DISASTER & RESILIENCE

The Canterbury earthquakes & their legal aftermath

Justice Stephen Kós[1]

A. The Canterbury Earthquakes

[1] A powerful magnitude 7.1 earthquake struck Canterbury on 4 September 2010, causing widespread property damage. A more devastating magnitude 6.3 aftershock quake struck on 22 February 2011 at 12.51 pm. It killed 185 people. It also caused substantial damage to the Christchurch CBD and suburbs. Many aftershocks have followed, some significant and causing damage. The most significant were in June and December 2011. The cost of the rebuild is estimated at $40 billion.[2] Much of the rebuilding work is yet to be undertaken. It is only right here to record with admiration the remarkable fortitude and forbearance shown by the people of the City of Christchurch.

[2] Sitting in the No 1 High Courtroom at ten minutes to one 22 February 2011, in a criminal trial, was Woolford J. These are his words:

> I was giving an oral evidentiary ruling at the time, having excused the jury until after lunch. You should be able to hear my very soft words followed by an almighty noise of about 20 secs duration. It was during this time that the defendant yelled out "Get under the f***ing table", he being a Cantabrian and having experienced the first big one in [September the previous year]. After the noise, you may hear my wonderful associate asking "are you alright Judge?"
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> After we got out, the defendant also emerged handcuffed to a security officer. I immediately bailed him and told him to go home and see to his family,

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1 Court of Appeal of New Zealand (2015 -); High Court (2011 – 2015); Canterbury Earthquake List Judge (2013-2015). The assistance of my clerk, Duncan Ballinger, in preparing this paper is gratefully acknowledged.

2 Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thompson Reuters, Wellington, 2015) at 1.

> saying that the Department would notify him in due course when he should next appear. The charges against him were eventually dismissed because of the delay. (I had been asked to go to Christchurch to do the trial because of the delays already).
>
> When we emerged we were enveloped in dust from the Durham Street Methodist Church across the road which had collapsed killing … [three] men who were repairing the organ which had been damaged in the [September quake]. The Court security staff rushed across to see if they could dig anyone out but to no avail.
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> The aftershocks kept coming. The Avon River doubled in size in minutes and then the liquefaction started and torrents of sandy water gushed up through tarseal, concrete. Anywhere it could find a weakness.
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> I wasn't permitted to go back to my hotel adjoining Cathedral Square and was directed, along with all the other tourists, to make my way to Hagley Park where blankets were being issued and many thousands slept the night. Luckily, my associate was staying in a motel outside the CBD so I walked there through the devastation and managed to get a bed for the night, through her wonderful help.
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> We managed to get out the next day and I arrived back in Auckland in the clothes I was wearing at the time of the quake, unshaven and really quite shaken. I got my clothes back months later after hotel staff were allowed back in by crane through a window!

[3] Of the 185 deaths, 115 occurred in a single building — the Canterbury Television Building — ironically a reasonably modern one built in 1986. A small number of people in the upper three levels were rescued. One person managed to run from the building before it collapsed. The Canterbury Earthquakes Royal Commission (chaired by Cooper J, now of the Court of Appeal) concluded that the engineer who prepared the structural design — his first significant multi-storey design — was not competent for that task. Inadequate seismic analysis occurred. The building joint zones lacked ductility and were brittle. Building columns were inadequately confined and unable to sustain significant deformation. These were the reasons the building ultimately collapsed. A building permit should not have been granted by the council, but was when the engineering firm pressured officials. Defects in the construction of the building were identified in 1990, when another firm of engineers inspected it for a potential purchaser. Some drag bars were retrofitted as a result, but without a building permit being obtained. So the council was not made aware of the concerns identified by the engineer. The September 2010

earthquake caused some damage, but council officers "green stickered" the building, meaning it could be reoccupied. An engineer then inspected the building for the owners. He was unable to access the structural drawings from the council. Although some minor structural damage was visible, the engineer considered the building still structurally sound. He recommended some further assessments. They were not undertaken.[3]

[4] In the major February 2011 earthquake the building twisted, restabilised, then tilted to the east, and pancaked "virtually straight down". All this happened within 20 seconds of the onset of the earthquake. The ruins then caught fire.

[5] Another relatively modern building, the Pyne Gould building — completed in 1966 — also collapsed causing 18 deaths. Minor damage was apparent only after the September earthquake. In the February earthquake the core collapsed, causing the building to tilt to the east. Again, as in the case of the CTV building, the floors pancaked down, although the ground floor area remained intact.[4] Occupants were still being pulled alive from the wreckage more than 24 hours after the quake.

[6] A number of large modern buildings have been demolished since the February 2011 earthquake, including the 26-storey Hotel Grand Chancellor and the 21-storey Pricewaterhouse Coopers Building.

[7] The third worst site was the collapse of the brick and masonry façade of a heritage building on top of a passing bus — bus 702 — in Colombo Street, three blocks from the City's Anglican Cathedral.[5] Eight people were killed on bus 702, and another four pedestrians were killed when the façade of the adjacent building toppled onto the footpath.[6]

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3 Canterbury Earthquakes Royal Commission Final Report (2012) v 6 (Canterbury Television Building), section 9.

4 Canterbury Earthquakes Royal Commission, Final Report (2012) v 2 (The Performance of Christchurch CBD Buildings), section 2.

5 Potential risks of structural failure of this building had been identified in 1982, and in 1991.

6 The Royal Commission was critical of the fact that although a notice to repair had been served after the September quake, the heritage status of the building meant that a resource consent was needed to demolish (the owner's preferred option) which meant it went unrepaired. Barricades should have been erected: Canterbury Earthquakes Royal Commission Final Report (2012), v 4 (Earthquake-prone Buildings), section 4.12.2.

