IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA200/2021
[2022] NZCA 391

	BETWEEN	STEVEN RICHARD YOUNG Appellant
	AND	THE ATTORNEY-GENERAL Respondent

Hearing:	12 April 2022 (further submissions received 3 May 2022)
Court:	Kós P, Cooper and Dobson JJ
Counsel:	A R B Barker QC and J Moss for Appellant K G Stephen and H T N Fong for Respondent
Judgment:	23 August 2022 at 9 am

JUDGMENT OF THE COURT

A The application for leave to file an amended notice of appeal out of time to appeal the costs judgment [2021] NZHC 1359, within the extant appeal, is granted.

B The appeal is dismissed.

C The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Young's land lies beneath cliffs compromised by the 2010/11 Canterbury earthquakes sequence. The cliffs lie across the boundaries between Mr Young's land

and the clifftop properties above. The earthquakes caused the cliffs to fail. Rocks fell across Mr Young's property. His wife narrowly avoided death.

[2] Following the earthquakes, the neighbouring properties on the cliffs were red zoned under the Canterbury Earthquake Recovery Act 2011. They were acquired by the Crown between 2012 and 2015. Continued instability in the cliffs means Mr Young's land is unsafe. It, too, was red zoned. The Crown made a number of offers to buy Mr Young's land, all of which he rejected.

[3] Instead, in 2017 Mr Young brought an action against the Crown in trespass and nuisance. He claimed the Crown was obliged to remove the rockfall from the 2010/11 earthquakes sequence and remediate the risk of further rockfall and/or cliff collapse on the cliffs so that he may return to, reoccupy and restore his property. Alternatively, he sought an award of damages reflecting the value of the property he lost.

[4] Dunningham J dismissed that claim.[1] Mr Young appeals. He seeks also to challenge a separate costs decision in which the Judge awarded the Crown scale costs of $69,448 and disbursements of $259,645 — these mostly being for the costs of expert witnesses in what had been a five-day trial.[2]

Background

[5] We draw here on the judgment below. For over 40 years Mr Young has owned the land at 124 Main Road, Redcliffs in Christchurch. Mr Young has devoted great effort to developing and landscaping the land, which extends to about two hectares. It now comprises an enclave of five houses and appurtenant gardens. The original homestead — House 1 — was built in 1901. At the rear of the property, and enclosing it in a sweeping curve, are the cliffs that give the suburb its name. At the top of the cliffs were the 13 properties acquired by the Crown after the 2010/11 earthquakes sequence, between 2012 and 2015, via red zone offers made under the Canterbury Earthquake Recovery Act.

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1 *Young v Attorney-General* [2021] NZHC 463 [Judgment appealed].
2 *Young v Attorney-General* [2021] NZHC 1359 [Costs judgment].

[6] Prior to 2007, only three of the five houses existed on Mr Young's land (Houses 1–3). In 2007, Mr Young obtained subdivision consent to create four new residential lots in addition to the balance lot (Lot 5), on which Houses 1–3 stood. Mr Young subsequently sold two of the lots to two different families, who each built family homes on these lots (Houses 4 and 5) and lived in them in anticipation of the subdivision being completed and acquiring title. Rockfall protection works still needed to be completed before that could happen.

[7] The 4 September 2010 earthquake damaged Houses 1–3, but relatively little rock fell from the cliffs. However, the 22 February 2011 earthquake (which struck at 12.51 pm) caused over 21,000 m^3 (or over 30,000 tonnes) of rock and debris to fall on to Mr Young's property. Mr Young described these frightening events in evidence:

> Outbuildings were knocked over, boulders hit the houses and the driveway was completely blocked by rockfall and debris blocking all access to the property from Main Road.
>
> It was very frightening and my wife almost lost her life. I was at home and my wife had just collected our son from daycare and was on her way back to her job at the Redcliffs Supermarket. She started driving down the drive but then realised she had forgotten her name badge and so jumped out of the car to go back into the house to collect it. At the very moment she was out of the car collecting her name badge the earthquake hit and her car was demolished by falling rock. Had she not returned for her name badge she would no doubt have been killed. This was a terrifying time for us.

[8] More rockfall also occurred in subsequent earthquakes. Overall, around 72 per cent of the detached rocks and debris came from the cliff face lying *within* Mr Young's own land; 28 per cent came from the neighbours' land above Mr Young's land. Houses 1–3 were damaged and became uninhabitable. Houses 4 and 5 were damaged but were capable of repair.

