IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000050
[2016] NZHC 1959

BETWEEN	QUAKE OUTCASTS Applicants
AND	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Respondent
AND	THE CHIEF EXECUTIVE, CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Second Respondent

Hearing: 18 July 2016

Appearances: F M R Cooke QC & L E Bain for the Applicants
K G Stephen & P H Higbee for the Respondents

Judgment: 22 August 2016

JUDGMENT OF NATION J

Introduction

[1] In September 2012, the Minister for Canterbury Earthquake Recovery, the Honourable Gerry Brownlee (the Minister), decided the Crown would offer to buy properties in the red zone based on 2007 rating valuations on the following basis:

(a) insured commercial properties – 50 per cent of land value and 100 per cent for improvements;

(b) vacant land – 50 per cent of land value; and

(c) uninsured improved residential properties – 50 per cent of land value and nothing for improvements.

I refer to these as "the 50 per cent offers".

[2] The Supreme Court, in judgments of 13 March 2015, made orders that the September 2012 decisions as to the 50 per cent offers were not lawfully made.[1] The Court directed the Minister and the Chief Executive of the Canterbury Earthquake Recovery Authority (CERA) to reconsider their decisions in light of the Supreme Court judgment.

[3] In a judgment (the majority judgment) for herself, McGrath and Arnold JJ, Glazebrook J analysed the reasons given for the differential treatment between insured and uninsured/uninsurable properties, and discussed whether the insurance status of the properties was a relevant factor to be lawfully taken into account by the Minister in making his decision. She stated:[2]

> For all of the above reasons, we do not consider that the insurance status of properties in the red zone should have been treated as determinative when deciding that there should be a differential and, if so, the nature and extent of that differential. We accept, however, that the insurance status of properties was not an irrelevant factor. Some of the reasons discussed above may have provided justification for a differential.

[4] The majority also questioned the Minister's reasons for approving the 50 per cent offers.

[5] On 27 July 2015, through approval of a Recovery Plan, the Minister approved the making of new offers (the Minister's decision). On the basis of 2007 rating valuations, they were:

(a) insured commercial properties – 100 per cent of the land value and improvements;

(b) vacant land – 100 per cent of land value; and

(c) uninsured improved residential properties – 100 per cent of land value but nothing for improvements.

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1 *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 [*Quake Outcasts (SC)*] at [207].

2 At [167].

I refer to these as "the final offers".

[6] In these judicial review proceedings, the issue is whether or not the Minister's decision was lawful. In considering that issue, I must determine:

i. what the Supreme Court decided and the extent to which the Minister was bound by that; and

ii. whether or not the Minister's decision was reasonable, having regard to his obligations to respond to the judgment of the Supreme Court and to act within his powers under the Canterbury Earthquake Recovery Act 2011 (the Act).

Background

[7] This is set out in detail in the majority judgment of the Supreme Court.[3] For the purpose of this judgment, I highlight various matters.

[8] Significant earthquakes occurred in Canterbury on 4 September 2010, 22 February 2011 and 13 June 2011.

[9] On 23 June 2011, the Government announced various measures it was going to take to deal with the damage in Christchurch which it said was of a scale and severity that had not been experienced in New Zealand before.[4] In a memorandum for Cabinet dated 24 June 2011, the Minister considered the loss of confidence and property damage to be of a scale to warrant a central Government response and "a circuit breaker" was required to arrest the current decline in confidence and form a solid basis for recovery.[5] The measures to be taken included the zoning of land dependent on whether rebuilding in those areas was unlikely to be practicable over the short to medium term. The red zone was to cover land where it was considered repair would be prolonged and uneconomic on the basis:

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3 *Quake Outcasts (SC)*, above n 1, at [39]-[88].

4 The measures had been approved by a committee of senior Ministers to whom Cabinet had delegated the responsibility of making decisions as to land damage and remediation issues.

5 Memorandum for Cabinet "Land Damage from the Canterbury Earthquakes" (24 June 2011) [*The Minister's paper*] at [19].

- The land had suffered significant and extensive damage, most buildings were uneconomic to repair.
- There was a high risk of further damage to land and buildings from low levels of shaking, e.g. aftershocks, flooding or spring tides.
- Infrastructure needed to be completely rebuilt.
- Land repair solutions would be difficult to implement, prolonged and disruptive for land owners.

[10] The Minister noted that residents in the red zone were likely to face many obstacles to the resumption of normal residential activity and enjoyment in the short-to-medium term, and the health or wellbeing of residents would be at risk from remaining in the area for prolonged periods. Ministers agreed that insured residential property owners would have the choice of two offered packages:

- *Option A* – Crown offer to purchase the entire property at the 2007 rating valuation, with the Crown taking an assignment of all earthquake-related insurance claims; or

- *Option B* – Crown offer to purchase the land only at the greater of 100 per cent of the 2007 rating valuation or EQC valuation for the minimum lot size applicable. The Crown would take an assignment of the EQC land claim with the landowners being free to pursue their private insurance company for any other insurance claim they had.

I refer to these as "the 100 per cent offers".

[11] As the majority noted, the Minister's paper said that consideration would in due course have to be given to the position of uninsured residential properties and vacant lots, with the Minister stating:[6]

> Neither uninsured residential properties nor vacant lots are covered by EQC land or improvements insurance. For residential owners, the risks of not having insurance were risks that ought to have been considered when making the decision to invest in the property. Residential owners should have been aware of the risks when choosing not to purchase insurance. Vacant lot owners were not eligible for EQC or private insurance cover.

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6 At [62], cited in *Quake Outcasts (SC)*, above n 1, at [59].

[12] On 15 June 2012, the Minister announced that the Crown was extending its offer to purchase red zone properties to include properties that had been under construction at the time of the February 2011 earthquake and to non-residential properties owned by not-for-profit organisations which had insurance but, being non-residential, did not have EQC cover.

[13] In a Cabinet paper of 30 August 2012, the Minister said, with regard to vacant land and uninsured residential properties:[7]

> There are strong arguments for not extending an offer to these property categories on the same terms as for insured properties. It would compensate for uninsured damage, be unfair to other red zone property owners who have been paying insurance premiums, and it creates a moral hazard in that the incentives to insure in the future (where insurance is available) are potentially eroded.

[14] In September 2012, the Minister decided the Crown would make the 50 per cent offers for uninsured property in the red zone.

[15] Fowler Developments Limited, a property development company that owned 11 vacant sections in the Broadlands area of the red zone, and Quake Outcasts brought judicial review proceedings.[8] They challenged the lawfulness of the Minister's decisions which did not extend the benefit of 100 per cent offers to owners of vacant land and uninsured residential properties in the red zone.

[16] In a judgment of 26 August 2013, Panckhurst J held the creation of the red zone and the decision to make purchase offers to affected property owners had to be made pursuant to the Act.[9] There had been no deliberative process as required by s 10 of the Act. When the 50 per cent offers were made, the decision had been made without regard for the statutory regime and had not been made according to law. Panckhurst J thus found that the process by which the 50 per cent offers had been made was unlawful. The announcement of the decision by the Minister to make 50 per cent offers and the making of the offers by the Chief Executive were set aside.

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7 Cabinet Paper "Red Zone Purchase Offers for Residential Leasehold Vacant, Uninsured, and Commercial/Industrial Properties" (signed by the Minister on 30 August 2012) at [32].

8 Quake Outcasts was the name chosen by the owners of 46 uninsured properties in the red zone who had joined in bringing the proceedings.

9 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54 [*Quake Outcasts (HC)*].

[17] Panckhurst J did not consider in detail the further claim that the 50 per cent offers to the Quake Outcasts were oppressive, disproportionate, contrary to their human rights and an abuse of power. He did say that there had been a lack of even-handedness in the decision to make the 50 per cent offers and insufficient consideration had been given to the plight of some of the Quake Outcasts.[10] As to the issue over whether insurance should be taken into account, he stated that, on the one hand, it seemed a legitimate factor to take into account as the Minister did. On the other, it was a blunt instrument because no distinction was drawn between those who made a deliberate election to be uninsured and those who were uninsured through no fault of their own, including because insurance cover was unobtainable.[11]

[18] The Minister and Chief Executive appealed.

[19] The Court of Appeal unanimously held that the red zone decision and the dissemination of information by Ministers in accordance with it did not affect legal rights.[12] That decision was lawfully made under the residual freedom of the executive to do anything that is not prohibited by law.[13] Although it was not material to the Court's judgment, it considered the decision to make the red zone was in accordance with s 10(1) of the Act.[14] The Court held the June 2011 decision to make the 100 per cent offers was lawfully made by the Chief Executive under the legislation.

[20] The Court of Appeal held that the decision from September 2012 to make the 50 per cent offers was not made in accordance with the recovery purposes of the Act as set out in s 3. The purpose of recovery, as referred to in the Act, was not brought to bear in the September 2012 decision-making process.[15]

[21] The Court of Appeal agreed with Panckhurst J that the process leading to the September 2012 decision to make the 50 per cent offers did not involve the deliberative process required under s 10 of the Act. It held the September 2012

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10 At [95]-[96].
11 At [94].
12 *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 [*Quake Outcasts (CA)*] at [92]-[133].
13 At [127].
14 At [131].
15 At [136]-[140].

decision was therefore made outside of, and without regard for, the statutory regime and hence not according to law.[16]

[22] It was also argued before the Court of Appeal that the decision of September 2012 was flawed because there had not been even-handedness in the treatment of the recipients of the 100 per cent offers and recipients of the 50 per cent offers. The Court of Appeal accepted that a clear choice had been made to limit the 100 per cent offer to those with insurance cover. In relation to that, the Court of Appeal stated:

> [150] We accept that there is a rational basis for differentiating between insured residential property owners and uninsured owners such as the respondents, given the potential value to the Government of the rights against EQC and insurers that were assigned to the Government under the contracts resulting from the 100 per cent offers. That is the very differentiation made in the June 2011 decision and the September 2012 decision. We do not accept that the mere fact that a different approach was taken in relation to the respondents than in relation to the recipients for 100 per cent offers constitutes a reviewable error.
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> [151] In addition to the argument about lack of even-handedness, it was argued that the September 2012 decision was unreasonable because it focused on the "moralhazard" risk of paying uninsured owners the same amount as insured owners, apparently on the basis that this would encourage home owners not to insure, if they believe that the Government would bail them out in the event of a disaster. That, of course, assumes that all of the uninsured owners in the red zone were uninsured because of a deliberate decision on their part.
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> [152] In fact, that is not the case. A number of the Quake Outcasts were left uninsured because of slip ups such as failure to pay premiums, time lapses between the commencement of cover under one policy after the termination of cover under another policy, and the like. We do not intend to deal with the personal position of individual members of the Quake Outcasts, because we see the case as being determined by principles that apply on a more generic level. While the recipients of the 100 per cent offers have, for the main part, been able to apply the proceeds of the Crown offer towards buying a new home elsewhere, many of the respondents are left in a very precarious position because of the very significant shortfall between the amount derived from the offer and the cost of acquiring a home elsewhere. In many cases they are retired and not in a position to take on any significant debt. We acknowledge the significant impact this is having on their lives.
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> [153] We do not see this argument as adding anything to the argument that the September 2012 decision was not made in accordance with s 10(1) of the Act, because the recovery objective of the Act was a mandatory relevant consideration that was not taken into account.

