Supreme Court of New Zealand

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QUAKE OUTCASTS v MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY (SC 5/2014)

FOWLER DEVELOPMENTS LTD v THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY (SC 8/2014)

[2015] NZSC 27

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

The Canterbury region suffered a series of significant earthquakes and aftershocks in 2010 and 2011. The first major earthquake was on 4 September 2010, causing extensive property damage and some injuries. The earthquake of 22 February 2011 was particularly devastating and resulted in 185 deaths and thousands of injuries. In addition, the February earthquake caused significant additional property damage, extensive damage to infrastructure and widespread liquefaction.

After another significant earthquake on 13 June 2011, Cabinet authorised a committee of senior Ministers to make decisions on land damage and remediation issues. The decisions of the Cabinet committee were announced to the public on 23 June 2011.

The committee categorised greater Christchurch into four zones, according to the extent of land damage and the prospects of remediation. As well as identifying the four zones, the Cabinet committee decided that there would be an offer to purchase insured residential properties in the red zones, which were

characterised by the committee as areas where "rebuilding may not occur in the short-to-medium term".

Owners of insured properties in the red zone were given two options:

(a) purchase of their properties at 100 per cent of the most recent (2007) rating valuation (land and improvements), with all insurance claims against the Earthquake Commission (EQC) and private insurers to be assigned to the Crown; or

(b) purchase of the land only at 100 per cent of the most recent rating valuation, with the owner assigning all insurance claims against the EQC for the land to the Crown but retaining the benefit of all insurance claims relating to improvements.

The position of owners of a number of other categories of property in the red zones (including of owners of uninsured residential properties and owners of uninsurable bare residential land) was not addressed until September 2012. In essence, the offer approved for those two groups by Cabinet was at 50 per cent of the 2007 rating value for the land only component of the properties and not the land and improvements.

The appellants, Quake Outcasts and Fowler Developments Ltd, issued proceedings for judicial review challenging the lawfulness of the 50 per cent offers on the basis that they were not made in accordance with the Canterbury Earthquake Recovery Act 2011 (the Act). It was also alleged that the offers were oppressive, disproportionate and in breach of their human rights.

Quake Outcasts and Fowler Developments largely succeeded in the High Court. In the Court of Appeal, the September 2012 offer to purchase the properties of owners of vacant land and owners of uninsured improved properties in the red zone was held to be unlawful because of non-compliance with the Act and in particular s 10 of the Act. The Court of Appeal made a declaration to that effect. The chief executive was therefore directed to reconsider the offers. The Court held, however, that any substitute offers could lawfully distinguish between owners on the basis of their insurance cover.

There was no appeal by the Crown against the determination of the Court of Appeal that the chief executive must reconsider the offers in accordance with the Act. Rather, the appellants applied for leave to appeal against the Court of Appeal's refusal to declare that the June 2011 establishment of the red zones was unlawful under the Act. The appellants also sought to argue that the Court of Appeal was wrong to hold that an offeree's insurance status could lawfully be taken into account in making any substitute offers.

On 5 May 2014, this Court granted leave to appeal in both cases on the following questions:

(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 Canterbury Earthquake Recovery Act 2011?

(b) Were the offers made by the Crown to Residential Red Zone property owners under s 53 of the Canterbury Earthquake Recovery Act 2011 lawfully made? In particular:

(i) Was there a material failure to comply with the Act?

(ii) Was there a rational basis for the distinction drawn between those owners who were insured and those who were uninsured?

The Supreme Court, by majority comprising McGrath, Glazebrook and Arnold JJ, has allowed the appeal in part. The Chief Justice and William Young J have dissented.

The majority judgment deals with four issues. The first concerns the Crown submission that it was merely providing information about the condition of land in certain areas in the June 2011 announcements. The majority of the Court has held that the Crown was not merely providing information when identifying the red zones. Instead, the Crown made decisions on a number of important matters, including that there should be a central government response.

The second issue was whether the procedures under the Canterbury Earthquake Recovery Act should have been used. The majority has held that they should have been. The Act provides a comprehensive regime to deal with earthquake recovery. This includes the promulgation of a Recovery Strategy for the region. The majority has held that the zoning and related decisions should have been dealt with under the Recovery Strategy. Given the Cabinet committee's objective of acting quickly to restore confidence, it was, however, not feasible to wait for the promulgation of the Recovery Strategy.

The Act does provide a mechanism to deal with the need for urgent decisions by allowing Recovery Plans to precede the Recovery Strategy. The June 2011 decisions involved important earthquake recovery measures and a Recovery Plan was the appropriate mechanism for implementing the Crown's land classification decisions. Given the close relationship between the zoning decisions and the purchase offers and the area wide approach, the majority has concluded that at least the broad outlines of the purchase decisions should also have been dealt with under the Recovery Plan processes. The majority has held that the s 53 purchase powers could not lawfully have been used, absent a Recovery Plan.

The third issue concerned the matters that were relevant to the September 2012 decisions relating to the uninsured and uninsurable properties. The majority has concluded that, although insurance status was not an irrelevant consideration,

other relevant considerations weighed against insurance cover (or lack thereof) being a determinative factor. For example, the fact that many of those who were insured were anticipated to be paid more than the insured value of their properties was a relevant factor and should have been taken into account. The majority has also held that the recovery purposes of the Act were not properly considered. Additionally, the majority has held that the failure of process and consultation in June 2011, the delay in extending the offer to the appellants, and the very difficult living conditions faced by those living in the red zones were relevant factors that should have been taken into account when making offers to the appellants.

The final issue dealt with by the majority is the appropriate relief. While the majority has held that the June 2011 red zone measures should have been introduced under a Recovery Plan, it is now too late for this to occur. As a result, a declaration as to the unlawfulness of the June 2011 decisions would not serve any useful purpose and therefore none is made. However, the majority has made a declaration that the decisions relating to the uninsured and uninsurable in September 2012 were not lawfully made and that the Minister and the chief executive of the Canterbury Earthquake Recovery Authority should be directed to reconsider their decisions in light of this judgment.

The Chief Justice and William Young J would have dismissed the appeal.

The Chief Justice considered that s 53 of the Act was able to be used for the purchases without an overarching Recovery Strategy or Recovery Plan. She said that the extent to which the difference between offers to the insured and those to the uninsured and uninsurable can be justified remains something for assessment in the context of a proper consideration under ss 10 and 3 of the Act.

William Young J concluded that it was not mandatory for the Crown to proceed by way of a Recovery Plan. He considered that it would be open to the Crown, having taken into account all other relevant considerations, to structure its new offers around the insurance status of the offerees.

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