[9] In June 2012, the property was designated as a red zone property under the Canterbury Earthquake Recovery Act. The Crown gave Mr Young two standard options for the purchase of his property. Option 1 was for the land and improvements, based on their 2007 rating valuation, with Earthquake Commission (EQC) and private insurance claims assigned to the Crown. Option 2 was for the land only, based on its 2007 rating valuation, with EQC claims relating to land damage assigned to the Crown (with Mr Young retaining all EQC or insurance claims in respect of the dwellings).

A hybrid offer was made in February 2015, and renewed in December 2017, of $2.08 million, with Mr Young retaining the proceeds of insurance payments on Houses 1–3.[3] Mr Young rejected all offers. In mid-2015, he bought Houses 4 and 5 from the families to which he had sold the underlying lots. Mr Young now owns all the land and improvements on it.

[10] Due to the devastating damage caused by the earthquakes sequence, the Christchurch City Council notified a new Christchurch District Plan (CDP), in tranches, in 2014/15. The CDP relevantly introduced new management areas, in which Mr Young's property is now located. These management areas largely either absolutely prohibit, or categorise as non-complying activities, development activities such as building, subdivision and hazard-removal works. The property is not currently accessible from the road due to rockfall at the street front. A private plan change would therefore be necessary to allow for the remediation Mr Young desires.

[11] Mr Young wishes to salvage Houses 1–5, protect them as best as possible from future cliff collapse and rockfall, and return to living in House 1. Two remediation plans were put forward in evidence, which we summarise:[4]

(a) the Davis Ogilvie plan, advanced by Mr Young. It involves scaling the rock faces to remove loose rock, removing approximately 56,800 m^3 of fallen rock and debris, benching the cliff face on the northwest side of the property (involving a further 13,600 m^3 of earthworks) and building a significant bund (about five metres in height and 300 metres in length), along the two sides of the property threatened by the cliff to protect the area where the existing houses stand. The cost estimate for this work was $4,337,763 plus GST;[5] and

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3 Based on the rating value of $1.05 million for the land less any EQC land payments, and $1.03 million for Houses 4 and 5 less any EQC dwelling payments and private insurance proceeds. Mr Young has already received "EQC and private insurance dwelling payments of circa $400,000 in respect of" Houses 4 and 5, according to counsel's submissions.

4 Their exact detail is beyond the essential scope of this judgment.

5 A Crown expert costed the Davis Ogilvie plan at $3.6 million plus GST.

(b) the Kupec proposal, advanced by the Crown (but on the express basis it had no such remediation obligation). It involves the construction of two substantial bunds through the property. The first would be about 94 m long, 4 m high and 4.6 m wide at the base. The second would need to be about 73 m long and 2.5 m high with a base width of 3.5 m, and have a two metre-high rockfall-protection drape fence on top. The Kupec proposal would allow around 2,100 m² of the property to be occupied for residential purposes, as opposed to 5,800 m² under the Davis Ogilvie plan. It would be cheaper than the Davis Ogilvie plan, with the Judge estimating the actual cost would be at least $1.6 million plus GST.[6]

[12] The first of these concepts depended on a private plan variation to the CDP being successful to permit remediation, and any consents being granted. As the Judge put it:[7]

> [79] The primary barrier is the prohibited status of the works under the CDP. It cannot be reasonable to expect the Crown to embark on the costly plan change process which would be required before it could even seek consent to undertake the works, particularly when the prospects of success are remote. The cost of that exercise is not quantified by Mr Young, but I accept Mr Allan's evidence that it could involve several hundred thousand dollars and would take 12–18 months to complete, disregarding the cost and time involved in any subsequent appeal. Without a successful plan change the works are unlawful and there is no prospect that this Court would impose such an obligation on the Crown.

[13] As to the prospects of obtaining the variation and/or consents, the key planning evidence came from Mr Mark Allan. He confirmed the necessity for a plan change to undertake certain development activities that are prohibited activities in the CCMA1 zone, which applies to a significant portion of Mr Young's land. The CCMA2 and MMMA1 zones, which also cover a lot of the land apart from a strip along the boundaries furthest from the cliffs (which is covered by the LMA zone), make these activities non-complying, requiring resource consents.

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6 Judgment appealed, above n 1, at [76].
7 Footnote omitted.

