IN THE COURT OF APPEAL OF NEW ZEALAND

CA571/2013
[2013] NZCA 588

BETWEEN	THE MINISTER FOR CANTERBURY EARTHQUAKE RECOVERY First Appellant
	THE CHIEF EXECUTIVE OF THE CANTERBURY EARTHQUAKE RECOVERY AUTHORITY Second Appellant
AND	FOWLER DEVELOPMENTS LIMITED First Respondent
	QUAKE OUTCASTS Second Respondents
	HUMAN RIGHTS COMMISSION Intervener

Hearing:	23 October 2013 (Last submission received 28 November 2013)
Court:	O'Regan P, Ellen France and Stevens JJ
Counsel:	D J Goddard QC and A A Jacobs for Appellants S P Rennie and J E Bayley for First Respondent F M R Cooke QC, M S R Palmer and L J C McLoughlin-Ware for Second Respondent V E Casey and M J V White for Human Rights Commission
Judgment:	3 December 2013 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The orders made in the High Court are set aside and replaced with a declaration that the decision of the second appellant to make offers to

purchase the properties of owners of vacant land and owners of uninsured improved properties in the red zone was not lawfully made.

C **The appellants must pay to each of the respondents costs for a complex appeal on a band B basis and usual disbursements. We certify for two counsel for each respondent.**

D **We reserve leave to apply for further directions in the event that there are any practical difficulties in relation to the relief granted in this Court.**

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] This is an appeal against a decision of Panckhurst J in which he upheld applications for judicial review by the respondents, Fowler Developments Ltd (Fowler) and Quake Outcasts.[1]

[2] The High Court proceedings were triggered by an offer made to Fowler and to the members of the Quake Outcasts by the second appellant, the Chief Executive of the Canterbury Earthquake Recovery Authority (CERA), to purchase their properties. Their properties are situated in an area of Christchurch which in June 2011 was declared a "red zone" after the significant earthquakes that occurred in Canterbury in 2010 and 2011.[2]

[3] The underlying grievance of the respondents is that the offer made to them in September 2012 set the price of their properties at 50 per cent of the 2007 rating value of their land. (We will call this the "50 per cent offer".) This contrasted with an offer that had been made some 15 months earlier to the owners of insured residential properties in the red zone, where the offer price had been 100 per cent of the 2007 rating value of both land and improvements in exchange for the transfer of the property and of the seller's rights against their insurers and against the Earthquake Commission (EQC).[3] (We will call this the "100 per cent offer".) The reason the lower offer was made to the respondents was because, in the case of Fowler, it owned undeveloped residential land (on which there were no improvements and which was uninsurable) and, in relation to the members of the Quake Outcasts, because their properties were uninsured.[4] The practical effect of the properties being uninsured was that there was no EQC cover.

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1 *Fowler Developments Ltd v Chief Executive of the Canterbury Earthquake Recovery Authority* [2013] NZHC 2173, (2013) 7 NZ ConvC 96-005 [High Court judgment].

2 The residential red zone comprises various areas of Christchurch (about six square kilometres in total) in which repairs or rebuilding was not possible in the short to medium term because of the severe impact of the earthquakes. We explain this in greater detail below at [22]–[32].

3 EQC provides cover up to specified limits for loss or damage from earthquakes and other natural disasters under the Earthquake Commission Act 1993 to residential property owners who have insurance against fire damage.

4 The members of the Quake Outcasts own either vacant land or uninsured improved residential properties, with one member owning an uninsured improved commercial property.

[4] In the High Court, Panckhurst J made declarations that:

(a) the decision to create the red zone did not lawfully affect the property rights of the respondents;[5] and

(b) the decision to offer to purchase the properties of the respondents on the terms announced by the Minister for Canterbury Earthquake Recovery (the Minister)[6] and the offers subsequently made by the Chief Executive of CERA (the Chief Executive) were not made according to law.[7]

[5] The Judge effectively found that the red zone was not lawfully established, but did not grant a declaration to that effect because he mistakenly thought the Quake Outcasts had abandoned their application for such a declaration.[8]

[6] The Judge set aside the offers made to the respondents and directed that the first appellant, the Minister, and the Chief Executive reconsider and reach a new decision to purchase the respondents' properties, such decision to be made in accordance with law as required by the purposes and principles of the Canterbury Earthquake Recovery Act 2011 (CER Act) and with regard paid to the reasons contained in Panckhurst J's judgment. The direction did not extend to the offers made to offerees other than the respondents.[9]

[7] The Minister and the Chief Executive appeal. They argue both decisions were lawful and effective.

Parties

[8] Fowler is a property developer. It owned 11 vacant residential sections in the red zone. Its claim was narrower than that of the Quake Outcasts, focused only on

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5 At [81].

6 The Minister for Canterbury Earthquake Recovery, both now and through the period to which these proceedings relate, is the Hon Gerry Brownlee.

7 At [102].

8 This misunderstanding was confirmed in a minute issued by the Judge: *Quake Outcasts v Minister for Canterbury Earthquake Recovery* HC Christchurch CIV-2013-409-843, 2 September 2013.

9 At [102].

the decision to make the 50 per cent offer (so the relief it claimed was limited to that described at [4](b) above). Its counsel, Mr Rennie, adopted the submissions made by Mr Cooke QC for the Quake Outcasts and made additional submissions addressing matters in respect of which Fowler's position differed from that of the Quake Outcasts.

[9] Quake Outcasts is an unincorporated body of 46 owners of properties in the red zone. All were eligible to receive the 50 per cent offer, although their positions are not all the same. Some own undeveloped, vacant land. Some own uninsured residences. One owns an uninsured commercial property. Fowler and some of the Quake Outcasts have accepted the 50 per cent offer subject to an agreement that the present proceedings could still proceed. Others of the Quake Outcasts received, but did not accept, the 50 per cent offers, while some did not complete the necessary consent form and did not therefore receive any offer.

[10] The Human Rights Commission was given leave to intervene. We considered the written submissions provided by its counsel but did not call upon her to address us.

Issues for determination

[11] At the heart of the case is the proper identification of the source of executive authority under which the decision to declare the red zone and the consequent decisions to purchase properties located in the red zone were made. The High Court Judge determined that the red zone decision had to be made pursuant to the powers contained in the CER Act. The appellants contend that the decision could be, and was, made under the residual freedom of the Government to do anything that is not in conflict with any obligation under common law or statute, sometimes also referred to as the "third source" of authority. We will explain later what that concept entails. It was common ground that the residual freedom (as we will call it) did not provide authority to take action impacting on the rights of those affected by the action.

[12] There was no dispute that the executive has a residual freedom to act in the absence of statutory or common law constraints. But there was a dispute about the nature and scope of this source of executive authority. There was also a dispute

about the nature of the decisions under challenge, particularly whether they affected rights and whether they were in the field of activity governed by the CER Act. The parties identified two issues for determination:

(a) Was the High Court right to conclude that the rights of property owners, including their human rights, were affected by the decisions challenged in this case?

(b) Was the High Court right to conclude that the decisions challenged in this case could be made only pursuant to provisions of the CER Act?

[13] We have found it more convenient to combine these and deal with this aspect of the case as one issue, namely, could the decisions under challenge be made under the residual freedom? Those two questions encompass the nature and scope of the residual freedom and the applicability or otherwise of the constraints on its exercise. That is the first issue.

[14] The second issue focuses on the decision made by the Chief Executive to offer to purchase the properties of the respondents (and others in similar positions) which was made pursuant to a power given to the Chief Executive under s 53 of the CER Act. The issue, as framed by the parties, is whether the High Court was right to conclude that the decision did not adequately take into account the purposes of the Act and the position of the applicants in light of a duty to act consistently.

[15] The final issue arises for determination if we find any of the decisions under challenge were not lawfully made. The issue is whether the High Court was right to grant the relief that it did.

[16] Before dealing with these issues, we need to consider the scheme of the CER Act and other applicable legislation, to provide a basis for our consideration of the first two issues. We also need to explain what is meant by the residual freedom, and outline its potential application on the facts of this case. The analysis of both of these aspects of the law relating to the appeal needs to be made in the context of the facts of this case, and we will start by identifying the decisions under challenge and

outlining the background to the making of those decisions. We will analyse the findings of the High Court Judge in the context of each of the issues as we deal with the relevant issue.

Decisions under challenge

[17] It is important to isolate exactly what decisions are challenged in the present case. The resolutions of Cabinet underpinning the decisions and authorising the making of offers to insured residential owners of red zone properties in June 2011 and to the respondents and other uninsured owners in September 2012 were not decisions having legal effect. Decisions of that kind are not reviewable. As Richardson J explained in *New Zealand Maori Council v Attorney-General*, a decision of Cabinet to authorise the exercise of a power is a "mere preliminary" to the exercise of the power and has no legal significance until the power is actually exercised.[10]

[18] The decisions declared unlawful by the Judge were the decision made by the Minister in September 2012 to make the 50 per cent offers and the consequent decision by the Chief Executive to exercise his power under s 53 of the CER Act to make the offers. As already noted, Panckhurst J did not declare the decision to create the red zone to be unlawfully made. He did, however, find that such a decision could be lawfully made only by the Minister exercising a power conferred on him personally under s 27 of the CER Act. His analysis was focused on that power, not on the Cabinet committee resolutions relating to the red zone.

