IN THE COURT OF APPEAL OF NEW ZEALAND

CA478/2016
[2017] NZCA 332

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

Hearing:	12 April 2017
Court:	French, Miller and Winkelmann JJ
Counsel:	FMR Cooke QC and L E Bain for Appellant K G Stephen and P Higbee for Respondents
Judgment:	1 August 2017 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is allowed. The substantive judgment and costs judgment of the High Court are set aside.

B The Minister's decision to approve the Recovery Plan, under which nothing was offered for uninsured improvements, is declared unlawful.

C Leave is reserved for the parties to file further submissions on remedy.

D The respondents will pay the appellant costs for a standard appeal on a band B basis and usual disbursements.

E	**Costs in the High Court should be fixed there in light of this judgment.**

REASONS OF THE COURT

(Given by Miller J)

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[1] This appeal addresses a government decision to discriminate among landowners in the Christchurch residential red zones (RRZ) when offering to purchase their properties.

[2] Those residential homeowners who were insured when struck by earthquake have been offered the last (2007) pre-earthquake rating valuation of their land and improvements. That offer was announced in June 2011.[1] Those who owned improved but uninsured properties have been offered the unimproved rating value of

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[1] For convenience and consistency we adopt the same nomenclature for the offers that William Young J used in his judgment in *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 [SC Decision] at [289]. The month is that in which the offer was announced to the public.

their land at 2007, the Government having decided that nothing would be paid for improvements.[2] That offer was announced in August 2015. Quake Outcasts, an unincorporated group of uninsured owners, seeks judicial review of the latter offer, complaining that such discrimination is unlawful.

[3] We have been here before. In September 2012 the Government announced an offer of 50 per cent of the unimproved land value to uninsured landowners, including those whose land was vacant and so uninsurable. Insured owners had been offered the improved value more than a year earlier. Quake Outcasts sought judicial review, culminating in a March 2015 decision of the Supreme Court. The Court found the offer unlawful and directed that it be reconsidered, leading to the August 2015 offer.[3]

[4] Quake Outcasts argue that in the August 2015 offer the Minister erred, essentially because he again discriminated by insurance status. They claim that the Supreme Court decision prevented him from doing this. In the High Court Nation J held that the Supreme Court did not preclude such discrimination and found the August 2015 offer was not unreasonable.[4] The appeal requires that we consider whether the August 2015 offer differs materially from the September 2012 one, and whether the reasons now given for discriminating by insurance status differ in any way that matters from those the Supreme Court discounted.[5] There is a degree of difficulty about the applicable standard of review.

[5] The Quake Outcasts landowners all accepted the offer, saying they had no other option after all this time and seeking to reserve rights. The transactions have settled. The Canterbury Earthquake Recovery Act 2011 (the 2011 Act), under which the offers were made, was repealed on 19 April 2016.[6] The repeal abolished the office of Minister for Canterbury Earthquake Recovery. Mr Stephen appeared before

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2 We will speak sometimes of the Government when we need not distinguish between the Minister and the Chief Executive.

3 SC Decision, above n 1, at [207]–[208] per McGrath, Glazebrook, and Arnold JJ.

4 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2016] NZHC 1959 [Nation J Decision].

5 The Supreme Court refused to hear a direct appeal from the judgment of Nation J: *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2016] NZSC 166 at [3].

6 Greater Christchurch Regeneration Act 2016 [2016 Act], s 146(1).

us to represent the Crown, both resisting the appeal on the merits and arguing that there is now nothing the Court can do about the offer.[7]

[6] Relief is in issue, should the offer be held unlawful. Quake Outcasts wants an order compelling the Crown to extend new offers that are consistent with the Supreme Court judgment. The Crown says that by accepting the offers the owners changed the character of the dispute; what is in issue now is not the purchase of land but the payment of compensation, which was never part of any offer to red zone owners. Partly for that reason and partly because of the 2011 Act's repeal, the Crown cannot now be compelled to pay; the only possible form of compensation is an ex gratia payment the making of which is a discretionary and unreviewable decision of the Executive. The Crown adds for good measure that, were a court to direct a specific offer, it would usurp the function of those to whom Parliament entrusted that decision.

A short historical narrative

[7] The background is set out at [39]–[88] of the Supreme Court judgment and [7]–[28] of the judgment under appeal. We will not repeat it. For our purposes a shorter account suffices:

(a) Major earthquakes struck Christchurch in September 2010, February 2011 and June 2011.

(b) Legislation was enacted almost at once to manage the recovery.[8] It established the Canterbury Earthquake Recovery Authority (CERA) and assigned certain powers and duties to the first and second respondents. The relevant statute is the 2011 Act. Its objectives can be summarised as aiding the recovery of affected communities and restoring their well-being.[9]

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[7] It is arguable that the Attorney-General ought to have been made a party to represent the Crown's interest, but no point was taken about that.

[8] Initially the Canterbury Earthquake Response and Recovery Act 2010, but then after the February 2011 earthquake the Canterbury Earthquake Recovery Act 2011 [2011 Act].

[9] 2011 Act, s 3.

(c) In 2011 the red zones were created. The designation recognised that the land was considered to be damaged beyond practical and timely repair and rebuilding was unlikely in the short to medium term. The land had suffered area-wide damage and remediation would be uncertain, disruptive, slow, and more costly than the land was worth.

(d) In June 2011 the Government announced an offer to purchase insured residential properties in the red zones. They were offered the full rating value in exchange for the property and their insurance rights. Where they were underinsured by more than 20 per cent the offer would be reduced pro rata. Owners might elect to sell the land only and retain their insurance rights.

(e) No offer was made at that time to uninsured owners, including those who were uninsured because their land was bare of improvements, and so uninsurable. The reason given in a memorandum to Cabinet dated 21 June 2011 was that:

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

(f) In June 2012 the offer was extended to homes under construction at the time of the quakes and non-residential buildings owned by not-for-profit organisations.

(g) Insured commercial properties subsequently received an offer for 100 per cent of the land value and 50 per cent of the improvements, the rationale being that these properties were never eligible for EQC insurance cover.

(h) The offers received a high level of acceptances, 75 per cent as at August 2012. This affected anyone disposed to remain in the red

zone, because it was expected that local authority services and utilities would be withdrawn. The offer documents accompanying the September 2012 offer highlighted this risk, along with another — that of compulsory acquisition at a lower price:[10]

> If you decide that you do not want to accept the Crown's offer, you should be aware that:
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> - The Council may not be installing new services in the residential red zone.
> - The Council and other utility providers may reach the view that it is no longer feasible or practical to continue to maintain services to the remaining properties.
> - Insurers may refuse to issue insurance policies for properties in the residential red zones.
> - While no decisions have been made on the ultimate future of the land in the residential red zones, CERA does have powers under the Canterbury Earthquake Recovery Act 2011 to require you to sell your property to CERA for its market value at that time. If a decision is made in the future to use these powers to acquire your property, the market value could be substantially lower than the amount that you would receive under the Crown's offer.

(i) A Recovery Strategy under ss 11–15 of the 2011 Act took effect on 1 June 2012. It stated that the RRZs were being cleared and returned to open space:

> **Residential red zone land clearance** is overseeing the clearance of residential red zone properties and the return of the land to open space. It consists of three stages over two to three years. The first stage is to remove built structures and services. The second will involve larger-scale land clearance and grassing. The final stage will be to liaise with utility providers to remove public infrastructure no longer needed. After that, Land Information New Zealand will manage the open space.
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> (Emphasis in original.)

(j) Government policy was to avoid compulsory acquisition but signal that it preferred the RRZs be cleared. Partly for that reason, an offer to uninsured owners was announced in September 2012. The

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10 See SC Decision, above n 1, at [61] per McGrath, Glazebrook and Arnold JJ.

explanation for the delay was that CERA had been occupied with more important matters.

