**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC: 98/2022**

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| **BETWEEN** | **STEVEN RICHARD YOUNG** |
| | **Appellant** |
| **AND** | **THE ATTORNEY-GENERAL** |
| | **Respondent** |

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# RESPONDENT'S SUBMISSIONS

**8 March 2023**

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Te Tari Ture o te Karauna
Crown Law

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
Ken Stephen | Nixon Fong
Ken.Steven@crownlaw.govt.nz | Nixon.Fong@crownlaw.govt.nz

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## Introduction

1. The whole of Christchurch was affected by the Canterbury earthquake sequence in 2010 and 2011, including the Port Hills. At the eastern end of the Port Hills, there are five large cliffs. One of which is the Redcliffs. At the top there are 13 properties. Mr Young, the appellant, has a property that sits below. The cliffs had always been a hazard. Mr Young's property has a recognised, pre-existing risk of cliff failure. He was aware of it. The earthquakes brought that risk to the fore. They damaged the fabric of the cliffs. As a result, the cliffs remain unstable – more so than before. Mr Young owns a "good proportion" of the cliff face.[1]

2. The Crown offered to purchase nearly 8,000 damaged properties at a cost of approximately $1.6 billion to taxpayers to facilitate the recovery of Canterbury. These were known as the "red zone offers". The Crown did so not for profit, but in the public interest.

3. As part of an area-wide solution to an area-wide problem, the Crown made red-zone offers to owners of 'red zoned' properties at the Port Hills. The clifftop property owners all accepted the offer. Mr Young did not. The Crown then made a further, improved hybrid offer to Mr Young, to allow him to move away if he wanted. That, too, was rejected. He now sues the Crown, as owner of the clifftop properties, in the tort of continuing nuisance. The nuisance, he says, is the instability of the cliffs. He seeks, as primary relief, the costs of remediation of the cliffs; alternatively, damages in the sum of the hybrid offer, without parting with his land. Through this private law claim, he seeks a differential treatment from all other red-zone owners.

## Issue and summary

4. The issue is whether, under the tort of nuisance, the Crown breached a duty of reasonable care to abate the nuisance – the instability of the cliffs. The trial Judge said "No".[2] The Court of Appeal also said "No".[3]

5. The Crown submits the Courts below were correct, for these reasons:

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1 R Benge Notes of Evidence (**NoE**) p158 l 11 [Case on Appeal (**CoA**) v201 Tab 45]**[201.0400].** See also **[201.0388]-[201.0389]**.

2 *Young v Attorney-General* [2021] NZHC 463 (**HC Judgment**) [Case on Appeal (**CoA**) v101 Tab 6]**[101.0025]**.

3 *Young v Attorney-General* [2022] NZCA 391 (**CA Judgment**) [CoA v101 Tab 13]**[101.0206]**.

5.1 In continuing nuisance cases, the touchstone for liability is negligence. Mr Young's primary relief is grounded on the premise that the Crown's duty of care required it to remediate the cliffs. But, in the circumstances of this case, remediation is impracticable and disproportionate. The only expert planning evidence is that the consenting of the remedial works is unlikely. This was accepted by the trial Judge. A duty to take reasonable care did not require the Crown to pursue extensive and expensive steps that are uncertain or unlikely to be achievable.

5.2 The Crown discharged its duty of care by making the hybrid red zone offer to Mr Young. This is not because the Crown had a duty in tort to make the hybrid offer. Rather, it is because, as remediation is not practicable, the only other way to reduce the effects of the nuisance is to facilitate an opportunity for the plaintiff to move away from the nuisance, if he wishes. This was the rationale of the red zone offers. The duty is not an absolute duty to secure Mr Young's relocation. The Crown opted to assist Mr Young to avoid the effects of the nuisance by moving away from it, including by varying the offer to accommodate his personal circumstances, and in so doing has clearly discharged its obligation to take reasonable care. The hybrid offer has not been withdrawn.

5.3 Mr Young's alternative relief, which seeks damages in the sum of the hybrid offer, but without the need to part with his land, fails to understand why the hybrid offer discharges the Crown's duty. The making of the offer was the way in which the Crown took reasonable steps to provide an opportunity for Mr Young to move away from the hazard. It is connected to the duty to abate reasonably. If Mr Young were simply to receive a sum of money, without moving away, there will be a logical disconnect between the duty to abate reasonably (here to move Mr Young away from the hazard) and the payment (the act that discharges the duty). Moreover, the alternative relief also assumes the Crown has already breached its duty.

6. In what follows, the Crown will first recount the relevant facts. Next, it will discuss the seminal authorities in some depth, identifying four key themes: overlap with negligence, the omission principle, practicality and modest responses. Then, it will explain why the Crown's duty to abate reasonably did not require it to remediate the cliffs. After that, it will address how the making of the hybrid offer discharged the Crown's duty. Finally, it will submit that the alternative sought by Mr Young is not tenable.

**Facts**

7. In the wake of the earthquake sequence, the government took unprecedented steps to facilitate the recovery of Canterbury. Among them was the creation of zones, including the residential red zone, which covered the worst affected areas. These lands were damaged beyond practical and timely repair. The government then offered to purchase properties in these zones, under two standard options, referred to as the red zone offers. The red zone offers were generous. So much so that almost everyone accepted the Crown's offers.

8. Mr Young owns a property at 124 Main Road, Redcliffs, Christchurch. It is bounded by steep cliff faces on two sides. At the time of the earthquakes, there were five houses on the title, referred to as Houses 1 to 5. Three were occupied by Mr Young and his extended family (houses 1 to 3). Two other houses were occupied by purchasers under agreements for sale and purchase – houses 4 and 5. These were referred to as the Wongs' and Jamiesons' houses respectively. **Annexure A** and **B** are two maps of the property, for orientation purposes. One shows the existing houses. The other is taken from the conditional resource consent. Mr Young has since purchased houses 4 and 5, the latter as part of settling litigation with the Jamieson.[4] Mr Young's property, as well as the surrounding land and buildings in the Port Hills, were 'red zoned' following the earthquakes.

9. Prior to the earthquakes Mr Young was developing the Property. He obtained conditional sub-divisional consent in March 2007, to create four new residential lots in addition to the balance lot of 1.8 hectares, Lot 5. The

[4] [CoA v306 Tab 213]**[306.2366]**.

condition referred to the pre-existing instability of the cliffs and identified a rockfall hazard on the property. It stated:[5]

> A significant rock cliff bluff adjoins the northwest side of lots 4 & 5 and effects of rock fall can be mitigated by design and construction of engineered works…
>
> In terms of rockfall there is potential for release of smaller sized debris from localised sources along with potential for some larger blocks to be released. A potentially unstable section of the cliff is located above the southern part of lot 4. Under direction of a Geotechnical Engineer the visible areas of loosened blocks of rock on the cliff above the southern part of lot 4 are to be removed and the larger blocks bolted. The geotechnical engineer is to design a rock catch/deflection fence across the southern part of lot 4 to protect an identified building site on the north part of the lot.

10. At the time of the earthquakes, the required works – the scaling of the cliff, the removal of the loose rocks, the bolting of large rocks and the construction of a rock catch fence or wall on Lot 4 – were not yet started or completed.[6] The trial Judge referred to these as "significant rockfall protection works".[7]

11. As discussed, the Crown made red zone offers to property owners in the red zone. All of the clifftop property owners accepted the red zone offers, from 2011 to 2015. The Crown purchased these properties pursuant to s 53 of the Canterbury Earthquakes Recovery Act 2011 (**Act**). Consistently with other red zone property owners, the Crown also made a red zone offer, with the two standard options, to Mr Young on 11 March 2013. Option 1 was for the land and improvements, based on their 2007 rating valuation, with Earthquake Commission (**EQC**) and private insurance claims assigned to the Crown. This was for $2,650,000. Option 2 was for the land only, based on its 2007 rating valuation, with EQC claims relating to land damage assigned to the Crown. This was for $1,050,000. Mr Young did not accept either offer.