[14] Mr Allan assessed a plan change was unlikely to be successful in respect of the CCMA1 zone, and resource consents were unlikely to be granted for the remaining land. These views were not significantly adjusted under cross-examination and were accepted by the Judge, as we noted at [12] above.

[15] Finally, we record that the valuation experts were agreed that the effect of the 2010/11 earthquakes sequence was that the property has no present value. Mr Barker QC (appearing for Mr Young) accepted that was so when we questioned him.

Issues on appeal

[16] The Judge held the rockfall risk from the Crown land constituted a substantial and unreasonable interference with Mr Young's right to use and enjoy his land.[8] It was therefore an actionable nuisance. That was so despite the fact the rockfall risk to date originated primarily from Mr Young's own land.[9] The Judge also held the Crown could not rely on the defence of statutory authority to bar Mr Young's claim.[10]

[17] There is no Crown cross-appeal against either of those findings. We proceed therefore on the basis the Crown is required to abate that nuisance.[11] The issue in this case is whether the Crown's hybrid offer made in 2015, and renewed in 2017, adequately compensates Mr Young for its failure to abate the continuing nuisance. The High Court judgment is not, however, a finding that the Crown was liable for the nuisance. As Mr Stephen submitted for the Crown, correctly in our view, in a case of continuing nuisance, there is no liability until and unless a defendant has breached its measured duty. The Judge found that the Crown's hybrid red zone offer met its measured duty to do what was reasonable to abate the nuisance.[12]

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8 Judgment appealed, above n 1, at [39].

9 At [39]. This was relevant to the extent of the Crown's duty to respond.

10 At [61]. See also the earlier judgment of Mander J in *Young v Attorney-General* [2019] NZHC 993, [2019] 3 NZLR 808, which (while rejecting statutory immunity) did not finally resolve the question of statutory authorisation.

11 In this judgment, we do not use the terms "abate" or "abatement" to refer to the specific self-help remedy of abatement.

12 Judgment appealed, above n 1, at [114] and [129].

[18] Mr Young contends the hybrid offer did not discharge the Crown's duty to abate. That gives rise to the primary question for us on appeal. We will summarise the judgment, and the appellate challenge, when we come to discuss each of the two issues before us:

(a) Did the Judge err as to the extent of the Crown's duty to abate?

(b) Did the Judge err in ordering costs against Mr Young?

Did the Judge err as to the extent of the Crown's duty to abate?

[19] The Judge held the Crown had a measured duty "'… to do what is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury'".[13] Reasonableness, at least in part, was a question of the shared responsibility for the nuisance, practicality and cost.

[20] The Judge canvassed both parties' proposed solutions. Mr Young's solution, which proposed that several works be undertaken on the property, was neither practical nor cost-effective. The "primary barrier" was the prohibited status of the works under the CDP.[14] Even if the works were not prohibited, the Judge considered they would overextend what could reasonably be required of the Crown.[15] The proposed works would "not permit full use of the property as occurred prior to the earthquakes" and their cost would "far exceed the value of the property that could be rendered usable by the works".[16] The Judge also rejected the Crown's proposed solution, saying there could be no certainty the requisite resource consents would be granted, and in any event the works could not "be said to be reasonable in all the circumstances having regard to their cost and the fact they will only enable a portion of the site to be used".[17] Therefore, the Judge concluded it would be unreasonable to require the Crown to meet the costs of implementing either party's remediation proposal.[18]

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13 At [77], quoting from *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA) at 524 per Megaw LJ.
14 At [79].
15 At [80].
16 At [80]–[81].
17 At [82]–[83].
18 At [85].

[21] The Judge then addressed whether damages should be awarded for the value of the land Mr Young had lost. The Judge found that $1,355,000 including GST was the value of the land immediately prior to the first earthquake on 3 September 2010.[19] That was Mr Young's loss, if he received no compensation, as the property "is worthless in its current state".[20] But given her view that the works mooted were impracticable, she concluded "there is no basis on which I would award the costs of the works, as damages".[21] Although the hybrid offer Mr Young received from the Crown did not reflect the actual value of the land he had lost, "this is not a case where … the Crown had a legal obligation to compensate Mr Young fully for his loss".[22]