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16 At [146].

[23] The Court of Appeal set aside the orders made in the High Court. In their place, it made a declaration that the September 2012 decision by the Chief Executive, to offer to purchase the properties of owners of vacant land and owners of uninsured improved properties in the red zone, was not lawfully made. The Court noted that the Crown would then be required to respond in a way which addressed the findings made by the Court. It said this would allow "sufficient flexibility for a reconsideration of the policy relating to vacant land and uninsured residences in the red zone if necessary".[17]

[24] In January 2014, both Quake Outcasts and Fowler Developments Limited sought leave to appeal from the Supreme Court.

[25] Leave was granted in a judgment of 5 May 2014 as to two questions:[18]

> (a) Was the establishment of the Residential Red Zones in Christchurch lawful as being a legitimate exercise of any common law powers or "residual freedom" the Crown may have, given the terms of the Christchurch Earthquake Recovery Act 2011?
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> (b) Were the offers made by the Crown to Residential Red Zone property owners under s 53 of the Christchurch Earthquake Recovery Act 2011 lawfully made? In particular:
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> (i) Was there a material failure to comply with the Act?
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> (ii) Was there a rational basis for the distinction drawn between those owners who were insured and those who were uninsured?

[26] Quake Outcasts sought a direction under s 4(5)(b) of the Judicature Amendment Act 1972 requiring the Crown to remake the offer in light of the fact that the discount based on insurance could not legitimately be applied. Fowler Developments sought a declaration that there was no rational or proportional basis for the distinction between those who received 100 per cent offers and the 50 per cent offers made to vacant residential landowners.

[27] The Supreme Court majority held that the zoning and related decisions had to be dealt with under the Recovery Strategy required under the Act.[19] The s 53

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17 At [166].
18 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2014] NZSC 51.
19 *Quake Outcasts (SC)*, above n 1, at [127]-[129].

purchase powers of the Chief Executive could not lawfully have been used absent a Recovery Plan.[20] Elias CJ and William Young J dissented on that point.

[28] The judgment of the majority in this regard does not impact on the issues which I now have to consider. As Mr Stephen for the Minister pointed out, following the Court of Appeal judgment, the Minister had already accepted that the decisions of September 2012 and the related 50 per cent offers had not been made lawfully. The majority reached the same conclusion but for a different reason. Its judgment provided a clear answer to the first question on which the appellants had been granted leave to appeal.

Submissions

[29] In these proceedings, Quake Outcasts argues that the Minister's decision was unlawful because, in deciding to offer nothing for the insured improvements on residential land, the insurance status of the properties was treated as determinative.

[30] Mr Cooke submitted the uninsured residential property owners had been treated differently because of just one factor, the insurance status of their properties. On that basis, he submitted the insurance status of their properties had been determinative as to the offers which the Minister decided would be made to them. He said the majority had been quite clear in stating that insurance status could not be determinative in this way. Quake Outcasts also claimed the Minister had failed to respond as the law required to the Supreme Court's rejection of his justification for the 50 per cent offers.

[31] Mr Cooke submitted the Minister had accordingly failed to recognise the Supreme Court's judgment in the way that was constitutionally required of him. That made his decision unlawful and, in these proceedings in the High Court, I was required to do what is necessary to maintain the rule of law.

[32] For the Minister, Mr Stephen submitted the majority's judgment in the Supreme Court was not one that determined the law, except as to whether the process

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[20] At [195].

followed by the Minister had been correct. He submitted the majority's judgment otherwise expressed views as to whether the basis for the earlier offers was reasonable. He argued that all that was required of the Minister was that he have regard to this judgment, that he had to have regard to relevant circumstances identified by the Supreme Court but was otherwise free to make his own decision as the statutory decision-maker.

[33] To deal with these submissions, I must determine what was decided by the Supreme Court and to what extent the Minister was bound by that. I also need to determine this because, sitting in the High Court, I am required to respect and follow what the Supreme Court decided - in legal terms, the ratio decidendi. To do that, I need to determine just what it was the majority decided.

What did the Supreme Court decide?

The majority's judgment

[34] As to the 50 per cent offers, the majority said that insurance was not an irrelevant consideration but other relevant considerations weighed against this being a determinative factor.[21]

[35] The majority concluded the Minister could still regard the insurance status of properties as relevant in deciding "whether or not there should have been a differential between the insured and the uninsurable and uninsurable [sic] and, if so, the nature and extent of any differential".[22]

[36] The majority commented on the reasons given by the Minister for his decision to make the 50 per cent offers. Generally, it expressed opinions as to whether the Minister may have given too much weight to certain factors or had not considered certain other matters which he should have taken into account. Factors it commented on in this way included:

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21 At [167] and [196].

22 At [196]. I presume the second reference to the "uninsurable" was intended to refer to the uninsured.

- the need to consider the difficult living conditions for those remaining in the red zone;[23]

- the failure of process and consultation in June 2011;[24]

- the delay in making offers to owners of vacant land and uninsured residential property owners;[25]

- the appropriateness of an area-wide approach in making offers;[26]

- the unreasonableness of the view that purchasers of property should have factored the risks of not insuring their property into their decision when deciding to invest in property;[27]

- the unfairness of taking into account as against all uninsured property owners the fact that some had consciously chosen not to insure their properties when this was not true of all uninsured property owners;[28]

- reasons which could have justified the Minister giving lesser weight to the moral hazard argument, including the way insured and uninsured property owners had benefited from earlier offers, the extent to which insured property owners had benefited from the 100 per cent offers, and whether or not the moral hazard argument could logically be such a strong factor when considering the owners of vacant land and the exceptional extent of the disaster;[29]

- the recovery purpose of the Act including the need to restore the "social economic, cultural and environmental wellbeing" of Christchurch communities;[30]

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23 At [199].
24 At [198].
25 At [198].
26 At [156].
27 At [153].
28 At [154]-[156] and [169].
29 At [162]-[164].
30 At [197]. See also [168] and [173].

- what the majority considered was an unjustified assumption that the owners of insured properties would resent the owners of uninsured properties obtaining the same benefit from Government offers when they had not borne the cost of insuring their properties;[31] and

- the increased cost to the Crown of acquiring uninsured properties.[32]

[37] After discussing the relevance and fairness of the reasons advanced for the differential, the majority concluded:

> [171] This means that, while the insurance status of the properties was not irrelevant, a number of relevant factors (outlined above) do not appear to have been taken into account in deciding on whether or not there should have been differential treatment for the uninsured and uninsurable and, if so, the nature and extent of any differential.

[38] The majority accepted the Crown's submission that the relief sought by the appellants went beyond "the usual relief" that would be given.[33] It noted the Crown's assurance that it would respond to the declarations. The majority made a declaration that the decisions in September 2012 as to the 50 per cent offers were not lawfully made. The majority directed the Minister and the Chief Executive to reconsider their decisions in light of the judgment.

Elias CJ

[39] In her dissenting judgment, Elias CJ said that, after the Court of Appeal judgment, the Crown had acknowledged that the exercise of the power to acquire land under s 53 had to be reconsidered in accordance with the recovery requirements of the Act.[34] That reconsideration of the exercise of s 53 powers would have to address the circumstances as they existed when the Supreme Court gave its judgment. Elias CJ said that taking into account the purposes of the Act in promoting recovery might well require consideration of the delay and its effect and the hardship caused by depopulation of the red zone in the meantime, with associated running-down of its infrastructure and its amenities. She did not consider

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31 At [161].
32 At [152].
33 At [203].
34 At [259].

it appropriate to enter into an assessment of the relevant factors beyond indicating what they might include in dealing with the points raised by the appeal.[35]

[40] In that regard, Elias CJ considered the question "Was insurance a proper basis for distinction?" The Court of Appeal had said there was a rational basis for differentiating between insured and uninsured residential property owners, given the potential value to the Government of the assigned rights against EQC and insurers. Elias CJ agreed with the Court of Appeal that the mere fact that a different approach was taken in relation to the respondents than in relation to the recipients for 100 per cent offers on the basis of insurance was not a reviewable error.[36]

[41] Elias CJ considered that, in comparing the treatment of insured and uninsured owners, it would not have been proper for the Court of Appeal to have expressed any view on the weight reasonably to be given to the lack of comparable off-set provided by recovery of insurance. This was due to the need for reconsideration in the light of s 3 and especially the recovery principle.[37] As with the majority, Elias CJ discussed some of the factors which the Minister had taken into account and suggested there might be reason to give them less weight when reconsidering the offers. She said these matters were for consideration, if ultimately relevant, when the Chief Executive reconsidered the offers to be made. She concluded by saying:

> [274] These are some of the circumstances relevant. No doubt there are others. The Court of Appeal said that "the mere fact" that some different basis of offer could be made was not reviewable error and might be justified. That seems to me to be undoubtedly correct. To what extent difference can be justified remains something for assessment in the context of proper consideration under ss 10 and 3. In that assessment, it may still be reasonable to draw some distinction between those who were insured and those in respect of whom the Crown will obtain no off-setting recovery. Dismissing the appeal on this ground is simply to leave this matter, as with other matters, open for consideration if it turns out reasonably to bear on the decision.

William Young J

[42] William Young J said insurance status affected the net cost (after insurance recoveries) and not just the gross cost of the offers. He said it also affected the value

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35 At [261].
36 At [264], citing *Quake Outcasts (CA)*, above n 12, at [150].
37 At [265].

of the economic interests which the offerees were required to surrender. He thus thought that insurance status of the properties would be highly material to the structure and amount of the offers to be made.