12. The Crown made an improved, hybrid offer to Mr Young in February 2015, and renewed in December 2017. Under this offer, the Crown would (a) purchase Mr Young's land and all buildings and fixture on his land, based on its 2007 rating value ($1,050,000), less the EQC land payment (but Mr Young

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5 [CoA v303 Tab 155]**[303.1313]**.
6 HC Judgment at [20] [CoA v101 Tab 6]**[101.0031]**.
7 HC Judgment at [21] [CoA v101 Tab 6]**[101.0032]**.

can keep the EQC dwelling payment and private insurance proceeds for all buildings except for the Wongs' and Jamiesons' houses); and (b) purchase the Wongs' and Jamiesons' houses, valued using an independent valuation (being $490,000 and $540,000, respectively), less the EQC dwelling payments and private insurance proceeds for these two houses.[8] The precise quantum of this offer depended on Mr Young's confirmation of the private insurance proceeds he had obtained. As the correspondence explains, the hybrid offer was to accommodate "the particular circumstances regarding ownership of the property" and allowed "for different interests in the buildings and any insurance claims for them".[9] Mr Young rejected the hybrid offers and bought Houses 4 and 5 in mid-2015.

13. As the Courts below detailed, as a result of the earthquakes, the Christchurch City Council notified a new Christchurch District Plan (CDP), in tranches, in 2014/15. The CDP introduced new management areas, called Cliff Collapse Management Areas 1 & 2 and Mass Movement Management Areas 1 & 2. Mr Young's property is covered by these areas. These management areas largely either absolutely prohibit, or categorise as non-complying activities, development activities such as building, subdivision and hazard-removal works. The significance of these management areas lies in their impact on the feasibility or practicality of any remedial works at the property, which will be discussed later.

**What is the nuisance here?**

14. Mr Young characterises the relevant nuisance as "the inherent instability of the cliffs".[10] In spite of the concurrent findings below, he says the cause of the nuisance "was, and continues to be, instability on the Crown's land".[11] He asserts that "the primary risk of further cliff collapse was the instability emanating from the Crown properties from the cracking and fractures in the land and the mass movements".[12]

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8 Of which the Crown is still unsure because Mr Young has not provided such information.

9 [CoA v302 Tab 106] **[302.0865]**. Namely, the fact that the Wongs' and Jamiesons' houses, privately owned, had been built prior to the subdivision (note that subdivision was not granted because Mr Young had not completed all the protective or mitigation works required under the consent).

10 Appellant's submissions at [2.13].

11 Appellant's submissions at [2.17].

12 Appellant's submissions at [2.14].

15. The Crown does not accept these assertions, nor consider they are necessary to the resolution of this appeal. It is useful to begin by considering whether, and if so how, the instability itself may amount to an actionable nuisance.

***Risk of future damage is not actionable nuisance***

16. In *Darroch v Carroll*, Shorland J stated that "until damage is caused there is no nuisance – only the potentiality of a nuisance".[13] There is a risk of imprecise language in referring to a state of affairs that has the potential to cause damage as itself being a nuisance.[14]

17. At common law, "no nuisance action lies where the claimant alleges only that there is a risk of future damage".[15] While a plaintiff could seek a quia timet injunction against a future nuisance, the English courts have held that "it does not follow that because the Court in its discretion may grant such an injunction that there is implicit in the exercise of such discretion a recognition that in truth the cause of action in nuisance then exists".[16]

18. The Crown does not dispute that an unstable cliff could amount to a nuisance. In the law of nuisance, the concept of damage is "a highly elastic one" and the threat of damage, if well-founded, may constitute an interference to a plaintiff's use or enjoyment of land.[17] It does not accept, however, Mr Young's suggestion that the Court can grant damages in lieu if it is not prepared to make a quia timet injunction. The law is that "[t]he apprehension of damage, however well founded, does not entitle a party to recover damages in nuisance for the steps taken to anticipate such damage of its consequences whether by preventative measures or otherwise…".[18]

***Cracks not primary cause of cliff instability***

19. It is wrong to assert the cracked grounds on the clifftop properties are the primary cause of the instability of the cliffs. It is inconsistent with the pre-

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13 *Darroch v Carroll* [1955] NZLR 997 (Supreme Court) at 1001 **[Respondent's Bundle of Authorities (RBoA) Tab 3]**.

14 *Jalla v Shell International Trading and Shipping Co Ltd* [2021] EWCA Civ 63 at [20], recording the reasons at first instance. Leave has been granted by the Supreme Court of United Kingdom.

15 *Winfield and Jolowicz on Torts* (20th ed, Sweet & Maxwell, London, 2020) at [15-054] **[RBoA Tab 12]**.

16 *Yorkshire Water Services Limited v Sun Alliance & London Insurance Plc* [1998] Env LR 204 at 236 **[RBoA Tab 9]**, citing *Midland Bank Plc v Bardgrove Property Services* (1993) 65 P & C R 153 (EWCA) at 166 **[RBoA Tab 5]**. See also Richard Buxton "The Negligent Nuisance" (1996) 8(1) Malaya Law Review 1 at 2 **[RBoA Tab 14]**.

17 *Winfield and Jolowicz on Torts* (20th ed, Sweet & Maxwell, London, 2020) at [15-054] **[RBoA Tab 12]**, citing *Network Rail Infrastructure Ltd v Williams* [2018] EWCA Civ 1514; [2019] QB 601 at [42] and *Birmingham Development v Tyler* [2008] EWCA Civ 859; [2008] BLR 445 **[RBoA Tab 2]**.

18 *Yorkshire Water Services Limited v Sun Alliance & London Insurance Plc* [1998] Env LR 204 at 236 **[RBoA Tab 9]**.

existing risk profile of the property. As the Judge found, "[t]here has always been a rockfall risk on his property which the Council recognised when it proposed conditions on Mr Young's five lot subdivision".[19] Similarly, Dr Kupec, the Crown's expert, confirmed in oral evidence that the hazards have "always exist[ed]" at the property and it is the risk – the chances of them occurring – that "might not have been appreciated till after the earthquake".[20] If the instability was a risk that had already existed on the property before the earthquakes, it is improbable that the cracks on the clifftop properties, which came about only after the earthquakes, are the primary cause of the instability.

20. The real reason for the cliffs' continuing instability is more straightforward. As Dr Kupec said, "the earthquakes have damaged the fabric of the cliffs".[21] The earthquakes have shaken some of the materials off the cliffs, but, more importantly, the shaking also loosened new material on the cliff face. Because there is currently a significant amount of loose material on the cliff face,[22] the cliffs are more unstable than before and pose a hazard to the property. This renders the cliffs more prone to fail in future, in the event of further earthquakes or other natural erosions.

21. This explanation is consistent with Mr Young's own geotechnical evidence, which shows that the "rockfall source area" (pink area) lies almost entirely on the cliff face (**Annexure C**). Most of cliff face falls within Mr Young's property (see black dotted line). In other words, the instability inheres primarily in the areas of the cliff face, rather than the relatively level land on top of the cliffs. In addition, it is undeniable that, as the trial Judge found, "the rock fall which occurred in 2010-2011 created the talus apron on Mr Young's property which exacerbates the ongoing rockfall risk to the land".[23] It is also accepted that 72% of the fallen rocks came from Mr Young's side of the cliffs.[24] Accordingly, to the extent the Crown has a duty to abate reasonably, the duty is limited to the instability from the Crown's part of the

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19 HC Judgment at [110]. [CoA v101 Tab 6][**101.0057**].
20 J Kupec Notes of Evidence (**NoE**) at 43, l 16. [CoA v201 Tab 29][**201.0178**].
21 J Kupec Brief of Evidence (**BoE**) at [41]. [CoA v201 Tab 28][**201.0145**]. See also J Kupec BoE at [25]. [CoA v201 Tab 28][**201.0137**].
22 J Kupec BoE at [44]. [CoA v201 Tab 28][**201.0145**].
23 HC Judgment at [110]. [CoA v101 Tab 6][**101.0057**].

cliff.

***Cause of instability immaterial***

22. In any event, the Crown submits it is not necessary for this Court to resolve the precise source of the instability to determine the issues on appeal. It is not pleaded, nor advanced in the evidence, the Crown could have abated the nuisance (cliff instability) simply by addressing the cracks on its property. Neither remedial option put forward at trial suggested so. Irrespective of where the cause of the instability lies, the question for the Court is simply whether the Crown had taken reasonable care to abate the resulting instability. The focus is on the steps taken, or that could be taken, to address the *effects* – rather than cause – of the nuisance the Crown came to.

