IN THE SUPREME COURT OF NEW ZEALND

I TE KŌTI MANA NUI

SC: 98/2022

Between	**STEVEN RICHARD YOUNG**
	Appellant
And	**THE ATTORNEY-GENERAL**
	Respondent

SUBMISSIONS FOR THE APPELLANT

Dated: 22 February 2023

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COUNSEL FOR THE APPELLANT
CERTIFIES THAT THIS SUBMISSION
IS SUITABLE FOR PUBLICATION

1. INTRODUCTION

Overview of appeal

1.1 Mr Young is the owner of a property of 2.0407 ha. that sits at the foot of the Redcliffs' cliffs in Christchurch (**the property**). He bought the property over 40 years ago, during which time he has lived there with his family. Over time he developed and landscaped the entire block and was in the process of completing a subdivision when the Christchurch Earthquake sequence hit in 2010 – 2011 (**CES**).

1.2 The cliffs that surround his property collapsed in the CES. The damage caused was extensive. Rockfall covers large parts of the property. Three of the five houses on the property were effectively destroyed, as were many of the extensive external improvements he had made to his land.

1.3 He currently has no access to the property, other than over a neighbouring property owned by the Crown.[1]

1.4 The issue for Mr Young is that he is severely restricted in what he can do on his property as a result of the potential for cliff collapse arising from land above Mr Young's property.

1.5 The land above Mr Young's property is made up of 13 separate properties owned by the Crown (**the Clifftop Properties**). The Clifftop properties are inherently unstable because of cracks and fractures that run from the cliff edge deep into those properties as well as two mass movements that flow through the properties in the direction of the cliffs.[2] It is the resulting instability that threatens Mr Young's land and has led to the planning restrictions.

1.6 The Crown has no intention of remediating the Clifftop Properties to remove this risk despite being entitled to EQC land payments in the sum of several millions of dollars to remediate the land. The Crown has removed the houses that were on those properties and the properties now lie empty.

1.7 The only acknowledgment of Mr Young by the Crown has been a Red Zone offer made in 2015. The offer was for less than the value of his land. The compensation it implied was conditional on Mr Young selling his property. Mr

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1 His use of that property as access was the basis for a claim in trespass against Mr Young by the Crown; see the Counterclaim at [31] to [57] of the Second Amended Statement of Defence and Counterclaim; 101.0014. That claim was abandoned at trial.

2 See Appendix A to this submission; 307.3119 – 3121.

Young has no interest in selling his property. He wishes to continue to live there,[3] and develop the 3,500 sqm of safe land on the Property as best he can in the circumstances.

1.8 Mr Young's claim against the Crown is in the tort of nuisance and in particular, the principle established in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* (***Leakey***).[4] That case confirmed the principle that occupiers owe a duty to do what is reasonable in all the circumstances to prevent or minimise a known risk of harm to their neighbour's property. This is referred to as the "measured duty".

1.9 The High Court and the Court of Appeal held that the measured duty in this case was discharged by the making of the Red Zone offer to Mr Young. If Mr Young chose not to accept that offer, then he was without a remedy.

1.10 Mr Young says that the approach of the Court of Appeal is wrong. He says that the appropriate award in his favour is one for damages in the amount of $2,000,000. This represents roughly 50% of the value of the property lost to Mr Young as a result of the instability on the Crown land. It is an appropriate balancing of the interests between two neighbours. In the alternative, and if this Court favoured an approach based on the Red Zone offer, then he seeks an award of damages in the amount of $1,229,393, being the estimated value of the Red Zone offer. Both of those approaches would allow Mr Young to remain on his property.

1.11 This case is about how the common law responds to hazards and harm to property caused by natural events. The principles of liability that will be addressed by the Court in resolving this appeal are the same principles that will likely govern claims between neighbouring landowners as a consequence of the recent floods and slips that have caused so much harm and destruction in Aotearoa New Zealand over the last month.

1.12 The submissions in support of the application for leave to appeal set out various errors that it is submitted were made by the Court of Appeal. Those alleged errors will be addressed at the relevant point in the submission.

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3 Mr Young currently lives in one of the houses on the property. He accesses the property over a neighbouring property owned by the Crown. That access was the subject of a claim in nuisance by the Crown that was abandoned at trial.

4 [1980] 1 QB 487 (EWCA).

2. FACTS

Overview

2.1 Mr Young purchased the property almost 40 years ago.[5] He had developed the property extensively, creating a family compound. It has been the focus for his family life. It is a property to which he has a profound and personal connection.

2.2 By the time of the CES, there were five houses on the property.[6] Houses 1, 2 and 3 were owned and used by Mr Young and his family. They consisted of the original homestead built in 1901 (**House 1**), a separate large two story home to accommodate extended family when they came to visit (**House 2**), and a multi-purpose dwelling including a sports pavilion and guest accommodation (**House 3**).

2.3 There were two other houses on the property. Mr Young had sold lots 1 and 2 in a proposed subdivision to third parties, the Wongs (**House 4**) and the Jamiesons (**House 5**). They had built new homes on their respective lots and were living in them.

2.4 The subdivision was almost complete by the time of the CES.[7] The subdivision consent had been issued in 2007 and all conditions satisfied apart from the completion of rock protection works for lot 4.[8] Once titles were issued, the property would have comprised five lots.[9] Lots 1 to 4 were typical sized residential lots, and included the Wong and Jamieson houses. Lot 5 was a substantial lot of 1.8 hectares with future subdivision potential, and on which were Houses 1 to 3.

2.5 The property suffered significant damage in the CES.[10] The most immediate damage was to the houses and improvements on the property. House 3 was seriously damaged by rockfall, being the house closest to the cliffs. The remaining houses were damaged primarily by ground shaking.

2.6 All five of the houses were insured. Insurance claims were made by Mr Young,

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5 Mr Young discusses the property and his relationship to it at Young at [8], [17] – [19] and [67]; 201.003. See also Young XE 201.0057 Line 21.

6 The condition of the Property prior to the Christchurch earthquakes can be seen the photo bundle at 307.2955-3017.

7 Judgment [17] to [22]; 101.0030. See also Young [24] to [28]; 201.0006.

8 A copy of the resource consent is at 303.1310. As noted by the High Court at [17], the only condition outstanding related to engineering work to protect against rockfall on lot 4 (part of the engineering conditions).

9 A copy of the subdivision plan can be seen in 303.1310.

10 The extent of the damage can also be seen in in 303.2951-54, and 303.3027-33.

the Wongs and Jamiesons. All five houses were over the EQC cap and were placed in the hands of private insurers. Mr Young's three houses were eventually deemed beyond economic repair, whereas the Wong and Jamieson houses were deemed repairable.

2.7 For this reason, Houses 1 to 3 do not feature in this claim, as Mr Young's loss was fully covered by insurance. Houses 4 and 5 did feature, because they had a current value even in their damaged state of $500,000.[11]

2.8 The Wongs and Jamiesons did not return to their homes after the CES. Eventually, as a result of the Crown refusing to deal separately with the Wongs and Jamiesons, Mr Young purchased their homes from them to enable them to move on.[12]

2.9 The Crown acquired the 13 properties at the top of the cliffs between 2012 and 2015 under Red Zone offers.[13] The Crown is entitled to EQC land payments in respect of those properties. At the time of trial, that issue was still "outstanding" and the amount to be received per property was unknown.[14] However, it is apparent that the sum will be significant, and likely not less than $3,900,000 for the 13 properties.[15]

2.10 The Crown made a Red Zone offer to Mr Young in 2015.[16] There was significant

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11 The valuation evidence was the houses 4 and 5 had an unrepaired value of between $460,000 and $500,000 (see fn 40 of the Judgment; 101.0050). GEM Valuations, which were used as the basis for the hybrid offer, valued the houses at $1,040,000 in their undamaged state as at 2010; 304.1473. This is the amount Mr Young paid to the Wongs and the Jamiesons.

12 Because the subdivision was incomplete, and titles had not issued, the Crown refused to deal with the Jamiesons and Wongs separately and made the Red Zone offer of the Crown, inclusive of the improvements values for Wong and Jamiesons directly to Mr Young.The purchase agreements are at 305.2258 (Wong) and 306.2258 (Jamieson).

13 Red Zone offers were offers made by the Crown to owners of properties deemed to be in the red zones in and around Christchurch and were based on 2007 rating valuations. The various sale and purchase agreements for the Clifftop Properties start at 304.1685 and finish at 305.2244.

14 Bradley XE p 31; 201.0085. There were express assignments of the EQC land claims in the various sale and purchase agreements (see for example 304.1774).

15 The Crown as owner of the 13 cliff top properties is entitled under s19 Earthquake Commission Act 1993 to the lesser amount of the cost to remediate the damaged land or the average value of the smallest consentable lot size in the area. Mr Foster's evidence at 301.0238 is that the sum of $300,000 for a 450 sqm site had been agreed with EQC's valuers as the amount payable if the cost to remediate was higher. This equates to the evidence of Mr Shalders at 201.0323. Therefore it would appear that the Crown was entitled to the sum of $3,900,000 for its 13 cliff top properties (13 x $300,000).

16 The High Court referred to an offer being made in November 2015. That is incorrect. The hybrid offer was made in February 2015. It was re-made on 6 August 2015. All that happened in November 2015 is that the Crown rejected a previous request made by Mr Young to vary the offer.

confusion after trial as to what the terms were of this offer. It was not a focus at the hearing.[17] However, Mr Young calculates that the offer implies a payment to him of $1,229,383.[18] That appears to be accepted by the Crown, although the offer itself is no longer open.