[8] In all 42 people died as a result of the collapse of unreinforced masonry buildings: 38 of these were people killed by façades collapsing into the street (including three who had run outside). Just four people actually died *inside* a collapsing unreinforced masonry building.[7]

[9] The city's great buildings suffered. The Anglican cathedral in a sense defined the city. "Iconic" does not begin describe it, although decades of lacklustre town planning meant it had gradually disappeared from view beyond the CBD. It was designed by George Gilbert Scott and consecrated in 1881. Interestingly, in a city thought largely spared earthquakes, the upper works of the stone spire were knocked asunder by earthquakes in 1888 and again in 1901 (when it was replaced with a hardwood replica). After that generations simply forgot about the prospect of earthquakes in Christchurch. Little damage was done in the September 2010 earthquake; it was open again at Christmas.

[10] The February 2011 quake was something else again. The spire and upper part of the bell tower collapsed. For some time it was thought visitors in the tower had been killed, but in fact none had. The west façade collapsed. The cathedral was deconsecrated, and the diocese determined to demolish and build a new cathedral (on the basis that restoration would cost at least $50 million more than the insurance payment due. This decision has caused litigation and a degree of internecine warfare not normally associated with Anglicanism.

[11] The other cathedral, the Catholic Cathedral of the Blessed Sacrament was also seriously damaged. The Church's strategy of limited deconstruction and preservation of a more limited building based around the nave — at a cost of $45 million — has not proved especially controversial. It has not resulted in litigation.

[12] The February 2011 quake, and four major further aftershocks in June and December 2011, devastated the city.[8] In the CBD more than 1,250 buildings have been demolished. Across the city more than 4,000 houses have been demolished. It

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7 Canterbury Earthquakes Royal Commission Final Report (2012), v 4 (Earthquake-prone Buildings), section 4.1.

8 The Christchurch area experienced 10,000 aftershocks after the 4 September 2010 quake. Of these, 4,000 or so were magnitude 3-plus, and 60 were magnitude 5-plus: *Earthquake Commission v New Zealand Insurance Council* [2015] 2 NZLR 381, [2014] NZHC 313 at [26].

is estimated that 10,000 or so houses required to be rebuilt, and another 105,000 required repair.

B. The Executive response

[13] A state of emergency under existing civil defence legislation was declared the day after the February 2011 quake.[9] The central city was cordoned off. The cordon remained there for 857 days. International assistance flooded in. The assistance given by Australian police and urban search and rescue teams was particularly notable.

[14] Damage on the scale in Christchurch required a coordinated government response. The Canterbury Earthquake Recovery Act 2011 was passed.[10] A Cabinet committee was authorised to make decisions on land damage and remediation issues. The Canterbury Earthquake Recovery Authority (CERA) was created by order in council to facilitate the recovery.

[15] One critical decision made was to identify zones in Christchurch based on the severity and extent of land damage, the cost-effectiveness and social impacts of land remediation. These were the red, green, orange and white zones.

[16] The red zones were areas where rebuilding should not occur in the short to medium term because the land was damaged beyond practical and timely repair. Some of the land was affected by liquefaction. There were risks of further shaking and damage. CERA offered to buy the properties in the red zones. Insured residents could sell the whole property, land and improvements, at the (latest) 2007 rating valuation or they could just sell the land and pursue their insurer for compensation for damage to the home.[11] The intention was to encourage people to move out of red-zoned areas and withdraw services. But the red zones did not actually prohibit repair or rebuilding, or continued occupation.[12]

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9 Civil Defence Emergency Management Act 2002, s 66.

10 Replacing the earlier Canterbury Earthquake Response and Recovery Act 2010.

11 The position of uninsured residents was less advantageous: see [49] below.

12 *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 375 at [37]: see [48] below.

[17] Green zone land was assessed as suitable for rebuilding, but various geotechnical categories applied indicating likely future land performance in any further major seismic events. White (slip and rock fall issues) and orange (further investigation needed) were interim zoning categories. Those zones have since been re-zoned either green or red.

[18] An important Executive provision, long predating the Canterbury earthquakes, was the Earthquake Commission.[13] It was originally established in 1945. It functions as a statutory insurer, covering the first $100,000 of "natural disaster damage" to residential land and dwellings.[14] One of the reasons for its establishment was the difficulty of obtaining insurance for unimproved land.

[19] As we will see, a number of legal issues arose from EQC's role: the meaning of "natural disaster damage", whether the Act provided separate cover (and the $100,000 cap) for separate seismic events,[15] how private insurers' and EQC's responsibilities overlapped,[16] and how EQC's decisions could be challenged by homeowners (EQC asserting this could be done only by judicial review).[17]

C. The Judicial response

[20] The ensuing disputes between landowners, insurers, EQC and the Executive generated a significant volume of litigation.

[21] But an immediate difficulty was the lack of a courthouse. The building housing the High and District Courts was in the cordoned-off zone, off limits to the public under the initial state of emergency. Most of the building, a seven-storey tower block, was structurally sound, but there was internal damage and disorder, and the basement was flooded. The adjacent historic courthouse used by the Environment Court was lost, and had to be demolished.

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13 Formerly, the Earthquake and War Damage Commission.

14 It also provides coverage for the first $20,000 of dwelling contents: Earthquake Commission Act 1993, s 20.

15 *Re Earthquake Commission* [2011] 3 NZLR 695 (HC).

16 The private insurers in effect "topping up" cover above the initial statutory cap if the damage covered (by the policy) exceeded that cap.

17 *Earthquake Commission v New Zealand Insurance Council* [2014] NZHC 3138, [2015] 2 NZLR 381.

[22] The Court's intranet server was on the top floor of the courthouse tower. A plucky official clambered up darkened stairways two days after the earthquake to retrieve it. It was reinstalled in a provincial courthouse north of Christchurch. From time to time files were retrieved as required by the same plucky official and his staff. The Christchurch profession were worse off. Most of their offices in the CBD were not only cordoned off, but in many cases seriously damaged. Client files were inaccessible. One senior practitioner I know disobeyed the curfew in desperation to recover his firm's server, and some key files, in the middle of the night. The response of the Christchurch profession to the problems they confronted was nothing short of magnificent.