[43] As to whether offers should have been structured to cover losses which were insurable but not insured, he saw arguments based on moral hazard (construed broadly) as highly relevant.[38] William Young J found moral hazard to have been "extremely important' in the Government's decisions as to losses which could have been but were not the subject of insurance, describing this as "a perfectly rational approach".[39]

[44] William Young J considered that symmetry between offers to insured and uninsured landowners was material only in relation to the offers to be made for uninsured bare land and even in respect of such land, symmetry considerations were not necessarily controlling.[40] He set out the limits of symmetry-based arguments, adding that it may be unrealistic to expect complete symmetry in the offers made to different classes of landowners in the red zone, particularly given decisions required in relation to land outside the red zone.[41]

[45] He was sceptical as to the extent to which the June 2011 decision, as opposed to the earthquakes, detrimentally affected the uninsured appellants in any economic sense.[42] He did, however, accept that certain appellants may fairly claim to have been prejudicially affected by the Government's offers, in which case, special consideration of their circumstances would be appropriate.[43] He also accepted that the offers had accelerated the depopulation of the residential red zone so as to detrimentally impact the ability of its inhabitants to use their properties for residential purposes. However, this was counter-balanced by uncertainties about the continued provision of services and infrastructure in the residential red zone.[44]

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38 At [361]. See also his more detailed discussion at [374]-[380]. Although he saw moral hazard in a strict sense as being of negligible materiality, the Government was entitled to be cautious about taking steps which might be seen as setting a precedent disincentivising insurance.
39 At [380].
40 At [361].
41 At [372].
42 At [361]. See also [381]-[385].
43 At [383].
44 At [385].

[46] He considered delays that had occurred in the making of offers to uninsured property owners and potential "infelicities" in the process by which CERA had come to make its offers. He did not consider they would provide a principled basis upon which the Court could compel the Government to offer more for the uninsured properties than would otherwise be the case and, in particular, to increase the September 2012 offers.

My analysis of the judgment

[47] If the insured status of the property could be taken into account as relevant, it had to be possible that the insured status of the property might ultimately determine what offer was made, consistent with the purposes of the legislation and all factors which the Minister had to take into account. If it was the view of the majority that the insured status of the property did not and could not provide a relevant or reasonable basis on which to differentiate between the offers to be made by the Crown to different groups of owners, the majority could have said so. It did not do so and instead said insurance could be a relevant factor.

[48] Furthermore, the statement made by the majority at para [167] was made with reference to its consideration of the reasons which had been given for the decision in September 2012 not to extend to the uninsured and uninsurable the benefit of the 100 per cent offers approved in June 2011.

[49] The majority also "discussed"[45] the various reasons for the Minister's September 2012 decision, generally without expressing a definite view as to the reasonableness or relevance of the reasons and without saying clearly what offers should be made in light of what they had to say about those reasons.

[50] For example, it said the fact that 100 per cent offers had been made for some uninsured losses, that in its view some property owners had suffered damage more from the general policy of encouraging withdrawal from the red zone rather than earthquake damage, and other factors:[46]

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45 The majority's term: see [159] and [167].
46 At [196].

> … should have been taken into account in deciding whether or not there should have been a differential between the insured and the uninsurable and uninsurable [sic] and, if so, the nature and extent of any differential.

[51] The majority did not decide that an area-wide approach should be adopted in making offers for land in the red zone. Instead, they said the area-wide nature of the decisions regarding the red zone *suggests* an area-wide community approach to recovery *where practical*.

[52] In a number of instances the majority said certain matters had not been properly considered, for example, the recovery purpose of the Act, the failure of process and consultation in June 2011, delay and the difficult living conditions in the red zone. The majority did not conclude or state that, if those matters were properly considered, the Minister would have to approve the making of the same 100 per cent offers as had been made to the owners of insured properties.

[53] The majority did not conclude the moral hazard argument could not justify a different payment to uninsured property owners. It said the argument was stronger for the uninsured rather than the uninsurable but said the effect should not be exaggerated.

[54] Given the views expressed by the majority as to the Minister's reasons for the 50 per cent offers, the majority could have concluded those reasons did not provide a reasonable basis for the Minister's decision to approve the 50 per cent offers. That is not what the majority said. Instead, it concluded "some of the reasons discussed above may have provided justification for a differential".[47]

[55] Given the way in which the majority said the insurance status of the properties could be relevant and the way it said the reasons advanced by the Minister for making the 50 per cent offers could be taken into account, I find the majority did not decide the insurance status of the properties could not justify the Crown making a lower offer for uninsured residential properties. Ultimately, I analyse the majority's judgment as meaning what William Young J said could have been what it intended. The insurance status of the properties could not be the only relevant

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47 At [167].

consideration to the Minister in deciding what offers to make for uninsured properties in the red zone. As a relevant consideration, it could reasonably be taken into account in determining the actual offer that should be made to those affected.[48]

What could the Supreme Court decide?

[56] Both Mr Cooke and Mr Stephen said the issues I have to consider in this case are of constitutional significance.

[57] Mr Cooke, for Quake Outcasts, submitted the Supreme Court had directed the Minister to reconsider his decision in light of the judgment and the majority's statement that insurance status could not be determinative. He submitted the Minister could not proceed on the basis he was free to disagree with the Supreme Court on this finding.

[58] For the Minister, Mr Stephen emphasised that the courts will be slow to interfere with the decision of a democratically elected decision-maker. He submitted the question for the Court is not whether it agrees with the Minister's decision but whether it was one which a reasonable Minister could take. Courts will accept that, in some cases, both the relevance and weight must be a matter of political judgment.[49]

[59] In identifying the effect of the majority judgment from the Supreme Court, I proceed on the basis that all Judges in the Supreme Court intended to respect the limits of the Court's role in judicial review proceedings where it was being asked to review the decision a Minister had made in the exercise of legislative powers.

[60] In 1981, Lord Diplock said of officers or departments of central government:[50]

> They are accountable to Parliament for what they do so far as regards efficiency and policy, and with that Parliament is the only judge; they are

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48 At [368].

49 Referring to *CREEDNZ v Governor-General* [1981] 1 NZLR 172 (CA) at 200.

50 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 619.

> responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

[61] Professors Wade and Forsyth, in their text *Administrative Law*, state:[51]

> The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'

Courts require statutory powers to be exercised reasonably, in good faith and on correct grounds. The Courts are entitled to review the decisions of a Minister on such bases while recognising the sovereignty of Parliament because the Court assumes that Parliament could not have intended to authorise unreasonable action which would therefore be ultra vires and void.[52]

[62] The Court of Appeal has observed that democracy imposes limits to the acceptability of judicial review which constrains courts from intruding into the policy functions of bodies entrusted with the power of decisions.[53]

[63] Courts are particularly sensitive to interfering with decisions of a Minister of the Crown.[54] Courts will generally be more cautious in interfering with the decisions of democratically elected officers, particularly so where their decisions involve matters of public policy.[55]

[64] Quake Outcasts contend that the Minister's September 2015 decision was unlawful because it was unreasonable. The basis on which unreasonableness could require a Court to interfere with an administrative decision, but also the constraints on the Court's jurisdiction to do so, were stated by Lord Green MR in *Associated*

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51 HWR Wade and CF Forsyth (eds) *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 26.

52 At 287.

53 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 45-46.

54 *Whangamata Marina Society v Attorney-General* [2006] 18 PRNZ 565 (HC) at [6].

55 *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA) at [222] per Hammond J; *B v Commissioner of Inland Revenue* [2004] 2 NZLR 86 (HC) at [40] per Patterson J; *Diagnostic Medlab Limited v Auckland District Health Board* [2007] 2 NZLR 832 (HC) at [52].

Provincial Picture Houses Ltd v Wednesbury Corporation, so much the classic statement that it came to be referred to as *Wednesbury* principles.[56]

[65] In *Blackadder v Minister of Forests*, Tipping J cited authorities expanding on *Wednesbury* from the House of Lords, and the New Zealand Court of Appeal and High Court.[57] Consistent with the statements of principle he referred to, Tipping J held it was not for the Court to interfere with a decision of the Minister as to matters which were "very much matters of fact, degree and policy".[58] Where Parliament had entrusted the decision-making power in relation to such matters to a particular body, it was the duty of the Court to leave the decision to that body save where it was obvious the public body, consciously or unconsciously, had demonstrated perversity or near absurdity. It was important for courts to remember they were not sitting on appeal to review factual findings or the exercise of discretions by administrative decision-makers, be they ministers of the Crown or other persons or bodies:[59]

> The Courts have no power and no right in this context to substitute their own views of the facts or their own assessment of a discretionary decision entrusted by law to another person or body. Any decision on matters of fact, policy or discretion, provided it does not fall outside the circle of reasonableness properly understood, is immune from attack by judicial review.

[66] Professor Joseph has suggested that Courts in England and New Zealand, since *Wednesbury*, have shown themselves willing to set aside decisions on the basis they were unfair, unreasonable or irrational in the broad sense without referring to the *Wednesbury* test.[60] Consistent with that, it has been said the Court's constitutional role on judicial review is to ensure the decision-maker has acted in

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56 *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (EWCA).

57 *Blackadder v Minister of Forests* HC Greymouth A22/85, 12 October 1987 at 16-19, citing with approval *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL); *Council of Civil Service Unions v Minister for the Civil Servants* [1985] AC 374 (HL); *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 All ER 199 (HL); *Puhlhofer v Hillingdon London Borough Council* [1986] 1 All ER 467 (HL); *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA); *NZI Financial Corporation Ltd v NZ Kiwifruit Authority* [1986] 1 NZLR 159 (HC).

58 At 19.

59 At 20.

60 P A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1005.

accordance with law, fairly and reasonably.[61] Nevertheless, Professor Joseph states:[62]

> Where the ground of substantive unfairness is invoked, the mere personal opinion of a Judge that a decision was "unfair" would not justify the Court intervening. Something more is required, "the line is not always easy to draw but that it has to be drawn". This ground shades into but is not identical with unreasonableness.

[67] In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, Cooke P said:[63]

> The basic principles of administrative law to be brought to bear on this case are in my opinion sufficiently settled to require little or no elaboration. Counsel recognised this in their oral arguments, consuming hardly any time by citation of authorities. The Minister was bound to act in accordance with law, fairly and reasonably. The threefold duty merges rather than being discrete; as already indicated, the appellant Association relies on all three heads.

[68] But, Cooke P went on to say:

> Equally clearly, in my opinion, the Minister's final recommendation was reasonable. As to this head it is elementary law that the question is not whether the Court thinks that this view was right or wrong, but whether it was one which a reasonable Minister could take. The statute required him to have regard to all the overlapping matters listed as (a) to (e), but their weight inter se was for him to decide, within the limits of reason. Subject only to that necessary qualification, it is as has been said again and again that policy is for the Minister, not the Courts.

[69] In *Canterbury Regional Council v Independent Fisheries Ltd*, the Court of Appeal upheld a judgment of Chisholm J in the High Court.[64] He held decisions by the Minister relating to an airport noise contour around Christchurch International Airport and providing for urban development of designated greenfield areas were neither made in accordance with the purposes of the Act nor made only when necessary, rather than when merely desirable or expedient. The Court of Appeal

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61 *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [158] per Randerson J.

62 Joseph, above n 60, at 1005-1006, referring to *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) at 652 and 653.