2.11 The property as it stands has no access due to rockfall at the street front of the property. There are areas at the rear of the property around the base of the cliffs which are covered by rockfall, some of which has fallen from Crown land and some from Mr Young's land. However, there is also a large area of approximately 3,500m2, including the Wong and Jamieson houses, which is outside the rock-fly zone and is safe and useable, subject to access being restored and rockfall protection measures being put in place. The only access Mr Young has had since the earthquakes has been informal, through neighbouring properties owned by the Crown.

The nuisance

2.12 There are two findings by the Court of Appeal on the facts that Mr Young says were wrong.

2.13 The Court of Appeal treated the relevant nuisance (i.e. the inherent instability of the cliffs) as one that existed on both the Crown land and Mr Young's land.[19] Mr Young says that this is not correct.

2.14 The evidence at trial was that the causes of the instability of the cliffs were a series of cracks leading from the cliff faces deep into the Crown properties, and two large mass movements that were located on the Crown properties but that flowed towards the cliffs.[20] While some parts of the cliff faces remained within

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17 The only reference to it as being a discharge of the duty was in one paragraph of the Crown's 124 paragraph closing: "It submits that the measured duty goes no further than providing access for Mr Young to enter his property, through the Crown's property at 124A Main Road. It has, indeed, gone beyond the measured duty by initially offering to buy Mr Young's property at a value commensuartate with its pre-earthquake value. The Crown has already done what is reasonably expected on it in the circumstances." Crown closing [81]. In respect of that submission, it should also be noted that the Crown had prior to trial maintained a claim in trespeass against Mr Young for using 124A Main Road as access. As some measure of the importance the terms of the actual offer had at trial, the offer referred to by the Court appears to have been omitted from the bundle of documents.

18 This is calculated as $2,090,000 for the land and dwelling values less the EQC payment to Mrs Wong ($67,734) *less* EQC land payment to Mr Young ($792,883).

19 Judgment [16], [19], [36].

20 The unstable areas are shown on photograph "**A**" attached to this submission. Note that the movement of the direction of the Balmoral Lane Mass Movement is noted incorrectly. The movement is towards Mr Young's property. This was amended in evidence.

Mr Young's property, the primary risk of further cliff collapse was the instability emanating from the Crown properties from the cracking and fractures in the land and the mass movements.

2.15 This risk was reflected in the designation by the Council of the CCMA1 and CCMA2/MMA1 zones that now prevent or restrict development on much of Mr Young's land.[21] They reflected the modelling by GNS Science of the flow of rock from movements and failures in the Crown land.

2.16 The High Court held that the restrictions of the CCMA1 and CCMA2/MMA1 zones were already in place when the Crown purchased the properties.[22] That is incorrect. The properties were purchased by the Crown in 2012/2013, with one property purchased in February 2015. The relevant parts of the District Plan did not become operative until later in 2016. The District Plan in its entirety became operative in 2017.

2.17 Accordingly, for the purpose of determining Mr Young's claim, it was important to recognise that the cause of the nuisance was, and continues to be, instability on the Crown's land.

Value of Mr Young's land at the time the Crown purchased

2.18 The Court of Appeal proceeds on the assumption that Mr Young's property was worthless at the time the Crown purchased its properties because of the harm it had suffered during the CES.[23] Mr Young says this is wrong in the absolute terms described by the Court.

2.19 Mr Young's property suffered damage from rockfall during the CES. That damage was to part of his property only. Much of his property was unaffected, and the rock that did fall could be removed. In addition, 3,500 m² of his property is outside any "fly rock" zone (and the CCMA1 and CCMA2 areas) and so would be unaffected by any future rockfall. That area includes the two houses which Mr Young currently uses and occupies. The problem with this area is one of access.[24] The front part of the driveway is blocked by rockfall that came solely from the Crown owned property immediately above that part of the driveway.

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21 These zones are shown on photograph "**B**" attached to this submission.
22 Judgment [10] and [41].
23 See for example, Judgment [38], [42].
24 The evidence on behalf of Mr Young was that, if the Kupec design was implemented, then the value of this area would be between $1,918,500 and $2,091,000 (see [4.7] below).

2.20 The rest of his property also has value in a general sense. Some of it is covered by rockfall which can be removed and remediation steps undertaken. The problem is that some of those steps cannot be undertaken because of the unstable cliffs which have led to the planning restrictions. So any lack in value is a consequence of the on-going nuisance that is at the heart of Mr Young's claim.

2.21 Accordingly, while the Court of Appeal was correct to say that Mr Young's property has no value as it currently stands, with its principal access blocked and no rockfall protection measures in place, it was wrong to say that the lack of value was crystallised in some way prior to the Crown's purchase of its properties. The lack of value is caused by the on-going nuisance on the Crown land.

2.22 It is also appropriate to address the criticisms by the Court of the valuation evidence, and its focus on pre-CES values (and its failure to address rockfall).[25] The Court of Appeal misunderstood the relevant evidence. The issue both of the valuers were trying to address was the value of the property if it was not subject to the on-going nuisance. Given that there was no market evidence for the value of properties within the Red Zone, they treated the pre-earthquake value as being a proxy for its value without the nuisance.[26]

3. THE LAW

Origins

3.1 The case raises directly the issue of the nature of the duty between neighbours in respect of hazards that naturally occur on their land and which have caused or which could cause damage to their neighbour's property. The leading decision is *Leakey*.[27] The origins of that case are the earlier decisions of the House of Lords in *Sedleigh-Denfield v O'Callaghan*,[28] and the Privy Council in *Goldman v Hargrave*.[29]

3.2 The issue in *Sedleigh-Denfield v O'Callaghan* was whether a landowner (**Occupier**) was liable for a nuisance to its neighbour (**Neighbour**) created by a

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25 Judgment [40].

26 In theory, a reduction could have been made to these values to reflect the rockfall that affected part of the property. Nether valuer sought to make that deduction, presumably because the rockfall was in an area to which the valuers ascribed little value (the area up against the cliffs).

27 Above note 5.

28 [1940] AC 880 (UKHL).

29 [1967] 1 AC 645 (UKPC).

trespasser. A drainage ditch on the property of the Occupier ran along the boundary with its Neighbour. Unknown to the Occupier, another neighbour filled in the ditch and replaced it with a culvert. It did so negligently, causing water to accumulate on the Occupier's property flooding the Neighbour's property.

3.3 The Court accepted that an Occupier is not generally liable for the acts of a trespasser. Some form of personal responsibility was required.[30] That responsibility came from knowledge of the nuisance and a failure to take reasonable steps to abate the nuisance. The Court approved a statement from Salmond's Law of Torts, 5th ed. 1920, pp. 258-265:[31]

> "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."

3.4 There then followed the well-known statement of Viscount Maugham:[32]

> "The statement that an occupier of land is liable for the continuance of a nuisance created by others, e.g., by trespassers, if he continues or adopts it - which seems to be agreed - throws little light on the matter, unless the words "continues" or "adopts " are defined. In my opinion an occupier of land "continues " a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts " it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions."

3.5 The decision in *Sedleigh-Denfield v O'Callaghan* involved nuisance by human action, albeit action for which the Occupier was not responsible. However the Privy Council in *Goldman v Hargrave* had to consider the issue of whether similar liability could arise when the nuisance was the result of a naturally occurring hazard.

3.6 In *Goldman v Hargrave, a* lightning strike hit a gum tree causing it to burn.[33] The Occupier cleared the area around the tree and cut it down, actions which were appropriate. However, rather than then putting out the fire, he left it to burn. A few days later, winds reignited the fire and it spread to the Neighbour's land causing extensive damage. It was held that it was unreasonable or negligent to have simply allowed the fire to burn out.

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30 At 896 per Lord Atkin; at 904 per Lord Wright; at 913 per Lord Romer; at 919 per Lord Porter.

31 At 893 per Viscount Maugham.

32 At 895 per Viscount Maugham.

33 In the current circumstance in New Zealand, the facts of *Goldman v Hargrave* would be a direct analogy for claims based on damage caused by "forestry slash".

3.7 The Court had little difficulty in finding that the principle established in *Sedleigh-Denfield v O'Callaghan* reflected a more general duty on occupiers to remove hazards occurring on their land whether natural or man-made. After referring to the relevant authorities and discussion in the texts, the Court concluded:[34]

> "All of these endorse the development which their Lordships find in the decisions, towards a **measured duty of care** by occupiers to remove or reduce hazards to their neighbours." (Empahsis added)

3.8 The more important issue was determining what that duty required:[35]

> "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 those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money, would be unenforceable or unjust. 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. And in many cases, as, for example, in Scrutton L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations, the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved, that he could, and reasonably in his individual circumstance should, have done more."

3.9 The final decision in this trilogy was *Leakey*.

3.10 The Trust owned a hill on which there was a steep bank that bordered the plaintiff's property. The bank had a propensity to slip, and had done so in the past. After a significant weather event, there was a large slip, depositing material onto the plaintiffs' property and damaging their house. The cause of the slip was natural events, and the hillside's inherent instability. The plaintiff brought a claim for an injunction to require remediation, orders to remove what had fallen, and general damages.[36]

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34 At 662 per Lord Wilberforce.

35 At 663 per Lord Wilberforce.

36 By the time of the appeal, the injunctive relief was not relevant as the work had been done. The issue was one of damages.

3.11 The Court held that the fact the cause of the slip (an inherent instability of the bank) was caused by natural causes did not mean that no duty was owed to the neighbour:[37]

> "If, as a result of the working of the forces of nature, there is, poised above my land, or above my house, a boulder or a rotten tree, which is liable to fall at any moment of the day or night, perhaps destroying my house, and perhaps killing or injuring me or members of my family, am I without remedy? ... Must I, in such a case, if my protests to my neighbour go unheeded, sit and wait and hope that the worst will not befall? If it is said that I have in such circumstances a remedy of going on my neighbour's land to abate the nuisance, that would, or might, be an unsatisfactory remedy. But in any event, if there were such a right of abatement, it would, as counsel for the plaintiffs rightly contended, be because my neighbour owed me a duty. There is, I think, ample authority that, if I have a right of abatement, I have also a remedy in damages if the nuisance remains unabated and causes me damage or personal injury."