[23] An empty commercial building was located in Sockburn, an industrial suburb of Christchurch seven kilometres to the west of the CBD. About 100 registry staff were relocated there in what Chisholm J has described as "a battery hen situation". There was a room in the building that the Judges from the two jurisdictions shared with their associates and secretaries. Some preferred (or had) to work from home. In one case that home was 500 kms to the south.

[24] Hearings were conducted in a startling array of venues. The Riccarton Racecourse was popular, as was a lecture theatre at Wigram Air Force Base. Sentencing hearings were held in the nearest provincial District Courts. Criminal jury trials were exported to Wellington and Dunedin. Other venues posed difficulties. The University Mooting room, in some senses admirable, lacked the usual separation of judiciary and public. No Judge's chambers, for instance. So while waiting in the corridor ahead of a hearing, Justice Whata found himself engaged in lively discussion by a young lawyer who was under the mistaken impression the Judge was the opposing junior counsel. Statutes and texts were not readily accessible. Justice Chisholm was sitting in a venue near the old courthouse. A copy of the Credit Contracts Act was needed, but no one had one. Someone — presumably the same plucky official — was in the tower block. He retrieved a copy of the Act, took it to the cordon fence and lobbed it over to the Judge's associate awaiting delivery on the other side. That's how things had to work.

[25] In August 2011 the old Family Court building adjacent to the tower block was re-opened for use as chambers by the High and District Court Judges and their immediate staff. A "hot chambers" approach applied. Registry staff remained at Sockburn, seven kilometres away.

[26] In December 2011 the Courts returned to the tower block. The No 2 High Court room had to be used by the Registry while repairs to an annexe building formerly used by them were completed.

[27] Things in the High Court have since returned to normal. But the entire complex is to be evacuated in mid-2017 when the Courts move into the new Justice and Emergency Services Precinct, occupying most of a city block.

The Canterbury Earthquake List

[28] In 2011 the Chief High Court Judge, Winkelmann J (now of the Court of Appeal) gave an assurance to practitioners that arrangements would be made to expedite the hearing of cases relating to earthquakes and the reconstruction process. In May 2012 a special Canterbury Earthquake List was established in the Court to provide close case management and expedition of earthquake-related cases. Initially it was managed by a single Judge, Miller J, deliberately chosen from a centre other than Christchurch. After his appointment to the Court of Appeal a year later in 2013, Justice Wylie (Auckland) and I (Wellington) took charge of the list. In 2016 the list will be "repatriated" to Christchurch-based Judges.

[29] As at 30 September 2015, 437 cases had been filed on the list: 8 per cent were disposed of by judgment, 40 per cent by discontinuance, and 52 per cent were still active. About 14 per cent of the total (27 per cent of active cases) were set down for hearing or awaiting judgment. The number of cases filed between September 2014 and September 2015 was much lower than in previous years. Filings took off in the late 2012, and reached a high of 35 filings a month in the middle of that year. They are now down to about five per month.[18] In the Court of Appeal, 23 appeals

[18] Statistics from the Chief High Court Judge's Report of 30 September 2015.

had been filed: 17 had been determined, and four abandoned. Two were awaiting hearing. Expedited status is generally given to earthquake appeals.

[30] The anecdotal reasons for the fall-off include the determination of some key precedent decisions, and an adjustment of expectations by litigants on all sides after seeing the outcomes in a number of representative trials.

[31] Interestingly, only one class action has been filed in the List. It is against a private insurer, Southern Response Earthquake Services Ltd (the state-supported successor to a large failed private insurer), and is brought on behalf of 47 policy-holders whose insurance claims still have not been resolved. Amongst other issues it challenges the insurer's claims management of replacement policies, alleging its methodology has in effect transformed these policies into indemnity ones. Leave has been sought to bring the proceeding on a representative basis. It has been opposed by the insurer, on the basis that an insufficient common interest exists across the class, and that this is really 47 individual cases. That issue was argued very recently before Mander J, whose decision has been reserved. Initial security for costs has been agreed at $155,000 — to be met by the litigation funder supporting the plaintiffs.

[32] A second unincorporated action group has filed proceedings against EQC and seeks declaratory relief only as to EQC's statutory obligations to pay for or undertaken certain work. This is a very new proceeding, not formally advanced as a class (or representative) action. EQC has signalled it may apply to strike it out.

[33] Class actions remain uncommon in New Zealand. The main reason is that the rules regarding such proceedings remain antediluvian. A draft Class Actions Bill was prepared by the Rules Committee in 2009. In 2011 the Commerce Select Committee recommended priority be given to introducing a modern class action regime. Nothing significant has happened. The result has been that individual litigants have had to bear the cost of running novel points of principle relevant to a wider class. And on occasion likely adverse outcomes have been averted by the defendant settling with that individual.

[34] The purpose of the Earthquake List is the expeditious processing of the interlocutory stages of earthquake cases. It is a vigorous process. It requires a higher degree of preparation than usual. It front-ends costs much more than in the case of ordinary proceedings. Essentially:

(a) The parties have to know the issues in the case (and be prepared to discuss them) at the first case management conference. That is scheduled two to three weeks after the statement of defence is filed. Most earthquake cases involve two or three parties only: an insured landowner, EQC and a private insurer is the typical roll-call. A key question at the first conference is what expert evidence will be needed at trial.

(b) The parties' experts will need to have been appointed, have exchanged reports, conferred and reported back jointly to the Court by the second case management conference. The date for that conference is flexible: it is done as soon as experts can reasonably be expected to confer. Typically not less than three months, and not more than five, from the first conference.

(c) If they have done so, the case may be set down for hearing at the second case management conference.