63 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

64 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57.

concluded "Whether the Minister wishes to reconsider his decisions in light of this judgment or proceed in a different manner, such as by way of the proposed Land Use Recovery Plan, is for the Minister to decide".[65]

[70] In its Quake Outcasts judgment, the majority recognised that it was not for the Court to dictate the basis on which the Minister should make his decision. The majority refused to make a direction that the Crown remake its offer in light of the fact that a discount based on insurance could not legitimately be applied. It said this would go beyond "the usual relief" that would be given.[66]

[71] All the Judges of the Supreme Court in this instance did consider in some detail the merits of the Minister's decision to make the 50 per cent offers but none of them concluded that this decision was so unreasonable that, on that basis, it could be declared unlawful. All Judges respected the limits of their role.

[72] Elias CJ stated that the Court of Appeal had acted properly in being careful not to express any view on the weight reasonably to be given in the comparison of the treatment of the insured and uninsured property owners to the lack of comparable off-set provided by recovery of insurance.[67] She noted it could not have done so given the view that the circumstances needed reconsideration in the light of s 3 and especially the recovery principle. When she discussed some of the reasons which the Minister had relied on in deciding to make the 50 per cent offer, she was careful to phrase her views in ways that suggested they could be properly taken into account but did not have to be. For example, if the recovery of insurance did not loom large in the decision-making in June 2011, this may suggest that distinguishing between property owners on the basis of their insurance status is not reasonably to be treated as a principal consideration in addressing the position of those who were not eligible to receive the 100 per cent offers.[68]

[73] In his report as to the reasons for his decision as to the final offers, the Minister said "the Supreme Court's judgment did not provide clear direction on the

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65 At [166].
66 *Quake Outcasts* (SC), above n 1, at [203].
67 At [265].
68 At [266].

construct [sic] and quantum of new Crown offers".[69] I accept that was so. All the Judges had expressed opinions as to reasons which the Minister had given for his September 2012 decision but they had refrained from stating clearly what conclusions he should reach in constructing new offers having regard to what they said. I proceed on the basis that all Judges deliberately framed their judgments in that way, recognising that it was for the Minister to decide what new offers should be made. They were deferring to the Minister in the manner that was constitutionally appropriate. The Court of Appeal did likewise. It is appropriate for me to do the same, but only if Quake Outcasts has not persuaded me that the Minister's decision was not one he could lawfully, fairly and reasonably come to given his powers and responsibilities under the Act.

To what extent did the Supreme Court's judgment bind the Minister in the decision which he had to make and to what extent does it bind this Court in determining issues in these proceedings?

[74] Sitting in this Court, I am bound by the decisions of the Supreme Court on questions of law.[70] The majority decided that the process by which the Ministers had created the red zone and decided to make the 100 per cent offers and the Minister's decision to make the 50 per cent offers were unlawful. I am bound by that decision, but this is uncontested. The Minister has accepted that judgment.

[75] The majority's comments as to the merit of the Minister's reasons for the 50 per cent offers are binding on the Minister and me only to the extent they determined with certainty issues that are on all fours with issues between the same parties in these proceedings.

[76] To be binding in that way, the conclusions of the Supreme Court have to have been "sufficiently final and certain".[71] I do not consider the views expressed by the majority as to the Minister's reasons are of that nature. The majority's comments were made in relation to the Minister and the Chief Executive's decision to make the 50 per cent offers, against the background to the making of those offers. These

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69 Gerry Brownlee *Report on Decision Made in Approving the Residential Red Zone Offer Recovery Plan* (27 July 2015) [*the Minister's Report*].

70 *Laws of New Zealand* Courts at [37]. See also *Willers v Joyce (No 2)* [2016] UKSC 44, [2016] 3 WLR 534.

71 *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 42 per Tipping J.

proceedings are concerned with the reasons for the Minister's decision and the Chief Executive's actions relating to the final offers and the particular background to the making of those decisions.

[77] The Supreme Court recognised that I am dealing with a different situation in refusing to allow Quake Outcasts to seek further relief from the Supreme Court in relation to proposals in the Recovery Plan. In its earlier Quake Outcasts judgment, the Supreme Court had reserved leave for the parties to come back to the Court for any supplementary or consequential orders. When Quake Outcasts sought to do this in relation to the new Recovery Plan, the Supreme Court held this was inappropriate because the Minister had not yet made his decision in a new decision-making process.[72] It was also careful to point out that, even when he had, this would not necessarily entitle Quake Outcasts to come back to the Supreme Court relying on the earlier reservation of leave.[73]

[78] The majority's views as to the Minister's reasons for the 50 per cent offers are thus not binding on me and were not binding on the Minister. They were nevertheless matters which the Minister, acting reasonably, had to consider in revisiting what offers should be made to uninsured property owners. The judgments of the Supreme Court were relevant, particularly because of the Crown's assurance to the Supreme Court that the Minister would respond to the Court's declarations.

[79] It follows that my decision as to the lawfulness of the Minister's decision cannot be determined simply by deciding whether the Minister's decision as to the final offers is the decision the majority of the Supreme Court would have expected him to come to given its discussion of the reasonableness of his September 2012 decision as to the 50 per cent offers.

On what evidence do I assess the reasonableness of the Minister's decision?

[80] The bases on which Quake Outcasts contends the Minister's decision was unreasonable were carefully set out in their statement of claim and in the submissions of Mr Cooke. I assess those contentions against the documentary record

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72 *Quake Outcasts v The Minister for Canterbury Earthquake Recovery* SC5/2014, 15 July 2015.
73 At [4].

as to how the new offers were made. I have also had regard to the Minister's affidavit in which he further explains how he came to make his decision and the reasons for it, and the affidavit of the Acting Chief Executive, Mr Ombler (the Chief Executive), in which he covers the same ground.

[81] I have also read the affidavits filed for Quake Outcasts and the documents produced with those affidavits.

[82] Mr Cooke suggested, although not strongly, that, because the Act expressly required the Minister to record the reasons for his decision, I should limit myself to a consideration of the reasons in his Report.

[83] I do not accept that submission. In *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, McMullin J in the Court of Appeal stated:[74]

> Where judicial review is sought of a decision which is required to be made by a specified person and based on matters detailed in a statute, it is as well that the person upon whom the decision-making duty is placed, be it Minister or official, should make an affidavit if the propriety of his decision is questioned.

[84] Richardson J referred to the Court of Appeal's emphasis that:[75]

> … it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the Minister or authority whose decision is under review. … What is desired is a record of what material was put before the Minister in the course of events and on which he made his decision rather than for the Court to have to scramble through a mass of material or be forced to try to draw inferences from inadequate information.

[85] The Court's determination as to whether the basis on which a Minister reached his decision was unreasonable should not ultimately turn on what he says were the reasons for his decision. His stated reasons, whether contained in the formal record of reasons for his decision or in his affidavit, and the weight to be

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74 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 63, at 568.

75 At 561-562, citing *Fiordland Venison Limited v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA); *CREEDNZ Inc v Governor-General, above n 49*.

given to them, should be assessed against the whole of the documentary record and all of the evidence which is before the Court.

[86] Mr Ombler (the Chief Executive) was the Acting Chief Executive at the time the Supreme Court gave its judgment and throughout the process of making and implementing the final offers. To a major extent, his affidavit adds little to the evidence from the Minister and the record of the documents which he took into account. The process adopted by the Chief Executive and his reasons for making the recommendations he did were largely reflected in the briefing papers and draft final plan which the Minister ultimately approved. The Chief Executive's thinking and decisions were reflected in the information which was put before the Minister in making his decision. They thus influenced the Minister's decision. Had there been evidence in this information that the Chief Executive had been influenced by a matter which should have been irrelevant in the decision-making process or which would have been outrageous or unlawful, perhaps in the sense of being in breach of the New Zealand Bill of Rights Act 1990, it would have been open to the Court to take that into account in deciding whether the Minister's ultimate decision was unreasonable. I must also be able to have regard to his reasons for the advice he gave to the Minister to the extent they may assist the Crown in establishing there was a reasonable basis for the Minister's decision and the Minister had due regard to the judgment of the Supreme Court.[76]

[87] I note also McMullin J's approval of a statement by Lord Diplock in *Bushell v Secretary of State for the Environment*:[77]

> The collective knowledge, technical as well as factual, of the civil servants in the Department and their collective expertise are to be treated as the Minister's own knowledge, his own expertise.

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[76] For a recent example of the High Court considering in detail the advice given to a Minister by her officials in reviewing the reasonableness of the Minster's ultimate decision, see *Kim v Minister of Justice* [2016] NZHC 1490.

[77] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 63, at 567, citing *Bushell v Secretary of State for the Environment* [1982] All ER 608 (HL) at 613.

The purposes of the Act

[88] In making his decision, the Minister had to have regard to the judgment of the Supreme Court. He also had to act within the powers given to him by the Act.

[89] Section 10 of the Act states:

> **10 Powers to be exercised for purposes of this Act**
>
> (1) The Minister and the chief executive must ensure that when they each exercise or claim their powers, rights, and privileges under this Act they do so in accordance with the purposes of the Act.
>
> (2) The Minister and the chief executive may each exercise or claim a power, right, or privilege under this Act where he or she reasonably considers it necessary.
>
> (3) The chief executive may from time to time, either generally or particularly, delegate to any employee of, or person seconded to, CERA any of the functions or powers of the chief executive under this Act or any other Act, including functions or powers delegated to the chief executive under any Act.

[90] The purposes of the Act are set out in s 3 as:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:
>
> (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:
>
> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:

(h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):

(i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[91] I assess the lawfulness of the Minister's decision against that background.

The process by which the Minister and Chief Executive made their decisions

[92] Key dates as to the process were as follows:

- 20 April 2015: the Minister directed development of a Recovery Plan;
- 5 May 2015: notification of a preliminary draft Recovery Plan;
- 11 June 2015: draft Recovery Plan was submitted to the Minister;
- 25 June 2015: draft Recovery Plan publicly notified;
- 27 July 2015: Minister's decision. Approves Recovery Plan with details of final offers to be made to affected uninsured property owners in the red zone;
- 5 August 2015: Chief Executive decided, under s 53 of the Act, to make offers to purchase in accordance with the Minister's decision;
- 20 August 2015: Quake Outcasts' lawyer advised that he expected to receive instructions to issue further judicial review proceedings shortly;
- 10 December 2015: the Crown offer to purchase the remaining properties expired;
- 3 February 2016: Quake Outcasts filed the current proceedings.

[93] It is clear from the Chief Executive's affidavit and the documents produced that he was providing advice to the Minister as to the process that should be followed and the matters which he should consider in deciding what offers the Crown would make.