3.12 The issue was what the duty required the Trust to do. It was not a duty to do all things to remedy the harm or potential harm to their neighbour, but only to do what was reasonable in the circumstances:[38]

> "The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and, if so, what.

Subsequent cases

3.13 There have been a number of cases that have applied the principles of *Leakey*.[39] Most are simply an application of the broad principles to particular

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37 At 523 per Megaw LJ.

38 At 524 per Megaw LJ.

39 See for example, *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (EWCA); *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321 (UKHL); *Abbahall v Smee* [2002] EWCA Civ 1831; *Vernon Knights Associates v Cornwall Council* [2013] EWCA Civ 950; *Network Rail Infrastructure Ltd v Williams* [2019] QB 601 (EWCA). In terms of its acceptance in New Zealand, see *Ruapehu Alpine Lifts v State Insurance Ltd* (1998) 10 ANZ Insurance Cases 74,432; *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC); *Double J Smallwoods*

facts. The two cases of most relevance to Mr Young's case are as follows.

3.14 *Holbeck Hall Hotel Ltd v Scarborough Borough Council*[40] involved the collpase of a cliff that undermined and eventually required the removal of the Holbeck Hotel. The area between the hotel and the cliff was substantial and owned by the Hotel and the Borough Council, and the instability was one that was on both sides of their boundary, roughly 50/50.[41] Although the potential for cliff collapse was known, and preventative measures had previously been taken, the critical finding in the case was that no-one foresaw a slip of the maginitude that occured and which caused the damage to the Hotel. For that reason the Council was not liable:[42]

> "And for my part I do not think it is just and reasonable in a case like the present to impose liability for damage which is greater in extent than anything that was foreseen or foreseeable (without further geological investigation), especially where the defect and danger existed as much on the plaintiffs' land as Scarborough's."

3.15 *Ward v Coope*[43] involved the collapse of a retaining wall between two properties. The cause of the collapse was an overloading of the retaining wall by previous owners of the Ward's property. However, there were no indications that the wall may collapse, and no fault on the part of either party when it did collapse. However, there remained the risk of further collapse, and the issue was who should pay to prevent that from occurring. While it was uncertain at that point what remedial work would be undertaken, the Court held that the Ward's should pay for it because the risk emanated from their land:[44]

> "First and foremost the cause of the collapse was the overloading of number 41 Orchard Road over the years with earth which, as we now know, was highly likely to lead in the end to this result. Prima facie it does not seem to me reasonable to require the Coopes to pay for what was neither their fault nor within their control when what happened was caused by the use of number 41 Orchard Road by those who built up the land there so as to become nearly double the height of The Herbs. Whilst the Wards were not personally at fault, responsibility for the collapse lay on their side of the fence and arose from the additions of earth made by the occupiers to their land."

Ltd v Gisborne District Council [2017] NZAR 1167 (HC). See also *Boatswain v Crawform* [1943] NZLR 109 (SC); *Landon v Rutherford* [1951] NZLR 975 (SC); *Morgan v Kyatt* [1962] NZLR 791 (SC); [1964] NZLR 666 (PC); *French v Auckland City Corporation* [1974] 1 NZLR 340 (SC).

40 [2000] QB 836 (EWCA).

41 46% per cent of the shearing face for the slip developed on the plaintiff's property; at [21].

42 At [51] per Stuart-Smith LJ.

43 [2015] EWCA Civ 30.

44 At [76] per Christopher Clarke LJ.

3.16 Other leading cases in the United Kingdon are *Abbahall Ltc v Smee*,[45] *Lambert v Barratt Homes Ltd*,[46] *Vernon Knights Assoc v Cornwall Council*,[47] *Green v Somerleyton*[48] and *Network Rail Infrastructure v Williams.*[49]

3.17 In terms of overseas authorities, there are few cases that do anything other than apply the general principles. In Australia, the leading cases are *Yared v Glenhurst Gardens Pty Ltd*[50] and *Owners Strata Plan 4085 v Mallone*.[51] In Canada, the main cases are *Hayes v Davis*[52] and *Doucette v Parent*.[53] In New Zealand, there are no cases of great significance, although the principles of *Leakey* have been applied in a number of cases.[54]

Principles

3.18 One feature that is lacking in the case law is a comprehensive discussion and analysis of the factors that determine what the standard of "reasonableness between neighbours" will require, The statements in *Goldman v Hargrave* and *Leakey* of the factors to consider remain the leading authorities. Counsel suggests that the following provides a useful framework for a discussion of the relevant principles.

a. There is a general duty to protect your neighbour from harm as a result of hazards that arise on your property. Where the hazard is a naturally occuring hazard, the property owner will be liable if they knew of the hazard, or ought to have known, and failed to take reasonable steps to prevent harm to their neighbour occuring.

b. What will be required is to be determined on the facts of each case.[55] It is not possible to be categorical. The assessment is focused on the

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45 [2002] EWCA Civ 1831.
46 [2010] EWCA Civ 681.
47 [2013] EWCA Civ 950.
48 [2002] EWCA Civ 198.
49 [2019] QB 601 (EWCA).
50 [2002] NSWSC 11.
51 [2006] NSWSC 1381. See also *Robson v Leischke* [2008] NSWLEC 152; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248.
52 [1991] BCJ No 635.
53 [1996] O.J. No. 3493 (ONCJ). See also *Bowes v Edmonton (City)* [2005] ABQB 502 and *PPG Canada Inc v RB Colwell Ltd* [1991] 103 NSR (2d) 181 (NSSC). See also *Schoeni v King* [1943] O.J. No. 493 (ONCA) (adopting *Sedleigh-Denfield* into Canadian law).
54 *Ruapehu Alpine Lifts v State Insurance Ltd* (1998) 10 ANZ Insurance Cases 74,432; *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* [2012] 1 NZLR 120 (HC); *Double J Smallwoods Ltd v Gisborne District Council* [2017] NZAR 1167 (HC).
55 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (UKHL) at p 888 per Viscount Maugham.

personal circumstances of the parties, rather than more objective assessments.[56]

c. There is a starting prejudice to the effect that the Occupier is the party primarily responsible for avoiding the consequences of the nuisance or compensating those who suffer from the nuisance.[57]

> "As the owner of the land is normally in the best position to obviate or to contain or to reduce the effect of nuisance arising on his land, he should be primarily responsible for avoiding the consequences of such nuisance or compensating those who suffer by their occurring."

d. To similar effect, there are references in some of the cases to the Occupier having the burden of proving that all that could reasonably have been done has been done.[58]

> "Once a claimant has proved that a nuisance has emanated from land in the possession or control of the defendant, the onus shifts to the defendant to show that he has a defence to the claim, whether this be absence of "negligence" in a statutory authority case or that he took all reasonable steps to prevent the nuisance, if it is a Leakey situation."

e. In determining what is required, the extent of the risk and foreseeable consequences of the hazard are important factors.[59]

> "In reality the scope of the duty depends upon the extent of the risk of damage and the two should be considered together. … In considering whether there is a breach of duty, the extent of the risk and the foreseeable consequences of it have to be balanced against the practicable measures to be taken to minimise the damage and its consequences."

f. Equally important is the issue of the extent of what is required to avoid the risk. If comparatively little is required of the Occupier to remove the hazard on their land, then their liability for a failure to do so may be clear.

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56 *Goldman v Hargrave* [1967] 1 AC 645 (UKPC) at 663 per Lord Wilberforce; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 487 (EWCA) at 526 per Megaw LJ ("the particular man – not the average man").

57 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 487 (EWCA) at 528 per Shaw LJ. See also *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (UKHL) at p 911 per Lord Wright; *Ward v Coope* [2015] EWCA Civ 30 at [76] per Christopher Clarke LJ.

58 *Marcic v Thames Water Utilities Ltd* [2002] QB 929 (EWCA) at [86] per Lord Phillips. The proposition was not commented on in the House of Lords; *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 (UKHL). This statement was cited with approval at in *Baddeley v Barker* [2003] EWCA Civ 742. The comment in *Marcic* was based on a passage in *Clerk & Lindsall on Torts*, 23rd ed., Sweet & Maxwell, 2020 at [19-34]. However, see also the comment in *Green v Somerleyton* [2002] EWCA Civ 198 at [105] per Jonathan Parker LJ.

59 *Solloway v Hampshire County Council* [1981] 1 WLUK 381 (EWCA) at 7 per Dunn LJ; see also 460. See also *Berent v Family Mosaic Housing* [2011] EWHC 1253 at [20] per Tomlinson LJ; *Green v Somerleyton* [2002] EWCA Civ 198 at [107] per Jonathan Parker LJ.

Where significant works are required, then it may be unreasonable to require those to be done by the Occuppier, especially without contribution from the Neighbour.

g. Equally, a Court may order significant works to be undertaken to prevent any future risk, even if they exceed the value of the property effected.[60]

h. The comparative financial position of the parties may be a relevant factor, in terms of their ability to undertake the works. This was recognised in *Goldman v Hargrave*[61] and *Leakey*.[62]

i. It is also relevant whether the hazard exists on one party's property or on both. This is an important point of distinction between the decisions in *Holbeck* and *Leakey*. If the cause of the hazard is one arising on the property of both parties, then the remedial response may be shared.[63]

j. The impact on and benefit to each property is important. A significant factor may be if the remediation work also benefits both parties.[64]

3.19 There is little discussion in the case law of the appropriate remedial response. Most cases involve a claim for damages for losses caused, or injunctive orders requiring the hazard to be removed. However, the general principles of relief in respect of a nuisance more generally may provide some guidance.