(d) As soon as the case is set down, even if the trial is a long way away (and even if the date of trial is unknown), the parties must start exchanging evidence. This is deliberately different from orthodox directions dating exchange backwards from a hearing date.

[35] That means that a case may be set down for trial within six months of filing, and evidence exchanged within eight months.

[36] All of this has been done by astute use of the power given in r 7.2(3) of the High Court Rules:

> At any case management conference, the Judge may give directions to secure the just, speedy, and inexpensive determination of the proceedings, including the fixing of timetables and directing how the hearing or trial is to be conducted.

Using this power, the Court makes directions for exchange of expert reports, expert caucusing, expert reporting to the Court, and other general timetable orders.

[37] Let me take you through the process in a little more detail. As soon as a case has been accepted for entry on the Earthquake List, a notice is sent to counsel. It sets out the date of the first case management conference, and what is required at that conference. As noted earlier, it is usually held two to three weeks after the statement of defence filing date.

[38] In particular, a very detailed memorandum must be submitted setting out the background to the claim, any relevant insurance policy terms, whether experts have produced and exchanged reports, the essential positions being taken by the parties, a list of issues for trial in the proceeding, and any expected interlocutory issues that will arise. Parties are encouraged to file a joint memorandum. Increasingly, this is occurring. But if they cannot agree, separate memoranda must be filed.

[39] Before the case management conference the Earthquake List Judges work through what has been filed. Our particular focus has been on what the real issues are and whether appropriate experts have been engaged. The word "appropriate" is important here. We have sometimes said in case management conferences that we feel that one party or the other has not engaged an expert with appropriate qualifications, or with an appropriate degree of independence to give effective evidence at trial. Some counsel have not liked those observations. But the reality is that if anyone has reason to complain, it is the *other side* which is then going to confront better experts, and more cogent analysis.

[40] At the first case management conference the parties and counsel must attend. We encourage the parties to speak at the conference. Sometimes the results are striking. At one conference, it was obvious the parties were not so far apart, but that the plaintiffs were very upset at the process undertaken by the insurance company. They got that issue off their chest, and it was quite emotional. The insurance

company was plainly embarrassed. Their representative (and lawyer) indicated a willingness to try and work through these issues more cooperatively and try and achieve a settlement. There was quite a distinct atmosphere in the Court of mixed frustration and enthusiasm. I had a gap in my roster. Reversing the orthodox approach to filing fees I handed the Registrar a $20 note, instructed him to go and get coffee for the participants, and invited them to stay in the courtroom and negotiate after I left. Although the case did not settle that afternoon, it settled soon afterwards.

[41] Issues that can be tried swiftly as separate questions under r 10.15 are looked out for. For instance, a legal question about a policy wording which does not require any or much evidence.

[42] There are very few interlocutory applications, although sometimes questions of security for costs arise when we are dealing with an economically impaired plaintiff. There are very few issues about discovery. Discovery is almost always agreed. Sometimes standard orders are made, and sometimes tailored orders for limited discovery are sought. Often there are claims for general damages about the way in which insurers have behaved. It is relatively standard to order discovery of an insurance company's file in that case.

[43] Telephone conferences are conducted where the parties need to obtain further directions. Cases are also called in for telephone conference if they have "gone quiet".

[44] The second judicial conference (six to eight months after filing) — to set down, set trial directions and provide evidence directions — is often vacated because directions are agreed and are simply made on the papers.

[45] The Earthquake List is generally thought to have worked pretty well.[19] It has expedited both interlocutory processes and ultimate resolution of its subject cases. That was its purpose. The major issue has been finding judicial resources (Judges,

[19] The Chief High Court Judge and Earthquake List Judges have met with counsel engaged in the List on an annual basis to discuss the List's performance and improvements which might be made. Procedures have evolved accordingly.

or courtrooms) to deal with trials. An extra Judge was appointed in Christchurch in June 2015 specifically to help with this.

[46] A core aspect of the List's purpose, by encouraging early identification of issues, exchange of expert reports, caucusing of experts and exchange evidence, is to make parties face up to the strengths and weaknesses of their cases sooner than normal. When they do so, they seldom need to go to trial. There are lessons here for case management of all civil proceedings.

[47] Throughout the earthquake litigation, a number of interesting issues have arisen. For example: what are the legal consequences of the government's macroscopic response? What is the scope of EQC's liabilities? How do insurance contracts respond to serial earthquake events? How can a Court assess what damage occurred and is attributable to each event?

D. The consequences and legitimacy of Executive action

[48] The creation of the red zones raised an interesting question about the scope of private insurance cover in *O'Loughlin v Tower Insurance Ltd.*[20] The O'Loughlins' property was red-zoned. They elected to sell just their land to the Crown for $110,000, and pursued their insurer for damage to their home. In High Court proceedings, one of the issues was whether creation of a red zone itself caused loss or damage to the property so that the insurer had to provide full replacement cover irrespective of the physical damage to the property. Asher J held that red zoning did not cause physical loss within the terms of the policy. Rather, it caused only economic loss. The red zones did not prohibit building, repair, and habitation or require demolition of the home, and thus did not render the property valueless. The insurer was not obliged to provide full replacement cover for economic value irrespective of the physical damage to the property.[21]

[49] The O'Loughlins were insured. Not all red zone residents were. The government's offer to uninsured red zone residents was less generous than for those who were insured. They were offered 50 per cent of the 2007 rating value of the

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20 *O'Loughlin v Tower Insurance Ltd*, above n 12.
21 At [67].

land component of the properties, with owners retaining salvage rights to the uninsured buildings and the possibility of relocation of buildings. Some of these uninsured property owners, a group calling itself the Quake Outcasts, commenced judicial review proceedings challenging the decision to offer them only 50 per cent of the land value.