[94] The Chief Executive and the Minister decided to make the revised offers through a Recovery Plan, recognising the majority had said a Recovery Plan was the appropriate way to determine significant matters such as the broad outline of offers to purchase property in the red zone. The Chief Executive considered the use of a truncated Recovery Plan for this purpose was the best way of ensuring there was appropriate consultation and public engagement on the reconsideration of issues, recognising the Supreme Court had considered such community participation was a key value of the Act. Mr Cooke suggested the majority may not have anticipated the revised offer would be made in this way but made it clear that Quake Outcasts were not suggesting the Minister's decision was unlawful because of the process he adopted in deciding to make the final offers.

[95] The Minister swore an affidavit on 30 May 2016 explaining his part in the process leading to his approval of the Recovery Plan and the offers made in August 2015. He referred to the Supreme Court decision as being of significant interest to him and his wish to ensure that new, legally robust decisions were made promptly. He did say he had been troubled by some aspects of the judgment and, rather surprisingly, referred to the Government never having wanted to "clear" the red zone and that not having occurred.

[96] In his paper for Cabinet of 22 June 2011, the Minister had explained the need for the creation of the red zone and what Mr Cooke described as the generous offer to purchase insured residential properties on the basis of the 2007 valuations.[78] The Minister said that, with the extent of land and infrastructure damage in that zone as a result of the earthquake and the need to deal with remediation on an area-wide basis, it was not going to be feasible for residents to live in the area in the short to medium term. One of the criteria for the establishment of the red zone was that the health or wellbeing of residents would be at risk from remaining in the area for prolonged periods.

[97] The extent to which the red zone, particularly in the Avonside, Dallington and Bexley areas, has been cleared over the years since the 2011 earthquakes is readily apparent to anyone who visits those areas and is also apparent from the photographs

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[78] *The Minister's paper*, above n 5.

and other information which was included with the affidavit of Mr A G Reid for Quake Outcasts.

[98] In the preliminary draft Recovery Plan, the Chief Executive referred to the Crown offer to buy flat land red zone properties having expired on 31 March 2013.[79] As at 1 May 2015, of the 7,194 eligible properties, the owners of 7,053 properties (around 98 per cent) had accepted the Crown offer. He mentioned the zoning of properties on the Port Hills was completed in 2013. In that area, the worst affected properties were at risk from rock roll, cliff collapse and land slippage, in contrast to those in the low-lying flat land red zone areas where the land damage was generally from liquefaction and lateral spreading. In contrast to the red zone area on the flat land, the red zoned properties on the Port Hills were spread out over a large area consisting of more than 50 clusters of adjacent properties, each containing between one and 25 properties. In this area, 700 properties were ultimately zoned red. The Crown offer to buy insured residential properties in the Port Hills red zone area expired on 27 February 2015. As at 1 May 2015, of the 455 eligible properties, the owners of 406 (92 per cent) had accepted the Crown offer.

[99] The Crown had been careful not to compulsorily acquire land in the red zone, although I accept this possibility was known to those who lived in the area, as was the possibility that, in such circumstances, compensation would be based on present day values. This possibility induced some to accept the offers that had been made for their properties.

[100] I accept the Minister asked his officials to consider the implications of the Supreme Court decision and to provide him with advice on the steps required to reconsider the challenged decisions in light of the judgment. I accept the Minister's decision and the August 2015 offers were based on that advice.

The preliminary draft Recovery Plan

[101] The first information the Minister took into account was a briefing from CERA which he received on 16 April 2015. In the executive summary, CERA

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[79] Canterbury Earthquake Recovery Authority *Residential Red Zone Offer Recovery Plan: Preliminary Draft* (May 2015) [*Preliminary Draft Recovery Plan*] at 10.

reviewed the Supreme Court's *Quake Outcasts* decision and said the Supreme Court had directed that the Minister and the Chief Executive should reconsider the decision in light of the requirements of the Act and the factors outlined in the judgment.

[102] The briefing proposed a payment to Quake Outcasts for engaging counsel up to a maximum of $5,000 plus GST to assist in obtaining further and up-to-date information as to the circumstances of the residential property owners. The briefing referred expressly to s 10 of the Act and the Minister having to ensure that, when he exercised the power under the Act, he did so in accordance with the purposes of the Act and where he reasonably considered it necessary. The briefing recommended that the Minister direct CERA to develop a draft Recovery Plan for reconsidering the offer to purchase vacant commercial and uninsured residential red zone properties. CERA recommended this would enable the Chief Executive to consider the circumstances of owners of uninsured property in the red zone and assist in covering other matters identified in the Supreme Court's judgment as needing to be specifically addressed.

[103] In his affidavit, the Minister said the briefing had outlined the key factors identified by the Supreme Court and:

> … that insurance status was neither irrelevant nor determinative; and that a Crown offer needed to consider the context of the residential red zone, including deteriorating living conditions and infrastructure, and the effects of those conditions on residents' health and wellbeing.

[104] The Minister concluded that the preparation of a Recovery Plan was consistent with the purposes of the Act and he reasonably considered it to be necessary.

[105] In accordance with the process the Chief Executive had recommended to the Minister and which had been adopted, CERA began by publicly notifying a preliminary draft Recovery Plan on which the public could express their views.

[106] The document referred to the 50 per cent offers that had been made for uninsured land and set out the rationale for those offers and what other red zone property owners had been offered. It said these considerations had been "discussed

by the Supreme Court".[80] The document summarised the conclusions reached by the different courts in the judicial review proceedings that had been brought by Fowler Developments Limited and Quake Outcasts. It referred to the judgment of the majority of the Supreme Court, quoting the passages at paras [196]-[199].

[107] Links were provided for access to further information. These included the Act and the Supreme Court judgment.

[108] The preliminary draft plan noted that issues for consideration included the circumstances of uninsured property owners, whether there should be a distinction made between the insured and uninsurable and whether the Crown should make a distinction based on the ability to recover some of the cost of the purchase.

[109] There is no criticism of the process which CERA and the Minister followed in notifying the public and those affected of the Minister's proposals or of the consultations that took place in relation to those proposals. As the Act mandates, the process and the proposals were discussed with the Community forum, a body of people appointed by the Minister for him to consult as representatives of the community over decisions he was making under the Act.[81] The public were invited to make comment on the preliminary draft plan by 19 May 2015. More than 800 comments were received. An independent research company engaged with three focus groups in Christchurch and one in Auckland to identify views within the community as to the proposals. Three specific focus groups were held with members of Quake Outcasts and one with members of the "red section owners", a group representing some of the red zone owners in the Port Hills. The solicitor for Quake Outcasts wrote to CERA on 19 May 2015 commenting on the preliminary draft Recovery Plan and providing individual submissions from some of the Quake Outcasts. He provided a second letter of 22 May 2015 with personal information questionnaires completed by the Quake Outcasts before the 2013 High Court litigation.

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80 At 13-15.

81 Canterbury Earthquake Recovery Act 2011, s 6.

[110] I have read the report of the research company as to views that were expressed by the Port Hills vacant landowners' focus group and uninsured property owners' focus groups. CERA was well informed as to their intense feelings of frustration with processes, delays, the way in which some attributed their problems to the creation of the red zone, the financial burdens they faced and what they wanted as a reasonable response to deal with their predicament.

[111] Quake Outcasts' solicitor submitted that the Minister and CERA were bound by the terms of the Supreme Court's judgment in making new offers. As noted above, he sent CERA the Outcasts' personal information questionnaires, which I assume he had prepared. The responses were the more telling for being in their own words. Some confirmed that their being uninsured had not arisen through choice. For a few Outcasts, the particular circumstances in which insurance had lapsed were particularly unfortunate. Nearly all spoke of the way they considered their properties had been devalued, through the red zoning of the land, the clearance of surrounding properties and the loss of infrastructure.

[112] With the affidavit of Richard Jeremy Lynn, for Quake Outcasts, there were a number of questionnaires which had been completed in 2016 after the Outcasts had accepted the August 2015 offer. They were not sworn statements. They were not part of the record of the decision-making process that would normally be considered in judicial review proceedings. I nevertheless note that, in their answers, the Quake Outcasts gave reasons as to why they considered the final offers approved by the Minister's decision were unreasonable, of the pressures they were under, the particular difficulties that some faced in continuing to live in the red zone and how those pressures had caused them to accept the Crown offers.

The draft Recovery Plan

[113] The Chief Executive then developed a draft Recovery Plan and submitted it to the Minister for consideration on 11 June 2015 with a briefing attached.[82] The Minister was also given the research company's summary of the public feedback on the preliminary draft.

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[82] Canterbury Earthquake Recovery Authority *Residential Red Zone Offer Recovery Plan: Draft* (June 2015) [*Draft Recovery Plan*].

[114] It was clear from the briefing paper and the draft plan that there were to be five key criteria for developing new Crown offers for all vacant commercial and uninsured improved red zone properties in the flat land and Port Hills residential red zone areas. These were:

- Health and wellbeing
- Insurance status and precedents
- Fairness and consistency
- Timely recovery and a simple process
- Costs to the Crown

[115] The Chief Executive said it was his preliminary view that there should be a new offer for:

- all vacant red zone properties at 100 per cent of the 2007/08 rateable land value;
- all insured commercial red zone properties at 100 per cent of the 2007/08 rateable land value, with the offer for insured improvements remaining at 100 per cent if the insurance benefits were transferred to the Crown or with the owners keeping the benefit of the insurance claims and not being paid for the improvements;
- all uninsured improved red zone properties at 80 per cent of the 2007/08 rateable land value. No payment to be made for uninsured improvements but the owner could choose to relocate, salvage or sell uninsured improvements or to have the Crown demolish the improvements. The Crown would meet the demolition costs.

[116] The draft plan included a section "Supreme Court's judgment – what needs to be considered".[83] Under that heading, it highlighted 13 factors which had been identified by the Supreme Court for consideration. It referred to the approach that was being taken as to those factors.

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[83] At 14.

[117] On 25 June 2015, the Minister publicly notified the draft Recovery Plan and invited written comments. CERA received submissions and responses to the draft Recovery Plan.

[118] On 15 July 2015, the Chief Executive briefed the Minister in a document entitled "Draft Final Residential Red Zone Recovery Plan: Quantum and Construct of New Offers". The Minister was reminded he had to take into account public feedback on the draft Recovery Plan along with the provisions of the Act in deciding whether to approve the Recovery Plan with or without changes by 31 July 2015. In discussing the public feedback, there was reference to an argument that, with all other owners of uninsured red zone land getting 100 per cent, the 80 per cent offer discriminated against uninsured property owners. The Minister was advised many submitters had advocated for both 100 per cent of the rateable land value and 100 per cent of the rateable improvements value for uninsured improved properties.

[119] The Minister was told there had been suggestions for case-by-case negotiations, taking into account whether the property owners were unintentionally uninsured. The advice to the Minister as to compensation on a case-by-case basis was that, on balance, this would not meet the Crown's recovery objectives and obligations, including those around fairness, consistency, certainty and timeliness.