**The law of continuing nuisance**

***The authorities***

23. It is customary to begin discussing the law of adopting or continuing nuisance with the trilogy of *Sedleigh-Denfield v O'Callaghan*, *Goldman v Hargrave* and *Leakey v National Trust for Places of Historic Interest or Natural Beauty*, decided in 1940, 1966 and 1979 respectively.[25] The law, according to standard accounts, can be traced to the dissenting judgment of Scrutton LJ in *Job Edwards Ltd v Birmingham Navigations Ltd*,[26] delivered in 1923, which marked "a turning-point in the law".[27] But in Aotearoa New Zealand the law may be traced earlier still. In 1875, almost 50 years before the turning point in *Job Edwards*, the New Zealand Court of Appeal in *Whitlock v Parsons* had already anticipated the shape of the law to come.[28]

24. That case was about a stream in Whanganui. The plaintiff, Whitlock, was entitled to, and enjoyed for a long time, the flow of water from Tangingongoro Creek to his own land. The defendants were alleged to have obstructed and diverted the flow of water from the plaintiff's land. The Court of Appeal found for the plaintiff.[29]

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[24] CA Judgment at [8]. [CoA v101 Tab 13]**[101.0208]**.
[25] *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 **[Appellant's Bundle of Authorities (ABoA) Tab 5]**; *Goldman v Hargrave* [1967] 1 AC 645 **[ABoA Tab 6]**; and *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 **[ABoA Tab 4]**.
[26] *Job Edwards Ltd v Birmingham Navigations Ltd* [1924] 1 KB 341.
[27] *Goldman v Hargrave* [1967] 1 AC 645 at 659 **[ABoA Tab 6]**.
[28] *Whitlock v Parsons* (1875) 1 NZ Jur (NS) CA 46 **[RBoA Tab 8]**.
[29] *Whitlock v Parsons* (1875) 1 NZ Jur (NS) CA 46 at 50-51 **[RBoA Tab 8]**.

> In order to render the defendants liable, it would be sufficient to prove that the water had been diverted from its natural course by means of a cut on land occupied by the defendants, and that, though the cut was not made by them or during their occupancy, if they had adopted the diversion. For, as a general rule, an action will lie against a person who continues a nuisance as well as against one who creates it, provided he has power to prevent its continuance.

25. While the development of the law was not complete at that stage, the Court of Appeal's early recognition of potential liability and the proviso about feasibility is prescient.

26. The first case in the trilogy is *Sedleigh-Denfield v O'Callaghan*. There, a drainage pipe had been installed on the defendant's land by a local authority, who was or was treated as a trespasser. The pipe was laid without properly fixing a grating in place, such that it was choked with rubbish. As a result, during a heavy rainfall, water overflowed onto the plaintiff's property. It caused substantial damage. The House of Lords held that the defendants were liable for continuing and adopting a nuisance. Viscount Maugham explained the concepts of adoption and continuance as follows:[30]

> [A]n occupier of land "continues" a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He "adopts" it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance.

27. A common theme in the judgment was the ease with which the nuisance could have been abated. Viscount Maugham considered the defendant had continued the nuisance because they neglected to take the "very simple step" of placing a grid in the proper place.[31] Lord Atkin reasoned the defendants were liable because they knew the danger, they were "able to prevent it" and they omitted to prevent it.[32] Lord Romer said the step necessary to abate the nuisance was "well within [the defendants'] power".[33] Lord Porter considered that an occupier is liable for a nuisance on his property "to the extent he can reasonably abate it" – but it is "to this extent, but to no greater extent" that liability runs.[34]

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30 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894 **[ABoA Tab 5]**.
31 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 895 **[ABoA Tab 5]**.
32 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 899 **[ABoA Tab 5]**.
33 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 912 **[ABoA Tab 5]**.
34 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 919 **[ABoA Tab 5]**.

28. As an interlude of interest, three years later, the then Supreme Court of New Zealand applied *Sedleigh-Denfield* in *Boatswain v Crawford*, a case about the spread of fire from an unknown origin. Johnston J found that the fire was "a small one" at the initial stages.[35] In the event, his Honour found that the defendant was negligent in failing to take reasonable steps to extinguish the fire, since "the fire could have been extinguished in the early stages".[36] This judgment featured in passing in the next case in the trilogy.[37]

29. In *Goldman v Hargrave*, an appeal from Australia, the Privy Council extended the principle in *Sedleigh-Denfield* to a situation where the nuisance was caused by natural forces. There, the defendant was found liable for failing to extinguish a fire caused by lightning striking a tree. The defendant had simply cut down the burning tree, and left it there – the fire then spread to his neighbour's property. While the plaintiff had pleaded nuisance, their Lordships' judgment was expressly founded on negligence.[38]

30. Delivering the advice of the Board, Lord Wilberforce considered that while "the hazard could have been removed with little effort and no expenditure", other cases may not be so simple.[39] In those other cases, "the law must take account of the fact that the occupier on whom the duty is cast has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own".[40] His Lordship explained "the existence of the duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it".[41]

31. Lord Wilberforce characterised this duty as "a measured duty of care by occupiers to remove or reduce hazards to their neighbours".[42] Subsequent cases have adopted the language of "measured duty". For analytical clarity, the Crown submits it is preferable to maintain the duty does not change – at all times it remains a duty to take reasonable care to abate or reduce the nuisance. The contrast is not between different levels of duty, but different

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35 *Boatswain v Crawford* [1943] NZLR 109 at 111 **[ABoA Tab 15]**.
36 *Boatswain v Crawford* [1943] NZLR 109 at 113 **[ABoA Tab 15]**.
37 *Goldman v Hargrave* [1967] 1 AC 645 at 662 **[ABoA Tab 6]**.
38 *Goldman v Hargrave* [1967] 1 AC 645 at 657 **[ABoA Tab 6]**.
39 *Goldman v Hargrave* [1967] 1 AC 645 at 663 **[ABoA Tab 6]**.
40 *Goldman v Hargrave* [1967] 1 AC 645 at 663 **[ABoA Tab 6]**.
41 *Goldman v Hargrave* [1967] 1 AC 645 at 663 **[ABoA Tab 6]**.
42 *Goldman v Hargrave* [1967] 1 AC 645 at 662 **[ABoA Tab 6]**.

ways of proving fault.[43] It is the standard of care that varies, according to what was reasonable to expect of the occupier in his or her individual circumstances.[44] Irrespective of whether it is the duty or the standard of care that varies, it is clear that "the ability to abate" the nuisance is a fundamental consideration. In the event, as the action necessary to put out the fire was "well within the capacity and resources" of the defendant, the Privy Council found for the plaintiff on the basis of negligence.[45]

32. The third case in the trilogy is the English Court of Appeal's decision in *Leakey v National Trust for Places of Historic Interest of Natural Beauty,*[46] which affirmed *Goldman v Hargrave* as part of English common law. As a result of natural forces, there had been, over the years, debris sliding from the hill on the defendants' land onto the plaintiffs' land. It was common ground that the instability of the hill was caused by nature. Following an unusually heavy rainfall, the plaintiffs alerted the defendants to the danger of a possible collapse. After a few weeks, there was a large fall onto the plaintiffs' land. The plaintiffs then brought an action in nuisance against the defendants. As it turned out, the relevant remedial and preventative costs were about £6,000 (£37,009.82 in today's terms).[47] By the time of appeal, the defendants had completed the remediation and preventative works, and undertook not to seek recovery of these sums should they succeed in the appeal.

33. Giving the lead judgment, Megaw LJ held that an occupier of land owed a general duty to a neighbouring occupier in relation to a hazard occurring on its land, whether such a hazard was natural or made-made. He noted that "the obligation postulated in the *Sedleigh-Denfield* case [1940] AC 880, in conformity with the development of the law in *Donoghue v Stevenson* [1932] AC 562, was an obligation to use reasonable care".[48] The duty is "a duty to do that which is reasonable in all the circumstances, and no more than what,

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43 Andrew Burrows (ed) *English Private Law* (3rd ed, Oxford University Press, Oxford, 2013) at [17.50] **[RBoA Tab 10]**.
44 *Goldman v Hargrave* [1967] 1 AC 645 (HL) at 663 **[ABoA Tab 6]**.
45 *Goldman v Hargrave* [1967] 1 AC 645 at 664 **[ABoA Tab 6]**.
46 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 **[ABoA Tab 4]**.
47 See Bank of England's inflation calculation: https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator
48 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 **[ABoA Tab 4]**.

if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property".[49]

34. His Lordship then set out a list of factors which help to decide "whether the defendant's duty of care requires, or required, him to do anything, and, if so, what".[50] These include actual or constructive knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost thereof, and the relative financial and other resources.[51] As he recognised, these are considerations "with which the law is familiar" for "deciding whether there has been a breach of duty".[52] This, again, is a reference to a duty of care in negligence.