3.20 The usual remedy for an established nuisance is an injunction to remove the nuisance as it stands and to prevent the nuisance occurring in the future.[65] In the case of an encroachment, the usual form of order is a mandatory injunction requiring the removal of the encroaching material and a prohibitory injunction to

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60 This appears to have been the case in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 487 (EWCA). See the argument of Counsel at 490.

61 At 663 per Lord Wilberforce.

62 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 487 (EWCA) at 526 per Megaw LJ.

63 *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11 at [107]–[108] per Austin J.

64 See for example, *Ward v Coope* [2015] EWCA Civ 30; *Abbahall Ltc v Smee* [2002] EWCA Civ 1831; *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11 at [108] per Austin J.

65 *Shelfer v City of London Lighting Co Ltd* [1895] 1 Ch 287 (EWCA) at p 322 ("prima facie"); *Ellis v Rasmussen* (1911) 13 GLR 213 (CA) at p 216 ("prima facie"); *Redland Bricks Ltd v Morris* [1970] AC 652 (HL) at p 664 ("as of course"); *Cowper v Laidler* [1903] 2 Ch 337 at p 341 ("as of course"); *BNZ v Greenwood* [1984] 1 NZLR 525 at p 535. See also *Lawrence v Fen Tigers* [2014] AC 822 (UKSC) at [101] ("prima facie" per Lord Neuberger).

prevent further infringement.[66] The preference for injunctive relief rather than damages is based on a concern that a person should not be able to forcibly purchase their neighbour's property rights through an award of damages.[67]

3.21 The Court does have a discretion to refuse to award an injunction and make an award of damages in the alternative to an injunction. The leading authority has historically been the decision of the English Court of Appeal in *Shelfer v City of London Lighting Co Ltd.*[68] The Court has a discretion as to how to approach the measure of damages. It can assess damages by reference to the diminution in value of the property or by the cost of repair or reinstatement. What is appropriate depends on the circumstances of the case. [69]

3.22 There are some cases in which courts have suggested the ordinary way of measuring damages is by diminution in market value.[70] But there are numerous examples of cases going the other way, even where the cost of cure is greater than the diminution in market value.[71] Ultimately, the damages awarded must be reasonable as between the plaintiff on the one hand and the defendant on the other.[72]

A continuing nuisance

3.23 The Court of Appeal held that Mr Young's land had no value at the time the Crown acquired its property, and that the effect of his claim was to pass to the Crown a liability owed by the previous landowners. The Court approached the damages calculation on the basis of a comparison between the value of Mr Young's property at the time the Crown purchased its land and the cost of

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66 See for example *Stellin v Hutt Speedways Ltd* [1950] GLR 77; *Woodnorth v Holdgate* [1955] NZLR 552; *Darroch v Carrol* [1955] NZLR 997; *Abbahall Ltd v Smee* [2002] EWCA Civ 1831.

67 *Krehl v Burrell* (1878) 7 Ch D 551 at 554 per Jessel MR; upheld on appeal in *Krehl v Burrell* (1879) 11 ChD 146 (EWCA) at 148: See also *Shelfer v City of London Lighting Co Ltd* [1895] 1 Ch 287 (EWCA) at 315-316 per Lord Lindley; *AG v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch 146 at 155 per Lord Hatherley; *BNZ v Greenwood* [1984] 1 NZLR 525 at 535.

68 [1895] 1 Ch 287 (EWCA).

69 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433 (EWCA) at 456–457 per Donaldson LJ.

70 *Moss v Christchurch Rural District Council* [1925] 2 KB 750 (KB); *Hunter v Canary Wharf* [1997] AC 655 (HL) at 695 per Lord Goff.

71 James Edelman *McGregor on Damages* (20th ed, Sweet & Maxwell, Croydon, 2018) at [39-003]–[39-009]. See for example, *Hollebone v Midhurst and Fernhurst Builders Ltd* [1968] 1 Lloyd's Rep 38 (QB); *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 (EWCA). This was a contract case but is cited in subsequent nuisance cases.

72 *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 (EWCA).

remediation.[73] Because of the instability, the value of his land at that time was zero.[74] The Court made repeated references to the idea that liability nuisance could not "reach back".[75]

3.24 There are issues of fact within these findings that are addressed elsewhere in this submission. However, it is submitted that the approach also misunderstands the nature of liability in nuisance, and in particular, liability for a continuing nuisance.

3.25 Liability in nuisance is an incident of ownership and control of property.[76] A nuisance can exist prior to an owner's purchase. Liability for that nuisance will pass to the new owner if they "adopt" or "continue" the nuisance. This is done through knowledge of the nuisance and a failure to take reasonable steps to abate the nuisance. This is the very principle developed in the *Sedleigh–Denfield/Goldman/Leakey* line of cases.[77]

3.26 The Court of Appeal refers on a number of occasions to the fact that there were no authorities identified that supported the idea that liability in nuisance could "reach back".[78] It was never suggested that it did. The issue in this case was the circumstances in which liability in nuisance "continues", and in particular, what steps were reasonably required to abate a continuing nuisance.[79]

3.27 The difficulty in the Court's analysis is shown by its suggestion that Mr Young may have had a claim against the former owners. That may have been correct.[80] However, he no longer has a claim against them in nuisance as they no longer have ownership or control of the properties. If the Court's analysis is correct, then the fact his neighbours transferred their property removes any remedy for Mr Young. This would be in circumstances where the very reason

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73 Judgment [30(c)]
74 Judgment [41].
75 Judgment [42], [49] to [50]. This analysis by the Court of Appeal was not one raised in submission nor was it something the bench discussed with Counsel at the hearing.
76 *Sedleigh Denfield v O'Callaghan* [1940] AC 880 (UKHL) at 903 per Lord Wright.
77 See for example the discussion of the issue in *Sedleigh Denfield v O'Callaghan* [1940] AC 880 (UKHL) at 904 per Lord Wright. The issue is also discussed by Lord Cooke in *Delaware Mansions ltd v Westminster City Council* [2002] 1 AC 321 (UKHL).
78 The Court also refers to the case being a claim in trespass. While the statement of claim in one of its headings referred to "Trespass and nuisance", the case was argued in the High Court and the Court of Appeal solely on the grounds of nuisance.
79 The Court refers at [50], by way of a distinction, to cases relating to an assumption of liability for nuisance as normally relating to injunctive relief. That was the relief sought in this case. Damages were sought in lieu of an injunction (or declaration, in the case of the Crown).
80 As the *Leakey* cases show, whether there was a claim for the original rockfall would likely turn on whether there was any knowledge of the risk of rockfall prior to the CES.

for the transfer by that neighbour was the existence of the nuisance. That is, in Counsel's submission, a perverse outcome.

3.28 The Court's analysis can also be challenged by asking what would happen if there was a cliff collapse in the future. It seems inevitable that there will be. If that were to happen, and it caused significant rockfall onto Mr Young's land (and potentially damage to property), the Court's analysis would suggest that there would be no liability. That conclusion cannot be correct. Of course, if there is liability in that instance, then Mr Young may be entitled to an injunction on a *quia timet* basis to prevent that nuisance, and damages in lieu if the Court is not prepared to make that order. That was Mr Young's claim in this case.

Relevance of public element

3.29 The Court of Appeal considered it relevant in determining the nature of the duty on the Crown that it acquired the properties as part of the Red Zone scheme. It had acquired them, not to occupy or develop, but as a "rescuer",[81] and as part of a "social programme".[82] The implication is that the fact that the Crown purchased its properties as a rescuer modified the duty that it otherwise owed.[83]

3.30 This is a finding that the Crown should not be liable in nuisance because of the public benefit associated with its actions. That finding, in Counsel's submission, is wrong.

3.31 The traditional position is that benefits to third parties, and in particular a public benefit from the nuisance, are irrelevant.[84] The rigidity of this approach was altered by the UK Supreme Court in *Lawrence v Fen Tigers*,[85] where it held that the public interest may be relevant to the type of remedy (i.e. injunction or damages). That position has been strongly re-affirmed by the United Kingdom Supreme Court in the recent decision of *Fearn v Board of Trustees of the Tate Gallery*:[86]

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81 Judgment [49].
82 Judgment [48].
83 See in particular Judgment [51].
84 "[T]he circumstances that the wrong-doer is in some sense a public benefactor … [has not] ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being presently infringed." *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 at 316 per Lindley LJ. Hardie Boys J adopted this position in *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, holding he could not put the public interest (in innovative building design) ahead of the neighbours' rights in reliance on *Shelfer,* but said "I regret that authority requires me to close my ears to it*"* (at 535).
85 [2014] AC 822 (UKSC).
86 [2023] UKSC 4 at [121].

> "I said I would come back to the principle that a defendant cannot avoid liability for nuisance by arguing that its activity is of public benefit. The reason is simply that private nuisance is a violation of real property rights (see paras 10-11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose - say, as a short-cut or as a place for taking exercise - is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference..."

3.32 If there is a public benefit associated with the Crown's purchase of the properties, then Mr Young should not carry its cost.[87]

4. APPLICATION OF THESE PRINCIPLES TO MR YOUNG'S CASE

4.1 Before addressing the proper resolution of this case, there are two issues relating to value that need to be considered.

The loss to Mr Young if nothing is done

4.2 The High Court held that the value of Mr Young's land that would be lost if nothing was done was only $1,355,000.[88] The Court did not recognise any additional value in respect of improvements to the property. This issue was not addressed in any detail in the Court of Appeal.