[120] In the briefing paper, the Minister was advised the options for a new offer for the uninsured improved red zone properties were either 80 per cent of the 2007/08 rateable land value or 100 per cent. The Chief Executive's advice to the Minister, which I accept he acted on, was:

> 27. The key issue for the Crown is not the relatively small additional cost. The key issue is whether paying uninsured owners 100% of land value would undermine the functioning of, or confidence in, insurance markets and increase expectations of government assistance in natural disasters. The Insurance Council and Earthquake Commission have expressed concerns about this. However, and as emphasised by the Supreme Court, the moral hazard risks should not be overstated. Whether paying 80% or 100%, the Crown is paying for the uninsured land only and no payment is proposed for the uninsured improvements. The Crown has also already paid for uninsured loss, including to the owners of not-for-profit organisations and part-builds with uninsured land. By not insuring their properties, these uninsured property owners

will have lost significant equity and the risks of not insuring, if insurance is available, remain clear.

28. No payment is proposed for the uninsured improvements. Paying for all uninsured loss for the approximately 106 properties in this category – for example at 100% of the 2007/08 rateable value for both the land and improvements – could expose the Crown to considerable risk around expectations of future assistance and could disincentivise people from taking out insurance. It would also mean the Crown would be making a significantly higher net contribution to these uninsured property owners, compared with the insured property owners in the red zone, taking into account there are no insurance claims to help offset the cost of purchasing the property.

29. The Crown will need to meet the cost of demolition of these improvements, unless the owners arrange to remove the buildings prior to settlement. This cost to the Crown will not be offset by any insurance recoveries, or any insurance contribution to the demolition (which would be provided if the properties were insured).

[121] In the executive summary to the briefing, the Chief Executive recommended that, taking into account public feedback on the draft Recovery Plan, the only change to the offers should be that the offer for uninsured improved red zone properties should be increased from 80 per cent to 100 per cent of the 2007/08 rateable land value.

The final Recovery Plan

[122] On 22 July 2015, the Minister received a further briefing from the Chief Executive with a bundle of documents, including a draft final Recovery Plan for his consideration and approval. The material included all written submissions on the draft Recovery Plan including material from counsel for Quake Outcasts provided on 17 July 2015, an impact assessment of the Recovery Plan outlining CERA's assessment of the health and wellbeing, social and economic impacts on the property owners and the fiscal and other impacts to the Crown, a draft cabinet paper and a draft ministerial decision paper.

[123] The Chief Executive gave evidence in his affidavit as to the considerations he had brought to bear in preparing this briefing paper to the Minister. He said that, having read public comment and reflecting more generally on the matter, he was of the view the Crown offer to uninsured improved residential property owners should be increased to 100 per cent as the 80 per cent offer may not have sufficiently taken

into account health and wellbeing considerations. He was also influenced by the fact an offer of 100 per cent of the rateable value for vacant property owners was inconsistent with the proposed 80 per cent offer for the uninsured property owners. He said:

> 37. I considered the issue of insurance incentives, particularly as the Supreme Court in the *Quake Outcasts* case had said that the moral hazard arising from offers to purchase both insured and uninsured properties was diminished when taken in the context of a disaster of the proportions, damage and human cost that occurred as a result of the earthquakes. In my view it was still a factor to be taken into account in order that the risks of not insuring remained clear. However, by increasing the land offer to uninsured improved residential property owners to 100% of 2007/08 RV [rateable value], I consciously decided to give insurance status less weighting than some of the other factors, such as the need for a timely recovery for these owners. In coming to this decision it was my view that an offer of 100% of the land value only still provided an incentive for the public to insure improvements and mitigated my concern that people might otherwise be disincentivised from taking out insurance.
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> 38. I also specifically considered the Supreme Court's comment that because insurance is bundled in New Zealand retail policies (i.e. fire, burglary, accidental damage, natural disaster), it is unlikely that policy owners will forego all insurance to achieve an imagined benefit from no longer retaining the natural disaster component. I did not consider this to be justification enough to completely discount the insurance status of uninsured improved residential property owners and for the Crown to offer to pay for all uninsured loss. The obvious difference between the two is that the Crown can recover any insurance money from insured improved residential property owners, but not from uninsured improved residential property owners. The inability of the Crown to use insurance money to mitigate the costs of purchasing uninsured improved residential properties did not significantly influence in [sic] my decision, but it was something I considered.
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> 39. I accepted the Supreme Court's suggestion that the red zoning decision had in part contributed to the adversity being experienced by some owners of RRZ [residential red zone] land who remained in the RRZ. However, in my view the primary cause of adversity was the earthquakes and RRZ or no RRZ there would still have been significant and on-going adversity for the affected uninsured land owners. Accordingly, I considered that any suggestion that all RRZ land owners should be treated exactly the same was too simplistic.
>
> 40. I decided that engaging in case by case negotiations with individuals was not tenable. It would be inconsistent with previous Crown offers and more importantly it was unlikely to result in a swift outcome or a simple process.

[124] The background to that briefing paper stated the Minister was required to take into account, along with other matters, the provisions of the Act in deciding whether to approve the Recovery Plan. The Minister was advised that an offer of 100 per cent of the 2007/08 rateable land value, with no payment for uninsured improvements, represented the best balance between the five key criteria CERA had considered and met the purposes of the Act. The advice was that this would provide the owners a fair and reasonable opportunity to re-establish themselves elsewhere if they wished, and was consistent with an offer for all uninsured red zone land (including vacant and commercial, as well as what owners of not-for-profit organisations and part-builds had received). The offer did not ignore the moral hazard risk because there was no payment for uninsured improvements and the risk of not insuring remained clear. The advice noted that no offers had been made for uninsured green zone properties (estimated to be approximately 3,500) or any other green zone properties.

[125] The impact assessment report referred to the five key criteria for determining new Crown offers. It said the five key criteria were based on an assessment of multiple considerations including the Crown's recovery objectives and obligations, the purposes of the Act and the matters raised by the Supreme Court judgment.

[126] The impact assessment report relevantly advised the Minister as follows:

Fairness and consistency

> The new offers would provide a fair and reasonable opportunity for the affected red zone property owners to move forward with their lives, while also taking into account the need for fairness and consistency for all other property owners, including those in the green zone and outside of greater Christchurch.

Timeliness

> The plan allowed for an expedited and efficient offer process which would allow owners to make decisions about what they wanted to do with their properties so they could move forward with their lives.

Health and wellbeing and social impacts

With the new Crown offers, red zone property owners could gain greater personal certainty and confidence about their future financial position, housing and property options which should contribute towards improving their health and wellbeing. Acceptance of the offers and relocation could assist with the problems property owners had identified as being associated with having to remain living in the red zone. Assisting the health and wellbeing of the affected red zone property owners would also benefit the collective psycho-social recovery of greater Christchurch. The wider community could gain secondary social and economic benefits if residential property and business owners who settled with the Crown relocated and integrated into other areas.

Economic

The new Crown offer would assist property owners to re-establish themselves in enabling them to keep all of the pre-earthquake equity of their land. The report did acknowledge that, with no payment for uninsured improvements, it might be more difficult for them to re-establish themselves elsewhere, although there was some potential for them to obtain some value from their improvements through relocation, salvage or sale. The Minister was also advised the offers did not take account of the individual needs of uninsured property owners.

Fiscal

The total cost to the Crown of making the new offers was estimated to be around $59 million, including ex gratia payments to property owners who had accepted the original September 2012 Crown offer.

The total cost to the Crown was estimated to be around $120 million if the Crown made the new offers and purchased all remaining insured privately owned residential red zone properties.

The higher quantum of the new offers might present some moral hazard risk and possible precedent setting both for greater Christchurch and New Zealand.

> Potentially, it could lead to some property owners deciding not to privately insure their properties. This had the potential to reduce levy income to EQC and funding to cover future natural disasters that could be available to the Crown if it was obligated to purchase uninhabitable properties after every disaster event. The Minister was advised that this risk was considered low given the high rates of private house insurance within New Zealand, the scale of the Canterbury earthquakes and the widespread public support for the Government to provide assistance to people in the worst affected areas. The report also advised the Minister that the risks of not having insurance would remain clear given the way owners of uninsured properties had lost considerable equity following the Canterbury earthquakes.

[127] In his affidavit, the Minister said his reasons for approving the residential red zone offer Recovery Plan were set out in a report which the Minister signed on 27 July 2015. In that report, he stated he had considered the Supreme Court's judgment and believed that the new Crown offers set out in the final Recovery Plan took into account the multiple factors raised in the judgment but noted "the Supreme Court's judgment did not provide clear direction on the construct and quantum of new Crown offers".[84] He set out his reasons for making no payment for the uninsured improvements for residential properties:[85]

> Paying for all uninsured loss for the approximately 106 uninsured improved red zone properties, at or close to 100% of the 2007/08 rateable improvements value, could expose the Crown to considerable risk around expectations of future assistance and disincentivise people from taking out insurance. It would also mean the Crown would be making a significantly higher net financial contribution to these uninsured property owners, compared with the insured property owners in the red zone. This is because there are no insurance claims to help offset the cost to the Crown of purchasing the property.
>
> Fairness and consistency, for these property owners as well as all other property owners, is a key consideration in making this decision, as are the precedent risks. No Crown offers have been made to uninsured green zone property owners (an estimated 3,500 properties, based on national insurance statistics), or any other green zone property owners. I have taken this into account in deciding that no payment should be made for the uninsured improvements for these red zone properties. The offer of 100% of the 2007/08 rateable land value for these red zone properties is fair and

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84 *The Minister's Report*, above n 69, at 3.

85 At 3-4.

> consistent, taking into account issues such as the impact of the earthquakes and the Government's zoning decisions on the red zone areas.

[128] He set out his views as to why the Recovery Plan was in accordance with the purposes of s 3 of the Act and consistent with other existing Recovery Plans - the Christchurch Central Recovery Plan and the Land Use Recovery Plan. In that regard, he referred to his view that the Recovery Plan:

- provided appropriate measures to ensure that greater Christchurch and the councils and their communities responded to and recovered from the impacts of the Canterbury earthquakes;
- reflected community feedback and enabled community involvement in the reconsideration of the Crown offers;
- enabled community participation in the planning of the recovery of affected communities without impeding, and in fact enabling, a focused, timely and expedited recovery;
- facilitated, coordinated and directed the planning, rebuilding and recovery of affected communities, including the repair and rebuilding of land, infrastructure and other property - the new Crown offers would assist with the recovery of affected property owners; and
- would help to restore the social, economic, cultural and environmental wellbeing of greater Christchurch communities, assist the health and wellbeing of the affected property owners, and assist with the collective "psychosocial recovery of greater Christchurch communities".