35. His Lordship continued:[53]

> If the risk is one which can readily be overcome or lessened – for example by reasonable steps on the part of the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little. But if the only remedy is substantial and expensive works, then it might well be that the landowner would have discharged his duty by saying to his neighbours, who would also know of the risk and who have asked him to do something about it, "You have my permission to come on to my land and to do agreed works at your expense"; or, it may be, "on the basis of a fair sharing of expense".

36. The principles established in this trilogy of cases have been applied in cognate jurisdictions and treated as good law. It is not necessary to canvass the authorities further, save for two cases of relevance.

37. In *Holbeck Hall Hotel Ltd v Scarborough Borough Council*,[54] the plaintiffs were the owners and lessees of a hotel on a clifftop overlooking the North Sea. The defendant council owned land that formed the undercliff between the hotel grounds and the sea. The cliff was inherently unstable. A massive landslide in 1993 damaged the hotel and led to its demolition. The plaintiffs sued the council in nuisance, among other things. The remedial scheme that might have prevented the nuisance would have cost about £500,000 (which

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49 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 517 **[ABoA Tab 4]**.
50 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 524 **[ABoA Tab 4]**.
51 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 524 **[ABoA Tab 4]**.
52 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 524 **[ABoA Tab 4]**.
53 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 526-527 **[ABoA Tab 4]**.
54 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) **[ABoA Tab 7]**.

is £869,828 today – just under $1.7m NZD). The English Court of Appeal found that the defendant was not liable.

38. Writing for the Court, Stuart-Smith LJ considered that the authorities on the content of the measured duty tend to focus "upon the ease and expense of abatement and the ability of the defendant to achieve it".[55] His Lordship also held that the extent of foreseen damage is relevant.[56] The Court noted, however, that even if the extent of the hazard had been foreseeable, it would not necessarily have been incumbent on the Council to carry out "extensive and expensive" remedial work to prevent the damage.[57] Rather, "the scope of the duty may be limited to warning neighbours of such risk as they were aware of or ought to have foreseen and sharing such information as they had acquired relating to it".[58]

39. Because the law of continuing nuisance has close affinity with the law of negligence, considerations relevant to negligence cases also feature in continuing nuisance cases. In particular, where public authorities are involved, the courts are alive to issues of resource allocation. In *Vernon Knight Associates v Cornwall Council*, the English Court of Appeal considered that "[w]here the defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held".[59]

***Four themes – negligence, omission, practicality and modesty***

40. There are four themes which emerge from the case law.

*Overlap with negligence*

41. The first is that, in continuing nuisance cases, the ambit of liability overlaps with that of negligence. As *Todd on Torts* explains, the principle derived in *Sedleigh-Denfield*, *Goldman* and *Leakey* "is based on negligence but remains actionable in private nuisance in cases of continuing interference with the use or enjoyment of land".[60] After *Goldman*, "the modern tendency is to use

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55 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [49] **[ABoA Tab 7]**.
56 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [49] **[ABoA Tab 7]**.
57 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [54] **[ABoA Tab 7]**.
58 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836, CA at [54] **[ABoA Tab 7]**.
59 *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950 at [49] **[ABoA Tab 10]**.
60 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [10.2.07] (p573) **[RBoA Tab 16]**. As the learned author observed, this has prompted academic suggestions to subsume this aspect of the nuisance under

without qualification the language of negligence and to ask whether the defendant exercised reasonable care to ensure that the state of affairs did not cause harm to his neighbour".[61] Similarly, *Winfield and Jolowicz on Torts* states that "in these cases it is immaterial whether the cause of action is termed 'nuisance' or 'negligence': the duty of the defendant to his neighbours and the standard imposed on him is the same".[62]

42. These statements accord with authorities. As discussed, Megaw LJ thought the law, as developed since *Sedleigh-Denfield*, was in conformity with *Donoghue v Stevenson*. Of more recent vintage is *Delaware Mansions Ltd v Westminster City Council*. There, Lord Cooke considered that, in cases of this kind, "[t]he label nuisance or negligence is treated as of no real significance".[63] In *Transco plc v Stockport Metropolitan Borough Council*, Lord Walker remarked that liability "overlaps with (indeed, is a sort of condominium with) that negligence" and that "the defendant's actual neighbour [is] also his neighbour for the purposes of the principle in *Donoghue v Stevenson* [1932] AC 562, 580".[64]

43. Once this is understood, it is clear the defendant does not bear the burden of proving that all that could reasonably have been done has been done (contrary to what Mr Young suggests).[65] As with negligence cases, it is for the plaintiff to plead and prove whether, and how, the defendant has breached the duty to abate reasonably.[66] This maintains coherence in the law of torts. Judicial dicta to the contrary are, with respect, per incuriam.

*The omission principle*

44. The second theme touches on why liability in continuing nuisance is fault (negligence) based, rather than strict. The reason is that the law distinguishes between a defendant creating a nuisance and continuing a nuisance. This reflects the distinction between acts and omissions in the law

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negligence: see Conor Gearty "The Place of Private Nuisance in a Modern Law of Torts" (1989) 48(2) CLJ 214; and Maria Lee "What is Private Nuisance?" (2003) 119 LQR 298. *Todd on Torts* however rightly declined to endorse that view given it may leave remedial gaps.

61 Stephen Todd (ed) *The Law of Torts in New Zealand* (2nd ed, Brooker's, Wellington, 1997) at [9.4] (p540) **[RBoA Tab 15]**.

62 *Winfield and Jolowicz on Torts* (20th ed, Sweet & Maxwell, London, 2020) at [15-046] **[RBoA Tab 12]**.

63 *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321 at [31] **[ABoA Tab 8]**.

64 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1 at [96].

65 Appellant's submissions at [3.18](d).

66 *Winfield and Jolowicz on Torts* (20th ed, Sweet & Maxwell, London, 2020) at [15-036], fn186: "The burden of proof in this respect would appear to lie on the claimant" **[RBoA Tab 12]**.

of negligence. As Robert Chambers QC (as he then was) explained, in the second edition of *Todd on Torts*:[67]

> It will be immediately apparent that the distinction between creating a nuisance and continuing a nuisance is very similar to, if not on all fours with, the distinction between misfeasance and non-feasance in negligence. Just as there are good practical reasons for drawing at least some distinctions between wrongful acts and "pure omissions", so the distinction between creation and continuance has some logic.

45. Since the common law does not generally impose liability for pure omissions,[68] the law's treatment of an occupier who omits to abate an inherited nuisance "is considerably more sympathetic" than one who deliberately engages in an activity which constitutes a nuisance.[69] The omission principle also explains why the duty to abate reasonably adopts a varying standard of care. As Professor Donal Nolan explained, not only is the subjectivised standard of care justifiable on the basis that the obligations in question are not voluntarily assumed, but it is also "a reasonable response to the peculiarly coercive nature of positive obligations, particularly if these require expenditure on the defendant's part".[70]

*Feasibility and practicality*

46. The third theme is that there is a strong emphasis on feasibility and practicality, as highlighted in the discussion of the seminal trio of cases above. More succinctly, in *Smeaton v Ilford Corporation*, Upton J (as his Lordship then was) said that "[i]n my judgment, in order to establish liability for continuing a nuisance by failing to prevent it, one must necessarily prove that the person so failing must be in a position to take effective steps to that end".[71] This reflects that the duty is not an absolute one. It is only a duty to take reasonable care to abate or reduce the effects of the nuisance.

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67 Stephen Todd (ed) *The Law of Torts in New Zealand* (2nd ed, Brooker's, Wellington, 1997) at [9.4] (p539) **[RBoA Tab 15]**.

68 *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 at [97]. In *Couch v Attorney-General* [2008] 3 NZLR 725, Tipping J observed that "[t]he law traditionally been cautious about imposing a duty of care in cases of omission as opposed to commission; in cases where a public authority is performing a role for the benefit of the community as a whole; and in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of the loss or harm suffered by the plaintiff" (at [80]). In *North Shore City Council v Attorney-General* [2012] 3 NZLR 341, Blanchard J noted at fn 223 that "the courts generally approach claims about allegedly tortious omissions with more caution than they do in the case of acts taken by a defendant".

69 Lewis Klar and Cameron Jefferies *Tort Law* (6th ed, Thomas Teuters, Ontario, 2017) at 879 **[RBoA Tab 13]**.

70 Donal Nolan "Varying the standard of care in negligence" (2013) 72(3) CLJ 651 at 683 **[RBoA Tab 11]**.

71 *Smeaton v Ilford Corporation* [1954] Ch 450 at 462 **[RBoA Tab 7]**.