Factual background

[19] The first of the serious earthquakes that occurred in the Canterbury region happened on 4 September 2010. Immediately after that, Parliament passed the Canterbury Earthquake Response and Recovery Act 2010 (the 2010 Act), which came into force on 15 September 2010.[11]

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10 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 at 160.

11 The Canterbury Earthquake Response and Recovery Act 2010 was repealed by the Canterbury Earthquake Recovery Act 2011, and it was common ground that there is nothing in the 2010 Act that is of relevance to the present proceedings.

[20] A second major earthquake occurred in Canterbury on 22 February 2011. This was a particularly devastating event, with substantial loss of life. Significant additional property damage also resulted.

[21] On 28 March 2011, CERA was established by an Order in Council made under the State Sector Act 1988.[12] The Bill which became the CER Act was introduced to Parliament and passed through all parliamentary stages on 12 April 2011. It received Royal assent on 18 April 2011 and came into force on 19 April 2011.

June 2011 decision

[22] In April 2011, officials from Treasury, EQC and CERA began considering the impact of land and property damage in the Christchurch area and the identification of the worst affected areas. This included consideration of whether people would need to be relocated out of some of the worst affected areas and, if so, whether voluntary or compulsory acquisition of their properties would be needed.

[23] On 23 May 2011, Cabinet delegated power to act to eight Cabinet ministers (we will refer to this group as the Cabinet committee). This delegated power allowed those ministers to make Cabinet decisions on matters relating to Canterbury earthquake land damage and remediation issues.

[24] On 13 June 2011, another serious earthquake occurred.[13] This appears to have been a catalyst to expedite the work relating to land remediation issues.

[25] On 22 June 2011, the Cabinet committee reached agreement on a detailed strategy for identifying areas of Christchurch or "zones" and for the Crown to purchase properties in the worst affected areas. Surprisingly, no record of the meeting of the Cabinet committee was in evidence in the High Court. Nor was it before us at the time of the hearing of the appeal. We did, however, have a report to Cabinet dated 24 June 2011 which recorded the decisions that were made by the

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12 State Sector (Canterbury Earthquake Recovery Authority) Order 2011.

13 Coincidentally, the Chief Executive of the Canterbury Earthquake Recovery Authority, Mr Roger Sutton, was appointed on the same day.

Cabinet committee on 22 June 2011. These decisions were publicly announced on 23 June 2011, and the decisions were formally noted by Cabinet at its meeting on 27 June 2011.

[26] We expressed concern at the hearing that we did not have before us a record of the decisions made by the Cabinet committee or a copy of the paper presented to the meeting of the Cabinet committee on 22 June 2011. After the Registry notified counsel of the imminent delivery of this judgment we received a memorandum from counsel for the appellants disclosing that a paper dated 21 June 2011, which appears to be the paper presented to the 22 June 2011 meeting, had recently been found in the office of the Minister. We deferred the delivery of the judgment. We have now received a copy of the paper and submissions from counsel on it. It is similar to the report to Cabinet dated 24 June 2011, but there are some differences. In particular, the report to Cabinet dated 24 June 2011 contained detail on the likely gross cost of the 100 per cent offer and the likely recovery from the Crown's assumption of offerees' rights against EQC and insurers. This detail was missing from the newly discovered paper dated 21 June 2011. We have considered and taken into account the 21 June 2011 paper and the submissions made on it. The discovery of the 21 June 2011 paper does not dispel our concern about the unsatisfactory nature of the records of decisions made by the Cabinet committee (exercising delegated powers to make Cabinet decisions).

[27] Although the focus of the litigation has been on the creation of the red zone, the decisions made by the Cabinet committee on 22 June 2011 in fact created four zones, and also decided on the policy for the making of offers to purchase insured residential properties in the red zone. The executive summary of the report to Cabinet of 24 June 2011 described the four zones as follows:

> 10 Four "zones" have been identified based on the severity and extent of land damage, the cost-effectiveness and social impacts of land remediation.
>
> a) In the Green Zones, there are no significant issues which prevent rebuilding in these areas, based on current knowledge of seismic activity.

b) For the Orange Zones, further work is required to determine if land repair is practical and if the areas are suitable for rebuilding on in the short-to-medium term.

c) In the Red Zones, rebuilding may not occur in the short-to-medium term because the land is damaged beyond practical and timely repair, most buildings are generally rebuilds, these areas are at high risk of further damage to land and buildings from low-levels of shaking (eg aftershocks), flooding or spring tides; and infrastructure needs to be rebuilt.

d) The White Zones include the Port Hills – the earthquakes on 13 June 2011 caused further extensive damage, which needs mapping and assessment. This is underway.

[28] The Crown offer to purchase insured residential properties in the red zone was described in the report in the following terms:

53 I propose that the following offers be extended to landowners in the Red Zones.

Insured residential properties

54 Insured residential property owners will have the choice of two offer packages:

Option A

55 The Crown will offer to purchase the entire property at the 2007 capital value rating valuation (less any land and dwelling insurance payments already made). The Crown will also take an assignment of all earthquake related insurance claims. There will be a process through which any property owners who consider that there is a material discrepancy between the 2007 rating valuation and the market value of their property (e.g. because of subsequent improvements) can raise their concerns.

OR

Option B

56 The Crown will offer to purchase the land only at the greater of the following (less any EQC land payments already made):

a) 2007 land value rating valuation; or

b) EQC valuation for the minimum lot size applicable.

The Crown will also take an assignment of the EQC land claim, and landowners will be free to pursue their private insurance company for any other insurance claims they have.

...

Uninsured residential properties and vacant lots

62 Neither uninsured residential properties nor vacant lots are covered by the 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.

63 Consideration will need to be given over time to the position of these people.

[29] The decision to omit uninsured property owners from the acquisition proposal seems to have been made at the last minute. A draft of the paper presented to the Cabinet committee dated 21 June 2011 (the day before their meeting) refers to a proposed offer to purchase their properties for 100 per cent of the 2007 rating value of the land (double the price eventually offered). The newly discovered paper, which is also dated 21 June 2011 (and which seems to be the paper actually considered by the Cabinet committee), omits this reference and instead says the following:

Uninsured residential properties and vacant lots

62 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.

63 Consideration will need to be given over time to the position of these people.

[30] The report to Cabinet dated 24 June 2011 records that the anticipated cost of purchasing the insured residential properties was up to $1.7 billion, but this was expected to be offset by recoveries from EQC and insurers, leaving a net cost of between $485 million and $635 million. It is significant, in the context of the 50 per cent offer made to the respondents, that the Crown envisaged that it would recoup between 60 per cent and 70 per cent of the cost of buying the insured properties from EQC and insurers. However, as Mr Cooke pointed out in his submissions on the newly discovered paper of 21 June 2011, this level of detail was not before the Cabinet committee on 22 June 2011 so does not seem to have loomed large in its decision making.

[31] The Chief Executive then in August 2011 exercised his power under s 53 of the CER Act to make offers to insured residents. The process involved seeking the consent of the insured owners to receive an offer and then making an offer to them. As recorded in the High Court judgment, the fact sheet accompanying the offer made to each resident included the following statement:

> **What will happen to my property if I decide that I do not want to accept the Crown's offer?**
>
> If you decide that you do not want to accept the Crown's offer you should be aware that:
>
> The Council will not be installing new services in the residential red zone.
>
> If only a few people remain in a street and/or area, 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 cancel or refuse to renew 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.

[32] These rather foreboding comments were repeated by both the Minister and the Chief Executive through the media.[14]

[33] The offers and accompanying information were sent to those eligible to receive them (red zone residential property owners who had insurance and therefore EQC cover, and who had consented to receiving an offer). In November 2011 the Minister used his power under s 27 of the CER Act to create new residential zoning in areas designed to provide places for displaced red zone residents to build new houses. Also in November 2011 the Minister made announcements resolving the position of some properties in the orange zone (declaring them either red zone or green zone).

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[14] The Christchurch City Council had estimated an annual ongoing infrastructure costs per household of over $16,000, compared to a pre-earthquake cost of about $600 per household. This was anticipated to increase as people moved out of the red zone.

September 2012 decision

[34] Although media statements made about the time of the 22 June 2011 decisions had given indications that the position of uninsured red zone property owners would be resolved within weeks, this did not occur.

[35] In April 2012 CERA provided a report to the Minister setting out its initial thinking about property owners in the red zone who had not received a 100 per cent offer.

[36] The initial thinking paper considered five classes of property owners who had not received a 100 per cent offer. These were owners of:

(a) residential properties under construction;

(b) vacant land;

(c) commercial and industrial properties;

(d) properties owned by not-for-profit organisations; and

(e) Waimakariri leasehold properties.

[37] CERA recommended 100 per cent offers be made to all of these categories, apart from the uninsured property owners, which were not dealt with in the paper. In relation to those with partially completed houses, the CERA advice was:

> CERA assesses that this option [100 per cent offer, giving value for the uncompleted residence] is consistent with the Crown's recovery objectives, and it does not exclude those red zone property owners from Government support based on their inability to obtain home insurance. Without support from the Crown this group of property owners may have difficulty re-establishing themselves and moving on with their lives with certainty and confidence.