[129] In his report, the Minister said the Crown offers would be based on the 2007/08 rating valuations as they had been for other property owners in the red zone and not the individual circumstances of property owners. He said his decision was that the Crown should not make case-by-case offers to the owners of the approximately 433 properties which would be subject of the offers "for fairness and consistency and to support a timely process".[86] He nevertheless said he had considered the information on the individual circumstances of these property owners

[86] At 5.

as provided to him during the public consultation process, had considered health and wellbeing issues and had taken those matters into account in deciding to increase the offers for all property categories over the amount originally offered in September 2012, and in further increasing the amount for uninsured improved red zone properties from 80 per cent of land value proposed in the draft Recovery Plan to 100 per cent.

[130] In his affidavit, the Minister said that he had tested the Recovery Plan against the Act and concluded that it was in accordance with the purposes of the Act under s 3. He summarised why this was so, consistent with the reasons referred to in his report. He set out the reasons why he considered approval of the Recovery Plan was necessary in terms of s 10(2) of the Act. He explained why there would be no payment for uninsured improvements. He referred to his particular concern as to risks for the Crown around expectations of future assistance and disincentivising people from taking out insurance. He said that, against his views, he had taken account of statements from the Supreme Court that:

> 46.1 the moral hazard from offers to purchase both insured and uninsured properties was diminished when taken in the context of the proportions, damage and human cost that occurred as a result of the earthquakes;
>
> 46.2 the moral hazard arguments were stronger for the uninsured than the uninsurable, but the effect should not be exaggerated;
>
> 46.3 the lack of insurance was not in all cases a conscious choice;
>
> 46.4 because insurance is bundled in New Zealand retail policies (i.e., fire, burglary, accidental damage, natural disaster), it is unlikely that policy owners will forego all insurance to achieve the imagined benefit from no longer retaining the natural disaster component; and
>
> 46.5 the fact that some uninsured properties may have suffered little damage as a result of the earthquakes suggests that the harm suffered by the owners at least to a degree relates to government policy rather than their insurance status.

[131] He said his decision to increase the new offers to 100 per cent of the 2007/08 rateable value land value took the views of the Supreme Court into account and, in his view, enabled the recovery of an affected community while maintaining a suitable incentive for people to insure. He considered it was salient that the net cost to the Crown of the purchase of uninsured properties would be significantly higher

than that of the insured properties but noted the Supreme Court had not placed much weight on this fact. Fairness and consistency for these property owners and all other property owners (including in the green zone) was another key consideration.

[132] The Minister, in some detail, explained why he had rejected alternative or additional options raised during the public engagement process, namely:

- land swaps;
- compensation/financial payments (other than, or in addition to, a property purchase agreement); and
- case-by-case offers of individual negotiations between the Crown and each property owner.

[133] Consistent with the views he had recorded in his report, these possibilities were rejected having regard to the Crown's objectives around "fairness, consistency, certainty and timeliness". In that regard, the Minister said the Crown offers to red zone property owners had been offers to purchase property. The Crown had never intended to compensate. He said that for the Crown to offer some kind of financial payment or compensation in addition to an offer to purchase the property "would have raised multiple issues around fairness and consistency of the approach including for other greater Christchurch residents". He again stated that he had taken information on individual circumstances of property owners, as well as health and wellbeing issues, into account in deciding to increase the new Crown offers.

[134] The Minister said he was aware that the Crown's decision not to pay for uninsured improvements would affect the ability of uninsured improved homeowners in the red zone to re-establish themselves elsewhere. He said the new Crown offers would mean that they would be recovering the 2007/08 value of the land which he said was generally better than comparable market values in late 2010. The owners would also have the ability to recover some value from their homes through relocation, salvage or sale. The Minister said the total cost to the Crown of the new offers was estimated at $58.636 million, including approximately $11.087

million in ex gratia payments to property owners who had already accepted the original, less favourable Crown offers.

[135] The final Recovery Plan was publicly released on 30 July 2015. Under s 53 of the Act, the Chief Executive had the power in the name of the Crown to purchase properties. On 5 August 2015, the Chief Executive prepared an aide memoire for the Minister informing him of his decision to make new Crown offers under s 53 of the Act, following the approval of the final residential red zone offer Recovery Plan. His aide memoire set out the way in which he considered the offers would achieve certain purposes in s 3 of the Act, consistent with the requirement in s 10 for him to exercise his powers in accordance with the purposes of the Act. His conclusions were consistent with those of the Minister in approving the plan.

[136] In his affidavit, the Chief Executive referred to the way in which he had taken the purposes of the Act and the Supreme Court's views into account in recommending to the Minister the formulation of offers through a Recovery Plan and the advice given to the Minister through various briefing papers. As one would expect, the views he came to were reflected in the advice he gave the Minister. That advice was accepted and then reflected in the views which the Minister came to, as already discussed.

[137] He also referred to the fact the 16 remaining members of Quake Outcasts had accepted the Crown offer at various dates, the earliest on 26 April 2013 with the last of the settlements on 26 February 2016.

Discussion

[138] Quake Outcasts did not plead in their statement of claim that the Minister's decision, and in particular the Minister's decision to approve an offer for only land value, was not for a purpose of the Act. However, Mr Cooke submitted that it was significant that nowhere in the Minister's affidavit or the documents which established the basis on which he had made his decision was there any mention of the way the Minister's decision with regard to payment for only land value was for one of the purposes set out in s 3 of the Act.

[139] The Minister and the Chief Executive had certainly proceeded throughout the Recovery Plan process on the basis that the proposals they were developing and those which were ultimately approved by the Minister had to be for one of those purposes.

[140] The purposes of the Act included:

> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes.
>
> …
>
> (c) to provide for the Minister and CERA to ensure that recovery.
>
> …
>
> (g) to restore the social, economic, cultural, and environment well-being of greater Christchurch communities.

[141] Consistent with those purposes, it was for the Minister to decide on *appropriate* measures to ensure greater Christchurch communities responded to and recovered from the impacts of the Canterbury earthquakes. In deciding what was appropriate, he was entitled to have regard to whether and how properties were insured and to what extent that might be relevant to offers which the Crown might make for the purchase of properties in the red zone.

[142] Section 21(2) also gave the Minister the power and discretion to "approve a Recovery Plan having regard to the impact, effect, and funding implications of the Recovery Plan".

[143] In developing a Recovery Plan, the Minister was obliged to have regard to (inter alia):[87]

> (a) the nature and scope of the Recovery Plan;
>
> (b) the needs of people affected by it; and
>
> (c) the possible funding implications and the sources of funding.

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[87] Canterbury Earthquake Recovery Act 2011, s 19(2).

[144] Under those provisions, the Minister was entitled to recognise that the Government's funds had to be used to finance the purchases which were to be made. There were limits on funds which could be available. The Minister was entitled to consider the way in which the uninsured status of the properties could affect the cost to the Crown of acquiring those properties, in contrast to the cost which the Crown had incurred in purchasing insured residential properties. The Minister was entitled to take into account the way he considered there should be fairness in the assistance provided by the Crown to those in the red zone and those who were uninsured in other parts of greater Christchurch. In considering the way the purchases were to be funded, the Minister was entitled to take into account what he considered would be the impact of the Government stepping in to assist people whose properties were not insured if it did so on the same terms as they had assisted those who were insured - the moral hazard issue.

[145] The Minister was also justified in taking the insurance status of the properties into account, given all five Judges in the Supreme Court held that the insurance status of properties was not an irrelevant factor in determining what offers should be made.

[146] In its statement of claim, Quake Outcasts claimed the Minister's decision and the Chief Executive's decision to make offers in terms of the Minister's decision were unlawful on various grounds which I now deal with:

(a) The decision-makers wrongly proceeded on the basis the Supreme Court had not given clear direction on the terms and conditions of the new offers to the uninsured.

I hold the Supreme Court did not give clear directions as to what the terms and conditions of new offers should be. It deliberately refrained from doing so, acknowledging that it was ultimately for the Minister to decide what new offers were appropriate provided that, in doing so, he had due regard to all matters which were relevant. These included the opinions expressed by the majority in the Supreme Court. He also had to disregard matters which they had held were irrelevant. The Minister made his decision on that basis.

(b) Contrary to the Supreme Court judgment, the decision-makers treated the insurance status of the land as the determinative factor on an area-wide basis.

The Minister did make his decision largely, but not exclusively, on an area-wide basis. The Supreme Court had acknowledged this could well be appropriate. Consistent with the Supreme Court's judgment, the Minister and Chief Executive were entitled to take the insurance status of the properties into account in deciding whether to make an offer for uninsured land and what that offer should be. They were entitled to do this because the insurance status of the properties was relevant.

To the extent he did so, the Minister's decision to differentiate offers on the basis of insurance cannot be considered unreasonable given it was a differentiation which at least two Judges in the Supreme Court and three in the Court of Appeal said could reasonably be made. In judicial review of a Minister's decision, courts must accept there can be differing but nevertheless reasonable views as to what would be a fair and reasonable decision on a particular issue.[88]

(c) To the extent the Supreme Court decision could have allowed differential treatment of the uninsured, the basis for such differential treatment set out by the Court was not satisfied and issues which the Court had identified as having to be satisfied were not addressed. In particular, the transactions contemplated by the offers were not voluntary and the owners had no realistic alternative but to leave given that the red zones were not fit for residential occupation.

The Minister did have due regard to the comments made by the majority as to matters which could properly be taken into account. He did take into account the difficult circumstances faced by the uninsured residential property owners and the way in which their ability to continue living in the red zone had been affected by the earthquake damage to the

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88 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 405-406 per Thomas J; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, above n 57, at 1064 per Lord Diplock.

areas in which they lived, damage to the infrastructure on which they depended, the withdrawal of other people from the red zone and the clearance of the red zone as a result of the earlier 100 per cent offers. Those matters were factors that contributed to his approval of the final offers at 100 per cent of land value compared to the 50 per cent offers made in September 2012.

(d) The lack of insurance may not have been the consequence of a choice.

As required, the Minister did have proper regard to this. The Minister weighed this in the balance in deciding to increase the offers to 100 per cent of land value. His reasons for refusing to deal with individual property owners on a case-by-case basis were reasonable having regard to the purposes for which he was making his decision. His views were also consistent with the support indicated in the differing Supreme Court judgments and the Court of Appeal's endorsement of a largely area-wide or "a more generic level" approach, rather than around the personal position of individual members of Quake Outcasts.[89]

(e) Without considering individual circumstances, an area-wide solution was involved.

That was the basis on which the Minister did make his decision but with a variation around insurance status. The majority had not said the offers for all property owners in the red zone should be made on the same basis. For instance, they had discussed a possible differentiation on the basis of whether properties were uninsurable as against simply uninsured.

(f) The Crown had already compensated for uninsured loss.

The Minister did properly take that into account in deciding to increase the offers to 100 per cent of land value. He also took into account the fact the Government had not made any offer to uninsured property owners who had suffered significant damage or loss to their properties in areas outside the red zone.