[22] This was for three reasons. First, "a claim in nuisance does not necessarily translate to a duty on a defendant to fully compensate a plaintiff for the loss".[23] Secondly, the nuisance which caused the damage to Mr Young's property "did not emanate solely from the clifftop properties owned by the Crown".[24] The "vast majority" of the rock which fell emanated from Mr Young's own land.[25] Placing "the entire burden of rectifying the situation on the Crown would be inequitable".[26] Thirdly, regard also had be had to the Crown's broader responsibilities following the earthquakes.[27] The Crown had to deal with almost 8,000 red zone properties and make decisions about how to use finite resources in a way that treated all homeowners equitably.[28] In these circumstances, it could not be reasonable to require the Crown to fully compensate individuals for all their losses.[29]

[23] The Judge therefore held that, in making the hybrid offer to Mr Young in 2015, the Crown had discharged its obligations to him appropriately. She noted the Crown remained willing to pay Mr Young in the context of that offer and reserved leave for the parties to make further submissions on the issue of interest.[30]

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19 At [102].
20 At [104].
21 At [106].
22 At [108]. The offer did not take into account the increase in value from the (incomplete) subdivision.
23 At [109].
24 At [110].
25 At [110].
26 At [110].
27 At [111].
28 At [112].
29 At [113].
30 At]114]–[115] and [129].

[24] As regards Mr Young's other damages claims, the Judge declined to award damages for the value of lost improvements, lost rental for Houses 3–5 and lost chattels.[31] She also declined to award general damages or damages on a diminution of value basis.[32]

Appeal

[25] For Mr Young, Mr Barker submitted the High Court was wrong to consider the broader social responsibilities of the Crown when determining the content of the measured duty. The Crown here should be treated no differently to any other private landowner. The fact that it had made red zone offers should not offset the obligations it owed.

[26] Mr Barker also submitted the usual remedy for an established nuisance was an injunction to remove the nuisance as it stands and to prevent it from reoccurring. The Court should have placed greater weight on Mr Young's desire to return to live on land he had owned for over 40 years. However, Mr Barker acknowledged the Court had a discretion to refuse to award an injunction (none of course being available here against the Crown), and to award damages in the alternative. Although the ordinary way of measuring damages is by diminution in market value, there are examples of cases going the other way, even when the cost of cure is greater than the diminution in market value. Ultimately, as Mr Barker accepted, the damages awarded must be reasonable as between the plaintiff on the one hand and the defendant on the other.

[27] Mr Barker argued the Court was also wrong to require Mr Young to sell his property to the Crown in order to achieve and receive relief. If the Court believed the measured duty would be discharged by the value of the red zone offer, it should have made an award of damages in that amount. That would have allowed Mr Young to keep the property and put that sum towards remediating the nuisance. Mr Barker submitted the appropriate remedy in this case was an award of damages in the amount of 50 per cent of the value of the property lost to Mr Young (as quantified by Mr Young).

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31 At [116]–[121].
32 At [122]–[128].

[28] Mr Barker criticised the Court's assessment that the property was worth only $1,355,000 immediately prior to the earthquakes sequence. Based on the cheaper, alternative Kupec plan (proposed by the Crown, but without accepting any liability to undertake it) costing $1,840,000, which would deliver a balance of land worth only $1,075,000, remediation was never realistic. The Court therefore concluded the Crown's offer to purchase the property for at least $1,050,000 was reasonable. But Mr Barker criticised the starting point in the assessment. He submitted the value of Mr Young's property was at least $4,263,512.[33] With the correct numbers used, the fair balance of the interests between the parties would be dramatically different.

[29] For the Crown, Mr Stephen submitted that it did what was reasonable in the circumstances by making an offer to allow Mr Young to move on (if he wished). It had discharged its measured duty. As a matter of logic, a measured duty cannot require a payment of damages. We address the Crown's arguments more fully in the discussion that follows.

Discussion — general

[30] The essential starting point here has been obscured. It is necessary to return to some first principles:

(a) The Crown's liability (if any) to abate the continuing nuisance caused by the properties it acquired is personal in nature. It began no earlier than its acquisition of the land, whereupon it adopted the nuisance, to the extent it continued, and became subject to what has been called a "measured duty" to abate it.

(b) The Crown was not of course liable for the earthquakes sequence.[34] Mr Young acknowledges that a claim could have been made against the then-owners of the adjacent land for the immediate damage done to his land at that time by rockfall, or at least the 28 per cent of it that did not

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33 This particular subject falls within the third matter which we address shortly at [30](c)].