47. Accordingly, there is no "starting prejudice" against the occupier.[72] While the law is predicated on the assumption that "the owner of land is *normally* in the best position to obviate or to contain or to reduce the effect of nuisances arising naturally on his land",[73] the common law equally is sensitive to the reality that in some instances it is not within the owner's control to abate the nuisance. As Megaw LJ noted, "the mere fact that there is a duty does not necessarily mean that inaction constitutes a breach of that duty".[74]

*Reasonable abatement is generally modest*

48. The final theme is that, in cases where a plaintiff has succeeded, the steps and costs required to abate the nuisance were generally modest. The nuisances were "easily controllable"; or prevention could have been achieved by taking "very simple steps"[75] or "without any great trouble or expense".[76] Where the steps were more involved, the sums at play were relatively low.[77] This is an unsurprising pattern. This is because a duty to take reasonable care to abate, in circumstances where the nuisance was "thrust upon" a defendant, is unlikely to require a defendant to expend significant outlay to abate the nuisance.

**Crown's duty of care does not require remediating the cliffs**

49. Mr Young's pleadings suggest the Crown's duty was to remove the rockfall and remediate the cliffs. This allegation forms the basis for the primary relief sought on appeal: an award of $2 million in damages, as a contribution to "the direct costs of implementing the Kupec design".[78]

50. The issue for this Court is whether, in failing to implement the Kupec design, the Crown breached its duty to take reasonable care to abate the nuisance. The Crown submits the answer is "No". The Crown was not negligent for not doing something that is unlikely to be achievable and at disproportionate costs.

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72 Appellant's submissions at [3.18](c).
73 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 528 **[ABoA Tab 4]**.
74 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 518 **[ABoA Tab 4]**. Contrary to Mr Young's submissions at [3.18](g), the Court did not order significant works to be undertaken to prevent future risks even if they exceed the value of the property effected. See p525E-F.
75 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 894 **[ABoA Tab 5]**.
76 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 517 **[ABoA Tab 4]**.

***Kupec design unlikely to be achievable***

51. At first instance, Dunningham J found that, while the Kupec design is "technically consentable", it is a non-complying activity under the Resource Management Act 1991 and "there can be no certainty resource consents would be granted for the works as proposed".[79] This finding was not disturbed on appeal. Contrary to Mr Young's submissions, the evidence of the Crown's expert witness, Mr Mark Allan, who was the only expert planner before the Court, was not "equivocal".[80] In fact, Mr Allan explained that the non-complying status signals to the community that "some activities are unlikely to be appropriate in certain areas". And, in his experience, this status is "typically used for situations where it is intended that consents only be granted in exceptional circumstances".[81]

52. He considered that the Kupec design would "face a difficult consenting process". He continued:[82]

> While it might be possible to demonstrate that any actual or potential adverse effects could be minimised through specialist technical design and assessment and mitigation measures (including independent peer review), I consider it more likely than not that [Christchurch City Council] would find such a proposal to be sufficiently opposed to the objectives and policies as to warrant decline. My opinion here is influenced by the directive nature of the "avoidance" policies and the prominence afforded to natural hazards in the CDP.

53. Mr Allan did not resile from this position under cross-examination.[83] The courts have held that it is not reasonable to require a defendant to contribute to a remedial solution that is unspecified.[84] This is sensible because, otherwise, the law will impose a positive obligation on a defendant to do something ex ante that is unspecified. By the same token, the Crown submits the exercise of reasonable care did not require it to undertake a remedial solution that is uncertain in terms of its achievability – and, indeed, less than likely according to expert evidence. Taking reasonable care does

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77 In *Leakey*, the relevant remedial and preventative costs were about £6,000 (£37,009.82 in today's terms).
78 Appellant's submissions at [4.23].
79 HC Judgment at [82] [CoA v101 Tab 6]**[101.0050]**.
80 Appellants' submissions at [4.13].
81 M Allan BoE at [24] [CoA v201 Tab 30]**[201.0225]**.
82 M Allan BoE at [54] [CoA v201 Tab 30]**[201.0233]**.
83 M Allan NoE at p94 l 33ff [CoA v201 Tab 32]**[201.0258]**: "…Dr Kupec's proposal involves hazard mitigation works within an area that has been identified in the plan as having been subject to unacceptable risk so there remains a degree of assessment required here. It's really that non-compliant activity status that I do take a cautious approach with".

not mean pursuing what is unlikely to be achievable. This is consistent with the pragmatism of the common law.

54. Mr Young is wrong to say that "whether the Kupec design can be consented is not the key issue".[85] The issue of practicability cannot be avoided. It is a repeating drumbeat in the authorities: "Is it practicable to prevent, or to minimise, the happening of any damage?"[86] It is no answer to assert, with no evidential foundation at this stage of the proceedings, that "there is likely to be alternatives" or there could be "some variation of [the Kupec design]".[87] As noted, a defendant owes no duty of reasonable care to contribute to "the cost of some as yet unspecified engineering solution".[88]

55. If, contrary to the evidence, the Kupec design has a likely prospect of achievability, it remains appropriate for the Court to ask, "how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works".[89] As the trial Judge found, the Kupec design would take about 10 to 12 weeks to implement. It would cost at least $1,840,000.[90] This type of undertaking is far removed from the "very simple steps" referred to in the authorities, such as stamping out a small fire or fixing a grating onto a pipe. Rather, it is akin to, and indeed more "extensive and expensive" than, the works that were rejected in *Holbeck Hall Hotel*.[91] The Crown therefore submits, even if the Kupec design is likely to be achievable, it does not fall within its scope of duty to take reasonable care.

***Kupec design disproportionate***

56. Moreover, the suggested undertaking is a disproportionate response. As the trial Judge said, if the Kupec design was implemented, the useable land is valued by the Crown's experts at $934,783 plus GST.[92] She further found that the cost of remediation and of creating a new subdivision "could well

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84 *Ward v Coope* [2015] EWCA Civ 30, [2015] 1 WLR 4081 at [75] **[ABoA Tab 19]**.
85 Appellant's submissions at [4.15].
86 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 524 **[ABoA Tab 4]**.
87 Appellant's submissions at [4.15].
88 *Ward v Coope* [2015] EWCA Civ 30, [2015] 1 WLR 4081 at [75] **[ABoA Tab 19]**.
89 *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 at 524 **[ABoA Tab 4]**.
90 HC Judgment at [76] [CoA v101 Tab 6]**[101.0048]**.
91 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [54] **[ABoA Tab 7]**.
92 HC Judgment at [84] [CoA v101 Tab 6]**[101.0050]**.

exceed the value of what would be preserved".[93] The costs and works required by the Kupec design are out of proportionate to the benefits they would achieve.[94] Accordingly, the Crown's duty of reasonable care does not compel its implementation.

57. This is sufficient to dispose of Mr Young's case for his primary relief sought. For completeness, the Crown addresses a further assertion that underlies the reasoning of Mr Young's claim for $2 million – namely, this amount is "roughly 50% of what will be lost if he is unable to undertake any remediation".[95] Two flaws underlay this assertion.

58. The first is that Mr Young's calculation of his loss ($4,263,512.33) is based on a wrong premise. Among other things, Mr Young treats the land value at 2010 as "the value of land unaffected by the nuisance".[96] That, however, simply provides a comparison between the valuation of the land before and after the earthquakes. This approach treats the earthquakes as the alleged wrong, that is, as the breach of duty itself. As this Court said in *Quake Outcasts*, however, "the earthquakes and not the Crown caused the land damage in the red zones".[97]

59. The proper measure of damages, in tort, is to restore the plaintiff to the position he or she would have been if the tort had not been committed.[98] If the alleged breach of duty is the failure to implement the Kupec design, then the proper measure of loss is the difference between (a) the value of the property with no remediation and (b) the value of the property after implementing the Kuepc design. Even on Mr Young's valuation evidence (which is disputed[99]), the loss on this basis is no more than $1,918,500 or $2,091,000 (as opposed to $4,263,512.33).