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[89] *Quake Outcasts* (CA), above n 12, at [152].

In this regard, Mr Cooke submitted there was a crucial difference in that, through Government policy, uninsured property owners could no longer live in their properties in the red zone and the area around them had been cleared.

There must however have been a number of people who had not insured their homes outside the red zone, who were not able to live in them because of earthquake damage. They must have suffered significant losses and costs for which they would not be receiving any compensation or other financial support from the state. Those uninsured property owners had to meet the cost of rebuilding, repairing or demolishing their homes. The value of their land would not have diminished through clearance of the land around them but the Minister's decision allowed offers for Quake Outcasts' land to be made at a pre-earthquake and pre-clearance value.

(g) The June 2012 extension of the offers had further compensated for uninsured loss.

Again, the Minister had due regard to this in arriving at the final offers to be made for uninsured properties in the red zone.

(h) Some insured property owners would have been paid more than the insured value of their properties and insured property owners might not consider it unfair for the uninsured to be assisted in similar terms.

That was a possibility which the majority of the Supreme Court said the Minister should consider. This observation was made in response to a submission, not evidence. Through the Recovery Plan process, the Minister obtained a range of views on the issue of whether uninsured property owners should receive the same offers as were made to insured property owners.

The Minister was advised that the submissions received during the public consultation process with the Recovery Plan could well not have been reflective of general views given that those with a direct financial interest

in receiving increased offers were more likely to have gone to the trouble of making submissions. The Minister also had a personal view on what the Christchurch community may have thought on this issue. He referred to the way people had indicated to him personally they thought it would not be fair for uninsured property owners to receive the same offer as those who has incurred the cost of insurance.

Issues of fairness and consistency were relevant to the decision which the Minister had to make. The Minister took responses to the Recovery Plan into account in increasing the offer for vacant land and for uninsured residential properties to 100 per cent of land value. He was entitled to have regard to public opinion, consistent with the majority's reference to it in their decision. The Minister was not bound by the majority's observation as to this. In the absence of evidence, it was the sort of judgment which was appropriate for the Minister to make. Through the democratic process, he and the Government would be accountable for the conclusion he reached in this regard in ways that no court would be.

(i) Only bundled insurance policies covering a range of risks were available in New Zealand and owners were not likely to forego insurance to achieve a perceived benefit from no longer retaining the natural disaster component.

The Minister had due regard to the comment made by the majority in this regard. The Chief Executive had also considered this in the advice he gave to the Minister. They had obtained the views of the Insurance Council and Earthquake Commission. The Minister was entitled to form his own view as to the way property owners might be disincentivised from taking out insurance if the Crown dealt with uninsured property owners in a way that could engender an expectation that in future, in the event of a major disaster, the Government would compensate for loss that could have been insured against.

(j) Any moral hazard arguments applied also to the insured.

The Minister had due regard to this. He also had regard to the majority's discussion of the moral hazard argument in increasing the offer for uninsurable properties, with the offers for vacant land being increased to 100 per cent of land value.

(k) Any precedent caused by the purchases had to be considered in the context of the major proportions of the disaster, where special legislation designed to promote recovery had been passed and where an area-wide clearance decision had been made by the Government as a consequence.

Mr Cooke stressed in his submissions that the reasonableness of the Minister's decision should be assessed in the context of the Government having decided that, consistent with the purposes of the Act, it had been necessary to create the red zone and have people move out of that area. I find the Minister did make his decision as to the final offers against that background through recognising the particular difficulties uninsured property owners faced in continuing to live in the red zone and through the making of offers which would assist them in realising a significant monetary value for their properties which they might not otherwise have had. The decision to create the red zone had also been made with the intention that the Crown would not be compulsorily acquiring properties or compensating property owners for losses they may have suffered. Rather, the Crown was seeking to assist property owners move out of the red zone area through offering to purchase their properties at a value which included the value of insurance policies over the properties.

(l) Without considering the damage actually caused to particular properties, the harm to the owners may have arisen because of government policy rather than insurance status.

The Minister had due regard to the majority's observation as to this. He and the Chief Executive had a different view as to whether the loss of value of uninsured properties and their owners' ability to continue living in the red zone was a result of government policy rather than the earthquake. His assessment of this was one that he could reasonably

come to. It could not be considered unreasonable when it was consistent with a view expressed by William Young J in the Supreme Court. The justification for the creation of the red zone and the Crown's offer to purchase properties in the red zone, as announced in June 2011, has not been challenged. That rationale was referred to in the Minister's memorandum for Cabinet discussed earlier.[90] Because of the earthquake, these properties were in an area where people would be able to live in them only with considerable difficulty. There must also have been a significant loss of equity in the properties as a result of the earthquakes, a point that had been made to the Minister in the impact assessment report.

(m) There was a need to provide a clear connection between the cost difference to the Crown and the offers made if such costs were to be taken into account.

The comment made by the majority in this regard was considered by the Chief Executive and the Minister. Given the majority was not directing the Minister as to precisely what offers he should make and given it was appropriate for him to make a decision on an area-wide basis, taking all factors into account, it was not unreasonable for him to make an offer on a broad-brush approach, offering to buy land at 100 per cent of its value.

(n) Recovery of the red zone communities needed to be facilitated to the extent practicable.

The Minister did expressly take this into account in deciding to make an offer which would make it easier for those who had uninsured properties in the red zone to re-establish themselves outside the red zone. He also had regard to the way in which offers had to be consistent and fair to uninsured people in Christchurch who owned property outside the red zone.

(o) The impact of delay on the red zone occupants.

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90 *The Minister's paper*, above n 5.

The Minister did take this into account but, consistent with approaches taken generally in the Christchurch area, had decided it was not appropriate to make any payments by way of compensation. The Minister acknowledged that, because of the delay, it was important to make new offers in a way that would avoid further delay and provide certainty for those who were going to benefit from the new offers.

It would be difficult for me to conclude the Minister's decision in this regard was unreasonable given William Young J had said delays and potential "infelicities" that had occurred in the making of offers would not provide a principled basis upon which could compel the Court to increase the September 2012 offers.[91]

Conclusion as to lawfulness of Minister's decision

[147] In *Minister of Energy v Petrocorp Exploration Ltd*, Cooke P held:[92]

> In administrative law cases about Ministerial powers a balance, sometimes quite a delicate one, has to be maintained. It is the exclusive role of the Minister to decide or apply policy and to act on his or her own view of the merits; that is a field into which the Courts must not trespass. On the other hand it is the duty of the Court to check that the Minister acts in accordance with the law and any relevant requirements of fairness and reaches decisions which a reasonable Minister could reach in exercising the powers conferred by Parliament.

[148] In response to the decision and judgments of the Supreme Court, the Minister decided Crown offers for land in the red zone should be increased:

(a) for insured commercial properties - from 50 per cent of 2007/2008 land value and 100 per cent of improvements value to 100 per cent for both;

(b) for vacant land – from 50 per cent of 2007/2008 land value to 100 per cent of that land value; and

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91 *Quake Outcasts* (SC), above n 1, at [304], [361] and [389].

92 *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 352.

(c) for uninsured residential property – from 50 per cent of 2007/2008 land value, initially to 80 per cent of that value and then finally to 100 per cent of that land value.

[149] I have not been persuaded that either the Minister or the Chief Executive acted unlawfully, that relevant requirements of fairness were not met or that their decisions were not ones they could reasonably reach in exercising the powers conferred on them by Parliament.

Alternative defences

[150] Mr Stephen, for the Minister, submitted Quake Outcasts' acceptance of the final offers should preclude it from obtaining the relief it was seeking.

[151] At the time sale and purchase agreements resulting from the final offers were settled, Quake Outcasts' solicitor sought an acknowledgement from CERA and its solicitors that settlement would be without prejudice to Quake Outcasts' claims in the then anticipated judicial review proceedings. Crown Law, for CERA, refused to accept that settlement would occur on that basis. They said it was for Quake Outcasts to rely on the legal advice which it was receiving as to what the consequences of settlement would be. Neither CERA nor Crown Law required acceptance of the final offers and settlement of the resulting sale and purchase agreements to be in full and final settlement of all disputes between Quake Outcasts and the Minister or CERA.

[152] Accordingly, acceptance of the offers did not legally preclude Quake Outcasts from issuing proceedings to challenge the lawfulness of the decision approving the making of the final offers. In all the circumstances, including the difficulties they faced in continuing to own and/or live in properties in the red zone, I do not consider their acceptance of the offers should prejudice them in the current proceedings. Had I decided that relief was otherwise appropriate, I would not have denied Quake Outcasts that relief in the exercise of my discretion, simply because they had accepted the final offers and no longer owned their properties. Had it been appropriate to declare the Minister's decision unlawful, the Minister under law would have had an obligation to consider how he should respond to that declaration.

[153] Mr Stephen also submitted that the making of an order directing the terms and conditions of the Recovery Plan be altered would not be appropriate because the Greater Christchurch Regeneration Act 2016 (the Regeneration Act) repealed and replaced the Act on 7 April 2016. It does not allow the Court to order an amendment to a Recovery Plan made under the Act. The only party who could begin the process of amending the Recovery Plan would be the body corporate established under the Regeneration Act, that is, Regenerate Christchurch.[93] While the Minister supporting greater Christchurch regeneration (currently the Hon Gerry Brownlee) has the final decision to approve or decline an amendment to the Recovery Plan, that would only be after the process mandated in the Regeneration Act had been followed.[94]

[154] Mr Cooke submitted the change in legislation should not have precluded the Court giving the sort of specific relief Quake Outcasts was seeking. He noted the High Court has jurisdiction to:[95]

> … direct any person whose act or omission is the subject-matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates".

[155] He also relied on s 4(5B):

> Where any matter is referred back to any person under subsection (5), that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court's direction notwithstanding anything in any other enactment.

[156] Had I held Quake Outcasts was entitled to relief, it may not have been appropriate for the Court to order an amendment to the Recovery Plan under the Act but it would have been possible for the Court to require the Minister and Chief Executive to respond to a declaration that their decisions were unlawful and whatever the reasons would have been for such a declaration. If the necessary response required the Minister to make certain payments, I do not consider that such an obligation would have been to require the Minister to make "ex gratia payments" which would be improper for the Court to order.

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93 Greater Christchurch Regeneration Act 2016, s 14(4).
94 Section 21.
95 Judicature Amendment Act 1972, s 4(5).

Conclusion

[157] Quake Outcasts' application for relief is declined.

[158] If there is any issue over costs, the Crown is to file its memorandum within 21 days. Quake Outcasts is to file its response within 14 days of receiving the Crown's memorandum. Any memorandum in reply is to be filed within a further 14 days. The memoranda are to be no longer than 5 pages. I will deal with any issue of costs on the basis of such memoranda.

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