(k) For owners of bare land the September 2012 offer was 50 per cent of unimproved value. The explanation for the amount was that the land retained some modest residual value and was not insured. Owners of improved but uninsured land received the same offer, with the proviso that they would retain salvage rights to their improvements. A paper sent to Cabinet in August 2012 recommending the proposal stated that:

> This offer supports the signalling objective for the red zone while providing some support for recovering elsewhere and acknowledging that the owners were not fully insured throughout the whole process.

[8] Quake Outcasts moved for judicial review. The progress of that litigation through the courts is recorded in the Supreme Court's reasons for judgment.[11] A majority in that Court found the creation of the red zones unlawful for failure of process (they ought to have been created under a statutory recovery plan) but denied relief, too much water having passed under the bridge.[12] So the zones themselves survived the judgment. But the offers were held unlawful in that they discriminated against uninsured owners for reasons the Court found unjustified.

[9] The Court granted declaratory relief in the following terms:[13]

> We therefore consider that we should make a declaration that the decisions relating to the uninsured and uninsurable in September 2012 were not lawfully made. The Minister and the chief executive should be directed to reconsider the decisions in light of this judgment.

[10] The Minister and Chief Executive have complied with the direction that they reconsider, resulting in the August 2015 offer.

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11 At [9]–[11] per McGrath, Glazebrook and Arnold JJ.

12 At [112], [121], [124] and [127] per McGrath, Glazebrook and Arnold JJ. Elias CJ left open the question of whether the red-zoning decision was lawful and William Young J saw the issue as a "red herring": at [275] per Elias CJ and [304] per William Young J.

13 At [204] per McGrath, Glazebrook and Arnold JJ.

What the Supreme Court said about insurance status

[11] The Supreme Court's decision is central to this case. What the Supreme Court said about insurance status affects the legal parameters within which the Minister could lawfully decide to discriminate among landowners, so it is convenient to begin by setting out what that Court decided.

[12] The majority discussed the relevance of insurance status at [148]–[171] of the judgment. An important premise was established earlier, at [140]. There it was said to be unrealistic to describe the purchases as voluntary:

> It is true that the Crown did not use its powers of compulsory acquisition under the [2011] Act. However, it is unrealistic to describe the transactions that occurred as voluntary. The inhabitants of the red zones had no realistic alternative but to leave, given the damage to infrastructure and the clear message from the government that new infrastructure would not be installed and that existing infrastructure may not be maintained and that compulsory powers of acquisition could be used.

[13] Insurance status was found to have been "determinative" in the decision to discriminate among property owners.[14] The majority listed the Government's stated reasons for deferring a decision on uninsured residential properties in residential vacant lots. The reasons may be summarised as:

(a) Moral hazard: owners should not experience reduced incentives to insure in the future.

(b) Fairness: insured owners had paid insurance premiums. Because uninsured owners assumed a risk by choosing not to purchase insurance, it would be unfair to compensate them for uninsured damage.

(c) Cost to the Crown: the land and improvements were not insured by EQC or private insurers, so raising the effective cost of purchase.

[14] While accepting that the absence of insurance cover increased the cost to the Crown of purchasing the properties, the majority observed that affordability did not

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14 At [148] per McGrath, Glazebrook and Arnold JJ.

seem to have "loomed large" in the ultimate decisions; it was not explicitly referred to and no comparison was made of the savings resulting from discrimination on this ground.[15]

[15] So far as vacant land was concerned, the majority discounted the moral hazard claim, observing that vacant land was uninsurable and the risk of uninsured damage would not have been built into the cost of land.[16]

[16] Turning to uninsured owners of improved residential land, the majority recorded that no inquiry had been made into their individual circumstances and recognised that not all were uninsured through choice:[17]

> As to the uninsured, as against the uninsurable, we do not understand there to have been any inquiry into the individual circumstances of the members of that group, although it was recognised in the August 2012 paper that some had consciously not insured and some were not insured by mistake. In the Quake Outcasts group, it was not in all cases a "choice" to be uninsured. As indicated above, a number of the Quake Outcasts group were uninsured through inadvertence or bad luck. It may be too that any "choice" of others not to insure could have arisen through financial hardship, lack of sophistication or a failure to appreciate the risks. In addition, because of the structure of EQC cover, property owners have to insure for fire to receive natural disaster insurance. An owner is unable to split insurance and only get cover for natural disaster insurance. Because earthquake insurance is not directly insurable, but instead is connected to fire insurance, there was not necessarily a conscious choice not to insure for earthquake damage.

[17] It was legitimate to make red-zone decisions on an area-wide basis. The majority were "not suggesting that failing to take into account individual circumstances was an error."[18] However, it was unfair to take "conscious choice to remain uninsured" into account when that explanation may or may not have been true of every member of the uninsured group.[19] They added that "an area-wide approach suggests an area-wide solution."[20]

[18] The reason given for discriminating among owners was that a 100 per cent offer would compensate for uninsured damage. The majority acknowledged this but

15 At [152] per McGrath, Glazebrook and Arnold JJ.
16 At [153] per McGrath, Glazebrook and Arnold JJ.
17 At [155] per McGrath, Glazebrook and Arnold JJ.
18 At [156] per McGrath, Glazebrook and Arnold JJ.
19 At [156] per McGrath, Glazebrook and Arnold JJ.
20 At [156] per McGrath, Glazebrook and Arnold JJ.

noted its significance was much reduced because the Government also expected that offers made to insured owners would cost more than the insurance recoveries.[21] The fact that compensation had already been made for uninsured loss under the June 2011 offers should have been taken into account, but evidently was not.[22] The majority added that the concern about compensation for uninsured loss was further undermined because the Crown had in June 2012 extended 100 per cent offers to properties under construction and non-residential properties owned by not-for-profit organisations, although the land in these cases was not insured or insurable.[23]

[19] The majority also discounted unfairness to those who had insured, pointing out that some insured owners would also be paid more than the insured value of their properties and that, in the absence of public consultation, it could not be assumed that the public would think it unfair to offer uninsured and insured owners similar assistance.[24]

[20] Moral hazard arising from reduced incentives to insure in future was accepted as a relevant consideration, but the majority held that the effect should not be exaggerated. They cited evidence from an economist to the effect this argument should carry little weight, notably because New Zealand property owners purchase bundled insurance packages which cover a variety of risks, such as fire, theft and accidental damage, as well as natural disasters; few owners would elect to forego all insurance in their belief that they need not bother purchasing natural disaster cover.[25] In any event, the majority added, moral hazard arguments also apply to those insured who were paid out, for whom government offers arguably created an incentive to structure future insurance cover in the belief that the Government would compensate them fully on the basis of pre-disaster property values. They noted that in the case of insured property owners such moral hazard arguments were not addressed in the June 2011 offer, possibly because the government wished to encourage voluntary withdrawal from the red zones and possibly because of the recovery principles,

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21 At [157] per McGrath, Glazebrook and Arnold JJ.
22 At [158] per McGrath, Glazebrook and Arnold JJ.
23 At [159] per McGrath, Glazebrook and Arnold JJ.
24 At [161] per McGrath, Glazebrook and Arnold JJ.
25 At [162] per McGrath, Glazebrook and Arnold JJ.

which in turn arose from the decision that it was inappropriate to leave the situation to the market.[26]

[21] Moral hazard arising from any purchases of uninsured and insured properties was held to be further diminished by the context; the offers to purchase were made in the context of a major disaster with widespread damage and significant human cost, and in the context of legislation designed to promote recovery.[27]

[22] The majority returned to the area-wide approach when examining evidence that some properties were not badly damaged. For example, one uninsured homeowner had stated that the land was hardly damaged and the house was repairable. This suggested that "at least to a degree" the harm suffered by owners related to government policy rather than insurance status.[28] It was not a viable option for owners to remain in their properties even if they were relatively undamaged. The offers were made to encourage voluntary withdrawal from the red zones and they had succeeded in that objective, meaning that services were likely to be withdrawn in the long term.[29]

[23] The Court's conclusion was that:[30]