[38] In relation to vacant land, it also suggested that the Minister consider extending an offer at 100 per cent of land value. The advice was:

> CERA considers that a similar approach is warranted here to allow owners of vacant land to move on with their lives with certainty and confidence. This approach is consistent with the Crown's recovery objectives.

[39] In relation to commercial properties the recommendation was that the Crown make an offer modelled on the offer made to insured residential property owners, modified to take into account the absence of land insurance policies. Moreover 100 per cent offers were recommended for the not-for-profit organisations.

[40] In May 2012, after further discussion with the Minister and further consideration, CERA recommended that offers be made on the same basis as for insured owners to those owning properties under construction and those owned by not-for-profit organisations, for which EQC cover was unavailable. Cabinet resolved to do this in June 2012.

[41] The Cabinet decision in relation to the offers under challenge was made by the Cabinet Business Committee on 3 September 2012.[15] A supporting paper explaining the background to this decision, signed by the Minister on 31 August 2012, said that in relation to properties with no insurance (vacant land and improved but uninsured residential properties) there were three broad options, namely:

(a) no offer;

(b) an offer at a reduced rate in valuation; or

(c) an offer on the same terms as for insured residential properties (that is, the same as the 100 per cent offer).

[42] The first of these was not recommended, because "there are good reasons to support exit from the red zones".

[43] The third was also not recommended. The Cabinet paper said:

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[15] In this decision Cabinet also agreed to make 100 per cent offers to insured owners of the Waimakariri leasehold properties, on condition that the leaseholders enter into agreements with the Council to acquire a freehold interest in the land.

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

[44] Support for the second option was indicated, to recognise that red zone properties were worth a lot less than they had been before the earthquakes, that the property damage they had suffered was not insured and that there was some residual property value.

[45] In relation to vacant land, the paper recorded that there were 65 vacant sections. The Valuer-General had indicated that the market value of this land might be only 10 per cent of the pre-earthquake value. The Minister recommended an offer at 50 per cent of rateable value on the basis that this would:

> ... ensure that the offer is not below the post-earthquake value (given individual properties' values may vary from the 10% estimate), and help support the signal that the Government wants to encourage property owners to move on from the red zone.

[46] In relation to uninsured improved properties, the paper noted that there were 50 of these in the red zones. Further, some of these had consciously chosen not to insure, whereas some had been insured at some point but did not meet the insurance continuity requirements for the 100 per cent offer. Again, an offer at 50 per cent of rateable land value was suggested, but with property owners retaining salvage rights to uninsured buildings. The reasoning for setting the offer at this level was as follows:

> 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. I would expect that for most red zone property owners in this position, the offer would be in the order of $60,000–$100,000.

[47] In relation to commercial properties that were insured but did not have EQC cover a variant on the offer was proposed, reflecting the absence of EQC cover. The options involved the most recent rating value as before the improvements and 50 per cent of the most recent valuation for the land, or 50 per cent of the most

recent rating valuation of the land with the owner retaining the insurance claims in relation to the improvements.

[48] Following the Cabinet Business Committee decisions, the Minister publicly announced the 50 per cent offers on 13 September 2012, and the offers were sent out to those who had returned consent forms on 5 November 2012.

[49] The material sent with the offer made to each property owner included the same statement about the possible detrimental outcome for those who chose not to accept the offer as had appeared in the documentation accompanying the 100 per cent offer.[16]

Other developments

[50] In the period between June 2011 and September 2012, there were a number of other developments. Areas of the orange zone were classified as red zone or green zone. The Minister used his power under s 27 of the CER Act to amend district plans to create new residential zones to which displaced red zone property owners could move. The process of developing and consulting on the Recovery Strategy required by the CER Act was undertaken and the Recovery Strategy was approved and Gazetted on 31 May 2012.

Statutory context

[51] We now turn to the statutory context. The CER Act is the key aspect of this, but Mr Goddard QC submitted that both the State Sector Act 1988 and the Public Finance Act 1989 are also important features of the statutory context.

The CER Act

[52] As noted earlier, the CER Act was passed after the second major earthquake. It replaced the 2010 Act. This Court analysed the CER Act in its decision in *Canterbury Regional Council v Independent Fisheries Ltd*.[17] We adopt that analysis.

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16 This is quoted at [29] above.

17 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [12]–[71].

The Court described the CER Act as "legislation imposing obligations and conferring wide powers on the executive branch of government to make decisions to ensure the expeditious recovery of Christchurch in the wake of both the September 2010 and the February 2011 earthquakes".[18]

[53] The CER Act sets out its purposes in s 3:

> **3 Purposes**
>
> The purposes of this Act are—
>
> (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes:
>
> (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery:
>
> (c) to provide for the Minister and CERA to ensure that recovery:
>
> (d) to enable a focused, timely, and expedited recovery:
>
> (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes:
>
> (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property:
>
> (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities:
>
> (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g):
>
> (i) to repeal and replace the Canterbury Earthquake Response and Recovery Act 2010.

[54] Part 2 of the Act is headed "Functions and Powers to assist recovery and rebuilding", and is divided into a number of subparts. Subpart 1 provides for "input into decision making by community and cross-party forums". It provides for community forums and cross-party Parliamentary forums.

[55] Subpart 2 sets out the functions and powers of the Minister and Chief Executive. The Minister's functions are set out in s 8, and include: developing and

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[18] At [13].

approving a Recovery Strategy and Recovery Plans; suspending, amending or revoking RMA documents; and directing councils to carry out certain functions.

[56] Under s 9 the Chief Executive is responsible for: developing a Recovery Strategy and Recovery Plan if directed to do so by the Minister; commissioning and disseminating information; controlling building, demolition and removal work; and closing or restricting access to roads. Significantly in the context of the present appeal, he is also authorised to acquire land and property under s 53.

[57] Section 10 requires that the Minister and the Chief Executive exercise their powers under the Act in accordance with the purposes set out in s 3 and only where he or she reasonably considers it necessary to do so.

[58] Subpart 3 concerns the "Development and implementation of planning instruments", and contains a series of provisions elaborating on the functions of the Minister and the Chief Executive relating to the development of a Recovery Strategy.

[59] Section 11 requires the Chief Executive to develop a Recovery Strategy and submit it to the Minister for approval, who is then responsible under s 11(2) for recommending to the Governor-General that it be approved by Order in Council. Subsection (3) describes the "Recovery Strategy" as an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch.

[60] This Court commented on the significance of s 11 in *Independent Fisheries*:

> [51] It is clear from this definition that the development and approval of the Recovery Strategy is an essential feature of the Act. The definition also serves to confirm the wide approach to the interpretation of the purposes of the Act to which we have already referred. Significantly for the present case, it is clear from s 11(3) that it is the Recovery Strategy that is intended to address the "long-term strategy" for the reconstruction, rebuilding and recovery of greater Christchurch, including the identification of areas for rebuilding and redevelopment, their sequencing and the location of "existing and future infrastructure". These provisions suggest strongly that Parliament intended planning certainty in the long-term to be addressed, at least principally, in the Recovery Strategy.

[61] The Recovery Strategy is required to be developed in consultation with local councils and Te Rūnanga o Ngāi Tahu,[19] the draft is required to be publicly notified,[20] and public hearings are required while the Strategy is being developed.[21] Once approved, the Recovery Strategy will prevail over any "RMA document" and other instruments set out in s 26(2) (which includes a wide range of local and regional planning and policy documents).[22]

[62] Provision is also made for Recovery Plans, which must also be approved by the Minister.[23] A Recovery Plan must be consistent with the Recovery Strategy. However, in recognition of the fact that the Recovery Strategy would take some time to develop and finalise, provision is made for a Recovery Plan to be developed and approved before the Recovery Strategy is approved.[24] A Recovery Plan may deal with "any social, economic, cultural, or environmental matter" or "any particular infrastructure, work, or activity".[25] A draft Recovery Plan must be publicly notified and available for written comment.[26] Once a Recovery Plan has been approved by the Minister in accordance with s 21, any person exercising specified functions or powers under the Resource Management Act 1991 (RMA) must not make a decision or recommendation that is inconsistent with the Recovery Plan.[27] In addition, s 26(1) provides that instruments described in s 26(2) must not be inconsistent with a Recovery Plan. Section 26(3) requires that such instruments must be amended if that is required by the Recovery Plan.

[63] Also within subpart 3 is s 27, which provides that the "Minister may, by public notice, suspend, amend, or revoke" the whole or part of a series of listed instruments and plans, including RMA documents and council plans or policies that relate to greater Christchurch. Section 27(2) allows the Minister, by public notice, to suspend or cancel: any resource consent; any use protected or allowed under ss 10,

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19 Section 11(4).
20 Section 13.
21 Section 12(1).
22 Section 15. An "RMA document" is defined in s 4 as a regional policy statement, a proposed regional policy statement, a proposed plan, or a plan made under the Resource Management Act 1991, or a change or variation to any of those documents.
23 Sections 16–26.
24 Section 18(2).
25 Section 16(2).
26 Section 20.
27 Section 23(1).