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93 HC Judgment at [84] [CoA v101 Tab 6]**[101.0050]**.
94 HC Judgment at [84] [CoA v101 Tab 6]**[101.0050]**.
95 Appellant's submissions at [4.23].
96 Appellant's submissions at [4.4](a).
97 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [179] **[RBoA Tab 6]**.
98 *Hunt v New Plymouth District Council* [2011] NZCA 406 at [80].
99 This is because this figure assumes houses 4 and 5 are fully repaired, when the damage to these houses was not caused by the alleged nuisance (unstable cliff) or the Crown's alleged failure to remediate, but by the earthquakes generally: Also, Mr Young bought these houses *after* the earthquakes. See Crown's submissions in the Court below at [56]-[57]: [CoA v101 Tab 12]**[101.0198]**. The Crown's evidence of Mr Young's land, if remediated, is either $833,500 or $1,006,000.

60. Mr Young's submissions on this issue repeat those advanced in the Court below. The Crown has responded to them in detail at paragraphs [51]-[76] of its submissions in that Court, which are included in the case on appeal.[100] The Crown relies on them in full.

61. The second flaw in his calculation is the adoption of a 50% split. This appears to be based on the suggestion that the remediation could benefit both Mr Young and the Crown, equally.[101] That is not correct. As Dr Kupec explains, rather than remediating the cliffs, his design simply seeks to protect as much of Mr Young's land as possible with some large bunds to allow for possible residential occupation in the future.[102] As Mr Young acknowledges, the Kupec design would "occur entirely on [his] land".[103] Therefore, if adopted, this remedial measure could only benefit Mr Young's property. There is no evidence to suggest this design could also benefit the Crown's land. The calculation also ignores the fact 72% of the rock fall emanated from Mr Young's land. For completeness, Mr Young's reference to the Crown's remedial undertaking at Sumner does not assist.[104] That work was undertaken to protect a lifeline route (rather than one residential property) and would have been a restricted discretionary activity (rather than non-complying activity) under the CDP.[105]

**The Crown has met its duty of care**

62. Before addressing Mr Young's alternative relief, it is convenient to set out what the Crown's duty is in this case. The Crown submits that, where it is neither practicable nor reasonable to undertake remediation, the steps required to meet the duty to abate reasonably are necessarily modest. According to authorities, an occupier may discharge its duty simply by warning its neighbour of the relevant risks or allowing access to either party's property. The Crown went further in this case and made a red zone hybrid offer to purchase a property that was and remains "worthless and

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100 [CoA v101 Tab 12]**[101.0196]**.
101 Appellant's submissions at [4.17].
102 J Kupec BoE at [78] [CoA v201 Tab 28]**[201.0155]**.
103 Appellant's submissions at [4.15].
104 Appellant's submissions at [4.18].
105 See detailed discussion in J Kupec BoE at [120]-[121] [CoA v201 Tab 28]**[201.0169]**. Hazard mitigation works to protect infrastructure, including earthworks associated with those works are "restricted discretionary activity": **[CoA v303 Tab 135][303.1032]**.

irremediable".[106] The Crown submits the making of the offer discharged the Crown's duty.

63. To be clear, this is not to say the duty to take reasonable care required the Crown to make a red zone offer. This would convert a government policy into a mandatory private law obligation. Rather, the duty at common law remains the same. It is to take reasonable care to abate or reduce the nuisance. The Crown discharged this duty by taking reasonable steps to facilitate an opportunity for Mr Young to move away from the nuisance, if he wishes to do so. The making of the hybrid offer was such a step.

***Reasonable care requires little else if remediation not practicable***

64. If a nuisance cannot be reasonably abated, then naturally an occupier cannot be expected to do much more in the circumstances. This is because an occupier is liable for continuing a nuisance only "to the extent he can reasonably abate it".[107]

65. *Holbeck Hall Hotel* is illustrative. There, the Court observed that, as the defendant was not required to undertake substantial remedial works, "the scope of the duty may be limited to warning neighbours of such risk as they are aware of or ought to have foreseen and sharing such information as they had acquired relating to it".[108] *Ward v Coope* is also instructive. Having found it was not reasonable to require a defendant to contribute to a remedial solution that is unspecified, the Court considered that the duty may simply require allowing the plaintiff to access the defendant's land to carry out remediation (on the plaintiff's part of the property), and remove whatever impedes such access.[109]

66. On this view, which was the Crown's position at trial, the Crown has properly discharged its duty. The Crown has consistently warned Mr Young of the relevant risks. For instance, when issuing a s 45 notice under Act (which restricted access to the property), CERA notified Mr Young that there are "significant concerns over safety in this area" and that the land underneath

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106 CA Judgment at [51] [CoA v101 Tab 13]**[101.0223]**.
107 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 919 **[ABoA Tab 5]**.
108 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [54] **[ABoA Tab 7]**.
109 *Ward v Coope* [2015] EWCA Civ 30, [2015] 1 WLR 4081 at [84] **[ABoA Tab 19]**.

the cliff is "considered extremely dangerous".[110] When withdrawing the notice in 2018, CERA emphasised that "the removal of the notice would not mean life risks affecting the property have been removed. While the risks have reduced over time, the geotechnical hazards still exist and access would need to be managed accordingly".[111]

67. The Crown has also facilitated access for Mr Young. Initially, CERA encouraged Mr Young to liaise with the Ministry of Education, who owns the adjacent land, for temporary access to his property. That access was obtained in 2014. When this arrangement ended in 2018, Mr Young took matters into his own hands and constructed a driveaway across the Crown's property at 124A Main Road without the Crown's consent. Other than preserving its position, in correspondence and in a counterclaim (abandoned at trial), the Crown has not taken action to prevent Mr Young from continuing to access the occupiable portions of his property through 124A. That access remains available and in use today.

68. This Court may conclude the Crown's duty, in the circumstances, extended no further.

***Hybrid offer facilitated opportunity to move away from nuisance***

69. Nevertheless, the Crown does not dispute the Courts' finding below: "in making the hybrid red zone offer to Mr Young in 2015, the Crown discharged its obligations to Mr Young appropriately".[112] This is not because the Crown had a duty in tort to make the hybrid offer. Rather, it is because, as remediation is not practicable, the only other way to abate or reduce the effects of the nuisance is to facilitate an opportunity for the plaintiff to move away from the nuisance, if he wishes. This was precisely the underlying rationale of the red zone offers. John Ombler, a former Chief Executive of CERA, explained, the policy intent was "to encourage inhabitants to move away from the red zones" and "[to ensure] people were not in an ongoing hazard area".[113]

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110 [CoA v302 Tab 98] **[302.0539]**.
111 [CoA v303 Tab 126] **[303.0964]**.
112 HC Judgment at [114] [CoA v101 Tab 6]**[101.0058]**. CA Judgment at [52] [CoA v101 Tab 13]**[101.0223]**.
113 J Ombler BoE at [12.1][CoA v201 Tab 18]**[201.0064]**.

70. Again, to be clear, this is not a general proposition that an occupier, or the Crown, would owe a duty to facilitate an opportunity to relocate whenever remediation is not practicable. That is typically the domain of public policy, not tort law. Rather, the submission is simply that the making of the hybrid offer is consistent with the rationale underlying the duty to abate reasonably. There is, in any event, no absolute duty at common law to secure Mr Young's relocation.

71. Because abatement was not practicable, the Crown has opted to assist Mr Young to avoid the effects of the nuisance by moving away from it and in so doing has clearly discharged its obligation to take reasonable care. The history of the parties' dealing shows that the Crown took reasonable steps in this regard. After Mr Young's rejection of the initial offers, the Crown made a tailored, hybrid offer to Mr Young. The offer was made in recognition of Mr Young's circumstances. It was the Crown's further attempt to allow him to move away if he wishes to do so. The Crown sought to accommodate the "particular circumstances" and "different interests" at the property.[114] While the parties could not ultimately agree on a value,[115] the Crown cannot be criticised for not taking reasonable steps to provide an opportunity to Mr Young. As Mr Ombler recalls, "[m]y distinct recollection was that CERA was trying very hard to create a solution for both parties".[116]

**Mr Young's objections**

72. Mr Young criticises the Court of Appeal's conclusion on the duty question on three bases. None of them has merit.

***Sale of land did not remove remedy***

73. The first is that Mr Young says the judgment means "the fact his neighbours transferred their property removes any remedy for Mr Young".[117] Nothing in the Court's reasoning suggests the fact of sale removed Mr Young's remedy. Whether there is a remedy depends on whether he can make good his claim that the Crown has breached the duty to abate reasonably. The fact of sale

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114 [CoA v302 Tab 106]**[302.0865]**.

115 Indeed, it would be wrong to consider the issue of reasonableness based solely on the merits of the hybrid offer. As Professor Todd explained in *Todd on Torts*, "the principles of negligence must operate consistently with the doctrine of the separation of powers": Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, 2019) at 175 **[RBoA Tab 16]**.