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

[24] The majority accepted that a distinction might have been made between the insured and the uninsured based, for example, on the cost difference to the Crown, provided there was "a clear connection between the offers made and that cost difference" and a rational and fair reason why the same distinction did not apply to offers already made to not-for-profit organisations and to owners of properties under

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26 At [163] per McGrath, Glazebrook and Arnold JJ.
27 At [164] per McGrath, Glazebrook and Arnold JJ.
28 At [166] per McGrath, Glazebrook and Arnold JJ.
29 At [166] per McGrath, Glazebrook and Arnold JJ.
30 At [167] per McGrath, Glazebrook and Arnold JJ.

construction.[31] Discrimination might also have been justified on the ground of fairness to insured owners, but it would have been necessary to address the problem of uninsurable properties and the fact that for some of the Quake Outcasts there was no conscious choice not to insure.[32] Finally, the decisions were not made in a vacuum. The decision to create the red zones on an area-wide basis and to encourage their voluntary clearance through the June 2011 offers set the parameters and the relevant factors for future purchase decisions in the red zones.[33]

The August 2015 offer

[25] We begin by noting that the former Minister for Canterbury Earthquake Recovery, the Hon Gerry Brownlee, and the former Chief Executive of CERA, John Ombler, have sworn affidavits in this proceeding. Mr Cooke QC, who appeared for the appellant, urged us to rely for their reasons on the contemporaneous documents recording their decisions, but he did not point to any new rationale belatedly advanced in the affidavits. We have found the affidavits helpful, as are those filed for Quake Outcasts.

[26] The Minister frankly admits to being troubled by aspects of the Supreme Court's reasoning, instancing what he sees as an erroneous assumption that the Government wanted to, and did, use the 2011 Act to clear the red zones. Nonetheless, he instructed officials to advise him on how he ought to reconsider the earlier offer in light of the judgment. Together the decision documents and the affidavits are at pains to emphasise that relevant considerations have been identified and taken into account. They focus on differences, in process and in substance, from the first offer, and explain why the second offer justifiably discriminated among owners by insurance status.

[27] The 2015 offers were made pursuant to a residential red zone offer recovery plan approved by the Minister and offers to purchase land made by the Chief Executive. The record is substantial, but the central documents — those recording the decisions made — are the Residential Red Zone Offer Recovery Plan

[31] At [168] per McGrath, Glazebrook and Arnold JJ.
[32] At [169] per McGrath, Glazebrook and Arnold JJ.
[33] At [170] per McGrath, Glazebrook and Arnold JJ.

of July 2015 (the Recovery Plan), a report of 27 July 2015 recording the Minister's decision for approving the Recovery Plan (the Minister's Report), and a Ministerial aide-memoire of 5 August 2015 and attached decision paper by the Chief Executive (the CERA Decision Paper). The Recovery Plan was the Minister's to approve under s 21 of the 2011 Act. Offers to purchase were the Chief Executive's to make under s 53.

[28] Mr Ombler recommended a recovery plan because the process incorporated engagement with interested parties and the public. The Minister accepted his recommendation and a draft recovery plan was publicly notified on 5 May 2015. It was to reconsider the Crown offer to purchase vacant, commercial and uninsured RRZ properties whose owners had not accepted or received a Crown offer. It was not to consider interim or future use of the red zone or its zoning. The key criteria for the offer were health and wellbeing, insurance status and precedents, fairness and consistency, timely recovery and a simple process, and costs to the Crown.

[29] There followed a public consultation process which attracted many responses. Mr Ombler identifies main themes in the feedback: emphasis that loss and impact on people's lives resulted from the Government's zoning decisions rather than the earthquakes; emphasis on difficulties of living in the RRZ including security, isolation and uncertainty about the future; concern about the associated impact on residents' health and well-being; strong consensus that a fair, simple and quick process was needed; emphasis on the need for fairness and consistency, with many responses indicating that everyone in the RRZs should be treated in the same way and insurance status was not a relevant or important consideration; and recognition that any offer must be affordable for the Crown.

[30] CERA then developed a draft proposal to offer 100 per cent of the 2007 rateable land value for vacant land and 80 per cent of rateable land value for uninsured improved properties.

[31] Further consultation was undertaken. The public response was that the offer was acceptable for vacant land but too low for uninsured improved properties. Mr Ombler reviewed the feedback and considered submissions from the

New Zealand Insurance Council, the Human Rights Commissioner, other agencies and Quake Outcasts. As a result, CERA proposed that the offer for uninsured improved residential properties be increased to 100 per cent of unimproved land value.

[32] The Minister approved the Recovery Plan on or about 27 July 2015, recording his decisions and reasons for approving the increased offer in the Minister's Report of that date, and the Recovery Plan was publicly released on 30 July 2015. On 5 August 2015 the Chief Executive prepared the aide-memoire for the Minister, informing him of a decision to make new offers under s 53 of the 2011 Act and attaching the ERA Decision Paper, which recorded that he had considered ss 3 (purposes) and 10 (necessity) of the Act. The offer was announced on 6 August 2015.

[33] We conclude this brief narrative of the offer by observing that while the Minister and Chief Executive were both statutory decision-makers, and inevitable defendants, the search for error in this proceeding focuses primarily on the Minister. That is so because the Recovery Plan gave legal effect to the Minister's decision to offer uninsured RRZ owners nothing for improvements and the Decision Paper implemented the Recovery Plan. CERA's statutory function was that of developing the Recovery Plan at the Minister's direction, managing consultation processes, and presenting it to him for approval.[34] When approving it he had regard, as the legislation said he must, to its impact, effect and funding implications.

[34] This leads us to make four points that inform the analysis to follow. First, the 2011 Act established a specific framework, notably in ss 16, 19 and 21, for the Minister's decisions to direct and approve the Recovery Plan. Second, when examining the record for Ministerial error CERA should be seen primarily as an advisor to the Minister, responsible for drawing relevant matters to his attention. Third, Quake Outcasts' grievance is framed by the actual offers, which were made by the Chief Executive in the exercise of his own powers under the 2011 Act, so his decision to make them remains relevant; for example, it may introduce new reasons or explanations. Fourth, the former litigation differed from this in that there was no

[34] 2011 Act, ss 19, 20, 21.

recovery plan and the then Chief Executive had made his decisions without expressly considering ss 3 and 10 of the Act;[35] one of the issues we must consider is whether those differences are material.

Features of the offer

[35] The offer was made on an area-wide basis. At the time there were 163 vacant land properties in the RRZs and 106 uninsured improved properties. So there were 269 offerees, in contrast to the more than 7000 who received the June 2011 offer and approximately 135 who received the September 2012 one.[36] However, the Minister and Chief Executive decided against individual negotiations, reasoning that they were both inexpedient and unfair to those who accepted previous offers.

[36] The salient features of the offer were:

(a) It was open for acceptance until 10 December 2015 and transactions were to have settled, at the latest, by 26 February 2016.

(b) Owners of vacant land and uninsured improved land received the same offer, 100 per cent of rateable land value at 2007.

(c) The purchase price included all improvements, but with CERA's permission owners might be permitted to relocate or salvage buildings. It appears to be common ground that CERA did allow the owners to salvage buildings.

(d) It included no compensation for delay.

[37] It will be seen that whereas the June 2011 and September 2012 offers discriminated among properties by insurance status, regardless of cause, the

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35 The Chief Justice noted that the Crown did not appeal this Court's finding that there was no compliance with s 10: SC Decision, above n 1, at [257]–[259] per Elias CJ. This is why the majority focused on the "third source": at [112] per McGrath, Glazebrook and Arnold JJ.

36 Different figures exist for those who received the September 2012 and August 2015 offers. The record does not explain why there were more offerees in 2015. See the paper to Cabinet from the Minister's Office dated 30 August 2012 and the Residential Red Zone Offer Recovery Plan dated July 2015.