34 *Quake Outcasts v Minister for Canterbury Earthquake Recovery on appeal from Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2015] NZSC 27, [2016] 1 NZLR 1 at [179] per McGrath, Glazebrook and Arnold JJ.

come from Mr Young's own land. Counsel for Mr Young seem to have suggested as much to the High Court Judge.[35]

(c) It follows that: (1) the Crown's acquisition of the adjacent land between 2012 and 2015 does not render it retrospectively liable for the initial nuisance caused by the rockfall (or for that part attributable to the land it later acquired); (2) the Crown's liability is limited to abatement of the continuing nuisance represented by the instability of the land it acquired, from the time it acquired it; and (3) if damages are in play, they must involve a comparison between the value of Mr Young's land at the time(s) the Crown acquired *its* land and the reasonable costs of remediation. The value of the land *prior* to the earthquakes sequence is not directly relevant to this question.[36]

We now enlarge upon these points of principle.

[31] Continuation of a private nuisance gives rise to fault-based, rather than strict, liability.[37] This principle has been long established in English and New Zealand law. In *Sedleigh-Denfield v O'Callaghan*, the House of Lords held the defendant landowner liable for flooding on the plaintiff's property caused by a pipe and grating placed on the defendant's land by the local authority without permission to remove rainwater.[38] The liability was sheeted home to the defendant because it knew of the pipe and grating, and the risk to the plaintiff, and thereby continued and adopted the nuisance. In taking that course, the House of Lords approved the dissenting judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations*,[39] in which he said:[40]

> There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does

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35 See Judgment appealed, above n 1, at [109].

36 In this respect we depart from the approach taken by the Judge.

37 Bill Atkin "Nuisance" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 533 at 564–565.

38 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL).

39 At 893–895 per Viscount Maugham and at 910–911 per Lord Atkin, citing *Job Edwards Ltd v Birmingham Navigations* [1924] 1 KB 341 (CA).

40 *Job Edwards Ltd v Birmingham Navigations*, above n 39, at 357–358.

> nothing, he has "permitted it to continue," and become responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under *Rylands v Fletcher* … I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours.

[32] Scrutton LJ (in *Job Edwards)*, and Viscount Maugham and Lord Wright (in *Sedleigh-Denfield*) adopted also the neatly qualified observation of Sir John Salmond about adjacent landowners' obligations in the fifth edition of his text on torts:[41]

> When a nuisance has been created by the act of a trespasser, or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement.

The choice of the word "efficient" perhaps sets the qualification that followed.

[33] These and other authorities gave rise then to what Lord Wilberforce termed "a measured duty of care by occupiers to remove or reduce hazards to their neighbours" in *Goldman v Hargrave*.[42] There lightning, then as now considered an act of God, caused a tree on the defendant's land to catch fire. Believing the fire would burn itself out, the defendant failed effectively to extinguish it. He was held liable for the damage to the plaintiff's property when wind fanned the embers and caused the fire to spread. Lord Wilberforce observed that:[43]

> … some definition of the scope of [the defendant's] duty [is required]. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable", since what is reasonable to one man may be very unreasonable, and indeed ruinous, to another: the law must take account of the fact that the occupier on whom the duty is cast has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources, whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with

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41 At 359–360 per Scrutton LJ; and *Sedleigh-Denfield v O'Callaghan*, above n 38, at 893 per Viscount Maugham and at 910 per Lord Wright, citing John Salmond *The Law of Torts* (5th ed, Sweet & Maxwell, London, 1920) at 260.

42 *Goldman v Hargrave* [1967] 1 AC 645 (PC) at 662. Professor Beever has described the "measured duty" as "sleight of hand", and that what is in fact engaged is a measured standard of care: Allan Beever *The Law of Private Nuisance* (Hart, Oxford, 2013) at 77.

43 At 663.

> those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest the physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it.