10A or 10B of the RMA; or any certificate of compliance under the RMA. Section 27(7) provides that no compensation is payable under the CER Act in respect of any action taken under s 27. In *Independent Fisheries*, this Court held that s 27 is not an alternative and independent mechanism for the Minister to use in situations where the Recovery Strategy or a Recovery Plan should be used.[28]

[64] Subpart 4 provides the Chief Executive with various powers, such as information gathering and dissemination, surveying and powers of acquiring and disposing of property. It also gives powers of entry onto private premises and to undertake building or demolition works. Of particular relevance to the present appeal is s 30, which empowers the Chief Executive to "disseminate information and advice on matters relating to work and activities under the Act".

[65] Section 53 states that the Chief Executive may, in the name of the Crown, purchase or otherwise acquire land and personal property. Property may be acquired voluntarily under s 53, and the Crown offers made to purchase red zone land were made under s 53. The Act also sets out provisions through which the Minister may compulsorily acquire land.[29] Sections 64–67 set out the compensation provisions applying when compulsory acquisition takes place, and s 68 provides a right of appeal to the High Court.

State Sector Act 1988 and Public Finance Act 1989

[66] Mr Goddard submitted that the State Sector Act and the Public Finance Act have an important bearing on the present appeal. He said Panckhurst J was wrong to dismiss the submissions made in the High Court on these two Acts as "something of a distraction".[30]

[67] Mr Goddard highlighted ss 32, 33 and 34 of the State Sector Act.

[68] Section 32 provides that a chief executive of a Government Department (such as CERA) is responsible to the relevant Minister for carrying out the functions and

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28 At [61]–[69].
29 Sections 53–58.
30 High Court judgment, above n 1, at [73].

duties of the Department, including those imposed by an Act or by Government policy.

[69] Section 33 says chief executives act independently of the Minister only in relation to employment matters.

[70] Section 34 confers on a chief executive all the powers necessary to carry out his or her functions, responsibilities and duties under the State Sector Act or any other Act (the CER Act being the obvious "other Act" in this case).

[71] The point Mr Goddard drew from these provisions was that the Chief Executive of CERA was responsible to the Minister in relation to the performance of his functions unless another Act required him to act independently.

[72] Mr Goddard's submissions in relation to the Public Finance Act emphasised the controls on expenditure of public money. He argued that the effect of these controls was that the Chief Executive could not make offers to purchase properties, thereby committing the Government to substantial expenditure, without having first obtained the necessary financial authority. So any decision by the Chief Executive had to take into account the amount of available funding.

[73] We were concerned that Mr Goddard was suggesting that compliance with the Public Finance Act obviated the need for the Chief Executive to comply with s 10(1) of the CER Act. He assured us that was not his submission.

[74] We record Mr Goddard's submissions but we agree with Panckhurst J that they do not greatly assist us in resolving the issues in dispute. We will explain why later.

Residual freedom of executive

[75] The residual freedom is a concept that is controversial. It is often referred to as the third source of authority.[31] There is no dispute about its existence in this case but there is a dispute about its scope.

[76] The essence of the concept is the idea that the executive is free to do anything that is not prohibited by law (either statute or common law).[32] The reason it has been given the label "third source" is to distinguish this source of executive authority from powers granted under statute (the "first source") and prerogative powers (the "second source").[33]

[77] Professor Harris describes the residual freedom as being subject to any constraints which may be imposed by either common law or statute.[34] In a more recent article, he describes it as the freedom to do anything that is not in conflict with positive law.[35] Examples that have been given in academic commentaries of government action that might be taken under the residual freedom are the publication of information, the entering into of contracts, and the making of ex gratia payments.[36]

[78] The residual freedom cannot authorise government officials to act in conflict with the legal rights and liberties of citizens.[37] This includes rights and liberties recognised in statute, such as the New Zealand Bill of Rights Act 1990 (or,

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31 Other names given to the residual freedom include "de facto powers", "common law discretionary powers", "common law personified powers", "secondary prerogative powers", "pretended prerogatives", "non-statutory powers" and "capacities": see BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225 at 225 [Harris (2007)].

32 BV Harris "The 'Third Source' of Authority for Government Action" (1992) 109 LQR 626 at 626 [Harris (1992)].

33 Prerogative powers in this context means the prerogative rights that Courts have recognised as powers that are unique to the Crown. For example, the power to grant a pardon. There is still debate about the distinction between the prerogative and the residual freedom. See, for example, GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [2.18], Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at [17.3.2(1)] and HWR Wade "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 at 191–194.

34 Harris (1992) at 626.

35 Harris (2007) at 249.

36 Harris (1992) at 627 and Jeff Simpson "The Third Source of Authority for Government Action Misconceived" (2012) 18 Auckland U L Rev 86 at 88.

37 *Ngan v R* [2007] NZSC 105, [2008] 2 NZLR 48 at [97].

relevantly to this case, the RMA), and common law rights, such as the protection to property given by the law of trespass.

[79] Nor can the residual freedom be authority for executive action where the field of that action is covered by statute. That principle is based on *Attorney-General v De Keyser's Royal Hotel Ltd*,[38] though that case was dealing with a prerogative power, not the residual freedom. However, it has been applied also to the residual freedom.[39] In the *De Keyser's* case, Lord Atkinson said:[40]

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. ... after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

[80] The extent to which this observation applies to the residual freedom is unclear. But Mr Goddard accepted that the Crown could not rely on the residual freedom if a statute "occupied the field", so we do not need to form a view on the issue.[41]

[81] The exercise of the residual freedom is reviewable by the courts.[42] The focus of any such review will be on the question of whether any legal rule prohibits the action or requires the action to be taken under a statutory power,[43] but review may also be on reasonableness/rationality grounds.[44]

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38 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) at 528 and 539–540.

39 *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [2008] 3 All ER 548 at [50]. See also Simpson at 91–92.

40 At 539–540.

41 Wade and Forsyth say the residual freedom (or "common law powers" as they call the concept) "cannot be exercised inconsistently with a statute": HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 183.

42 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) confirmed that the exercise of non-statutory executive power is reviewable. McGrath J in *Ngan v R* at [98] considered that residual freedom action was reviewable, as do Wade and Forsyth at 183.

43 Simpson at 89–90.

44 Simpson at 91.

[82] In New Zealand, McGrath J in the Supreme Court recognised the existence of the residual freedom in *Ngan v R*[45] and in *Rogers v Television New Zealand*.[46] In the former case, McGrath J described the residual freedom as follows:[47]

> It is, however, a residual form of authority which is subject to statutory and common law constraints. It does not permit government officials to act in conflict with the rights and liberties of citizens. In particular the residual freedom of officials is constrained by the Bill of Rights Act. Residual freedom to act can never justify a breach of protected rights. Wherever residual freedom conflicts with a statutory or common law rule it must give way to that rule. No balancing of the relevant interests is permitted because the residual freedom only exists to the extent that there is no other positive law that deals with the circumstances in question.

The Chief Justice expressed the view that there is no residual freedom in *Hamed v R*, stating in that decision that "public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do."[48] That observation was made in the context of a surveillance operation of an area of public land. However, in the same case, Tipping J reiterated his view from *Ngan* that police officers are entitled to do what any member of the public can lawfully do in the same circumstances and do not need any specific authority to do so.[49]

[83] The position is similar in the United Kingdom, where the existence of the residual freedom has been confirmed, although with some reluctance. The most recent statement comes from Lord Sumption, speaking for the majority of the United Kingdom Supreme Court in *R (New College London Ltd) v Secretary of State for the Home Department*:[50]

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45 *Ngan v R* at [93]–[100]. Tipping J also recognised the existence of the residual freedom in *Ngan v R* at [45].

46 *Rogers v Television New Zealand* [2007] NZSC 91, [2008] 2 NZLR 277 at [110].

47 *Ngan v R* at [97].

48 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [24].

49 At [217]. In *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [26]–[38], this Court concluded that, despite the division of views about the residual freedom in the Supreme Court, the combined effect of the decisions in *Ngan*, *Rogers* and *Hamed* was that there is a residual freedom that authorises executive action unless there was a statutory or common law prohibition against it.

50 *R (New College London Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358. See also *Shrewsbury & Atcham Borough Council v Secretary of State for Communities and Local Government* [2007] EWHC (Admin) 2279 at [17] per Underhill J. For a fuller discussion of recent English and United Kingdom cases see BV Harris "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373 at 374–376 [Harris (2010)].

> [28] ... It has long been recognised that the Crown possesses some general administrative powers to carry on the ordinary business of government which are not exercises of the royal prerogative and do not require statutory authority: see B.V. Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 *LQR* 225. The extent of these powers and their exact juridical basis are controversial. In *R v Secretary of State for Health Ex p C* [2000] 1 FLR 627 and *Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government* [2008] 3 All ER 548, the Court of Appeal held that the basis of the power was the Crown's status as a common law corporation sole, with all the capacities and powers of a natural person subject only to such particular limitations as were imposed by law. Although in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, para 47 Lord Hoffmann thought that there was "a good deal of force" in this analysis, it is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.