August 2015 offer discriminated among them by insurability, with those that might have been insured being purchased for less than their full rating value. (The net effect, when the two offers are considered together, is that insurability and insurance status together determined whether owners received an offer of their full rating valuation.) The August 2015 offer also imposed a deadline for acceptance. When explaining the offer process it warned owners of what might happen should they not accept:

> If you decide that you do not want to accept the Crown's offer, you should be aware that:
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> …
>
> - Insurers may cancel or refuse to renew insurance policies for properties in the residential red zones.
> - The relevant councils will make decisions on the ongoing provision of infrastructure.
> - While no decisions have been made on the ultimate future of the land in the residential red zones, CERA does have powers under the Canterbury Earthquake Recovery Act 2011 to require you to sell the property to CERA for its market value at that time. If a decision is made in the future to use these powers to acquire your property, the market value could be substantially lower than the amount that you would receive under the Crown's offer.

[38] The prospect of compulsory acquisition was much less attractive to owners than the Crown offer because it might be based on 'market' price or the most recent (2014) rating valuation, which was substantially less than the 2007 valuation.

Rationale for the offer

[39] The Minister and Mr Ombler say that the offer was thought to best meet the five objectives of health and well-being, insurance status and precedents, fairness and consistency, timely recovery and a simple process, and cost to the Crown. In formulating the offer they recognised that the Supreme Court had said community input was needed, insurance status was neither irrelevant nor determinative, and the "context of the red zone" mattered, including deteriorating living conditions and their effect on residents' health and well-being.

[40] The rationale for offering vacant land owners 100 per cent of rateable land value — in other words, the full rating value of their unimproved properties — was that it would help to restore their well-being, was fair and consistent with other Crown offers, did not increase moral hazard (since their properties were uninsurable), and involved a simple process. It follows from the offer and its rationale that these considerations outweighed the Crown's concern that vacant land cost more because there was no offsetting recovery from EQC. The Recovery Plan stated:

> If the Crown pays for all uninsured loss, for example by making an offer at 100% of the 2007/08 rateable value, this may create disincentives for people to take out insurance if insurance is available. It may also create expectations about how the Government might respond in future natural disasters in New Zealand.
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> That said, the damage caused by the Canterbury earthquakes was unprecedented and there was widespread public support for the Government to provide assistance to people in the worst affected areas. The owners of uninsured properties have lost considerable equity following the Canterbury earthquakes, and the risks of not insuring — where insurance is available — remain clear.
>
> In addition, it is not possible to insure vacant land in New Zealand, either through EQC or privately. Irrespective of whether or not these property owners wanted to get insurance for their vacant land, they were unable to. As the Supreme Court noted and the public feedback emphasised, vacant land is effectively uninsurable, and this status needs to be taken into account.

[41] It appears that the initial proposal to offer 80 per cent of land value for uninsured improved properties was that they could have been insured, so that the Crown would have enjoyed the benefit of owners' insurance rights, and moral hazard was a relevant consideration. Mr Ombler explains that the figure was increased to 100 per cent in the final offer because the lower offer was inconsistent with that for vacant land, because public feedback was strongly against the lower offer, and because of health and wellbeing considerations and the need for timely recovery from disaster. The Minister says that the decision reflected factors identified by the Supreme Court: the disaster context (which mitigated moral hazard), reasons for not being insured, and the impact of zoning.

[42] Several reasons were cited for not paying for improvements; moral hazard, cost to the Crown, fairness to other owners, and causation.

(a) Moral hazard

[43] Mr Ombler acknowledges that the Supreme Court discounted moral hazard because insurance is purchased on a bundled basis and no one is likely to forego it to achieve an imagined benefit from government backup for natural disasters. However, the Minister was concerned Government should not create expectations of assistance following future disasters. The Minister's Report stated that:

> Paying for all uninsured loss for the approximately 106 uninsured improved red zone properties, or as close to 100% of the 2007/8 rateable improvements value, could expose the Crown to considerable risk around expectations of future assistance and disincentivise people from taking out insurance.

(b) Cost to the Crown

[44] Cost to the Crown was a factor. The CERA Decision Paper recorded that the total of all offers (including vacant land and insured commercial properties) was about $58.636 million. The Minister's Report noted that because there were no insurance claims to offset the cost of purchase:

> [Paying for all, or close to all, uninsured loss] would … mean the Crown would be making a significantly higher net financial contribution to these uninsured property owners, compared with the insured property owners in the red zone.

[45] As that passage suggests, the relevant cost is the marginal cost saved by not offering full rating valuation to the 106 properties affected by the decision to discriminate by insurability. There is no estimate of that cost. The papers state that it is not yet finally known what proportion of the value of improvements the Crown will recover from assigned insurance rights on other properties. We observe that in the Supreme Court decision William Young J recorded that the June 2011 offers were underpinned by an estimate that the net cost would be around one third of the gross cost, the difference being recovered from insurance claims.[37] It ought to have been possible by 2015 to estimate actual recoveries, based on claims settled to date. It appears that no attempt has been made to do so.

[37] At [362] per William Young J.

[46] As noted, the Minister's Report justified discrimination by reference to the "key" considerations of moral hazard and fairness to others. This suggests that in the end cost to the Crown was not a principal consideration in the decision to discriminate that concerns us. We infer, though, that it remained important, and we note that the Minister must expressly consider it under ss 19(2)(c) and 21(2).

(c) Fairness to other owners

[47] Fairness to other owners was a principal consideration. The Minister's Report states:

> The original Crown offers did not take into account individual circumstances. The Crown offers for all other property owners in the red zone were based on the 2007/08 rating valuations. These rating valuations were chosen as the basis for the Crown's offer because they are an independent figure which could be readily applied, and they determine the value for all properties in an area at the same point in time. For fairness and consistency and to support a timely process, my decision is that the Crown should not make case-by-case offers to the owners of the approximately 433 properties.

[48] Public consultation, as noted above at [29], had supported the making of full offers, with some submissions attributing loss to the Government's zoning decisions.

(d) Causation

[49] The Minister and Chief Executive accepted that zoning played a part in owners' losses. The Recovery Plan recorded that:

> The uptake of the Crown offers has been very high and has increased the isolation … There is little or no market for red zone properties.

[50] However, the Minister has made it clear that he considers zoning was not the only cause, pointing out that the Crown has not sought to clear the red zones. Mr Ombler's opinion is that the earthquakes were the "primary cause of adversity". And the rationale for not paying for improvements — additional cost to the Crown and fairness to owners who were insured — assumes that the affected owners suffered earthquake damage that would have produced some recovery for the Crown had the properties been insured.

Acceptance of the offer

[51] All owners of vacant and uninsured improved land accepted the Crown offer, and the transactions have settled. Vacant land owners evidently accepted without reservation, and they have taken no part in this proceeding. Uninsured improved land owners asked the Crown to agree that they could settle on a without prejudice basis, reserving rights. Crown Law refused, claiming that any such arrangement was unnecessary and adding that offerees must take legal advice about the effect of acceptance upon further proceedings.

The remaining plaintiffs and their circumstances

[52] At the time of the first proceeding, Quake Outcasts comprised some 46 owners of vacant and uninsured improved land.[38] It now comprises some 16 former owners of uninsured improved land. Speaking of this class of owner, the majority in the Supreme Court recorded that:[39]

> We record at this point that a number of the Quake Outcasts group cannot be described as making a "conscious choice" not to insure their properties. The reasons for this include:
>
> (a) a couple who had paid insurance premiums "religiously" but were in the process of having a financial adviser package up a complete insurance offer for everything, with a four-day gap before the September 2010 earthquake;
>
> (b) a couple who had overlooked changing insurance cover into their name because of stress from a cancer diagnosis and caring for dependent family members. This couple were uninsured at the time of the September 2010 earthquake and their insurance company had refused cover even though they had had insurance with the company since 1972;
>
> (c) a claimant who had understood that insurance was in the hands of her bank; and
>
> (d) a claimant who had not paid his insurance premiums for the two months prior to the earthquake by oversight.

[53] Members of the group have answered updated questionnaires for the purposes of this proceeding. The themes of their accounts are:

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[38] At [8] per McGrath, Glazebrook and Arnold JJ.
[39] At [88] per McGrath, Glazebrook and Arnold JJ.