[34] In *Leakey v National Trust*, a hillside or mound (known as the Burrow Mump) on the defendant's land in Somerset subsided into the plaintiff's land.[44] The instability of the Burrow Mump was not caused by, nor was it aggravated by, any human activities on the defendant's land. It was caused by nature: "the geological structure, content and contours of the land, and the effect thereon of sun, rain, wind, and frost and such-like natural phenomena".[45] The English Court of Appeal held that an occupier of land owed a general duty to a neighbouring occupier in relation to a hazard occurring on its land, whether such a hazard was natural or man-made.[46] The duty was to take such steps as were reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or its property.[47] The relevant circumstances include actual or constructive knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost thereof, and the relative financial and other resources, taken on a broad basis.[48]

[35] In *Holbeck Hall Hotel Ltd v Scarborough Borough Council*, the plaintiffs were the owners and lessees of a hotel on a clifftop overlooking the North Sea.[49] The defendant local authority owned land that formed the undercliff between the hotel grounds and the sea. The cliff was inherently unstable. A massive landslide in 1993 damaged the hotel and led to its demolition. The triggering event was ongoing geological processes in combination with heavy rainfall in the two months preceding the landslide. The judgment of Stuart-Smith LJ records that "the timing of particular

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44 *Leakey v National Trust for Places of Historic Interest or Natural Beauty*, above n 13.

45 At 508 per Megaw LJ.

46 At 515 per Megaw LJ, referring to *Goldman v Hargrave*, above n 42, at 661–662.

47 At 524 per Megaw LJ, referring to *Goldman v Hargrave*, above n 42, at 663–664.

48 At 524 and 527 per Megaw LJ.

49 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA). In CA Hopkins "Slipping into Uncertainty" (2000) 59(3) CLJ 438 at 439–440, Hopkins "welcomed" the outcome in *Holbeck Hall* but argued the decision showed the "difficulties … of predicting the outcome of litigation where it is argued that there is a 'measured duty of care', tailored to the defendant's particular circumstances".

episodes [was] entirely unpredictable".[50] The local authority was held not to be liable, for reasons we raise shortly.

[36] The nature of the measured, rather than absolute, duty means "'reasonableness between neighbours'" may require some degree of cost sharing.[51] Because principles of negligence are engaged in a continuing private nuisance, contributory negligence may be advanced by way of a partial defence.[52] Also material to the extent of the duty is where — as here — the risk is split between the plaintiff and the defendant's respective land. In *Holbeck Hall*, Stuart-Smith LJ said:[53]

> I do not think justice requires that a defendant should be held liable for damage which, albeit of the same type, was vastly more extensive than that which was foreseen or could have been foreseen without extensive further geological investigation; and this is particularly so where the defect existed just as much on the plaintiffs' land as on their own. In considering the scope of the measured duty of care, the courts are still in relatively uncharted waters.

[37] We now address two points. One relates to what the liability of the departing landowners might have been. The second is whether the Crown's liability, on acquiring the land from them, ought to be the same.

Departing landowners' liability

[38] We start by asking ourselves what the liability of the departing landowners might have been. It is common ground that the immediate consequence of the initial rockfall in 2010/11 was to render Mr Young's land essentially worthless. What value it had was then further impaired by the notification of the CDP in 2014/15, requiring plan variation and/or resource consents for remediation, the likelihood of which the Judge found was less than even.[54]

[39] How then might the liability of the departing landowners in this situation have arisen? Potentially at least, it might be from those rocks from their land that fell in the 2010/11 earthquakes sequence (being 28 per cent of the rocks that were strewn across

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50 At [8].
51 Atkin, above n 37, at 568, citing numerous cases. See also *Holbeck Hall Hotel Ltd v Scarborough Borough Council*, above n 49, at [55].
52 Atkin, above n 37, at 575.
53 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* above n 49, at [49].
54 Judgment appealed, above n 1, at [79].

Mr Young's land), and further, from the continuing nuisance represented by the instability of their land (as opposed to the instability of Mr Young's). Any assessment of the departing landowners' liability for the former aspect would require analysis of the factors identified above at [34], including apprehension of risk.

[40] The valuation evidence before us focuses on value, but not on loss or causation. It does not enable us to discriminate between: (1) loss caused by the rockfall in the 2010/11 earthquakes sequence *from Mr Young's land*; (2) like loss attributable to rockfall *from the neighbouring land*; (3) loss caused by *continuing* cliff instability on Mr Young's own land; and (4) like loss attributable to the continuing nuisance from the neighbouring land.

[41] The neighbouring landowners are not liable for (1) and (3), and the extent of their liability for (2) and (4) remains unclear. It would depend on evidence enabling attribution and an assessment in light of that as to the extent of the measured duty. However, it is patently clear that by the time the Crown acquired the neighbouring properties, the combination of (1)–(4) above, along with the CDP notification in 2014/15, had already effected the wholesale loss of value of Mr Young's property.