116 J Ombler BoE at [23][CoA v201 Tab 18]**[201.0064]**.

117 Appellant's submissions at [3.27].

does not prevent Mr Young from establishing such a claim. As the Court explained, what is being assessed in this case is "the continuing nuisance represented by the continued risk of further rockfall from [the Crown's] land, after it took ownership".[118] This is correct. Until the Crown has taken ownership, it had no ability to abate the nuisance and therefore could not have been under any duty. That is what the Court of Appeal meant when it said liability cannot "reach back".

74. In any event, it is highly doubtful whether the former owners would be liable for what is an act of God (an assumption underlying the first criticism). As Stuart-Smith LJ said in *Holbeck Hall Hotel*, justice does not require a defendant to be liable "for damage which, albeit of the same type, was vastly more extensive than that which was foreseen or could have been foreseen…".[119] Moreover, as the trial Judge found, "there has always been a rockfall risk on [Mr Young's] property".[120]

***No liability for future rock fall***

75. The second criticism is that the Court's analysis implies "there would be no liability" even if there were future significant rockfall on Mr Young's land.[121] If the duty was to abate reasonably, and it is not practicable to abate, then it is not surprising there would be no liability even if there were to be further rockfalls. In the language of negligence, prevention of further rockfalls is outside the scope of the Crown's duty of care in the circumstances. It follows logically the Crown cannot be liable for further rockfalls.

76. The matter can also be looked at through the lens of the *volenti* defence. Mr Young has the right not to accept hybrid offer and stay at the property. But in doing so, Mr Young must be taken to have consented to the risks presented by the hazards. Not least because the risk was one that pre-existed before the earthquakes. This is consistent with Stuart-Smith LJ's observation in *Holbeck Hall Hotel*. There, his Lordship raised the issue of "what should be the position if both parties knew of the defect and the potential risk on their respective land?", and if neither party took effective

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118 CA Judgment at [50] [CoA v101 Tab 13]**[101.0222]**.
119 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [49] **[ABoA Tab 7]**.
120 HC Judgment at [110] [CoA v101 Tab 6]**[101.0057]**.

remediation action? His Lordship answered, "each would have consented to the risk as regard themselves and each would have a defence of volenti non fit injuria".[122]

***Public benefit of red zone acquisitions is relevant***

77. Third, Mr Young says the Court implied that "the Crown should not be liable in nuisance because of the public benefit associated with actions".[123] In cases where a defendant created a nuisance, it may well be that public utility should not affect the question of liability. However, this is a case about continuing nuisance. As discussed, the nature of liability is that of negligence. As *Todd on Tort* recognises, the social value of the relevant activity is relevant to assessing whether there has been a breach of reasonable care,[124] or, as some cases say, to the scope of any duty of care.[125] In *Daborn v Bath Tramways Motor Co Ltd*, Asquith LJ said:[126]

> In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or that…The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.

78. There are also established statements to that effect by Lord Denning in *Watt v Hertfordshire County Council*[127] and Lord Hoffmann in *Tomlinson v Congleton Borough Council*.[128] Accordingly, in determining whether the Crown breached its duty to abate reasonably, it was legitimate to take into account the public benefits arising from the Crown's acquisitions in the red zone.

79. The role of the Crown, in the context of the earthquake recovery, is also relevant to the analysis for another reason. If a commercial party had acquired the clifftop properties for the purpose of making a profit, the common law may conceivably impose a higher standard of care to abate the nuisance. This is because the commercial party could have anticipated it may

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121 Appellant's submissions at [3.28].
122 *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836 (CA) at [56] **[ABoA Tab 7]**.
123 Appellant's submissions at [3.30].
124 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, 2019) at [7.3.04] **[RBoA Tab 16]**.
125 *Humphrey v Aegis Defence Services Ltd* [2017] 1 WLR 2937 at [10].
126 *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333 at 336.
127 *Watt v Hertfordshire County Council* [1954] 1 WLR 835 at 838.
128 *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46 at [34].

be subject to a duty to abate reasonably and, if it finds that too burdensome, it had a choice not to purchase the properties. The Crown, however, was in a different position. As the Court of Appeal said, "the Crown entered the picture effectively as a rescuer, without intent to occupy, develop or otherwise exploit the land it had no realistic choice but to acquire".[129] While, arguably, the Crown could have anticipated it would be acquiring some properties with legal liability attached, as Mr Ombler explained the Crown was "dealing with areas of significant devastation" and "the primary concern was to make offers to help people to move on with their lives".[130]

80. It was therefore proper for the Court of Appeal to take into account this unique challenge faced by the Crown. It was an orthodox application of the law of negligence. In *King v Sussex Ambulance Service NHS Trust*, the English Court of Appeal dealt with a negligence claim made against the ambulance service. It involved an injury sustained by an ambulance crew member in the course of his duty (carrying a patient down the stairs). He alleged the ambulance service, as an employer, failed to take appropriate measures in the circumstances to protect him from injury.

81. There, Hale LJ (as she then was) accepted that "what is reasonable may have to be judged in the light of the service's duties to the public and resources available to it to perform those duties".[131] Her Ladyship acknowledged the risk of injury in that case was considerable both in terms of its likelihood of occurring and in the seriousness of the harm which might be suffered if it did.[132] "Against that", Hale LJ continued, the service's activity "was of considerable social utility" and that the service "did not have a choice but to respond".[133] The question remains what could reasonably have been done to respond to the situation without putting the plaintiff at risk. As there was nothing the service could have reasonably practicable done to prevent the relevant risk, "it cannot be lack of reasonable care to fail to do so".[134]

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129 CA Judgment at [49] [CoA v101 Tab 13]**[101.0222]**.
130 J Ombler BoE at [26][CoA v201 Tab 18]**[201.0068]**.
131 *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413 at [23] **[RBoA Tab 4]**.
132 *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413 at [24] **[RBoA Tab 4]**.
133 *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413 at [24] **[RBoA Tab 4]**.
134 *King v Sussex Ambulance Service NHS Trust* [2002] EWCA Civ 953, [2002] ICR 1413 at [24] **[RBoA Tab 4]**.

82. Accordingly, when judging whether a public authority's conduct was reasonable in the circumstances, it is relevant to consider the limitations under which the authority operates, including, as a matter of practical reality, its lack of choice in finding itself in the circumstances.

**No basis to award alternative relief – hybrid offer as damages**

83. As alternative relief, Mr Young seeks damages in the amount of the hybrid offer. He says the payment should not be conditional on a sale of the property. But this fails to understand why the hybrid offer discharges the Crown's duty. As noted, the making of the offer was the way in which the Crown took reasonable steps to provide an opportunity for Mr Young to move away from the hazard. It is connected to the duty to abate reasonably. If Mr Young were simply to receive a sum of money, without moving away, there will be a logical disconnect between the duty to abate reasonably (here to move Mr Young away from the hazard) and the payment (the act that discharges the duty).

84. Moreover, the alternative relief assumes the Crown has breached its duty. For instance, he faults the hybrid offer as "a remedy [that] required the sale to the party *liable* in nuisance of the neighbour's land".[135] But that simply attacks a strawman. Neither the Crown nor the Courts below treated the offer as a remedy. Remedy is relevant if, and only if, there has been a breach. Rather, the hybrid offer relates to the anterior question of whether the Crown has met its duty to abate reasonably. Mr Young has conflated the issue of duty/breach with remedy.

85. On Mr Young's argument, the Crown could only discharge its duty of care by paying damages in the amount of the hybrid offer. It therefore transforms the tort of continuing nuisance into one of strict liability, against long-established authorities. As Lord Atkin said in *Sedleigh-Denfield*, "[t]he occupier or owner is not an insurer; there must be something more than mere harm done to the neighbour's property to make the party responsible".[136]

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[135] Appellant's submissions at [5.5] (emphasis added).
[136] *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 897 **[ABoA Tab 5]**.