(a) They are not all to blame for their uninsured status:

> … older sister had power of attorney … [she] failed to pay the insurance …
>
> Our house was uninsured at the time of the quakes purely by mistake …
>
> … the property had always been insured. Due to an oversight the insurance had not been paid just prior to the September quake …
>
> … I had paid insurance premiums religiously … and was in the process of having a financial advisor package up a complete insurance offer for everything … the EQC levy had been paid by ASB on our property and sent to EQC … so for the sake of four days we are not covered…
>
> Insurance was overlooked when buying the unit due to family illness, my serious illness and ensuing stress.

(b) Their homes suffered little damage or were readily repairable:

> The house was largely undamaged and still liveable …
>
> … my "Home" had no damage …
>
> … my house and my land… suffered no detectable damage … Even if my property were to have been fully insured at the time of the quakes, I would not have needed to make a claim …

(c) They cannot borrow or insure:

> The new [rating valuation, post quakes and red zoning] made it worthless to the Bank so no way to raise a mortgage, and no way to insure.

(d) Their loss was caused by Government policy to create and clear the red zones:

> … based on the lack of evidence of any damage … there was no reason why the property was red-zoned in the first place…
>
> The earthquake caused about $40,000 damage to my house which I was prepared (and preparing) to alleviate at my own cost … the Govt removed this option … by declaring their "red-zones" …

(e) They have suffered loss of services and amenities:

> Our address had been removed from the database that the banks and other public services use and not considered a valid address

> … tired of trucking water in …
>
> … services were cut ie roads very rough postal services cut.

(f) They have experienced burglary and vandalism:

> There were looters constantly trying to break in …
>
> … sick of being broken into all the time.
>
> My house was vandalised.

(g) They have lost their major asset and cannot move on because they are financially vulnerable:

> … I essentially now have no home and cannot afford to buy another one with the money I received from the Crown …

(h) They were under severe pressure, and had no choice but to accept the offer:

> I'm still extremely angry with the way this was done and the heavy phone calls we received from CERA just trying to get him "out" with no regard for the terrible situation he was in.
>
> I accepted the offer because of the continual bullying and the implied threat that if a further offer had to be made it would be at the latest (minimal, spurious) R.V.
>
> … I was afraid that it was going to be requisitioned for the new RV.
>
> The pressure applied by the Crown (both expressed and implied) led me to believe I had no choice but to take the latest offer, or risk financial ruin at the hands of the Crown … If I were to have refused … the Crown would simply compulsorily acquire my property at a future date and would use the future RV of $8,000 when calculating compensation [despite the property in question being undamaged].
>
> … the unknown of the probability of CERA in exercising the compulsory acquisition was high which would effectively give us a pay out of 50K …
>
> … we had no alternative. We had little if any resources outside the equity from our home. Therefore to even maintain a standard of living required us to utilise the proceeds … We are old people and have no ability to supplement our capital through other means.

(i) They salvaged little from their buildings. In most cases nothing was recovered. In one the house was removed and sold for $5,000. In another a garage was removed.

[54] It will be seen that many sold because they saw no future in the red zone and feared compulsory acquisition at what they consider an artificially depressed price.

State of the red zones

[55] The evidence from Quake Outcasts is that effective clearance of the red zones has been achieved, and that the market for properties there has been effectively destroyed. We do not understand the Crown to dispute this, though as noted at [50] above it appears to attribute loss of the market primarily to the earthquakes rather than Government decisions to declare the zones and promote clearance.

[56] As Mr Stephen realistically recognised, courts have consistently preferred the view that zoning is a principal cause of loss.[40] Perhaps there are some owners whose improvements and land were so damaged that zoning had little impact on the medium to long term value of their properties. But for those whose properties were little damaged and repairable, it is plain that zoning is the real cause of the loss in value. There is evidence of a thriving market for green zone properties, including damaged properties, but none at all for the red zone.

[57] The Minister continues to resist this conclusion to some degree, maintaining that it was and is viable for owners to remain. He points out that the local authority has not withdrawn services and emphasises that the Crown did not employ compulsory acquisition. Nor did it take regulatory steps to rezone the land under a Recovery Strategy so as to formally preclude residential use. (It was concerned about the impact of such action upon insurance claims and the insurance market.)[41] We accept that the Crown chose for good reason to employ an offer mechanism. We recognise too that in other circumstances it might have been possible by 2015 to argue that it would again be viable to live in the red zones. William Young J made

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[40] See for example *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173 [Panckhurst J Decision] at [62]; and SC Decision, above n 1, at [134]–[137] per McGrath, Glazebrook and Arnold JJ.

[41] SC Decision, above n 1, at [352] per William Young J.

this point in the Supreme Court decision, stating that it is quite possible that in the medium to long term some of the land will be remediated and used again for residential purposes.[42]

[58] But it does not follow that as at the offer deadline it was viable to remain in the red zones or that government decisions caused no loss. The Supreme Court majority made the following findings:[43]

> The Crown argues that owners in the red zone are free to decide not to sell and that they may remain in the red zone if they wish to do so. However, the reality is that the red zone is no longer suitable for residential occupation. We accept the Human Rights Commission's argument that the red zone decisions meant that residents in the red zone were faced with either leaving their homes or remaining in what were to be effectively abandoned communities, with degenerating services and infrastructure. In light of that stark choice, Panckhurst J, in his judgment, termed this a "Hobson's choice". We agree.

[59] In our view, those findings settle the question of viability. In any event, the evidence before us supports them. The offer was made against a deadline, and it warned of a risk of compulsory acquisition at a price depressed by zoning. That threat was backed up by the June 2012 Recovery Strategy, which affected planning decisions and instruments and envisaged that the land would become open space. In our opinion it was manifestly not viable to remain so long as the land remained red-zoned and compulsory acquisition might take place at a lower price. We do not exclude the possibility that in future some of the land may again be designated for residential use,[44] but we find that possibility irrelevant for purposes of this proceeding. What matters is that at the offer deadline, government decisions meant there was no market for red-zone properties and no immediate prospect of one developing. As other courts have put it, owners had "Hobson's choice".[45]

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42 At [352] per William Young J.

43 At [176] per McGrath, Glazebrook and Arnold JJ.

44 As noted at [27] above, the recovery plan did not address future use or zoning of the land.

45 Panckhurst J Decision, above n 40, at [93]; and SC Decision, above n 1, at [176] per McGrath, Glazebrook and Arnold JJ,

The statutory framework and standard of review

The legislation

[60] The statutory framework was discussed by the Supreme Court and by this Court in *Canterbury Regional Council v Independent Fisheries Ltd*.[46] We focus on the most salient provisions, beginning with s 8, which established the Minister's functions:

> **8 Functions of Minister**
>
> The Minister has the following functions for the purpose of giving effect to this Act:
>
> (a) establishing a community forum in accordance with section 6 and a cross-party parliamentary forum in accordance with section 7:
>
> (b) recommending for approval a Recovery Strategy for greater Christchurch under section 11:
>
> (c) reviewing the Recovery Strategy and approving any changes to it under section 14:
>
> (d) directing the development of, and matters to be covered by, Recovery Plans for all or part of greater Christchurch under section 16:
>
> (e) approving Recovery Plans and the review and changes to them under sections 21 and 22:
>
> (f) suspending, amending, or revoking the whole or parts of RMA documents, resource consents, and other instruments applying in greater Christchurch in accordance with section 27:
>
> (g) giving directions to councils or council organisations under section 48:
>
> (h) directing a council to carry out certain functions of the council within a specified timeframe under section 49:
>
> (i) issuing a call-in notice under section 50 and assuming certain responsibilities, duties, or powers of the council if a timeframe under that section is not complied with:
>
> (j) compulsorily acquiring land in accordance with subpart 4:
>
> (k) determining compensation in accordance with subpart 5:

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[46] SC Decision, above n 1, at [110]–[141] per McGrath, Glazebrook and Arnold JJ; and *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 [*Independent Fisheries*] at [12]–[70].