4.3 Mr Young says that this finding was wrong. He says that the true value of the loss was $4,263,512.33.

4.4 The reasons for this submission are set out in Schedule A. In summary, however, his position on value is as follows:

a. The correct assessment of the land value at 2010 (which was treated as the proxy for the value of the land unaffected by the nuisance) was $2,097,500 and not $1,355,000. The issue here turns of a question of valuation methodology. Mr Young's position is that the valuation that was relied on by the High Court, was a value in a situation of a "forced sale"

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87 The Court in taking this approach referred to cases such as *Lambert v Barratt Homes Ltd* [2010] EWCA Civ 681 and *Vernon Knights Associates v Cornwall Council* [2013] EWCA Civ 950. It is submitted that these authorities have been taken out of their context. The comment in *Lambert*. was directed to an argument that a public authority may be under a *greater* duty because of its significantly larger resources. It was referring back to the comments in *Leakey* that the relative resources of the neighbours may be a factor in determining what the measured duty required. *Vernon Knights* largely applied what was said in *Lambert*.

88 Judgment [102]; 101.0055.

and was not appropriate for determining a compensation payment.

b. Account should have been taken of the external improvements valued at $1,666,012.33.[89] These are improvements to the land which were not themselves damaged during the CES (and so were not covered by insurance) but are nevertheless lost (if nothing is done). The quantum of these improvements was not challenged by the Crown.

c. The High Court also failed to take account of houses 4 and 5, which were valued at least $500,000.[90]

d. The total value was accordingly at least $4,263,512.33.

The remediation

4.5 The cost of the Kupec design was estimated as being $1,840,000. That is not, however, the total cost of that design to Mr Young.

4.6 The Kupec design involves Mr Young giving up significant parts of his land. In a property of over 20,000 sqm, Mr Young would be left with approximately 3500 sqm of land[91] on which he would be able to have 4 sites including the existing sites of houses 4 and 5. He would be able to repair houses 4 and 5 and may also be possible to relocate house 3 onto one of the remaining 2 lots.[92]

4.7 That would have substantial value. Mr Foster's assessment of the value of the property once the remediation work had been done including the value of the houses was $1,918,500 or $2,091,000 depending on whether house 3 could be relocated.[93] However it also involves Mr Young losing a substantial part of his land. On the basis of the calculation above, then the value of what he would

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89 Ellis evidence at [13]-[14]; 201.0404 and 306.2515.

90 The High Court judgment does not make a finding on a value for the houses 4 and 5 but refers to Mr Shalders' evidence for the Crown of their residual value being between $460,000 and $500,000 at footnote 40 and [103]. A value of $500,000 was the figure adopted by Mr Young at trial because it represented his 'loss' from the purchase of the properties. He purchased them for a combined value of $909,578.19 but has received EQC and private insurance dwelling payments of circa $400,000 in respect of those properties.

91 Foster reply at [40]; 201.0275.

92 Foster reply at [43]; 201.0276.

93 Foster reply at [54]; 201.0278. See also Young at [70] (201.0016) where Mr Young obtained a quote to relocate house 3 on the remediated site. The High Court considered that the value of the property with the Wong and Jamieson houses might be less than the cost of remediation and subdivision; Judgment [84]; 101.0050. Mr Young says that assessment depends on errors in determining the value of the land, as discussed in the Schedule.

lose would be in the region of $2,172,512 to $2,345,012.

Application to Mr Young

4.8 Mr Young submits that the principles described above should be applied in the following way to his case. It is accepted by the Crown that the circumstances for the duty exist, in that it is aware of the risk of further damage to Mr Young's property. The issue is what does the duty require the Crown to do.

What can be done?

4.9 The first issue is what can be done to remedy the nuisance. It is technically possible to remedy the instability on the Crown land. This is how the Davis Ogilvie design approached the issue. Dr Kupec, the expert for the Crown, accepted that this was technically possible.[94] The problem with this design was its cost, which was seen as disproportionate, and the fact that it was not possible under the current planning rules unless a change, or challenge, was made to the District Plan.

4.10 Mr Young does not accept that the cost is disproportionate. The effect of the Davis Ogilvie design was not only to protect his property, but also to secure the Clifftop Properties. The problem has come from the changes made to the District Plan following the CES. Those changes were made after the Crown acquired the Clifftop Properties and chose not to reinstate those areas.

4.11 Nevertheless, because of this problem with the District Plan, the Davies Ogilvie solution was not pursued in the Court of Appeal nor is it pursued here.

4.12 The alternative design is the Kupec Design that was proposed by the Crown at trial. This would create 4 new lots on Mr Young's land.[95] The remaining part of the property would be separated by large rock bunds.[96] The cost of this alternative was found to be at least $1,840,000.[97]

4.13 As the High Court noted, there is uncertainty as to whether this could be consented. The evidence of Mr Allan (the Crown's witness) was equivocal on whether it would be consented or not. The issue is that some of the proposed rock bunds lie within CCCMA2 and as a result an application for a resource

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94 "From a purely academic perspective, I believe that the proposed mitigation measures may work (subject to my other comments below). Kupec [80].
95 Kupec at [65]; 201.0152.
96 Kupec at [70]-[76] and [79]; 201.0154-157.
97 Judgment [76]; 101.0048.

consent is required.[98]

4.14 An area designated CCCMA1 under the Plan means that an activity is "prohibited" whereas an area designated CCMA2 is less restrictive and means an activity is "non-complying" and is subject to the resource consent process. A small part of the Kupec design involves an activity in the CCCMA2 area, being some of the proposed rock bunds protecting the driveway.

4.15 However, whether the Kupec design can be consented is not the key issue. If it cannot, there is likely to be alternatives. The importance of this design is that it would occur entirely on Mr Young's land. Whether the Kupec design, or some variation of it, will be achieved, is something that Mr Young will be responsible for. He is committed to remaining on his land, unlocking both the access and value to the land, and so he will ultimately need to find a design that achieves these objectives.

The risk is ultimately on the Crown's land

4.16 This is not a situation where the hazard is shared between two properties, as in a case such as *Holbeck Hall*. As discussed above, the risk here is one that lies on the Crown's land.

Impact on Mr Young

4.18 The risk to Mr Young, and the impact on him, is not hypothetical or merely anticipated. His property currently has no value given the issues over access. This issue has been discussed above.

Impact on the Crown land

4.17 There is an element running through the position of the Crown, and the approach in both the High Court and Court of Appeal, that any work that could be done is only to the benefit of Mr Young. That characterisation is not correct.

4.18 If the Crown chose to remediate its properties, then it would return value to its own properties. The instability affects the useability of not only Mr Young's property, but also that of the Crown properties. For example, the Crown had remediated the immediately adjacent properties because the danger of further collapses was a danger to the main road that runs from Sumner to the city. Yet

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98 This can be seen in the photographs of the Kupec design; [].

the Crown chose to stop its remediation works at Mr Young's boundary.[99]

4.19 Moreover, as already submitted, the Crown is entitled to payments from EQC for the land damage claims on each of the 13 Clifftop Properties. Mr Bradley for the Crown accepted that the Crown were entitled to those payments on cross examination and that the payments were "outstanding". [100]

4.20 Those claims arise under s 19 of the EQC Act for the costs of reinstating and remediating the land on its properties. The quantum of each claim is based on a formula in the Act, but at the minimum, would be at least the sum of $300,000 for each of its thirteen Clifftop properties.[101]

4.21 The Crown purchased these properties with the apparent intention of leaving them vacant and un-remediated. That is the Crown's choice as the owner. The difficulty for Mr Young is that the Crown's decision not to repair its own land, even though it is entitled to payments to effect those repairs, has the impact of making his land worthless.

Resources

4.22 There is no reason to reduce the burden on the Crown on the basis of a limitation in resource. Certainly, the impact on any individual of the losses to be incurred by Mr Young if he has no relief are significant.

Conclusion

4.23 In light of all of the above, Mr Young says that the appropriate relief to grant is damages in the amount of $2,000,000. It is the result of a broad assessment of the issues in the case. It would be a contribution toward the direct costs of implementing the Kupec design, although it would still leave him having lost almost 17,000 sqm of land. It is roughly 50% of what will be lost if he is unable to undertake any remediation.[102] It is an appropriate balancing of the interests between two neighbours.

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99 Mr Young's evidence at [68], [92]; 201.0016, 201.0020.

100 Mr Bradley at 201.0085.

101 Mr Foster's evidence at 301.0238 was that the average lot size in Redcliffs was 450 sqm and the value was $300,000. See also Shalders at 201.0323. Thus, unless the cost to remediate all of the land on each lot was less than that sum, EQC had to pay out $300,000 per Clifftop Property.

102 There is a discussion of the imprecision and inherent fairness of a sharing of costs on a 50/50 basis in *Abbahall v Smee* [2002] EWCA Civ 1831 at [40] per Munby J.

5 DAMAGES IN ACCORDANCE WITH THE RED ZONE OFFER – AN ALTERNATIVE MEASURE

5.1 The High Court and the Court of Appeal both held that any measured duty was discharged by the making of the Red Zone offer. This was the approach proposed by the High Court, and then adopted by the Crown in the Court of Appeal. Neither party put any focus on the measured duty at trial.

5.2 If the Court is not prepared to accept the approach to damages as set out in section [4] above, Mr Young seeks in the alternative, an award of damages in the amount of the Red Zone offer.

5.3 It seems implicit in the Red Zone offer that the figure of $1,229,383 is accepted by the Crown as an appropriate figure for compensation. The issue is whether it should be conditional on Mr Young agreeing to sell his property to the Crown, which is a condition of a Red Zone offer. Mr Young says that it should not. It is effectively a compulsory acquisition of Mr Young's land at a significant undervalue. Such a remedy is at odds with basic principles of the common law.