[50] In the High Court, they succeeded. Panckhurst J held the decision creating the red zones was not lawfully made.[22] There was no prerogative power to create the red zones; prerogative was displaced by the Canterbury Earthquake Recovery Act 2011. The Minister of Canterbury Earthquake Recovery was obliged to use his Recovery Act powers, had not followed the correct statutory procedure and was directed to reconsider in accordance with the Act.

[51] The Court of Appeal allowed the Crown's appeal in part.[23] It said the creation of the red zones was lawfully made under the residual freedom of the Crown to do anything not legally prohibited. Resolutions of Cabinet to make offers were not reviewable. This did not, however, absolve the Chief Executive of CERA of his obligation to make the decision in accordance with the purposes of the Recovery Act, which he had not done. The reasons given for making a 50 per cent offer to the uninsured homeowners did not accord with the purposes of the Act. But the Court accepted there was a rational basis for distinguishing between property owners on the basis of their insurance cover and therefore did not see it as appropriate to provide relief against the decision to offer to purchase the uninsured properties.

[52] There was a second appeal, this time to the Supreme Court, by the uninsured Quake Outcasts, on the issue of whether it was lawful to create the red zones and to distinguish between property owners on the basis of their insurance status.[24] The appeal was allowed again in part. The Supreme Court (by a majority) found the offers made to the Quake Outcasts were unlawful. Procedures under the Recovery

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22 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, [2014] 2 NZLR 54.

23 *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587.

24 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27.

Act should have been used in creation of the red zones. The Act provided a comprehensive regime to deal with earthquake recovery and for appropriate levels of consultation. The zoning decisions and purchase offers should have been made under a Recovery Plan process, which would have required public notification and consultation. Furthermore, the offer decisions should not have treated the insurance status of the homeowners as the determinative factor, because some of the uninsured properties fared well and suffered little damage, and some of the other offers within the red zones allowed for payment above the level of insurance.[25] The Minister was directed to reconsider his offers to the uninsured residents.

[53] Another case which dealt with the scope of the Crown's powers in the context of earthquake recovery was *Independent Fisheries.* The Minister has power under s 27 of the Recovery Act to amend or revoke any council plan by giving public notice. The Minister set a noise contour around Christchurch Airport within which noise sensitive development would be prohibited. He did this by using his power to amend the Canterbury Regional Policy Statement. The Minister also cancelled a Proposed Plan Change and short-circuited Environment Court litigation over related amendments to the Plan Change in the same way.

[54] Chisholm J held the amendment to the noise contours was not within the purpose of the Act, which was directed at earthquake recovery.[26] The change to the Regional Policy Statement should have been made through a Recovery Strategy or Recovery Plan process, which would have ensured consultation safeguards were in place. The Minister had used the statutory power under s 27, which was only intended to be used for quick and discrete action, for a wide ranging noise contour decision.[27] It was also unlawful for the Minister to effectively determine appeals in the Environment Court using his recovery powers. Rights of access to courts cannot be ousted by implication.[28]

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25 At [189]–[199].
26 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810.
27 At [114].
28 At [166].

[55] The Court of Appeal dismissed an appeal by the Regional Council, although on a slightly different basis.[29] It found the insertion of the noise contours into the Policy Statement *was* consistent with the purpose of the Act, as it was intended to aid recovery, provide planning certainty, and ensure continued efficient operation of the airport. However, the Minister needed to ask himself whether it was necessary to use the power in s 27, and to take alternative ways of achieving the same result into account. Viewed objectively, it was not necessary for the Minister to have inserted the noise contours into the Policy Statement using s 27. He should have issued a Recovery Strategy and engaged in public consultation. The Court of Appeal also differed from Chisholm J on access to the Courts. Had s 27 applied, by necessary implication it was capable of overriding appeals to the Environment Court.

[56] Standing back and looking at *Quake Outcasts* and *Independent Fisheries*, it is evident that a disaster on this scale requires decision making which deals efficiently with problems affecting large numbers of properties and people. But it must be lawful. The Minister was given extensive powers to manage the earthquake recovery, but those powers were not unrestrained and were essentially statutory rather than prerogative in nature. Some of the most extensive powers (such as that under s 27) are only to be used in extreme cases. Processes which provide for consultation when a decision has a wide and enduring impact will be enforced. None of this, it may be noted, troubled the Executive in the rebuild of Napier after the 1931 earthquake, where a two man commission — a magistrate and an engineer — were given extraordinary statutory powers to "get the job done".[30]

E. Difficulties at EQC: delays, disputes about the scope of cover, and the relationship between statutory and private insurance

[57] EQC handles insurance claims for residential properties unless the value of the claim is greater than the statutory cap of $100,000. If "overcap", the private insurer's liability is triggered and it handles the claim and determines the amount of its overcap liability.[31] EQC's assessment of their claim as over or undercap became

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

[30] A H McLintock (ed) *Encyclopaedia of New Zealand* (Wellington, 1966) vol 1 at 475. The death toll in that earthquake was 161.

[31] Treasury *New Zealand's Future Natural Disaster Insurance Scheme* (July 2015) at 36.

a log jam for homeowners. Like the Minister for Earthquake Recovery and CERA, EQC had difficulty in responding to the sheer scale of the disaster.

[58] For example, in *EQC v Whiting* EQC initially assessed the damage to three homes as under the statutory cap of $100,000 for each earthquake event.[32] EQC's assessment stopped homeowners pursuing claims against their private insurers. The homeowners thought the claims were over cap, and obtained engineering reports saying so. However, EQC took some time reassessing the claims. Such delays were common. The insured parties initiated proceedings alleging EQC was in breach of its obligation to settle claims within a reasonable timeframe. In part they did so to force EQC's hand — although in doing so they were accused of queue-jumping. Eventually, EQC reassessed the value of the properties as overcap — two to three years after the initial under cap assessment. It paid out the $100,000 cap amount, and the insured parties were able to pursue their private insurers for the rest of the payment. The proceedings against EQC were discontinued. Ordinarily a party discontinuing without agreement as to costs is liable to pay some or all of them to the discontinued party. But here the discontinuing plaintiff homeowners *sought* costs from EQC. Two High Court Judges (I was one of them) had said EQC should pay costs. The Court of Appeal upheld those decisions. It was certainly arguable EQC had not determined its liability as soon as reasonably practicable — and indeed had substantially altered an earlier erroneous assessment.