> (l) appointing a Canterbury Earthquake Recovery Review Panel under, and for the purposes outlined in, subpart 7 regarding development of delegated legislation:
>
> (m) reporting to the House of Representatives on the operation of the Act in accordance with sections 88 and 92:
>
> (n) any other functions provided in this Act.

[61] Section 10 prescribed when and for what purposes powers might be exercised:

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

[62] The 2011 Act's purposes included:

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

> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
>
> (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):
>
> ...

[63] Under s 16 the Minister might direct that a Recovery Plan be developed for all or part of greater Christchurch. He could also direct how the plan was to be developed having regard to its nature and scope. Such plan must be consistent with a Recovery Strategy developed under s 11, subs (3) of which provided that:

> …
>
> (3) The Recovery Strategy is an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation) include provisions to address—
>
> (a) the areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of rebuilding or other redevelopment:
>
> (b) the location of existing and future infrastructure and the possible sequencing of repairs, rebuilding, and reconstruction:
>
> (c) the nature of the Recovery Plans that may need to be developed and the relationship between the plans:
>
> (d) any additional matters to be addressed in particular Recovery Plans, including who should lead the development of the plans.
>
> …

[64] At the time of the September 2012 offer there was neither a Recovery Strategy nor a Recovery Plan. That had changed by the time the August 2015 offer was made. Further, the June 2012 Recovery Strategy brought into play s 15 of the Act, which provided that no RMA document or instrument might be interpreted or applied in a manner inconsistent with a Recovery Strategy. As noted above at [7(i)], the Recovery Strategy envisaged that the red zones would become open spaces.

[65] Section 19 authorised the Minister to determine how Recovery Plans were to be developed and relevantly provided that he must have regard, inter alia, to:

…

(2) In acting under subsection (1), the Minister must have regard to—

(a) the nature and scope of the Recovery Plan; and

(b) the needs of people affected by it; and

(c) the possible funding implications and the sources of funding; and

…

[66] The Minister might approve or modify a Recovery Plan under s 21, which provided:

21 Approval of Recovery Plans

(1) Following the development and consideration of a draft Recovery Plan, the Minister may—

(a) make any changes, or no changes, to the draft Recovery Plan as he or she thinks fit; or

(b) withdraw all or part of the draft Recovery Plan.

(2) The Minister may approve a Recovery Plan having regard to the impact, effect, and funding implications of the Recovery Plan.

(3) The Minister must give reasons for any action taken under subsection (1) or (2).

(4) The Minister must, as soon as practicable after deciding to approve a Recovery Plan under subsection (2),—

(a) give notice in the Gazette of the issuing of the Recovery Plan and where it can be inspected; and

(b) publicly notify the Recovery Plan in whatever form he or she thinks appropriate; and

(c) present a copy of the Recovery Plan to the House of Representatives.

[67] A Recovery Plan having been gazetted, planning decisions and instruments made under the Resource Management Act 1991 must not be inconsistent with it.[47] The Minister might suspend planning instruments and cancel resource consents and permitted uses. The evident object, as William Young J observed in the Supreme

[47] 2011 Act, ss 23–26.

Court decision, was to ensure that the administration of the Resource Management Act operated consistently with recovery planning exercises over which the Minister was ultimately responsible.[48]

[68] Section 53 provided that the Chief Executive might acquire property in the name of the Crown. The 2011 Act also established a power to take land compulsorily, on payment of compensation for "actual loss", which was defined to ordinarily exclude loss from cancellation of existing use rights.[49] Section 67 excluded any right to compensation except as provided for in the Act.

The standard of review

[69] As Nation J recognised in the judgment under appeal, the central question is whether the decision to discriminate by insurance status in the August 2015 offer was unreasonable.[50] The Minister and Chief Executive were at pains to weigh all considerations that had been identified as relevant, and it is not now suggested that they misdirected themselves about their powers.

[70] The decision to offer nothing for improvements was made under legislation that conferred upon the Minister extraordinary powers to, among other things, decide where rebuilding might or might not occur overriding existing planning instruments).[51] His powers might be exercised where he reasonably considered it necessary, and must be exercised in accordance with the Act's purposes.

[71] Parliament subjected the Minister and Chief Executive to various forms of political and community accountability for decisions made in the exercise of these powers. For example, the Minister was required to establish community and parliamentary cross-party forums and listen to their advice.[52] Recovery Strategies were to be the subject of community consultation.[53] By setting legal criteria and processes for decision-making the legislation also contemplated that decisions might

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48 SC Decision, above n 1, at [356].
49 2011 Act, s 61.
50 Nation J Decision, above n 4, at [74]–[80].
51 2011 Act, ss 8, 11(3) and 15.
52 Sections 6 and 7.
53 Section 13.

be judicially reviewed.[54] The criteria included, for a Recovery Plan, the Plan's impact, effect and funding implications, and the processes included an obligation to give reasons for approving or modifying the Plan.[55] In the Supreme Court the majority rejected a submission that, because the offers required funding decisions, they were non-reviewable.[56]

[72] So far as the standard of review is concerned, the Court in *Independent Fisheries* held that the legislation constrained the Minister's powers by subjecting them to an objective and judicially reviewable standard of reasonableness; and while merits review should be avoided and the Court should give such weight as it thought fit to the Minister's expertise and opinion, the standard of review was higher than *Wednesbury* unreasonableness.[57]

[73] This was to recognise that the standard of review for reasonableness may vary with context. As Wild J put it in *Wolf v Minister of Immigration*:[58]

> [47] I consider the time has come to state — or really to clarify — that the tests as laid down in *GCHQ* [outrageousness] and *Woolworths* [overwhelming] respectively are not, or should no longer be, the invariable or universal tests of "unreasonableness" applied in New Zealand public law. Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (i.e. its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them …

[74] The Supreme Court was not required to review the reasonableness of the September 2012 offer in its decision; it was not in dispute that the Chief Executive's decisions had not taken account of s 10, and the Crown's attempt to defend them by invoking the so-called "third source" of power failed.[59] However, the Court's reasons are consistent with the closer standard of review adopted in *Independent Fisheries*. The Court critically examined the justification for the offer, and it

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54 *Independent Fisheries*, above n 46, at [14]. With certain exceptions, the 2011 Act excluded appeals from Ministerial decisions, but it did not purport to oust judicial review: 2011 Act, s 68.
55 2011 Act, s 21(2).
56 SC Decision, above n 1, at [143]–[145] per McGrath, Glazebrook and Arnold JJ. Elias CJ concurred on this point: at [260].
57 *Independent Fisheries*, above n 46, at [21]–[22].
58 *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC) at [47].
59 SC Decision, above n 1, at [110] and [121] per McGrath, Glazebrook and Arnold JJ.

evaluated relevant considerations to be taken into account on reconsideration, relying on the statutory purposes, the framework established by previous decisions to establish the red zones and to make offers to other classes of landowner, and evidence adduced in the judicial process. The earlier decisions were held to have "set parameters" for offers to uninsured owners, allowing the Court to insist that the Chief Executive justify discrimination.[60] So, for example:

(a) Having regard to evidence about the reasons why owners were uninsured, the Court found that fault was not a relevant consideration where offers were to be made on an area-wide basis.[61]

(b) The majority held that moral hazard was relevant but not a major consideration, reasoning that the Act focused on recovery, moral hazard was not a factor in the June 2011 decisions, and that property owners were unlikely to forego insurance.[62]

(c) The Chief Justice held that:[63]

> If the recovery of insurance did not loom large in the decision making in June 2011, it may suggest that distinguishing between property owners on the basis of their insurance status is not reasonably to be treated as a principal consideration in addressing the position of those who were not eligible to receive the 100 per cent offers.

(d) William Young J noted inconsistent treatment of owners whose land was uninsurable and observed that it was "open to argument whether the different approaches … were appropriate", suggesting that had the Minister persisted in such discrimination his decision might have been considered unreasonable.[64]

[75] When reviewing the August 2015 offers we must consider the parameters set by the legislation, including now those provisions governing Recovery Plans, and the earlier decisions, which were made expressly relevant by s 19(2)(a) of the 2011 Act.

