

ROAD MAP FOR ORAL ARGUMENT BY APPELLANT

1. FACTS

- a. The hazard is primarily on Crown land; contrast CA Judgment [16] to [19] and [36]. Not a concurrent finding of fact; High Court Judgment [36], [110]. The risk is explained by Duke: Duke XE p 34 l.20 to p 37 l.7; 201.0100. He references the slide show at 307.3116. His summary was agreed with by Kupec; Kupec XE p 43 l.10; 201.0178.
- b. The hazard is a significant and imminent threat. See designation of area as CCMA 1 and CCMA 2 in Canterbury District Plan (**CDP**); explained by Kupec [32] to [34]; 201.0141. See also Allan [16]; 201.0222. HC Judgment [26]; 101.0033. Kupec considers 80% likelihood of further rock in the next 50 years; Kupec [43]; 201.0145.
- c. Crown wrong to say risk known before earthquake; Crown subs [9] to [10]. See original subdivision and consent; 301.0277. In any event, coming to a nuisance is not a defence; *Fen Tigers* [51] (tab 33), *Fearn v Tate Gallery* [42] (tab 34).
- d. Remediation/protection is possible (leaving aside CDP issues).
 - i. Remediation strategies at 307.3127 and 307.3129.
 - ii. Difference between two remediation strategies was extent to which they maximized usable land on Young property: Duke (reply) [7]; 201.0092; Kupec [77]; 201.0155; Kupec XE p 47 l.20; 201.0182.
 - iii. Kupec accepts Davis Ogilvy design is technically possible; Kupec [80]; 201.0151; XE p 54 l.25; 201.0189; p 58 l.25; 201.0193. His issue was that the cost of Davis Ogilvy design was disproportionate and it would not get a consent; Kupec [80]; 201.0158, XE p 54 l.25 to p 60 l.6; 201.0189.
- e. Context for CDP restrictions:
 - i. Crown acquired all but one of the properties December 2013; see 304.1688 ff. Took assignment of all EQC claims. CDP became operative in mid 2016; Allan Tr. p 85 l.25; 201.0248.
 - ii. Crown refused to consider any remedial works for the benefit of Mr Young's land; 304.1460, 304.1466, 304.1490.

- iii. Crown undertook extensive works in what would become CCMA areas; 306.2419. Consenting situation significantly easier prior to CDP; Allan ex 93 I. 14; 201.0257.
- iv. As to consent issues in respect of Kupec design, see Allan XE ap 93 I.22 to p 95 I.5; 201.0257.

2. PRINCIPLE

- a. Principles of liability set out in *Goldman v Hargrave* (tab 6) and *Leakey* (tab 4). *Ward v Coope* (tab 19) a helpful illustration.
- b. Test is what is reasonable as between two property owners, not a general inquiry into reasonableness of defendant's actions; *Fearn v Tate Gallery* at [29] ff (tab 34).
- c. Public interest is not relevant; submission [3.29]; *Fearn v Tate Gallery* [121] ff (tab 34).
- d. Structure of the claim; injunction to prevent further damage or damages in lieu; submission 3.20 to 3.22. Injunction is the standard remedy for a continuing nuisance or the continuing threat of a nuisance; *Fen Tigers* [101] (tab 33).
- e. Damages in lieu can be assessed by diminution in value or cost of remediation; submission 3.22; *Fen Tigers* [101] (tab 33); *Grocott v Ayson* (tab 32). Cost of "protection" is a recognized head of damages; *Delaware Mansions* (tab 8).
- f. Issues as to CDP are a reason not to grant an injunction rather than a reason not to award damages; *Grocott v Ayson* (tab 32).

3. APPLICATION – THE FACTS (AGAIN)

- a. Value of property lost by Young is \$4.6m. Submission schedule A.
 - i. Land value is \$2,097,500. Subdivision 301.0285. Shalders wrongly discounted value on basis of a "distressed sale"; submission Sch. A [4.8] to [4.10]; Shalders XE p127 I. 15; 201.0360.
 - ii. High Court failed to take account of houses 4 and 5 - \$500,000.
 - iii. High Court wrongly held (at [118] and [126]) that land value included improvements - \$1.6m.
- b. Cost of Kupec design \$1,8m plus 17,000sqm land lost by Young. Value of that land is circa \$2m (ie external improvements plus land value). Submission [4.7].

4. APPLICATION

- a. Nuisance lies on the 13 Crown properties.
- b. Significance of impact on Young property.
- c. Near certainty of further damage to Young property.
- d. Available remediation strategy.
- e. Crown entitlement to EQC land payments of \$3.9m to reinstate its properties.
- f. Broader public benefit from red zone programme irrelevant to Young's claim; see references above at 2 c. Should be treated as a private individual; *Young v AG* (Mander J).
- g. \$2m allows Young to undertake Kupec design or similar, but is also a reasonable contribution to the value of land lost if unable to undertake that design.

5. RED ZONE OFFER

- a. Cost of Red Zone programme unknown – Crown submission ignores assignment of EQC payments; see *Ombler* 201.0065. Unknown here what Crown paid for 13 properties, but entitled to \$3.9m from EQC; see submission fn.15.
- b. Uncertainty as to value of the offer. Not re-made prior to trial, and withdrawn prior to this hearing. Crown advised that not available after 1 July 2021.
- c. Now calculate value of offer as \$733,601.
- d. Offer is for significantly less than the value of Young's property. As to Young's assessment of value, see submission Schedule A. Even on Crown case, land value (\$1.35m) plus houses 4 and 5 (\$500,000) and external improvements (unknown).
- e. Unclear why Crown requires transfer of land rather than a payment of damages.