[59] *Whiting* also demonstrates a difficulty in the interaction of the statutory and private insurance arrangements. The basis for compensation under EQC's statute and the private policy of insurance are generally different. The bifurcation in liability creates inefficiencies in the processing of claims. I will return to this point.[33]

[60] Another example of the difficulties at the interface of EQC and private insurance cover is *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[34] The issue was whether the sum insured under an insurance policy was inclusive or exclusive of the $100,000 statutory insurance sum. An apartment building complex was completely

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32 *Earthquake Commission v Whiting* [2015] NZCA 144 at [13].
33 At [76] to [80] below.
34 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432

damaged in the 22 February earthquake. The reinstatement cost was estimated to be $25 million. The complex was underinsured, for only $12.95 million, on a sum insured basis. EQC accepted liability for $6.8 million — the statutory cap of $100,000 times 68 residences. The issue arose as a matter of interpretation of the insurance policy — was the sum insured inclusive or exclusive of the sums paid by EQC? Was the insurer liable to pay the full sum insured of $12.95 million, or that amount less the $6.8 million EQC had already paid? The parties agreed the High Court should answer this as a preliminary question. Appeals to the Court of Appeal and Supreme Court followed. The Supreme Court found in favour of the insurer. The relevant contractual clause, read in context, provided the insurer's liability was limited to the difference between the amount paid by EQC and the sum insured. The focus was on the word "loss", which meant the insured's loss remaining after any payment from EQC had been deducted from the sum insured. This was supported by a table showing the mechanics of how the premium was calculated. The commercial context suggested the insurance was "top up" only. The insured's interpretation would lead to the strange result that the money received would be much greater if the building was destroyed by earthquake than it would be if it were destroyed by fire.

[61] The scope of EQC's cover itself has been questioned in a number of cases.

[62] An early case was *Morley v Earthquake Commission*, which concerned whether a boarding house was a residential building within the scope of the statutory EQC scheme.[35] As a matter of statutory interpretation, Priestley J held the boarding house was covered by EQC. Although an explicit reference to boarding houses was removed during the drafting of the Act, the fact it was used as a dwelling by people who chose to live there made it fit within the humanitarian purpose of the Act to provide adequate housing after an emergency.

[63] Another such case was *Kraal v Earthquake Commission*.[36] The issue was whether a Council issued notice restricting entry to the home because it was exposed to rock fall in the Port Hills triggered EQC's liability for "natural disaster damage". Ms Kraal's house was otherwise habitable, slightly damaged, but repairable.

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35 *Marley v Earthquake Commission* [2013] NZHC 230.

36 *Kraal v Earthquake Commission* [2014] NZHC 919, [2014] 3 NZLR 42; *Kraal v EQC* [2015] NZCA 13.

Mallon J held that the Council's action in issuing its notice did not constitute natural disaster damage within the meaning of the EQC legislation. The Court of Appeal upheld that conclusion. The claim did not relate to physical damage to the home.

[64] In *EQC v Insurance Council of New Zealand* declarations were sought by EQC concerning whether damage to land which makes it more prone to flooding and liquefaction is "natural disaster damage" in respect of residential buildings under s 18 of the EQC Act.[37] A considerable area of land in Christchurch had slumped as a result of the quakes. This had decreased amenity and made the land more vulnerable to flooding and liquefaction. The High Court (sitting as a Full Court) considered this was natural disaster damage because it was a disturbance to the physical integrity of the land which affected its use and amenity. It was more vulnerable to flooding and liquefaction and therefore less habitable.

[65] The High Court was also asked to determine whether a policy EQC had developed to resolve claims for increased flooding vulnerability of land was legitimate. This was effectively a request for anticipatory relief against judicial review challenge. The Court was not able to prospectively declare the policy valid. But EQC was entitled to make and publish guidelines identifying factors it would take into account in assessing the validity of a claim for increased flooding vulnerability. Any guidelines would need to require EQC to act in good faith, could not be applied mechanically, must include consideration of relevant factors, and must not prevent claimants challenging the decisions of EQC in court. The Court rejected EQC's argument that such challenges must be by judicial review only. Claims for sums payable by statute could be brought in ordinary private law proceedings, just as in the case of private insurance. Judicial review was not generally an appropriate mechanism to enforce EQC's statutory obligations.

[66] In another case, *Re Earthquake Commission*, the High Court (also sitting as a Full Court) was asked to make a declaratory judgment as to the extent to which EQC coverage applied to properties that had been damaged in each of the major

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[37] *Earthquake Commission v Insurance Council of New Zealand Inc*, above n 17. A Full Court sat. I was a member, along with Heath and Gilbert JJ.

earthquakes.[38] Is each event an independent occurrence, such that separate claims can be made up to the statutory cap of $100,000? The Court held EQC cover extended to each event separately, even though that meant the claims from the events totalled more than the cap.

F. Difficulties arising from the serial nature of the earthquakes

[67] As well as difficulties in determining the scope of EQC's cover and its interaction with private insurance, issues have arisen in private insurance claims as to the scope and nature of cover. One theme that has emerged is the response of insurance policies to the serial nature of the earthquakes. What happens when properties are damaged, assessed, partially repaired, damaged again, and then finally destroyed?