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60 At [178] per McGrath, Glazebrook and Arnold JJ and [272] per Elias CJ.
61 At [156] per McGrath, Glazebrook and Arnold JJ and [374] per William Young J.
62 At [162]–[164] per McGrath, Glazebrook and Arnold JJ.
63 At [266] per Elias CJ.
64 At [371] per William Young J.

We must also consider parameters set by the Supreme Court. As will be seen, we do not accept that the Court precluded discrimination by insurance status, but it did set criteria against which a court might assess the reasonableness of any decision to do so.

The judgment under appeal

[76] Nation J cited *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* as the basis on which a court might interfere for unreasonableness.[65] He emphasised that courts are particularly sensitive to interfering with a ministerial decision, or decisions for which the maker is politically accountable.[66] Courts should not interfere in decisions that involved matters of fact, degree and policy. He noted that the Supreme Court had been careful to avoid giving clear direction to the Minister on the form and content of any new offers, recognising that the decision was the Minister's to make.[67]

[77] We accept Mr Cooke's submission that this was an error. In *Independent Fisheries* this Court adopted a more liberal standard of review, recognising that the legislation itself set a standard of reasonableness against which decisions of the Minister and the Chief Executive might be reviewed. As the Court emphasised there, this is not to preclude deference, where appropriate, for expertise, policy content or political accountability.[68]

Was the Minister entitled to discriminate by insurance status?

[78] Mr Cooke argued that the Minister erred by discriminating by insurance status; this was to make insurance determinative, contrary to what the majority said in the Supreme Court. He submitted that Nation J was wrong to find that the Supreme Court did not preclude such discrimination.

[79] We have set out at [23] above the majority's conclusion about the relevance of insurance status. They found that insurance status had been determinative and

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[65] Nation J Decision, above n 4, at [64], citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[66] Nation J Decision, above n 4, at [63].

[67] At [71]–[73].

[68] *Independent Fisheries*, above n 46, at [22].

ought not to have been, but accepted that it was a relevant consideration. Nation J held that this did not preclude discrimination by insurance status in the August 2015 offer.[69] He agreed with William Young J that the majority decision established that insurance status could not be the sole relevant consideration.[70] However, it was relevant and that being so, it "might ultimately determine what offer was made".[71]

[80] We agree with the Judge that the Supreme Court did not preclude discrimination by insurance status. The point being made by the majority was that insurance status had been treated as dispositive in the September 2012 offer, which focused on considerations affecting insurance, such as fault, moral hazard, fairness to others, and cost to the Crown, and excluded other relevant and important considerations, such as the Act's recovery objective. The Court did not exclude the possibility that insurance status might justify discrimination after all relevant considerations had been identified and weighed appropriately. The majority accepted that some of the reasons provided by the Minister could "have provided justification for a differential" between the insured and the uninsured,[72] and focused on the failure of the Minister to take into account relevant factors in determining differentiation.[73] They also emphasised the failure of the Minister to consider the purposes of the 2011 Act,[74] which, as the Chief Justice noted, necessitated a complete reconsideration of the offers that were made by the Minister and the reasons for differentiating that underpinned them.[75]

[81] Undoubtedly the Minister could not make the same decision that was made in September 2012 for the same reasons. However, he did not do that. He made a different decision, following a different process, and he acted for somewhat different reasons. In so deciding he had regard, the Judge found and we agree, to the relevant considerations.[76] The real question is whether the offer was unreasonable, having regard to the statutory criteria and what the Supreme Court said about some of those considerations.

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69 Nation J Decision, above n 4, at [55].
70 SC Decision, above n 1, at [368] per William Young J.
71 Nation J Decision, above n 4, at [47].
72 SC Decision, above n 1, at [167] per McGrath, Glazebrook and Arnold JJ.
73 At [196] per McGrath, Glazebrook and Arnold JJ.
74 At [197] per McGrath, Glazebrook and Arnold JJ,
75 At [274] per Elias CJ.
76 Nation J Decision, above n 1, at [146].

Was the August 2015 offer otherwise unreasonable?

[82] Our answer to the question just posed is affirmative. In general, we conclude that following the Supreme Court decision the Minister and Chief Executive could not rely on certain considerations to deny uninsured owners the benefit of an offer made to others, without considering those owners' personal circumstances. Put another way, the insistence on making an area-wide offer limited the Government's ability to discriminate among owners.

[83] We begin with moral hazard, which as we have said was one of two major considerations, the other being fairness to the insured, cited in the Minister's Report (see above at [47]). In that document the Minister also said, as quoted at [43] above, that paying for all uninsured loss could expose the Crown to "considerable risk around expectations of future assistance and disincentivise people from taking out insurance".

[84] Two points may be made about this. First, the Supreme Court accepted that moral hazard is a relevant consideration, but made clear that in this setting, having regard to the evidence about insurance markets, the offers already made, and the 2011 Act's recovery purposes, it could not be a major consideration. That being so, the Minister attached more significance to it than it warranted.

[85] Second, the Minister's focus on moral hazard has again led him to discount (though not wholly overlook) the reasons why the affected owners were uninsured. There is a sense in which his approach is correct. The Minister's concern is for incentives to insure in the future. Viewed from that perspective, the reason why an owner may fail to insure is irrelevant; the risk was theirs to manage. But by reference to the statutory purposes the Supreme Court precluded reliance on moral hazard to justify discrimination against owners in the present, unless the Minister considered why they were uninsured and assessed their moral responsibility for it.

[86] We consider accordingly that we are bound to hold that the Minister could not rely on moral hazard to justify paying an owner nothing for uninsured improvements unless he had first considered the owner's circumstances and satisfied himself that they should be held responsible. The Minister does not claim to have

satisfied himself of that. He could hardly have done so, since the area-wide offer treats all in the same way but, on the material before us, some owners had chosen not to insure while others can fairly claim to have been without fault.

[87] We turn next to fairness among owners, the other principal consideration. Here too we do not consider that it was open to the Government, following the Supreme Court decision, to adopt an assumption that all 106 owners were seeking compensation for uninsured loss. On the evidence, some had suffered no or little loss from the earthquakes. For those owners, as the majority in the Supreme Court found and we have confirmed,[77] Government zoning decisions are the real cause of their loss. Public feedback during the recovery plan process supported that view. The Recovery Plan added significant legal force to it, as noted at [68] above. And as noted at [17], it is a reasonable assumption that some insured owners also experienced no damage and so were compensated for uninsured loss. It would have been permissible to take this factor into account on a case by case basis, but not area-wide.

[88] Mr Stephen emphasised that the Minister did take personal circumstances into account, relying on them as one reason for increasing the offer from 80 to 100 per cent of land value. This is a framing argument, dependant for such force as it has on an assumption, which we are not prepared to adopt, that the 80 per cent offer was defensible although owners of vacant land had been offered 100 per cent. And more generally, it is not a sufficient answer to say that the Minister considered personal circumstances when what resulted was an area-wide offer that treated owners identically although their circumstances differed materially.

[89] Next, cost to the Crown was a material but not, it seems, principal consideration in the decision to discriminate. The question is whether it was unreasonable to take this factor into account without estimating the cost on the correct basis. In our opinion it was. The Supreme Court required that there be a "clear connection" between the distinction drawn by the offer and the cost difference

[77] SC Decision, above n 1, at [166] per McGrath, Glazebrook and Arnold JJ. See also [63] of this judgment.

if cost to the Crown was to be relied on when formulating the new offers.[78] Such a connection would have required that the marginal cost be estimated, as noted at [44]–[45] above. On the material before us, that connection is lacking. To rely on the gross cost of acquiring uninsured properties was to overestimate the cost associated with the decision to discriminate.