[42] It cannot be right however that the landowners would bear the whole cost of remediation, even assuming their measured duty made them wholly liable for loss caused by (2) and (4). To state the obvious, that is because a substantial part of the loss was caused by (1) and (3) — not their responsibility — and the evidence does not enable us to apportion loss. Nor, as we will see, can it be right that in acquiring the land, the Crown's liability in nuisance reached back to assume (1)–(3) above.

Crown liability for red zone acquisitions

[43] Where the liable neighbour is a public authority, its competing resource demands associated with its devotion to public purposes may be a relevant consideration in assessing the extent of the measured duty.[55] Logically, the competing responsibilities of public authorities put them, potentially, into a different classification from purely private landowners when considering what abatement

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[55] *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681, [2011] HLR 1 at [22].

response reasonably may be expected of them. As Jackson LJ observed in *Vernon Knights Associates v Cornwall Council*:[56]

> Where the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage.

[44] Relevantly, in this case, the Crown only adopted the nuisance by acquiring the neighbouring land as part of the red zone recovery plan developed for the greater Christchurch city in the wake of the devastation caused by the earthquakes sequence.

[45] As part of the government's response to the earthquakes sequence, four zones were created in the Christchurch area, based on severity and extent of land damage, as well as the cost-effectiveness and social impacts of land remediation.[57] The red zone classification was saved for the worst-affected areas. It was comprised of land considered damaged beyond practical and timely repair, where rebuilding was unlikely in the short to medium term.

[46] The Canterbury Earthquake Recovery Authority (CERA) would offer on the Crown's behalf to buy properties in the red zone pursuant to the Canterbury Earthquake Recovery Act. Section 53 gave the chief executive of CERA the power to enter into voluntary agreements for the sale and purchase of land. In so acting, CERA was to be a responsible steward of taxpayer money.

[47] For residential and insured properties, CERA presented landowners with two options, canvassed above at [9]. In evidence, Mr Ombler, a former acting chief executive of CERA, made clear that the offers made were exactly that: offers to purchase property and not compensation or welfare. The Crown, it is said, never intended to compensate. This framing was intended to avoid issues around fairness and consistency of approach.

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56 *Vernon Knights Associates v Cornwall Council* [2013] EWCA Civ 950, [2013] 3 EGLR 69 at [49(iii)].

57 For this explanation, we rely on the evidence filed by Mr John Ombler, a former acting chief executive of the Canterbury Earthquake Recovery Authority.

[48] This proposition is substantiated by the numerous sale and purchase agreements reached between CERA and landowners filed in evidence. The reality, however, is that the Crown spent over a billion dollars acquiring almost worthless land (from which it would albeit recoup some money from insurance recoveries). The red zone scheme was essentially a form of social programme. The primary concern, as stated by Mr Ombler, was to help people move on with their lives (if they so chose).

[49] The Crown acquired the neighbours' land not to occupy or develop it, but in effect as a rescuer: to enable the owners of that unstable land to retrieve some value from their now valueless land and move on with their lives.[58] Unsurprisingly, the offers were accepted. But it does not follow that the Crown in principle takes over the same liability the departing landowners potentially had for (1) past rockfall, or (2) past loss of value due to continuing nuisance before the Crown took ownership.

[50] In this instance, the initial rockfall was not the Crown's responsibility. The Crown is not sued (and cannot be sued) in respect of that. Nor has it assumed the departing landowners' liability — if any — for that past rockfall. At most, it is only the continuing nuisance represented by the continued risk of further rockfall from *its* land, after it took ownership, that is being assessed.[59] Much effort was applied in this case to measure the value of Mr Young's land absent the initial rockfall. But that was a false target. What matters is what value the land had when the Crown adopted the remaining, continuing nuisance by acquiring the adjacent land. Here, timing becomes critical. We do not think it principled or appropriate to treat the Crown as taking over the departing landowners' potential liability for nuisance *antecedent* to acquisition. Mr Barker points to no authorities suggesting that approach and we have found none. The cases on assumption of liability for nuisance upon acquisition of land normally relate to injunctive relief to prevent a continuing nuisance.[60] As noted earlier, the Crown entered the picture effectively as a rescuer, without intent to occupy, develop or otherwise exploit the land it had no realistic choice but to acquire.