[84] While this statement of the law confirms the residual freedom as a source of executive authority under the law of England, it is unclear whether the reference to "general administrative powers" limits its scope. On the face of it, it appears to be a narrower formulation than that of the New Zealand Judges referred to above. House of Lords decisions that have been interpreted as supporting the existence of the third source are *R (Anufrijeva) v Secretary of State for the Home Department*[51] and *R (Hooper) v Secretary of State for Work and Pensions*.[52]

[85] Opposition to the concept of the residual freedom was expressed by Lord Carnworth in his minority opinion in *New College London Ltd*,[53] and by Laws J in *R v Somerset County Council, ex parte Fewings*.[54]

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51 *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, where the majority held that the common law right of an asylum seeker to be informed of the outcome of her application before it took effect thwarted any government action to use the third source to terminate income support before notification had occurred. See Harris (2010) at 378.

52 *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, where the majority accepted that the government could pay pensions to widowers even though payment was not positively authorised by statute using its "common law powers".

53 At [34], noting his views in *Shrewsbury and Atcham Borough Council*, above n 41, at 562–564.

54 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (HC) at 524, although the comments in that case should be considered in light of their context as being about the powers of local authorities. Sir John Laws has underscored his opposition to the third source extra-judicially in "Public Law and Employment Law: Abuse of Power" [1997] PL 455.

Dealing with the issues

[86] We now turn to the issues identified at [13]–[15] above.

Could the challenged decisions be made under the residual freedom?

Scope of the June 2011 decision

[87] The June 2011 decision had a number of components. First, the identification of the red zone, green zone, orange zone and white zone, based on the assessment made by engineering consultants engaged by EQC. Second, the decision that offers should be made to insured residential property owners, but that no offer should be made to uninsured property owners until further consideration had been given to their positions.

[88] It was notable that throughout the oral submissions made by the respondents, reference was made only to the red zone aspect of the decision. There is no suggestion that there was anything amiss with the decisions relating to the green, orange and white zones, and the respondents expressly did not challenge the decision to make the 100 per cent offers to the insured residential property owners in the red zone. It was also notable that the respondents did not suggest that the information underpinning the red zone decision was inaccurate or incorrect. In other words, they did not challenge the substance, but rather the process of the decision making.

[89] There was no dispute that the decision made by the Chief Executive to make an offer to each of the insured residential property owners was made pursuant to s 53 of the CER Act. The Chief Executive confirmed in his evidence that this was the legal basis on which he made the offer. That being the case, the offer was subject to the requirements of the CER Act, particularly the requirement of s 10(1) that any decision be made in accordance with the purposes of the CER Act set out in s 3. As there is no challenge to the legality or validity of the 100 per cent offers, there is no need for us to form a view about compliance with that requirement, though in saying that we do not suggest that we have any basis to suggest non-compliance.

[90] Because the only aspect of the June 2011 decision that was challenged was the red zone aspect of that decision, we will refer to "the red zone decision" from now on, unless we are referring to all aspects of the June 2011 decision.

[91] In order to determine whether the red zone decision was lawfully made, we must consider whether the decision affected legal rights, and whether it was required to be made under the CER Act.

Legal effect of the red zone decision

[92] The red zone decision could not be made using the residual freedom if it interfered with the rights and liberties of red zone property owners.

[93] The High Court Judge accepted a submission that the red zone decision affected legal rights.[55] He said that the reality of the decision meant that over time the red zone would cease to be residential and would become open space. In the meantime, the residential zones under the District Plan subsisted, but in reality were no longer operative. He said that this meant that, although property owners in the red zone had the right to establish and live in their homes in the red zone subject to compliance with the relevant plan, the principle that people in communities can order their lives under the RMA with some assurance no longer applied to them.[56]

[94] This finding led the Judge to conclude that the red zone decision did, in effect, override the relevant planning documents and also interfered with the human rights of the affected residents (their right to enjoyment of the home). He found that the practical implications of the red zone were such that it was necessary for legally binding and compulsory powers to be used, overriding by law the relevant RMA documents and Local Government Act 2002 (LGA) obligations applying to red zone residents.

[95] Having made that decision, it was then a logical consequence that the Judge found that the red zone decision could be made only by the Minister under s 27, and

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55 High Court judgment, above n 1, at [60]–[65].

56 The reference to people ordering their lives with some assurance comes from the judgment of the Chief Justice in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 at [10].

that recourse to that statutory power was required.[57] Since that did not happen, the decision to create the red zone had not been done lawfully.

[96] In this Court the parties characterised the nature of the June 2011 decision quite differently. For the appellants, Mr Goddard suggested that the creation of the red zone, green zone, orange zone, and white zone was simply a reflection of the engineering advice received and the dissemination of that information to affected residents. The red zone decision was simply the publication of information and did not have any legal effect, or affect rights and liberties. He said the provision of accurate information about land, and the making of offers that property owners were free to accept or reject, could not be characterised as interference with rights. He said that the number of residents in the green zone massively outnumbered those in the red zone, and the decision to create the green zone was an extremely important step for them as well, because it paved the way for the process of settling claims and remediating property damage to begin.

[97] On the other hand, Mr Cooke said that the practical effect of the creation of the red zone had to be examined. He said that the deliberations of officials and Ministers in the period preceding the June 2011 decision indicated that attention was focused on the "retirement" of land in the worst affected suburbs of Christchurch. A paper setting out the options for achieving this "retirement" set out five options, all but one of which appeared to involve the use of powers under the CER Act. They were:

(a) voluntary or compulsory acquisition (under s 53);

(b) use of the power under s 27 to amend the land use zoning in the city plan;

(c) using s 27 to remove existing use rights;

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[57] At [70].

(d) the Minister directing a Recovery Plan be produced setting out the amendments required to the city plan and any other relevant RMA document; and

(e) the Christchurch City Council amending the city plan to change their land zoning.

[98] None of these options included the provision of information to residents to make it clear that rebuilding would not be possible in the short term and offers to encourage them to leave voluntarily. None involved the use of the residual freedom.

[99] Mr Cooke said it could be inferred from the newly discovered paper dated 21 June 2011, considered by the Cabinet committee on 22 June 2011, as well as the report to Cabinet of 24 June 2011, when read in the light of earlier advice and drafts of those papers, that the Crown was pursuing a clearance programme (that is, a programme to remove all buildings and improvements from red zone land, followed by removal of infrastructure) in declaring the red zone and making the 100 per cent offer. He said the intention was to entice the majority of residents to leave voluntarily, leaving a bleak situation for the remainder who could then be pressured into leaving or, ultimately, subject to compulsory acquisition. We consider this reads too much into the comments about the difficulties of continued occupation of the red zone in those papers.

[100] Mr Cooke referred to references to a "clearance programme" in a later Cabinet paper (December 2012) and in the Recovery Strategy adopted in May 2012. Mr Cooke said this betrayed the real intention, which was to remove all residents from the red zone and retire the land from residential use completely.

[101] Mr Goddard disputed this. He said the use of the term "clearance programme" in the December 2012 Cabinet paper and in the Recovery Strategy was, in fact, referring to a programme for removing structures from land that had been purchased by the Crown under the 100 per cent offer. So it was a consequential decision from the 100 per cent offer, rather than any indication about the Crown's initial intentions. We accept that this is an available interpretation, and we do not

consider we are greatly assisted in interpreting a decision made in June 2011 by statements used in other documents many months later.

[102] The Minister made it clear in his affidavit that the Crown did not choose to use compulsion in relation to the red zone, nor did it wish to do so. Rather, it made an active policy choice to provide an exit to residents through the 100 per cent offer, without compelling residents to do anything.

[103] Mr Cooke said the reality was that the creation of these zones was more than just the provision of information. It affected the future use of the land and created a zone in a town planning sense. He argued that, in order for the Minister to make a decision of this nature, recourse to the power in s 27 of the CER Act to suspend, amend or revoke an RMA document was necessary. He submitted that in declaring the land no longer suitable for residential occupation, the Crown restricted the rights associated with ownership of a residential dwelling, the body of substantive and procedural rights contained in the RMA and LGA, and the right recognised in international law that protects against interference with the home.[58]

[104] We broadly agree with the Judge that the practical effect of the creation of the red zone and the making of the 100 per cent offer has been the exit of most residents from the area, leaving those who remain in a very difficult and unattractive position. But we do not agree that the legal effect of the June 2011 decision is as described by the Judge. There has, in fact, been no legal step to change the relevant planning documents and, indeed, it seems that this option which was considered prior to the finalisation of the report to the Cabinet committee meeting of 22 June 2011 was rejected. Instead, it was determined that information about the impracticality of repairing or rebuilding on the land in the red zone in the medium term would be disseminated. In addition to this, the 100 per cent offer was intended to provide for a practical exit for those who would otherwise be involved in protracted negotiations with insurance companies and EQC about their claims.

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[58] See International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17, and *Universal Declaration of Human Rights* GA Res 217 A(III) (1948), art 12.

[105] We agree with the characterisation of the red zone decision by Asher J in *O'Loughlin v Tower Insurance*:[59]

> [27] ... I set out what the red zone did not do:
>
> (a) It did not prohibit building or the granting of building consents in the area for repair or rebuilding.
>
> (b) it did not prohibit residents from continuing to live in the red zone.
>
> (c) It did not require residents to demolish or repair their houses.
>
> [28] In terms of what the creation of the red zone did do, it created an area in which CERA would make offers to purchase the properties of insured residents.

[106] As we see it therefore, the nature of the actions decided upon in the June 2011 decision were:

(a) The dissemination of information about the state of land in various parts of the city, which was described by reference to zones. Such dissemination of information about damage to land did not interfere with property rights or statutory rights under the RMA or LGA, although the choice of the term "zone" (with its town planning connotations) was perhaps unfortunate.