[90] Finally, there can be no doubt that the appellants have experienced extraordinary delay and have suffered because of it. The second quake struck in February 2011, and not until August 2015 was the offer made. Speaking of a much shorter period, the Chief Justice said in the Supreme Court that delay and its resultant hardships were relevant factors to take into account.[79] That is all the more so now. The delay since the Supreme Court decision has been substantial, and it may well have adversely affected owners' ability to re-establish themselves.

[91] Whether it had that effect depends on the relationship of the 2007 valuations to the 2015 value, not of land in the red zone but of properties outside it. If that relationship has moved against Quake Outcasts, there may be a strong case for an element of interest. However, we do not feel able to conclude that the offer was unreasonable because it included nothing for delay. It may have been, but we are not in a position to say how much of the delay should be deemed unreasonable, and what impact that may have had on owners.[80]

[92] We conclude that, for the reasons given above, the Government decisions to approve the Recovery Plan and make offers pursuant to it were unreasonable and so unlawful. The majority of the Supreme Court established clear parameters for how a lawful decision to discriminate between landowners in the red zone could be made, and the Minister has not stayed within those parameters when approving the Recovery Plan.

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[78] SC Decision, above n 1, at [168] per McGrath, Glazebrook and Arnold JJ.
[79] At [261] per Elias CJ.
[80] See at [388] per William Young J.

What can be done now?

[93] The relief sought by the appellants is a declaration that the decisions setting the terms and conditions of the offers to them were unlawful, a direction that the respondents extend offers to them that are consistent with the Supreme Court decision, and a direction that the terms and conditions of the Recovery Plan be altered accordingly.

[94] To this the Crown first says that the offers were accepted and settled. Mr Stephen pointed out that the agreements did not reserve rights of judicial review. Nation J rejected this argument, recording that neither CERA nor Crown Law required that acceptance of the offers and settlement of the resulting agreements be full and final settlement of all disputes; accordingly, Quake Outcasts were not precluded from issuing proceedings.[81] We agree, and we also endorse the Judge's conclusion that their acceptance of the offers should not prejudice them.[82]

[95] Mr Stephen next emphasised that the offers were not compensation but sale and purchase transactions. This point is more substantive. We agree that the Crown offers were not structured as compensation for loss. The land was not compulsorily acquired for purposes of sub-pt 5 of the 2011 Act, and Quake Outcasts did not seek compensation under s 63 of that Act.

[96] However, that is not an end of the matter. As a matter of form and process, there is no reason why a recovery plan should not be revisited to allow an offer made under it to be reopened, with the purchaser offering to pay a higher price. Of course this is in substance compensation. But all the several Government offers contained an element of compensation, if one accepts (as the Government seems still to do) the premise that market value at the time the offers were made was less than the 2007 rating valuation. In order to revisit the offers, one would first need to change the Residential Red Zone Recovery Plan, under which the amount paid was fixed.

[97] Can the Recovery Plan be reopened? The Crown says not, for the 2011 Act's actors and their powers are gone, with no relevant savings or transitions provisions.

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[81] Nation J Decision, above n 4, at [152].
[82] At [152].

[98] The Greater Christchurch Regeneration Act 2016 (the 2016 Act) repealed the 2011 Act with effect from 19 April 2016. There is no longer a Minister for Canterbury Earthquake Recovery. CERA was slowly dissolved, with its various roles being distributed across several government agencies, including the Department of Prime Minister and Cabinet and the Ministry of Health. The 2016 Act establishes a corporate entity called Regenerate Christchurch, which has taken on some of the functions corresponding to those formerly vested in CERA, and it vests certain powers in Ministers of the Crown responsible for the administration of the relevant provisions of the 2016 Act. There is a Minister supporting Greater Christchurch Regeneration, the Hon Nicky Wagner.

[99] The 2016 Act contains transitional provisions in sch 1. Broadly, they either provide that the 2011 Act is deemed to continue in force for the relevant purpose or treat actions taken under the 2011 Act as having been taken under corresponding provisions of the 2016 Act. For example, any claim for compensation made under s 63 of the 2011 Act that was not completed at the time the relevant provisions of the 2016 Act came into force is to be completed as if the 2016 Act had not been enacted.[83] In addition, cl 3 of sch 1 provides that the recovery strategy for greater Christchurch is to be treated as remaining in force for certain planning purposes, and cl 4, which provides that ss 16, 18, 19, 20 and 21 of the 2011 Act are treated as remaining in force for purposes of the development of the Waimakariri Residential Red Zone Recovery Plan.

[100] We accept that these provisions do not address the Residential Red Zone Recovery Plan directly. But there is no need to have recourse to the 2016 Act's transitional provisions, for the Recovery Plan is expressly capable of amendment under the 2016 Act. Section 15 allows Regenerate Christchurch to propose the amendment of a "Recovery Plan",[84] and that term is defined to include the Residential Red Zone Recovery Plan.[85] It follows that the Recovery Plan survived and there exists a statutory power and process to amend it.

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83 2016 Act, sch 1 cl 9.

84 The 2016 Act imposes obligations on the "proponent" of an amendment to a recovery plan: see s 13. Section 14 states that Regenerate Christchurch may be a proponent of an amendment.

85 Section 4 definition of "Recovery Plan", sub-paragraph (a)(iii).

[101] Were it necessary to do so, the Court might rely on s 21 of the Interpretation Act 1999, which provides that:

> **21 Powers exercised under repealed legislation to have continuing effect**
>
> Anything done in the exercise of a power under a repealed enactment, and that is in effect immediately before that repeal, continues to have effect as if it had been exercised under any other enactment—
>
> (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
>
> (b) under which the power could be exercised.

[102] The effect of this provision is that anything done under the Recovery Plan under the 2011 Act is deemed to have effect as if done under the corresponding provisions of the 2016 Act (so long as corresponding provisions exist in the 2016 Act). As noted, the 2016 Act authorises regeneration plans and establishes Regenerate Christchurch, which has taken on some functions formerly performed by CERA. These provisions appear to be substantially similar to these of the 2011 Act for present purposes.[86] In particular, the Chief Executive of Regenerate Christchurch is empowered to purchase land.[87]

[103] An amendment to a recovery plan must be promoted by the Chief Executive of the relevant Government Department, which may be the Department of Prime Minister and Cabinet, or Regenerate Christchurch. Neither is a party to this proceeding. Nor is the responsible Minister.

[104] Neither counsel examined the possibility that s 15 of the 2016 Act might apply. Mr Cooke submitted rather that both CERA and the Minister of Earthquake Recovery should be deemed preserved for purposes of this proceeding, citing s 17(6)(b) of the Judicial Review Procedure Act 2016. That provision allows the court to order reconsideration "despite anything in any other enactment". It is in materially similar form to the now repealed s 4(5B) of the Judicature Amendment

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[86] See the tests in *Winter v Ministry of Transport* [1972] NZLR 539 (CA) at 541; and *Ministry of Transport v Hika* [1984] 2 NZLR 385 (CA) at 388–389. These cases concerned the predecessor of s 21 of the Interpretation Act 1999: s 20(d) of the Acts Interpretation Act 1924. We do not see any material difference between them.

[87] 2016 Act, s 91.

Act 1972. Mr Cooke submitted that this allowed the Court a degree of remedial creativity. We respectfully doubt whether that provision extends so far, and we prefer to rest our decision on the provisions of the 2016 Act.

[105] Rather than make a final decision on the point now, we think it appropriate to invite further submissions on whether the Court can and should make orders requiring that the Recovery Plan be reopened and reconsidered in light of this judgment, with renewed offers being made to affected landowners should the reconsideration result in a decision that some payment should be offered for uninsured improvements.

Decision

[106] This is an interim judgment. The appeal is allowed. We set aside the substantive judgment below and the judgment of the High Court on costs. We declare that the Minister's decision to approve the Recovery Plan, under which nothing was offered for uninsured improvements, was unlawful. We otherwise reserve the question of remedy for further argument.

[107] Quake Outcasts will have costs in this Court as for a standard appeal on a band B basis and usual disbursements. Costs in the High Court should follow our decision and be fixed there.

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