86. Mr Young also asserts that the hybrid offer is effectively a compulsory acquisition at an undervalue. That, too, is incorrect. Under s 64(2)(a) of the Act, where land is compulsorily acquired, compensation is determined as at the date of the compulsory acquisition. The Minister must determine compensation having regard to the land's current market value.[137] Any compensation will therefore be based on the post-earthquake valuation of the land, which is likely to be "worthless in its current state".[138] The red zone offers were generous when compared with the post-earthquake valuation of land. As recorded in *Quake Outcasts*, the government had pointed out at the time that, if it were to exercise its compulsory acquisition powers, the acquisition price is "likely to be substantially below the price then on offer [by way of the red zone offers]".[139]

87. As that judgment also indicates, the Crown had considered the option of compulsory acquisition during the policy design of the red zone offers. CERA officials had raised the option of compulsory acquisition, but made a decision not to use these powers.[140] This Court acknowledged that this decision, among others, "may indeed, given the situation facing Christchurch, have been seen by the [Cabinet] Committee as the only sensible decisions that could be made".[141]

**Costs judgment**

88. In respect of the appeal against the costs judgment, Mr Young's "basic point" is he was the successful party because he says the Court held that "the Crown was liable in nuisance". That misunderstands the judgment. The Court found that the Crown had discharged its duty of care by making the hybrid offer in 2015, and was therefore not liable. The Crown was therefore the successful party and is entitled to costs.

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137 Canterbury Earthquake Recovery Act 2011, s 64(3) **[RBoA Tab 1]**.

138 HC Judgment at [104]. [CoA v101 Tab 6] **[101.0055]**.

139 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [245] **[RBoA Tab 6]**.

140 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [106](h) **[RBoA Tab 6]**.

141 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [107]. (per McGrath, Glazebrook and Arnold JJ) **[RBoA Tab 6]**. As Professor Todd notes in *Todd on Torts*, whether a public has acted rationally can bear upon the question of breach: "The question would be whether the particular exercise of discretion was reasonably open to the defendant, not whether it was in some sense right or wrong": at 378 **[RBoA Tab 16]**.

89. It is also incorrect to say the "economic effect of the judgment is analogous to a successful claim for damages".[142] It is not. It betrays a repeated conflation between duty and remedy. The making of the offer relates to the duty issue, not remedy.

**Conclusion**

90. For these reasons, the Crown respectfully invites this Court to dismiss the appeal, with costs.

8 March 2023

Ken Stephen / Nixon Fong
Counsel for the respondent

[142] Appellant's submissions at [7.13].

# Annexure A


N

5 0 10 20m

SCALE 1:500

DATA QUALITY STATEMENTS

- THE AERIAL PHOTOGRAPHY FROM LINZ DATA SERVICE (CREATIVE COMMONS LICENCE) WAS FLOWN IN SUMMER 2018-2019, PRIOR TO DEMOLITION OF REDCLIFFS SCHOOL.
- CADASTRAL BOUNDARIES FROM LINZ, CURRENT OCTOBER 2020.

Plot Date: 6/3/2023 8:55:15 AM Office: NZCHC Filename: P:\D\18\14\DELIVER\DESIGN\A93 CAD\DRAWINGS\D18088-0000-DRG-GG1000-BUILDINGS.DWG

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CLIENT
Land Information New Zealand
Toitū te whenua

| REV | DATE | REVISION DETAILS | APPROVED |
|---|---|---|---|
| A | 03/03/23 | ISSUE FOR INFORMATION | J KUPEC |

| SCALE | SIZE |
|---|---|
| 1:500 | A1 |

DRAWN: R DAWSON
DESIGNED: -
REVIEWED: B TOMS

INFORMATION
NOT FOR CONSTRUCTION

APPROVED
DATE

PROJECT: 124 MAIN ROAD, REDCLIFFS

TITLE: EXISTING HOUSES

| DRAWING No. | PROJECT No. | WBS | TYPE | DISC | NUMBER | REV |
|---|---|---|---|---|---|---|
| | D18088 | - 0000 | - DRG | - GG | - 1000 | - A |

# Annexure B

LOTS 1 TO 5 PROPOSED SUBDIVISION OF PT 2 DP 303384
124A MAIN ROAD REDCLIFFS CT 13588
OWNER/ APPLICANT S R YOUNG
SCALE 1:750 PROJECT: 510

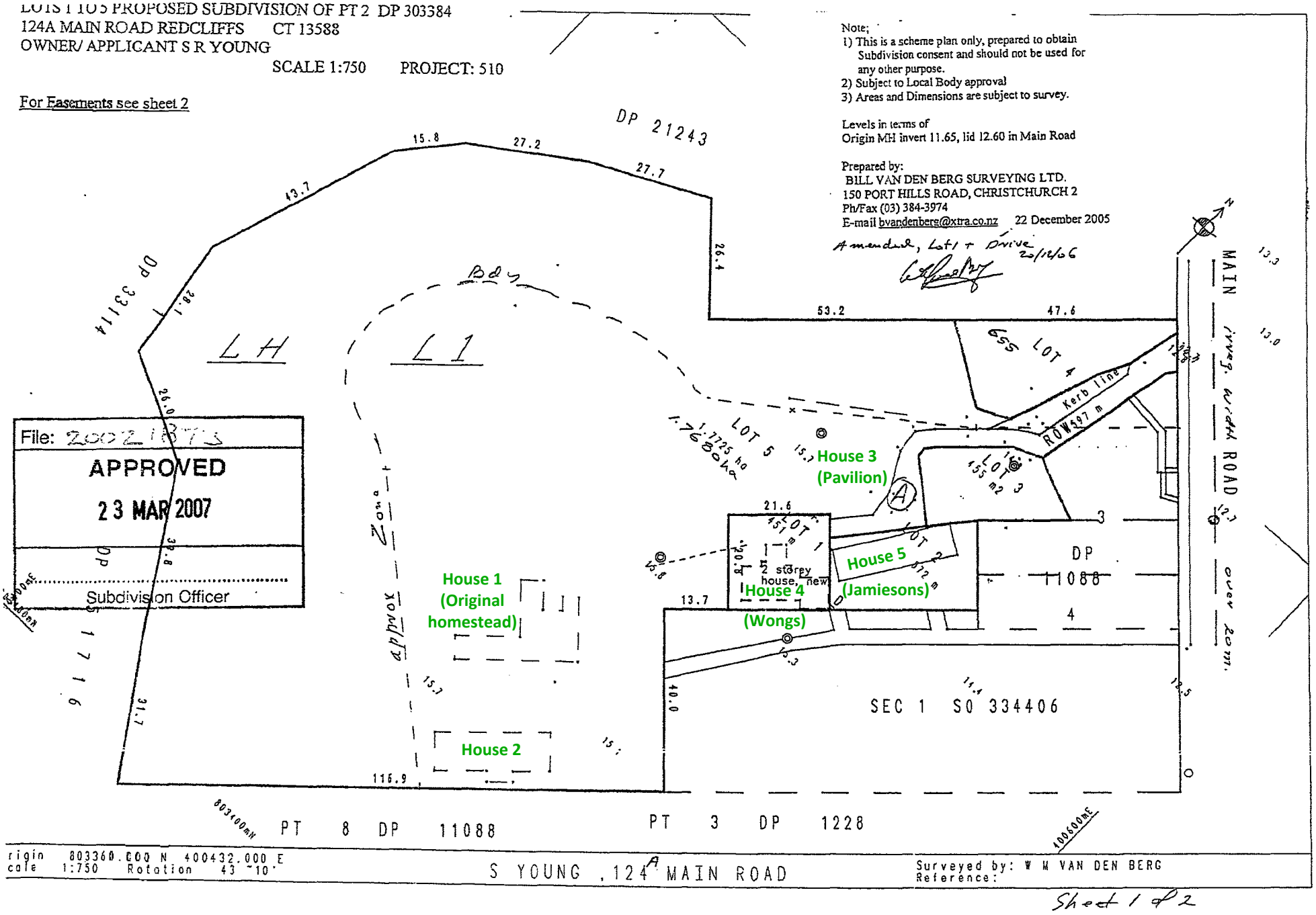
For Easements see sheet 2

Note;
1) This is a scheme plan only, prepared to obtain Subdivision consent and should not be used for any other purpose.
2) Subject to Local Body approval
3) Areas and Dimensions are subject to survey.

Levels in terms of
Origin MH invert 11.65, lid 12.60 in Main Road

Prepared by:
BILL VAN DEN BERG SURVEYING LTD.
150 PORT HILLS ROAD, CHRISTCHURCH 2
Ph/Fax (03) 384-3974
E-mail bvandenberg@xtra.co.nz 22 December 2005

Amended, Lot 1 + Drive 20/12/06




File: 2002 1873

APPROVED

23 MAR 2007

Subdivision Officer

303.1318

# REDCLIFFS GEOLOGICAL HAZARDS

(GNS, 2014)