[68] In *Ridgecrest NZ Ltd* the building was damaged by four earthquakes in September and December 2010 and then February and June 2011.[39] Repairs for the first earthquakes had been started but were not completed. After the June 2011 quake the building was damaged beyond repair. The maximum liability under the insurance policy was $2 million for each "happening", after which the cap was reset. The issue was whether the insured was entitled to the full losses caused by all the earlier earthquakes or just the cost of repairs actually undertaken for the earlier quakes. The insured argued it was entitled to the $2 million cap for the June earthquake and the losses attributable to each of the earlier quakes. The insurer said its liability was limited to the cost of repairs actually undertaken for the earlier earthquakes plus the $2 million cap for the June 2011 quake. The Supreme Court found in favour of the insured. The insurance policy allowed the cost of replacement after the final earthquake (capped at $2 million) *and also* to payments for the amount of loss associated with each earlier quake up to the $2 million cap for each. The contrary interpretation of the policy would run counter to the insurance on a happening by happening basis. The losses from the earlier earthquakes were not to be treated as merged or subsumed in the loss caused by the final earthquake. The merger principle from marine insurance (on which the insurer relied) was

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38 *Re Earthquake Commission*, above n 15.

39 *Ridgecrest NZ Ltd v IAG NZ Ltd* [2014] NZSC 117, [2015] 1 NZLR 40.

inconsistent with the resetting of the limits after each happening provided for by the policy. The Court did not consider this ran contrary to the indemnity principle, because the $2 million cap was less than the replacement value of the building (unknown, but much greater than $2 million). But it noted the total of all claims could not exceed the replacement cost of the building, and there could not be any double counting of damage.

[69] A related issue arose in *Marriott v Vero Insurance*. It concerned whether a policy automatically reinstates, and at what point an insurer may cancel cover. The insured's commercial property was damaged in the September 2010 and then the February 2011 earthquake. The building was insured on a sum insured basis, and cover was to reinstate after the occurrence of loss. The building was underinsured. The insured party claimed on the basis the policy provided for automatic reinstatement of the sum insured after each earthquake event, so the sum insured could be claimed for each event. The insurer argued it could have given written notice so that the policy would not be renewed, and therefore prevent cover continuing after an insured event. Dobson J in the High Court held the sum insured reinstated after each earthquake event under the policy terms.[40] Finite quantification first was not required. It was open to the insurer to give prospective notice that reinstatement would not occur. But it could not retrospectively terminate its underwriting commitment. The Court of Appeal upheld this finding.[41] The alternative argument rested on the proposition that the insured is indifferent to the risk that a second event will happen before cover is reinstated by the insurer making payment. The Court did not consider this was correct because the insured may not know the measure of indemnity for the first event at the time of the second event; the loss caused by the first event may alter the insured's view of the risk that the remaining cover will not suffice for the damaged building; and it was possible the insured might have incurred the cost of reinstatement but not yet been paid by the insurer when the second event occurs.[42] In short, it was an unworkable interpretation of the policy for reinstatement to not occur automatically so as to create continuous

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40 *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120.

41 *QBE Insurance (International) Ltd v Wild South Holdings Ltd* [2014] NZCA 447, [2015] 2 NZLR 54.

42 At [35]–[38] and [55]–[58].

cover. The insurer's liability was still limited, however, by the indemnity principle to the total amount of the insured's loss.

[70] The serial nature of the earthquakes led to more practical difficulties in *Morrison v Vero Insurance NZ Ltd*.[43] The dispute was over how much of the damage was caused by each earthquake. The insurer said all of the damage occurred in the September 2010 and February 2011 quakes, and as insurance was capped at $3.4 million per event the total payable was about $4 million. The insured said damage was attributable across five earthquakes, such that the amount payable was $13.1 million. The High Court relied on modelling evidence from an expert in support of the insured's position. The model related to how energy dissipated through the building for each earthquake event. Whata J relied on this model in assessing the relative impact of the earthquakes and allocation of damage. The model provided helpful, albeit coarse, information. It could be used to make up for a lack of invasive testing and measurements.[44] The Court of Appeal, however, said there were problems with the model. It did not take into account the extent to which damage may be caused by liquefaction, nor did it take into account what damage was caused to specific building elements. This led the Judge to overestimate the extent of damage caused by the June 2011 earthquake. The assessment of quantum was remitted to the High Court to consider these limitations to the model.

G. Difficulties in proving the extent of loss and damage

[71] *Morrison v Vero Insurance NZ Ltd* also demonstrates, more generally, the difficulties in establishing the extent of loss and proving it was caused by a qualifying earthquake event.

[72] Another case in which difficulties in proving the extent of damage arose was *Jarden v Lumley General Insurance (NZ) Ltd*.[45] The issue before me in the High Court was what damage to the Jardens' house was caused by the earthquakes and what was pre-existing. Relying on the House of Lords decision in *Rhesa Shipping*

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43 *Morrison v Vero Insurance New Zealand Ltd* [2014] NZHC 2344; *Vero Insurance New Zealand Ltd v Morrison* [2015] NZCA 246.

44 At [135].

45 *Jarden v Lumley General Insurance (NZ) Ltd* [2015] NZHC 1427. An appeal is pending in the Court of Appeal.

SA v Edmunds, I found the plaintiffs had not proven that cracks in the concrete slab and irregularities in the slab levels were caused by the earthquake.[46] The plaintiffs had not carried out a ground-penetrating radar test, which would have cost some $3,000 and would have assisted the Court in determining whether there were voids under the concrete slab (as they alleged — based on tapping the surface). There was no persuasive evidence whether the voids actually existed. The internal walls were out of true, but that was not necessarily caused by the quake — there were no pre-quake measurements. In any event, there was no evidence the deviation from true impaired the structural integrity of the walls. One of few findings in the Jardens' favour was that damage to the exterior brick cladding *was* caused by the quake and (as it involved heritage bricks) the cladding had to be restored in kind or wholly replaced.