5.4 remedy of injunction. The concern is that, through an award of damages, a party is effectively being allowed to compulsorily acquire a property right from their neighbour. In respect of the discretion to award damages under Lord Cairns Act, the Jessel MR has famously stated.[103]

> "The question I have to decide is, whether the appeal to me by the Defendant to deprive the Plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. … It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the Lands Clauses Act, to compel people to sell their property with-out their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute …"

5.5 Counsel has not identified any case where a remedy required the sale to the

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[103] *Krehl v Burrell* (1878) 7 Ch D 551 at 554 per Jessel MR; upheld on appeal in *Krehl v Burrell* (1879) 11 ChD 146 (EWCA) at 148: "It was not intended, and never could have been intended, by the Legislature, in giving a right to damages under Lord Cairns' Act, to compel a man who is wronged to sell his property to the person who has wronged him. No such right as is claimed by the Appellant can exist in this country unless specially given by an Act of Parliament". See also *Shelfer v City of London Lighting Co Ltd*, [1895] 1 Ch 287 (CA) at 315-316 per Lord Lindley; *AG v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch 146 at 155 per Lord Hatherley; *BNZ v Greenwood* [1984] 1 NZLR 525 at 535.

party liable in nuisance of the neighbour's land. The only discussion that has been identified was in the Court of Appeal decision in *Marcic v Thames Water Utilities Ltd*.[104] In that case, the defence raised by the Occupier was that the only way that it would be able to abate the nuisance was to exercise its statutory power of purchase, and that it could not be compelled to do that.

5.6 The Court of Appeal in that case held that a consideration of what was reasonable for the Occupier (in this case, a Statutory Authority) to abate the nuisance included a consideration of whether they should exercise their power to compulsorily acquire his property.[105]

5.7 In this regard, it should be recognised that the Crown had the power at the time, under the Canterbury Earthquake Recovery Act 2011 (**CER Act**), to compulsorily acquire Mr Young's property.[106] Had it done so, Mr Young would have been entitled to compensation from the Crown of the current market value of the land and improvements on the property, and subject to the protections in the Act in regard to being heard on those values, and the right of appeal to determinations made on value.[107]

5.8 The Crown did not seek to compulsorily acquire Mr Young's property. However, it has sought to obtain the equivalent result (acquisition of his property) through the re-made Red Zone offer, but for a lesser payment than the market value of the land and improvements.

5.9 Even if the Court's analysis was otherwise correct, the proper remedy to have granted was an award of damages in the amount of the Red Zone offer. It was not correct to make that payment conditional on the sale/ transfer of the property.

7. COSTS

7.1 If the appeal is successful, the costs awards in the High Court and Court of Appeal should be set aside and costs remitted to those Courts for determination

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[104] [2002] QB 929 (EWCA).

[105] See the discussion at p 993 to 994 per Lord Phillips MR. The issue did not arise in the House of Lords, where the case was dealt with on the basis of a defence of statutory authorisation: [2004] 2 AC 42 (UKHL).

[106] Section 53 of the CER Act.

[107] Section 60 – 69 of the CER Act. An example of such a claim is the recent decision of the High Court in *NZ Cash Flow Control Limited v AG* [2022] NZHC 2351.

in light of the Court's decision. If the appeal is unsuccessful, however, Mr Young appeals the significant costs award in favour of the Crown of $329,092.80.[108]

7.2 The basic point made by Mr Young in this regard was that Mr Young was ultimately successful in the High Court. Mr Young accepts that it was for a lesser remedy that he sought, being the Davis Ogilvie design, however the Court still held that the Crown was liable in nuisance and that in order to discharge that duty, the Crown effectively had to re-make its red zone offer of 2015 which implied a purchase price of $1,229,383.00[109] plus interest.[110] Put another way, but for bringing the claim in nuisance, the Crown would not have been found liable in nuisance and forced to re-make its Red Zone offer.

7.3 Mr Young says that the economic effect of the judgment is analogous to a successful claim for damages, i.e., the Crown's duty to Mr Young is discharged by a payment of $1,229,383.00. The underlying land at present has no value. The only real difference between a damages award and the result in the High Court decision was that the Red Zone offer left the Crown owning the land rather than Mr Young. If Mr Young retains the land, he will reinstate and develop it in some way[111] with at least the two current liveable homes on it (even if not subdivided, Mr Young could reopen part of the driveway), whereas if the Crown owns the land, it is likely to be left to lie as it is as the clifftop properties have.

8. RESOLUTION

8.1 Mr Young seeks an order allowing his appeal and setting aside the judgments in the Court of Appeal and the High Court. He seeks:

a. An order for damages in the amount of $2,000,000;

b. In the alternative, an order for damages in the amount of $1,229,383.00;

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[108] See Costs Judgment at [51]; 101.0135.

[109] See letter of 22 March 2021 which clarifies the offer after the HC judgment. The calculation is a red zone offer of $2,090,000 (land of $1,050,000 plus Wong and Jamieson houses of$1,040,000) *less* EQC payment to Mrs Wong ($67,734) *less* EQC land payment ($792,883).

[110] The High Court judgment at [115] commented that consideration could be given to adjusting the hybrid red zone offer of 2015 by payment of interest on the sum and reserved leave for the parties to make submissions on the issue if it could not be resolved between them.

[111] Mr Young's evidence at [66]-[67], [69]-[70],[75]; 201.0015 – 201.0018.

c. Interest on any judgment at the relevant statutory rate from 11 February 2015.[112]

d. Costs in this Court on a standard basis, with certification for second counsel;

e. Costs in the High Court and the Court of Appeal to be remitted to those Courts for determination in light of the Court's judgment.

Dated this 23rd day of February 2023

Andrew Barker KC/Jai Moss
Counsel for the Appellant

112 This is the date of the hybrid red zone offer. It is a date after the Crown had acquired the cliff top properties.

SCHEDULE A

The correct land value as at 2010

4.1 The Court approached the question of value of the property by reference to its value as at 2010, the time of the first earthquake. This was because of difficulties with determining current values for red zoned land.

4.2 At that date, Mr Young was close to completing a 5 lot sub-division of the property. Mr Young intended to sell lots 1 to 4, and he had already sold lots to the Wongs and the Jamiesons. Lot 5 was the 'balance' lot containing houses 1 to 3 which Mr Young intended to live on and had future subdivision potential.

4.3 The valuers were agreed that lots 1 to 4 could be valued on the basis of the intended titles. However, the value for lot 5 would be determined by reference to a future 8 lot subdivision of that lot.

4.4 The High Court appeared to find that the value for lots 1 to 4 was between $1,205,000 and $1,250,000.[113] The value for lot 5 was between $950,000 and $1,200,000.[114] Assuming mid-points between those ranges, the value for the property once titles were issued would be $2,327,500 (incl GST). From that, $230,000 needed to be deducted for rock protection works that remained to be done on Lot 4. Accordingly, the land value of the property if the final titles had issued was $2,097,500 (incl GST).[115]

4.5 Mr Young agrees with the Court's analysis up to this point. It disagrees with the next step.

4.6 Because titles had not yet issued for lots 1 to 5, the Court (relying on the evidence of the Crown's valuer Mr Shalders), applied a subdivision discount analysis, deducting almost $750,000 from the value of the property, to take account of (among other things):[116]

a. $239,444 – GST;

b. $58,900 – Agent fees and solicitor's costs;

c. $309,443 – 20% profit and risk margin;

d. $140,656 – holding costs.

4.7 Counsel submits that this deduction was not appropriate. It was on the facts excessive. The Court had found that the subdivision was largely complete, except for one issue as to the construction of a rock protection wall. Yet it deducted 1/3 of the value of the property on account of this comparatively minor

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[113] Judgment [96] 101.0053.
[114] Judgment [102] 101.0055.
[115] That appears to be the implication from the Courts finding. However, in subsequently adopting the value used by Mr Shalders (see Judgment at [102]) the Court appeared to use the values at the low end of the range.
[116] Judgment [98]-[99]. See the table at [80] of Mr Shalders evidence 201.0325.

issue.

4.8 It became apparent that what Mr Shalders was really doing in his evidence was adopting a technical valuation approach, and effectively ignoring the work that had been done on the subdivision. He was assuming that Mr Young actually sold the property as bare land, with an unrealised subdivision potential.[117] Yet when cross examined, Mr Shalders' recognised that this was not something that Mr Young was likely to do.[118]

4.9 The fact that Mr Shalders appeared to have proceeded on the basis of something akin to a forced sale became apparent later in his evidence. The valuation relied on by the Court was his valuation on the assumption that titles had not issued. However, he also prepared a valuation on the assumption that titles had issued. Yet for that valuation he still made significant deductions from the value of the lots for real estate agent commissions, profit and loss and holding costs. It was clear that these deductions were made because he was approaching this as a forced or distressed sale.[119]

4.10 The Court said Mr Shalders' evidence was as to what a "willing buyer, willing seller" would have paid for the property. Counsel submits that this is not correct. A willing buyer/willing seller is a person who is not acting under compulsion.[120] The simple question is what was the property worth at that time. There is no reason to approach that on the basis of a forced sale, or some 'net' return to Mr Young, and it was wrong for the Court to adopt Mr Shalders' values in this respect. It may have been that some deduction could have been made for the fact that final titles had not issued, but in the circumstances, and where the cost of the rock protection works on Lot 4 had already been deducted, it should have been nominal. Counsel submits that on the evidence, the correct value for Mr Young's bare land was $2,097,500.

