficient difference between insured and uninsured land. Lower limit maybe 20% but limited signalling benefit at this level." So the signalling thing is to get people to move. On balance we have concluded that a premium can be justified as payment for the signalling to these owners that the Government wants to encourage property owners to vacate the red zone. If you are not comfortable that this premium is a price worth paying you might want to consider a less generous offer of 20%."

**GLAZEBROOK J:**

Well that was basically what Mr Sutton said in his affidavit, wasn't it?

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

They're worth about 10% but we need to encourage people to move.

**MR COOKE QC:**

Yes and my key point is that the real, the fact of it has to drive the decision here is what is necessary to fulfil the purpose of the Act, or to use section 10, what will ensure that the purpose of the Act is satisfied, and what is the purpose of the Act in question (3)(a), the –

**ELIAS CJ:**

That's quite interesting that box, with the first paragraph too, in the absence of future use decisions no normal market because of red-zoning.

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

Well I mean it is interesting because Mr Goddard kept saying this was because of the earthquake but it can't be just because of the earthquake because there's a whole pile of land that's damaged because of the earthquake that's still got a normal market –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– related to it because you can use it, whereas if you can't use something –

**MR COOKE QC:**

Yes.

**GLAZEBROOK J:**

– then it's not going to have a normal market attached to it. Now it might be a market that takes into account the repair costs of the land.

**MR COOKE QC:**

But really it's, when Her Honour the Chief Justice mentioned the other day that the reference to when the Government moves it has implications and this, we haven't got you the reference I'm sorry, but it's obvious. Once the Government declared the red zone, the area that wasn't going to be supported in Christchurch for residential occupation and, in effect, was going to be cleared, no one's going to buy that land unless they're a speculator in terms of working out what the Government might be doing and trying to foreshadow that. It's not a residential market any longer whereas the properties in the green zone on the other side of the road from Mr Tsao, as we know from the recent valuations that have come out, have perfectly adequate values as residential properties. So again it's sophistry to say this has all been done by the earthquakes and not by the Government measures because it is the Government's decision to close this area and move people on that is inevitably caused the position that the people are in. Obviously people were adversely affected by the earthquake, but plenty of other people in Christchurch are getting on just fine outside the red zones in a difficult situation still, but not with the oppression that the red zone people are in.

So Your Honour the Chief Justice asked me, what do you want us to do? Now, obviously I would – the first point is, I don't think that the declaration or a finding that the whole process has been unlawful in itself is sufficient, and that is because of the dilemma that the individual property owners are in, and even a judgment that requires the process now to be put back on the rails in terms of the legal process under the Act has continuing disadvantage to the outcasts because of the oppression caused by the delay in time. So there would be – if now the correct step would be to require an amendment to the recovery strategy to get things back on track, that as well as to deal with what offers would be made to those who remain, there is a period of time that would be involved in that that causes further disadvantage to them, so what I – obviously I still seek the order that I sought at the outset, which was an order under section 4 of the Judicature Amendment Act that the same offer that people got in June be extended to the quake outcasts. Now, I obviously have to ask for that because of the circumstances that they are in. That's the offer. In the end, I asked Justice Panckhurst to do that but he was reluctant to go that far and then ultimately gave directions under section 4 requiring a new offer to be made in light of the judgment of the Court, but I still pursue that for the reasons that's obvious, that these are people in a terrible situation. If the Court is to go short of that, what I have in mind is directions under section 4 requiring the respondents to make new offers to the appellants complying with the obligation to ensure that the offer enables them to recover from the impact of the earthquakes in accordance with sections 10(1) and (2) and section 3(a).

**WILLIAM YOUNG J:**

So you treat them as synonymous with community?

**MR COOKE QC:**

Well, the premise of that relief is that they are what remains of the community. They are a remnant of a community. They were a community at the time. They've been carved out of that community for a reason that is not lawful and so we need an order from the Court that restores them as far as possible to their lawful position.

Now, I also seek the leave that I asked for and I think that's quite important.

**GLAZEBROOK J:**

Mr Goddard, I think, was in agreement with that, sort of.

**MR COOKE QC:**

Well, his proposal was different. His proposal was let's get a judgment out of this Court on the legality and then we'll go about a further hearing, you know, I don't know when that would occur, but have a debate about remedy. We need action urgently now. We need people to be able to move on and the leave – the Government just needs to get on and make a new offer within the confines of the law and we need the ability to come back here if there's some reason why we're saying it's inconsistent with the Act or the appropriate answer to the dilemma that they've been put in.

So I seek that leave still, and I guess the direction has a degree of uncertainty about it, about what it means, but it certainly ties it to the Act, because that's what the Act says. The decision-makers must ensure these things.

You would have thought the easy answer for this – because we've got a relatively small number of people left in this position – would have been for the 100% offer to be extended to all, and the amount of money left for these people is comparatively small compared with the huge amount of money that was involved for the red zone people overall.

So does Your Honour want to ask me any more about that formulation? I appreciate this is a really tricky question for relief and I do see it – I don't see myself asking for a *Fiordland Venison* order in the strict sense. What I'm saying is the circumstances that we are now in sort of so long after the fait accompli has been created that the only just result in accordance with law would be to give effective orders of this kind, and this is precisely why section 4 of the Judicature Amendment Act as well as the Court's constitutional reserve powers in this respect exists to ensure people that have not had the rule of law applied to them have justice according to law. In some ways, this case for public lawyers is a great case because it's such an interesting constitutional case. It's great to be involved in it in that sense. But one must remember there are people behind it, people who need justice according to law, and they can't be forgotten.

Unless Your Honours have any further questions about that, that's what I propose to say by way of reply.

**ELIAS CJ:**

Thank you, all counsel, for your considerable help and please convey that to Mr Goddard. We will reserve our decision in this matter, thank you.

**COURT ADJOURNS 10.57 AM**