(b) The making of the 100 per cent offers.

[107] Whilst the first of those is subject to challenge, it is the second (the 100 per cent offer) that has been the substantial cause of the exodus of residents from the red zone. This highlights the artificiality of challenging one aspect only of the June 2011 decision.

[108] Even if the combined effect of the red zone decision and the 100 per cent offer is considered, we do not see these as having any legal effect on the rights or liberties of the affected residents. That is not to say they have not had a significant practical impact on land owners. But, as Mr Goddard pointed out, it must be remembered that the creation of the red zone was a recognition of the severe damage

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[59] *O'Loughlin v Tower Insurance Ltd* [2013] NZHC 670, [2013] 3 NZLR 275.

caused by the earthquakes. It did not create that damage. The fact that land in the red zone is not, and will not for some time, be suitable for houses is a state of affairs caused by the earthquakes not by the decision to create the red zone. The respondents do not challenge the correctness of the assessment that land in the red zone is not suitable for houses. While the impact of the earthquakes has been devastating for the respondents and the red zone property owners in general, we do not consider that the June 2011 decision has interfered with their legal rights and liberties.

Did the red zone decision require the exercise of statutory power?

[109] Having determined that the red zone decision did not interfere with the rights of the respondents, the next issue is whether the CER Act required the declaration of the red zone to be made under that Act.

[110] The challenged action in relation to the creation of the various zones is the dissemination of information, which any Minister is entitled to do without statutory authority under the residual freedom. We must decide whether the exercise of that residual freedom would be inconsistent with the Act, or, to use the term coined by Mr Goddard, whether the Act "occupies the field".[60]

[111] The High Court Judge considered that the red zone decision was of a kind contemplated by the Act. He found that the Minister was required to use his s 27 power to create the red zone.[61]

[112] Mr Cooke supported the High Court Judge's finding. He submitted that the CER Act sets out a comprehensive regime for taking action necessary to recover from the Canterbury earthquakes, and that the Act contains specific powers that cover the challenged decisions. He said that the Act established relevant powers for earthquake recovery, and did so in a manner involving the planning and implementation of that recovery by the Crown through the Recovery Strategy and Recovery Plans. He also relied on the specific powers of the Minister in s 27 to alter the status of land under the RMA, and the powers of the Chief Executive to

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60 See [79]–[80] above.
61 High Court judgment, above n 1, at [70].

disseminate information under s 30 and acquire property under s 53. As the measures adopted by the appellants are specifically covered by those sections of the Act, Mr Cooke submitted that the appellants had to use those statutory powers, within the statutory procedural framework that Parliament had put in place.

[113] By contrast, Mr Goddard submitted that in enacting the CER Act Parliament did not intend to displace the Crown's ability to publish information or enter into contracts under the residual freedom. The Act was intended to supplement, not restrict, the Crown's ability to respond to the earthquakes. He also submitted that the Judge's conclusion that the Minister should have used his s 27 power to create the red zone was in error, because action taken under s 27 would have a significant intrusive effect on the rights of red zone property owners, contrary to what actually happened which has not affected legal rights.

[114] In the parliamentary debates on the first reading of the Bill that became the CER Act, the Minister clearly contemplated that the red zone decision was the type of decision that would be taken under the Act. He said:[62]

> Only those powers considered necessary have been provided for, and they fall into a series of broad groupings. The first is information gathering, reports, and investigations. These powers are necessary, as critical decisions must be based on accurate information. Most notably here, gathering information for a large data set that will help make informed decisions about the future viability of some streets and, indeed, some suburbs in Christchurch is absolutely essential. This information must be able to be shared to ensure appropriate levels of consultation, and explanation of the decisions made.

[115] We have considered whether the powers in the Act are such that they should be seen as covering the field in relation to the matters dealt with in the June 2011 decision.

[116] As noted earlier, the Recovery Strategy is the key document in the CER Act. Under s 11(3) the Recovery Strategy is expressed to be:

> ... an overarching, long-term strategy for the reconstruction, rebuilding, and recovery of greater Christchurch, and may (without limitation), include provisions to address—

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62 (12 April 2011) 671 NZPD 17899.

(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 ...

[117] It could have been expected that decisions as far reaching as the June 2011 decision would have been foreshadowed in the Recovery Strategy, which could then have been subject to the consultation processes mandated by the CER Act. But in the present case, the decisions were made, and it is clear they needed to be made, well before the Recovery Strategy process was able to be completed. Earthquake recovery objectives necessitated the earlier decision making.

[118] The Recovery Strategy published in May 2012 said that when the CER Act was passed, it was thought that the Recovery Strategy might address "areas where rebuilding or other redevelopment may or may not occur, and the possible sequencing of building or other development". It went on to say that the Strategy had not been able to address all issues, partly because of ongoing seismic activity. So although one would have expected the matters dealt with in the June 2011 decision to be dealt with in the Recovery Strategy if the timing had been right, the position in the present case is that that was not a practicable solution.

[119] Another possibility is s 27, but we do not consider that that addresses the matters dealt with in the June 2011 decision. Section 27 involves the use of coercive powers which override planning documents, and that is not what the red zone decision did or sought to do. As noted earlier, no compensation is payable under s 27.[63] In June 2011 the Crown was not looking at the exercise of statutory powers of compulsion.

[120] Another possibility is the use of a Recovery Plan. Under s 16, the Minister may direct that a Recovery Plan for all or part of greater Christchurch be developed for his approval. In the present case, if that step had been taken, it could have been anticipated that CERA would be the body directed to prepare the Recovery Plan relating to the matters covered by the June 2011 decision. Under s 18(1) a Recovery

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[63] Above at [63].

Plan must be consistent with the Recovery Strategy. However, perhaps anticipating the situation that arose in this case, where important decisions needed to be undertaken before the Recovery Strategy was completed, s 18(2) allows for a Recovery Plan to be developed and approved before the Recovery Strategy is approved. In that event, the Recovery Plan must be reviewed when the Recovery Strategy has been approved and then amended if necessary to ensure that it is consistent with the Recovery Strategy.

[121] It would have been possible for the Minister to direct that the Recovery Plan process be adopted in relation to the matters covered by the June 2011 decision. But the use of the Recovery Plan process would have been awkward fit, given the nature of the decisions taken. We say that because under s 23 any person exercising functions under the RMA is prohibited from making a decision or recommendation that is inconsistent with the Recovery Plan on any of a number of specified matters, including applications for resource consent. Given that the intention of the June 2011 decision was to make no modifications to the RMA regime, the Recovery Plan mechanism would have had to be somewhat strained to give effect to the June 2011 decision. It may have been possible to include provisions in the Recovery Plan itself providing for such flexibility so that s 23 would not have any practical effect, but that would have required some straining of the statutory scheme.

[122] Accordingly, although we believe that the Recovery Plan mechanism could possibly have been adapted to provide a statutory mechanism for the June 2011 decision, we do not think that it is sufficiently aligned with what actually occurred in this case for us to be able to say that the intention of Parliament was that the Recovery Plan process was the mandatory mechanism for decisions of the type made in June 2011.

[123] Another possibility is s 30. On the face of it s 30 seems to describe exactly what happened in relation to the creation of the zones. Under s 30(1) the Chief Executive "may disseminate information and advice on matters relating to work and activities under this Act". In the present case the dissemination of information was undertaken by Ministers rather than the Chief Executive. But if the announcements

in relation to the June 2011 decision had been made by the Chief Executive, it is likely that this would have been seen as an exercise of the s 30 power.

[124] Section 30 comes immediately after s 29, which provides the Chief Executive with the power to require that a person give the Chief Executive information in their possession, which is capable of being provided without unreasonable difficulty or expense. Mr Goddard submitted that s 30 applies only to information obtained under the power in s 29, rather than to any information at all relating to work and activities under the Act. We do not accept that: there is nothing in s 30 that indicates that it should be read down in that way. Section 30 applies to "information and advice on matters relating to work and activities under this Act". Section 29 does not refer to "advice" and does not use the qualifier "relating to work and activities under the Act." This suggests that s 30 is a standalone power independent of s 29.

[125] We consider that information of the kind dealt with in the June 2011 decision is information and advice to which s 30 refers, and that the Parliamentary intention appears to have been to empower the Chief Executive to disseminate information of that kind.[64]

[126] However, there is nothing in s 30 (or elsewhere in the CER Act) that indicates any intention to restrict Ministers' abilities to communicate with the public on matters relating to their portfolios or, indeed, any other matter of interest to the public. Given that this sort of communication with the public is an important part of the everyday operation of Government, it could be expected that if Parliament intended to restrict it, it would do so in clear language. In the absence of any clear signal to that effect from the statutory wording, we conclude that no such restriction was intended or imposed.

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[64] In its submission to the Select Committee on the Bill that became the CER Act, the Legislation Advisory Committee questioned the need for cls 31 and 32 of the Bill (empowering the Chief Executive to commission reports and conduct investigations) because these were inherent powers of a Government Department and identifying them in the legislation could create an implication that the CERA did not have other, similar powers: Local Government and Environment Select Committee *Hearing of Evidence on the Canterbury Earthquake Recovery Bill* (14 April 2011) at 22 and 42–43.