Houses

4.11 There are two houses capable of repair on the property, houses 4 and 5

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[117] This can be seen clearly in a comparison with the approach that both valuers took to lot 5. Both agreed with a full subdivision analysis to reflect the fact that the value for that lot lay in a future 8 lot subdivision. On Mr Shalders' analysis, this reduced the potential yield of a 8 lot subdivision on the lot of $2,600,000 to $1,483,173. See Shalders Annexure C; 201.0330. That is the same approach that he takes to a valuation of lots 1 to 5, suggesting he has equated the current consented and near compelted subdivision with a potential subdivision for which there was not even an agreed plan. It also shows that lot 5 at least has had a subdivision analysis applied to it on two occassions.

[118] Shalders XE p124 line 30; 201.0357; Shalders XE p126 line 17; 201.0359. See the comment on this by Foster XE p 125 line 11; 201.0358. The valuers gave evidence in a "hot-tub".

[119] Shalders XE p127 line 15; 201.0360.

[120] *Inland Revenue Commissioners v Clay* [1914] 3 KB 466 (EWCA): a willing seller is "a person who is a free agent and cannot be required by virtue of compulsory powers to sell" (at 473). "It does not mean a sale by a person willing to sell his property without reserve for any price he can obtain" (at 477). See also *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer Vizagapatam*: [1939] A.C. 302 at 312-313, cited in *Carlton Heights Ltd v Minister of Works* [1963] NZLR 97 (Land Valuation Court) at 975-976. The test for compensation under the Public Works Act 1981 is that of a "willing buyer/willing seller"; s 62(1)(b).

(originally the Wong's and Jamieson's). The evidence was that their pre-earthquake 2010 value was $1,040,000,[121] and between $460,000 and $500,000 in their current unrepaired condition.[122] The sum of $500,000 is also approximately Mr Young's out of pocket losses too as he purchased those houses from the Wongs and Jamiesons for $909,578.19[123] but has received around $400,000 from EQC and private insurer dwelling payments that he has yet to put towards repairing the homes.

4.12 Despite that evidence, the Court did not attribute any value to houses 4 and 5 when assessing the loss to Mr Young. It is not clear from the Court's reasoning why that was. [124]

4.13 The evidence of both valuers was that while those houses had a residual value of between $460,000 and $500,000, they had no current value because there was no access to them.[125] The reason they had no access was because of rockfall blocking the drive entrance to the properties and the unstable land of the Crown above the driveway. That particular area of rockfall was largely the Crown's responsibility.[126]

4.14 Accordingly, in determining what Mr Young has lost as a consequence of the instability of the Crown's land, the value of the houses should have been taken into account. That value is, at the very least, the sum of at least $500,000.

External improvements

4.15 The property was uniquely developed with extensive external improvements on the land. This was apparent also from the photographs.[127] The unchallenged evidence was that the value of these improvements undamaged by the earthquakes was $1,666,012.33.[128]

4.16 The High Court, however, did not take the value of these improvements into account for two reasons:[129]

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[121] This was the red zone offer for the two dwellings based on a valuation by GEM (304.1473).

[122] Judgment at fn 40 and [103]; 101.0050 and 101.0055 and Shalders' evidence at 201.0313 at [22] and XE at 201.0335 Line 7.

[123] See Wong settlement agreement at 305.2257 and the Jamieson settlement agreement is at 305.2366.

[124] High Court Judgment [89]; 101.0052. The Court refers to this as being a value captured within the red zone offer and a value used in calculating the purchase price for the two properties. Both of these facts support the idea that the houses were of value, rather than the Court's conclusion that their value can be ignored.

[125] Shalders' evidence at 201.0337 at Line 1; Foster's evidence at reply 201.0279 at [59]-[62] and XE at 201.0337 Line 9

[126] It should also be noted that the access issue was particularly the Crown's responsibility. The rockfall in the area identified as zone 1 in the Davis Ogilvie evidence was 64% from Crown land; Benge evidence at 201.0382 (Table). However, zone 1 covers an area greater than the particular area where the accessway is blocked. In this particular area, the unstable cliff over the accessway is almost entirely within the Crown land. See diagram in Benge evidence at 201.0385. Note the amount of rockfall from the Crown land (blue shading) which illustrates the unstable cliff above the driveway to the property as compared with the small amount of rockfall in the same area (green shading).

[127] 307.2955-2966, 307.2983-91, 307.2994-3010.

[128] Ellis evidence at [13]-[14]; 201.0404 and 306.2515.

[129] High Court judgment [117], [118] and [126]; 101.0059, 101.0061.

a. If these improvements would be damaged in the reinstatement process, it was not "rational" to say the Crown would have to pay for them.

b. The value of these external improvements was reflected in the land value.

4.17 In respect of the first of these points, it was unclear how the Court's conclusion followed from the stated premise. If the external improvements would be damaged in the course of remediation, then it would seem to make sense to treat the cost of repairing those external improvements as a cost of remediation. This accords with standard remediation principles in insurance claims for example. If the property cannot be remediated, then their value is lost.

4.18 In terms of the Court's statement that the value of the improvements was reflected in the land value, that was simply incorrect. The values given by both valuers for land, and that were adopted by the Court, were bare land values.[130] They did not include the value of any improvements to the property.

4.19 For these reasons, the value of the external improvements should have been taken into account in determining the value of Mr Young's property lost.

Summary

4.20 Accordingly, when considering what has been lost by Mr Young as a consequence of the instability on the Crown land, it is necessary to include the value of the land and improvements that he cannot use. The total of these figures is $4,263,512.33.

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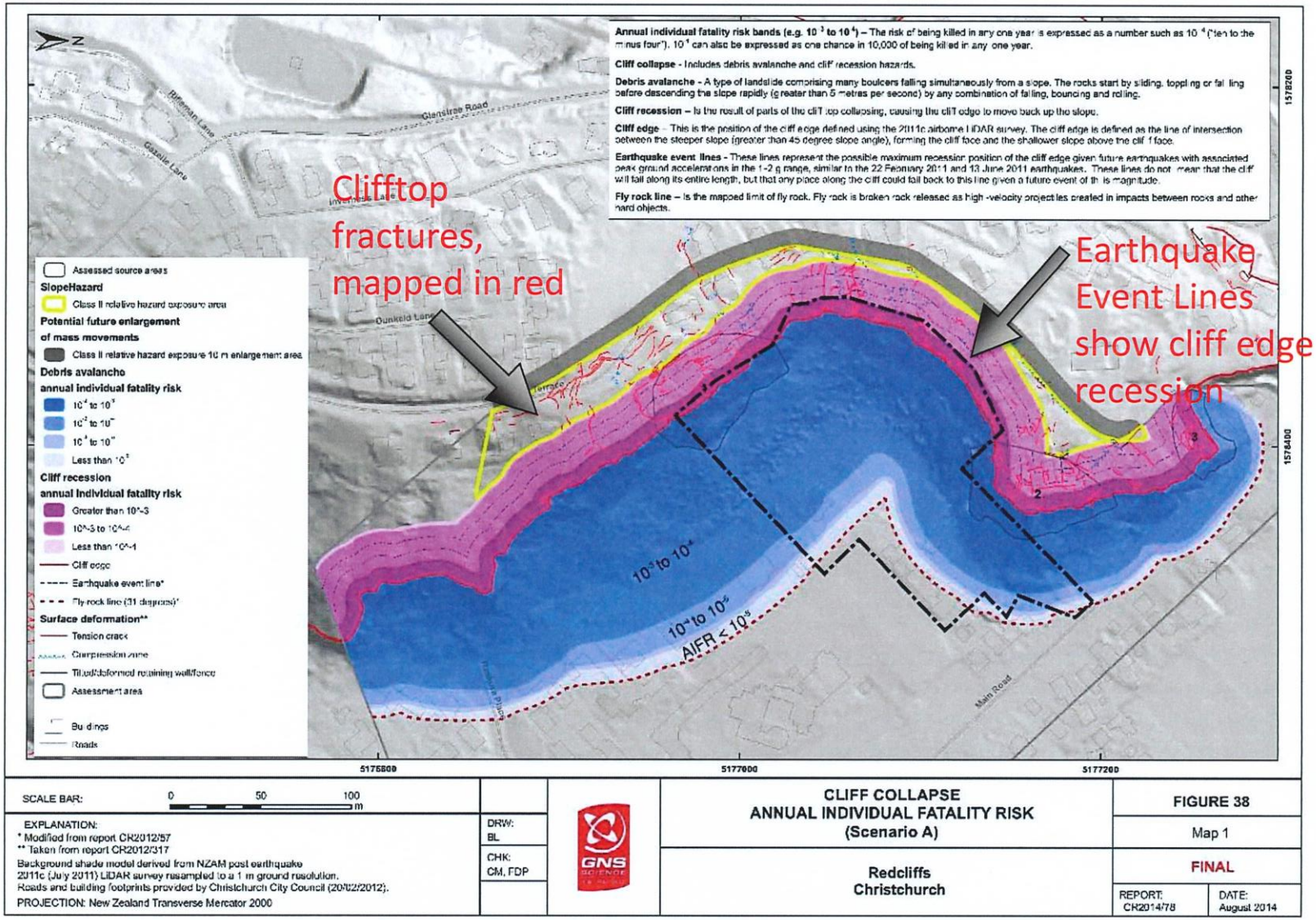
130 Foster's evidence at 301.0211; Shalders' evidence at 201.0311.