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58 Given the potential liability to Mr Young for continuing nuisance, the neighbouring land conceivably may have had a negative value.

59 That is, (4) in [40] above.

60 See, for example, *Broder v Saillard* (1876) 2 Ch D 692 (Ch).

[51] Had the Crown not done so, Mr Young's land would remain, as it is today, worthless and irremediable. He would have had, perhaps, some claim to compensation from the former landowners, although that would have run into some of the difficulties just identified. But we do not consider it appropriate or proportionate to attribute the impairment of value from rockfall and continuing instability *prior* to acquisition, to the Crown. As also noted earlier, to do so would be disproportionate to the Crown's liability for its non-economic acquisition of the adjacent land and would discourage similar initiatives in the future.

[52] Given the difficulty of attribution of risk and responsibility, the difficulties of effecting abatement due to the CDP, and the policy implications of attributing pre-acquisition loss to the Crown as a rescuer, we are not persuaded the Judge erred in assessing that the making of the hybrid offer outlined at [9] above adequately met the Crown's measured duty to abate. That offer achieved proportionality between the Crown's limited responsibility and Mr Young's loss in light of the unique factors at work in this case.

Did the Judge err in ordering costs against Mr Young?

[53] In her costs judgment, the Judge held that:[61]

> [10] In my view the Crown is entitled to costs in this case as it was the successful party. Mr Young's claim was premised on him being entitled to something more than the offer and that claim failed. While there was an actionable nuisance, I held the Crown had discharged its measured duty to Mr Young by providing the offer in exchange for the land. I do not accept the offer was equivalent to an award in damages. The offer was not contingent on the litigation or an award in recognition of his claims. As the Crown says, Mr Young rejected that offer, litigated, lost and has since appealed. Characterising the judgment as analogous to a successful damages award ignores that the offer was made prior to the litigation, was contingent on the transfer of land, which is very different from an award of damages, and was rejected on the basis Mr Young believed he was entitled to more under his claim in nuisance.

[54] By oversight Mr Young overlooked the need to file an appeal against that costs judgment. He now applies for leave to amend the notice of appeal filed in the present appeal.[62] In substance it is an application for an extension of time to appeal

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61 Costs judgment, above n 2.

62 Court of Appeal (Civil) Rules 2005, r 34.

the costs judgment.[63] There is no prejudice to the Crown, submissions on the appeal for Mr Young having traversed costs. We grant leave to amend, with the appeal against costs incorporated into the extant appeal. We directed further submissions on costs to follow the hearing.

[55] Mr Young contends the Crown's primary pleaded position was that it owed no duty in nuisance at all. Mr Barker submits that instead of finding in favour of the primary arguments of either party, the High Court determined that the Crown owed a measured duty, which was met by its previous red zone offer (which was re-made as a result of Mr Young bringing his claim). To suggest Mr Young failed entirely was to ignore that the judgment required, at Mr Young's option, the Crown to take over his worthless property and pay the sum of $1,229,383.00 plus interest. That, Mr Barker submits, is the effect of the hybrid red zone offer.

[56] We are not persuaded by these arguments. As Mr Stephen submitted, it was the *making* of the offer in 2015 which discharged the Crown's duty to abate. But the offer was rejected emphatically by Mr Young. The Crown then renewed it by a letter from Crown Law dated 6 December 2017 — a few months after these proceedings were commenced, but almost three years before trial. That offer was not withdrawn, and it met the Crown's legal duty. Mr Young tried to gain a better result by rejection and litigation but did not succeed in that enterprise. The Judge did not err in concluding that, so far as costs are concerned, they must be met by Mr Young.

Result

[57] The application for leave to file an amended notice of appeal out of time to appeal the costs judgment [2021] NZHC 1359, within the extant appeal, is granted.

[58] The appeal is dismissed.

[59] The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

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63 Rule 29A.

Postscript

[60] We are conscious in delivering this judgment that it will come as a considerable disappointment to Mr Young. He has owned the land since 1979 and spent approximately 35 years developing the land and the dwellings on it. The likely effect of the judgment is that that tenure and connection will end. But the responsibility of the Crown for literally what has befallen the land began only on its acquisition of the adjacent properties. It does not reach back, requiring the Crown to make good what occurred in the 2010/11 earthquakes sequence. In that context, the Crown's responsibility for the continuing rockfall risk to the already gravely impaired land owned by Mr Young, was met by the offer it remade in 2017.

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