[127] We have no doubt that the dissemination of information and advice by Ministers is an action authorised by the residual freedom, as long as legal rights are not affected by it. That would be so even if a narrow interpretation of the scope of the residual freedom is adopted. As noted earlier, we do not consider that the red zone decision did affect legal rights. So we are satisfied that, in the circumstances of this case, the red zone decision and the dissemination of information and advice in accordance with that decision did not require specific statutory authorisation and was lawfully made under the residual freedom.

[128] If we are wrong about that, then statutory authorisation for the dissemination of information would be provided by s 30 of the CER Act, but only for the Chief Executive. In the present case, the information was disseminated originally by the Prime Minister and the Minister, but was then also disseminated by CERA through its website. The record that we have of the June 2011 decision, the report to Cabinet of 24 June 2011, makes it clear that the decision was focused on the recovery objectives described at paragraph 20 of the paper,[65] and therefore complied substantially with the requirements in s 10(1) of the CER Act that decisions made under the Act be made in accordance with the purposes of the CER Act.

[129] If the s 30 power ought to have been used in relation to the dissemination of information, the only non-compliance with the provision would appear to be that the first dissemination of information was by the Prime Minister and the Minister, rather than by the Chief Executive. We see that as a matter of no practical consequence and certainly not of such significance as to require the issuing of a declaration or any orders affecting the validity of the June 2011 decision.

[130] In summary, on this issue we conclude that the June 2011 decision resolved to disseminate information and to make offers to the affected landowners.

[131] As the red zone decision and the dissemination of information by Ministers in accordance with it did not affect legal rights, that decision was lawfully made under the residual freedom. If, contrary to that conclusion, the dissemination of information required statutory authorisation, s 30 of the CER Act provided such

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[65] Quoted below at [138].

authorisation to the Chief Executive, but not Ministers. In the present case the dissemination of information was initially made by Ministers rather than the Chief Executive, but if we had had to decide the point we would have found that to be a trivial matter, not justifying any relief, given the red zone decision was made in accordance with s 10(1) of the Act.

[132] The statutory power to make offers was given under the legislation to the Chief Executive. The Cabinet decisions authorising the Chief Executive to make the 100 per cent offers needed to be made in anticipation that he would exercise those statutory powers. He did, in fact, do so in relation to the 100 per cent offers, and there is no suggestion that he failed to comply with s 10 of the CER Act or otherwise acted unlawfully in doing so.

[133] We conclude that the June 2011 decision was lawfully made. We respectfully disagree with the High Court Judge's finding to the contrary.

Did the Chief Executive act consistently and comply with the CER Act in making the September 2012 decision?

[134] The decision to make the 50 per cent offer in September 2012 was, like the decision to make the 100 per cent offer in June 2011, an exercise by the Chief Executive of the statutory power in s 53 of the CER Act. It is not, therefore, necessary to ask or answer whether that decision could be made only pursuant to the provisions of the CER Act because there is no dispute that the decision was, in fact, made under the CER Act.

[135] We heard two arguments from the respondents about why the 50 per cent offer was unlawful:

(a) First, that the 50 per cent offer did not comply with the recovery purpose of the CER Act, set out in s 3.

(b) Second, that in making the 50 per cent offer the Government did not comply with a public law duty to act consistently. This argument was also framed in the language of unreasonableness, in that it would be

unreasonable to treat insured and uninsured property owners differently because they were equally placed.

[136] Our conclusion is that the 50 per cent offer was not made in accordance with the recovery purposes of the Act as set out in s 3.

[137] The decision made by the Chief Executive to make the 50 per cent offers was authorised by Cabinet. As the analysis of the Cabinet decision set out earlier in this judgment demonstrates, the Cabinet deliberation did not take into account the purposes of the CER Act as set out in s 3.[66] That can be contrasted with the Cabinet deliberations in relation to the June 2011 decision, where that did happen.

[138] For example, in relation to the June 2011 decision, Cabinet expressly recorded the recovery objectives of the Act, and made offers calibrated to allow insured home owners in the red zone to move on with their lives with confidence, simplicity and certainty. The following extracts from the Cabinet paper illustrate this:

> *Recovery objectives*
>
> 20 The government is committed to supporting a speedy recovery for people and businesses in the Greater Christchurch area, and it accepts that recovery will be a long-term activity and that it is important that recovery is underway quickly. It was with this in mind that the Canterbury Earthquake Recovery (CER) Act 2011 was enacted, to ensure that through the Canterbury Earthquake Recovery Authority (CERA) it could among other things:
>
> - 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.
>
> - Enable a focused, timely and expedited recovery.
>
> Facilitate, co-ordinate and direct the planning, rebuilding and recovery of affected communities, including the repair and rebuilding of land, infrastructure and other property.
>
> ...
>
> 50 The government could allow the various insurance schemes and policies in place in the Red Zones to play out without any

[66] At [35] to [49] above.

> intervention. This may result in protracted individual settlements for the affected occupants given the great uncertainty regarding when, or if, or on what terms, repairs or rebuilds could take place in these areas given the ongoing uncertainty of and risk management with respect to the underlying geotechnical state of the land. This simply would not meet the government objectives of certainty, confidence for landowners or a simplified process.
>
> 51 As the status quo does not meet the government's objectives, the government should act to provide the certainty, simplicity and confidence that insured residential landowners in the Red Zones require. I consider that that the best mechanism for doing this is for the Crown to make an offer to purchase insured residential Red Zone properties.
>
> 52 As a result of these offers there is unlikely to be any justification in the near to medium term for the infrastructure and services in these areas to receive any more than temporary repairs. The relevant Councils will be asked to discuss any proposed maintenance and repair plans, for the infrastructure in these areas, or any proposed regulatory interventions for the areas.

[139] The Cabinet paper then went on to explain the 100 per cent offer in the terms set out at [28] above.

[140] By contrast, the purpose of recovery from the earthquakes was not brought to bear in the September 2012 decision making process. The 3 September 2012 Cabinet minute set out three "good reasons" for not extending the 100 per cent offer to properties without insurance: it would compensate for uninsured damage, it would be unfair to those who had paid for insurance, and it would create a moral hazard. Recovery was not mentioned. The 31 August 2012 Cabinet paper, referred to above at [41], indicated that the 50 per cent offer would provide "some support for recovery elsewhere", but the focus of that document remained on the three reasons identified in the final Cabinet minute of 3 September.

[141] The Chief Executive said in his evidence that he considered it was necessary to make the 50 per cent offers that Cabinet had authorised for the purposes of the earthquake recovery, which we take as an assertion that he did, in fact, comply with s 10(1) of the CER Act. However, the mere assertion of that position after the fact in the face of the contemporary documentation showing the statutory requirements were not, in fact, drawn to Cabinet's attention in relation to its underlying policy decision does not satisfy us that the CER Act has been complied with. We agree

with the High Court Judge that this statement should not be interpreted meaning anything more than the fact that the Chief Executive understood the obligation imposed by s 10 of the Act.[67] It does not indicate that he actually complied with it.

[142] Mr Cooke argued that this failure to address the purposes of s 3 had a substantive impact on the decision. He noted that the CERA "initial thinking" paper dealing with the position of (among others) vacant land owners, which did expressly engage with the recovery purpose in s 3(a), recommended that the offers made to the owners of vacant land in the red zone be the same as those that had been made pursuant to the June 2011 decision to the insured residential owners (that is, 100 per cent of the rating value). He also attached significance to the fact that the final draft version of the Cabinet paper that became the paper presented to the Cabinet committee meeting of 22 June 2011 included within it a proposal that an offer be made to uninsured owners at 100 per cent of the land value, which, although less than the offer made to the insured owners, was twice as high as the offers ultimately made to the respondents. His argument was, essentially, that when the recovery objective had been brought to bear in the assessment of the available options, the result was quite different from, and considerably more generous than, the 50 per cent offer.

[143] We do not think that much can be derived from advice provided to decision makers that was not accepted, and thus not reflected in the decisions. What is important is compliance by decision makers with requirements of the CER Act, not what others recommended should occur. We do, however, acknowledge that, given that the statutory decision making power under s 53 is entrusted by Parliament to the Chief Executive, there may be some significance in CERA's views, assuming that they represent the views of the Chief Executive.

[144] Mr Goddard argued that the focus on the decision making power of the Chief Executive was flawed. First, the Chief Executive was obliged under the State Sector Act to act in accordance with the directions of his Minister. Second, the requirements of the Public Finance Act prevented the Chief Executive from making

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[67] High Court judgment, above n 1, at [87].

offers under s 53 for which Cabinet and, ultimately, Parliament had not made financial provision.

[145] We accept that the Chief Executive cannot lawfully make an offer under s 53 for which there is not the appropriate financial authorisation. But we do not think that can trump the clear requirement of the CER Act that the Chief Executive make his decision in accordance with s 10(1). In our view the Cabinet decision considering the way in which the respondents and others in similar positions would be dealt with needed to be made in light of the reality that the Chief Executive's decision would, itself, have to be made in compliance with s 10(1). The reality of this seems to have been acknowledged in the newly discovered Cabinet paper for the June 2011 decision (and the later report to Cabinet), but not in relation to the September 2012 decision.