[73] Such forensic difficulties may be even more acute when the Court is tasked with assessing the quantum for a notional rebuild. In *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* the insured had sold its red-zoned land to the Crown and could therefore neither repair the dwelling nor replace it on the same land.[47] So the claim was for the notional cost of rebuilding the house on the red-zoned site. The parties agreed the notional cost of rebuilding would make allowance for a profit margin for the contractor, overheads, and unexpected items of expenditure. MacKenzie J had to make what he called an "essentially arbitrary" selection of the profit margin. He chose 10 per cent. The notional rebuild cost also included the cost of professional fees, such as obtaining consents, designing the replacement house, but only those fees which would have been incurred to build a house in the same place. Costs not essential to the rebuilding but which a homeowner might choose to incur were not to be included.[48]

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46 *Rhesa Shipping SA v Edmunds* [1985] 1 WLR 948 (HL).

47 *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2013] NZHC 1433.

48 These elements of the reasoning were essentially unchanged on appeal to the Court of Appeal and Supreme Court: *Avonside Holdings Ltd v Southern Response Earthquake Services Ltd* [2014] NZCA 483, (2014) 18 ANZ Insurance Cases 62-040; *Southern Response Earthquake Services Ltd v Avonside Holdings Ltd* [2015] NZSC 110. The Court of Appeal allowed the appeal but that does not affect the point that there was an acknowledged degree of arbitrariness in MacKenzie J's selection of 10 per cent and the conceptual difficulty in estimating professional fees.

H. Forthcoming reforms

[74] There are two proposed legislative reforms I should touch on.

[75] First, the Building (Earthquake-prone Buildings) Amendment Bill. This responds to the final report of the Canterbury Earthquakes Royal Commission. It will revise the system for managing quake-prone buildings by requiring territorial authorities to undertake seismic capacity assessments of existing non-residential buildings and multi-storey and multi-unit residential buildings within 5 years. If a building is found to be earthquake-prone, the owner will be required to do work within 15 years of the assessment. This essentially sets a 20 year time frame to strengthen or demolish earthquake prone buildings. The bill was reported back from Select Committee in September 2015 with a number of detailed amendments — including reducing the overall time frame to 15 years in high seismic risk areas, and half that for "priority buildings".[49]

[76] Second, the government, through the agency of the Treasury, has issued a discussion paper proposing amendments to the Earthquake Commission Act 1993.[50] These include:

(a) For EQC claims to be lodged with private insurers, rather than EQC. Private insurers would authenticate claims. Insurers would then pass the claim to EQC for further processing or complete the management of the claim on EQC's behalf. This reflects a view that private insurers are able to achieve better economies of scale in the processing of claims. EQC had 24 staff before the Canterbury earthquakes and was not ready to cope with the extensive number of claims.

(b) For building cover to include the costs of siteworks associated with the repair of the building, such as land works, filling and levelling the land, testing the soil, geotechnical engineering assessments and

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[49] These include hospitals, schools, emergency response buildings, and façades of unreinforced masonry buildings which could fall into the street (to be assessed by the relevant council).

[50] Treasury, above n 30.

installing retaining walls. This would mean EQC's cover fits better with private insurer practice in commercial claims.

(c) As a consequence of the inclusion of siteworks in EQC building cover, for the monetary cap for residential buildings to be increased from $100,000 to $200,000.

(d) For EQC's land cover (as opposed to residential building cover) to apply only where rebuilding is not practicable. Currently, land is insured at the value of the damaged land or the cost of repairing the land to its pre-event condition. The change would mean no separate land cover will be paid if the dwelling can be repaired. The costs of remediating the land would be paid under the new siteworks cover, included in the building cover and capped at $200,000. This will remove the ability to claim for land that is damaged but has not caused damage to the house itself, such as undulations in a garden. It will reduce complex interactions with building cover, which was a source of delay in EQC claim processing.

(e) Fixing a standard claims excess of $2,000, rather than the excess being proportional to the claim and unable to be finalised until the final cost is known.

(f) EQC to no longer provide contents insurance, currently capped at $20,000. Contents insurance claims are considered to take up disproportionate resources.

(g) Introducing a scheme for periodically reviewing the pricing of EQC premiums. These premiums have sat at five cents per $100 of private insurance cover since 1945, until they were increased to 15 cents per $100 of cover after the Christchurch quakes in 2012.

[77] The Insurance Council of New Zealand submission in response to Treasury's proposal may be summarised:[51]

(a) Claims should not only be lodged with insurers, but also assessed exclusively by insurers. EQC could assume responsibility in the event of non-performance by an insurer.

(b) Rather than including siteworks in building cover of $200,000, there should be a separate cover for landworks. Landworks should cover the foundation work necessary to create a building platform.

(c) EQC should have arrangements to audit private insurers.

(d) For EQC's standards of assessment and repair to be based on the private insurance cover, so there is no bias by the insurer in assessing whether the loss is under or over cap.

[78] An alternative model, not proposed by either party, is the Japanese scheme. The Japanese government underwrites the costs of insuring house owners against damage by tsunami, earthquake and volcanic eruption. This is said to allow quick processing of claims: 99.5 per cent of claims against the Japanese fund arising from the March 2011 earthquake and tsunami were apparently settled within 14 months.[52]

[79] My own experience as an Earthquake List Judge for two years, dealing with the frustrations of split cover, policy terms and assessment, suggests there is a very great deal to be said for at least the following reform: that a single policy cover the whole of the damage; that the private insurer takes responsibility for claims processing and assessment; and that the role of EQC be modified to focus on underwriting, audit, research and education.

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51 Insurance Council of New Zealand "EQC Act must be changed" (11 November 2015) at <http://www.icnz.org.nz/category/press-release/>.

52 Finn and Toomey, above n 2, at 221.

[80] The bifurcation of cover and assessment has heaped needless delay and misery on an already devastated city and its people. The resilience of that population in the face of these events has been a remarkable event in its own right.