307.3120

REDCLIFFS GEOLOGICAL HAZARDS

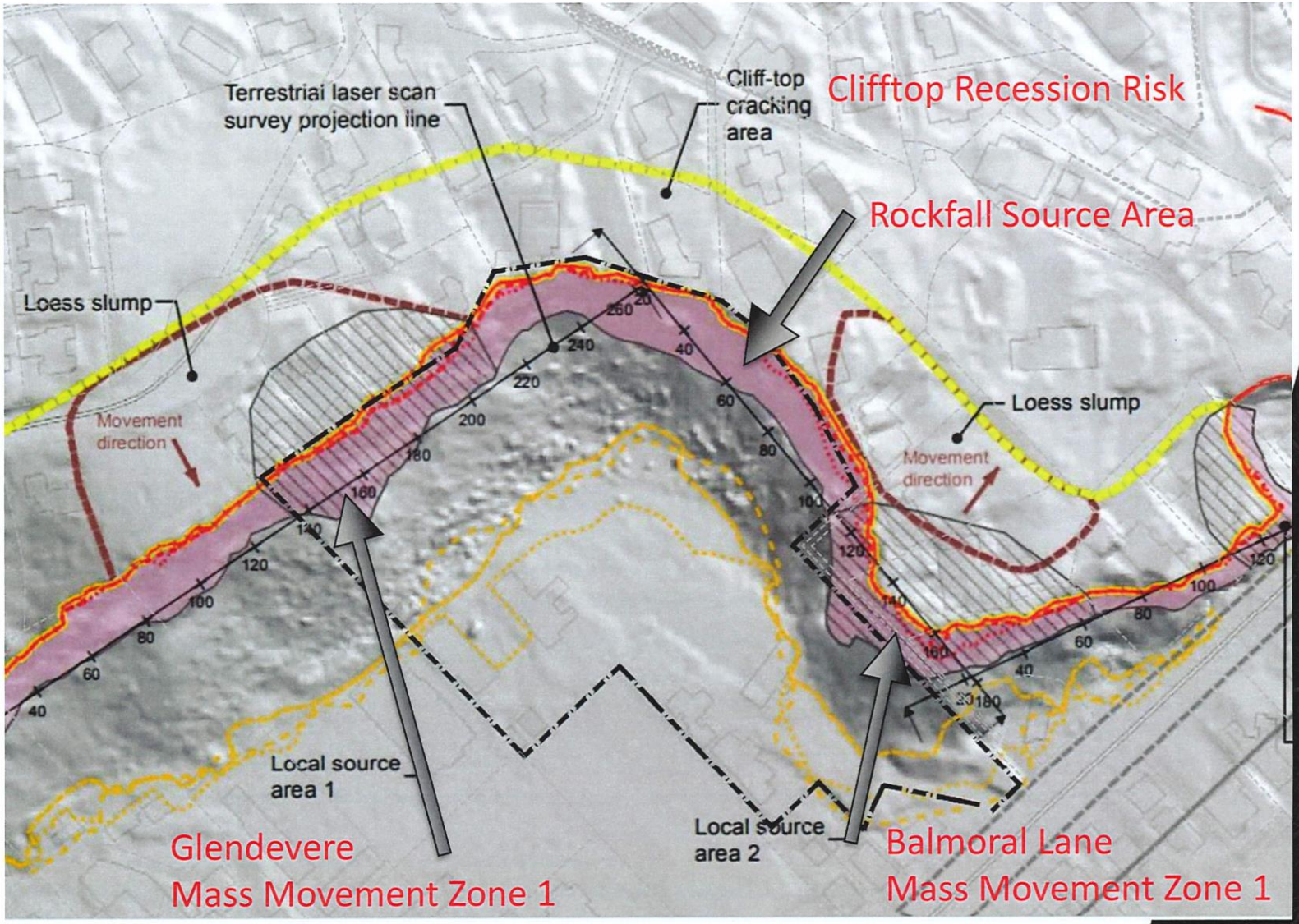
Clifftop Recession and Rockfall Risk (GNS, 2014)



SCALE BAR: 0 50 100 m			CLIFF COLLAPSE ANNUAL INDIVIDUAL FATALITY RISK (Scenario A)	FIGURE 38
EXPLANATION: * Modified from report CR2012/57 ** Taken from report CR2012/317 Background shade model derived from NZAM post earthquake 2011c (July 2011) LiDAR survey resampled to a 1 m ground resolution. Roads and building footprints provided by Christchurch City Council (20/02/2012). PROJECTION: New Zealand Transverse Mercator 2000	DRW: BL CHK: CM, FDP	GNS SCIENCE	Redcliffs Christchurch	Map 1
				FINAL
			REPORT: CR2014/78	DATE: August 2014

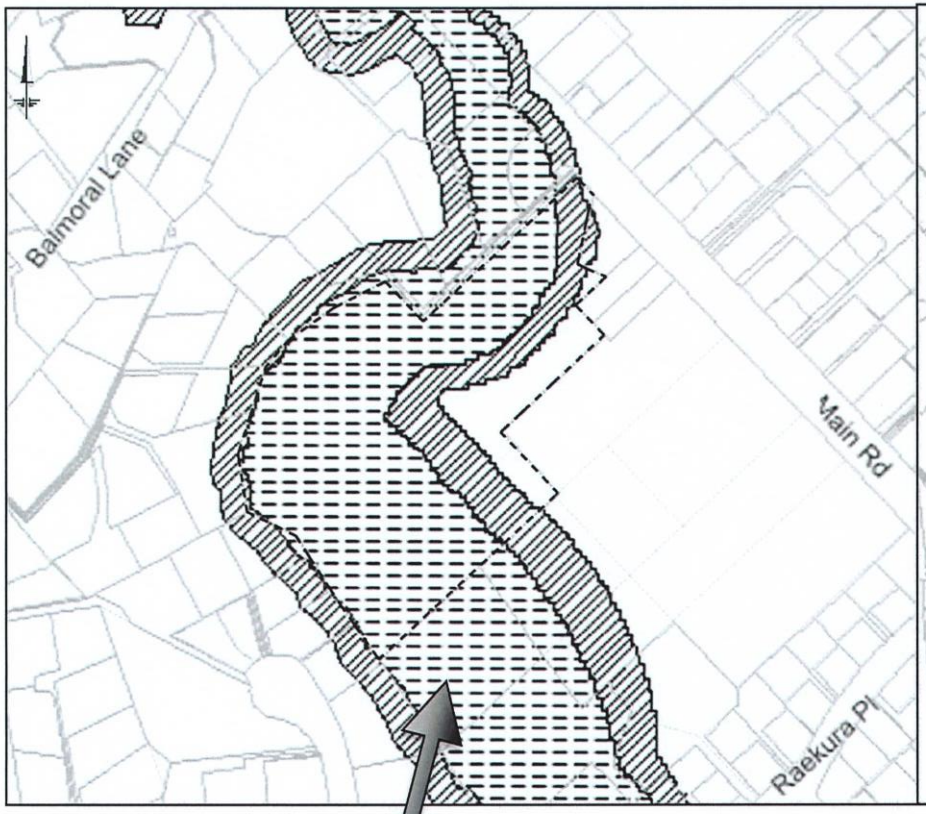
REDCLIFFS GEOLOGICAL HAZARDS

(GNS, 2014)

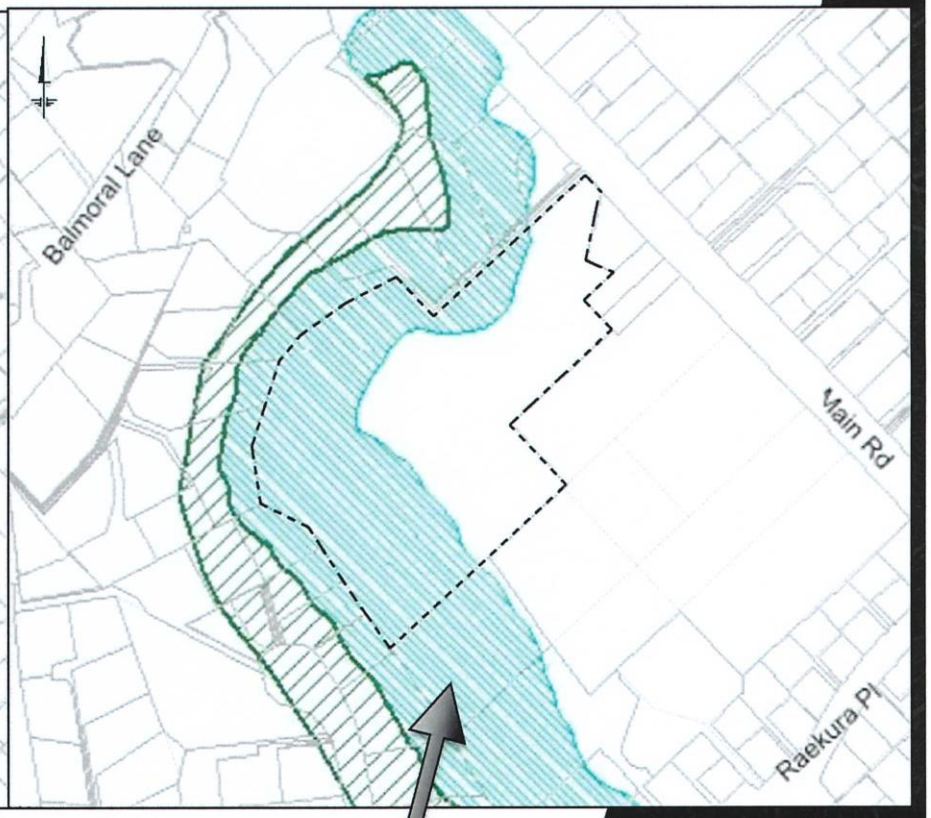


307.3122

NATURAL HAZARDS IDENTIFIED IN THE DISTRICT PLAN



Cliff Collapse
Management Area 1



Mass Movement
Management Area 1

B1