[146] The problem with the September 2012 decision, therefore, as we see it, is that the Cabinet decision left the Chief Executive in a position where he was required to make a decision to make offers under s 53 in circumstances where there is nothing to indicate that he addressed the purposes of the CER Act set out in s 3, particularly the recovery objective in s 3(a), as he is required to do by s 10(1). We agree therefore with the High Court Judge's conclusion that the process leading to the September 2012 decision to make the 50 per cent offer did not involve the deliberative process required under s 10 of the CER Act and the decision was therefore made outside of, and without regard for, the statutory regime and hence not made according to law.

[147] The second argument on the September 2012 decision, put to us by Mr Rennie for Fowler, was that the September 2012 decision was flawed because there had not been even-handedness in the treatment of the recipients of the 100 per cent offer and Fowler (and the other respondents).[68] Mr Goddard's response to this was that there could be no requirement to treat Fowler in the same way as the recipients of the 100 per cent offer if Fowler's position was different. He said that the obvious difference between the position of Fowler and the other respondents and

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[68] Relying on a public law duty to act consistently and provide equal treatment to those evenly placed: Joseph, above n 34, at [22.2.4].

the recipients of the 100 per cent offer was the fact that they had less to sell to the Crown than the recipients of the 100 per cent offer.

[148] In essence, the offer made to Fowler was to buy its land, whereas the offer made to the insured residential property owners was to buy their land and improvements, their rights against EQC and their rights against their insurer. Mr Goddard pointed out that the forecast expenditure in relation to the 100 per cent offer was a gross amount of $1.7 billion, but a net amount of between $485 million and $635 million, indicating that the Government anticipated deriving value from the assignment of rights against EQC and insurers of greater than 50 per cent of the amount expended on the 100 per cent offer. In those circumstances, he asked rhetorically, what was uneven about the 50 per cent offer?

[149] The force of that submission is lessened somewhat by the newly discovered paper dated 21 June 2011, which seems to be the paper actually considered by the Cabinet committee on 22 June 2011. As noted at [26] above, that paper did not have details of the financial ramifications of the 100 per cent offer. It is hard to argue, therefore, that the extent of the likely recoveries from EQC and insurers in relation to properties purchased pursuant to the 100 per cent offer loomed large in the decision making. That said, however, the same paper does highlight the crucial difference between insured and uninsured property owners in the red zone and makes a clear choice to limit the 100 per cent offer to those with insurance cover.

[150] We accept that there is a rational basis for differentiating between insured residential property owners and uninsured owners such as the respondents, given the potential value to the Government of the rights against EQC and insurers that were assigned to the Government under the contracts resulting from the 100 per cent offers. That is the very differentiation made in the June 2011 decision and the September 2012 decision. We do not accept that the mere fact that a different approach was taken in relation to the respondents than in relation to the recipients for 100 per cent offers constitutes a reviewable error.

[151] In addition to the argument about lack of even-handedness, it was argued that the September 2012 decision was unreasonable because it focused on the "moral

hazard" risk of paying uninsured owners the same amount as insured owners, apparently on the basis that this would encourage home owners not to insure, if they believe that the Government would bail them out in the event of a disaster. That, of course, assumes that all of the uninsured owners in the red zone were uninsured because of a deliberate decision on their part.

[152] In fact, that is not the case. A number of the Quake Outcasts were left uninsured because of slip ups such as failure to pay premiums, time lapses between the commencement of cover under one policy after the termination of cover under another policy, and the like. We do not intend to deal with the personal position of individual members of the Quake Outcasts, because we see the case as being determined by principles that apply on a more generic level. While the recipients of the 100 per cent offers have, for the main part, been able to apply the proceeds of the Crown offer towards buying a new home elsewhere, many of the respondents are left in a very precarious position because of the very significant shortfall between the amount derived from the offer and the cost of acquiring a home elsewhere. In many cases they are retired and not in a position to take on any significant debt. We acknowledge the significant impact this is having on their lives.

[153] We do not see this argument as adding anything to the argument that the September 2012 decision was not made in accordance with s 10(1) of the Act, because the recovery objective of the Act was a mandatory relevant consideration that was not taken into account. Given that failure, we must now address what remedy is appropriate, if any.

Was the High Court right to grant the relief that it granted?

[154] The relief granted by the High Court in relation to the September 2012 decision was as follows:

(a) a declaration that the September 2012 decision was not made according to law and an order setting aside that decision and the offers subsequently made to Fowler and the members of the Quake Outcasts (the affected offerees) by the Chief Executive; and

(b) a direction that the Minister and the Chief Executive reconsider and reach a new decision to purchase the properties of the affected offerees, such decision to be made in accordance with law:

(i) as required by the purposes and principles of the CER Act, and

(ii) with regard paid to the reasons contained in the High Court judgment.

[155] The respondents sought to uphold those orders. The appellants argued that the Judge was wrong to set aside the September 2012 decision, because it was a Cabinet decision, nor should the order have affected the announcement of that decision by the Minister. Mr Goddard also argued that the Minister should not have been directed to reconsider, because he did not exercise any statutory power in connection with the making of the September 2012 offers.

[156] We agree that the focus of relief ought to have been on the decision made under s 53 of the CER Act, namely the decision by the Chief Executive to make the 50 per cent offer to the affected offerees and to other uninsured owners of properties in the red zone. We agree with Mr Goddard that the Cabinet decision did not, of itself, involve the exercise of a statutory power. In any event, we do not see that there was any necessity to make orders relating to the Cabinet decision or the Minister's announcement of it, because the decision which affected the interests of the affected offerees was the decision under s 53 by the Chief Executive, not the policy decision made by Cabinet that preceded it. The fact that the former was greatly influenced by the latter does not change that legal analysis, though it highlights the point we have already made that Cabinet ought to have been advised that the decision would need to be implemented through the CER Act and the decision had to be made in accordance with the requirements of the CER Act, so authorisation by Cabinet of a non-complying decision exposed the consequential decision of the Chief Executive to review.

[157] The High Court Judge accepted that he could not grant relief in relation to the Cabinet policy decision, but saw the Minister's announcement of that decision as separate. We prefer to approach the matter by focusing on the statutory decision of the Chief Executive to which the requirements of the Act applied.

[158] A controversial aspect of the relief granted in the High Court was that the order to reconsider the September 2012 decision applied only to offers made to the affected offerees, and therefore did not affect offers made to any others in the same position as the affected offerees. The practical reality is that many people in the same position as the affected offerees have already accepted offers and in some cases settled the sale of their properties, so for those who are not party to the present proceedings an order that the decisions be reconsidered would be problematic.[69]

[159] Mr Goddard argued that confining the grant of relief to the affected offerees was inappropriate, for a number of reasons:

(a) the decision made by the Chief Executive was to make offers to all of the relevant property owners in the red zone, not just to the affected offerees;

(b) the Crown had irreversibly altered its position by entering into agreements with many property owners based on the September 2012 decision;

(c) the order was inconsistent with the respondents' argument that all cases should be treated alike; and

(d) the order failed to take into account the obligations of the Chief Executive under the Public Finance Act.

[160] We accept the validity of these arguments. If the Court requires reconsideration of the offers only in so far as they relate to the affected offerees, this is effectively allowing what had been found to be unlawful offers to remain extant in

[69] Some of the respondents had also accepted offers, but on the basis that their ability to pursue the present proceedings was not prejudiced by having done so.

relation to offerees who are not party to the present proceedings. It also fails to address the legitimate concern that the Chief Executive cannot be placed in a position where he is required to make an offer on terms that exceed his financial authority.

[161] All of this leads us to conclude that better course is simply to make a declaration that the Chief Executive did not comply with the CER Act in making the 50 per cent offer, and leave it to the appellants to determine the appropriate response to that declaration. During the course of the hearing we discussed with counsel the likely response of the appellants to a declaration of this nature, and Mr Goddard confirmed that the appellants accept that the making such a declaration triggers an expectation that the Crown will respond to it.[70]

[162] We are satisfied, therefore, that if relief is to be granted, then it should be confined to a declaration.

[163] However, Mr Goddard also argued that relief should be declined in the exercise of the Court's discretion.

[164] Much has been said in recent years in this Court about the discretion to decline relief in judicial review cases. In *Air Nelson Ltd v Minister of Transport*, the Court recorded that public law remedies are discretionary, but added that there must be "extremely strong reasons" to decline to grant relief.[71] However, in later cases, a more nuanced approach has been taken.[72]

[165] Much of the discussion about the discretionary nature of relief in the written and oral submissions was against a background of a possible finding that the red zone decision was unlawful. The discussion focused on the delay mounting the challenge to the red zone as well as the very significant practical inconvenience if a decision that had had such wide ranging effect on the people of Christchurch and had

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70 *Re M* [1994] 1 AC 377 (HL) at 397.

71 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [59]–[61]. See also *Unison Networks Ltd v Commerce Commission* CA285/05, 19 December 2006 at [94].

72 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]; *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [117]; *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, (2012) 25 NZTC 20-143 at [89]–[91].

been acted on by large numbers of recipients of the 100 per cent offer were declared invalid.

Those considerations do not apply to the same extent to the September 2012 decision. In particular, it cannot fairly be said that delay is a significant factor, given that only a few months passed between the making of the September 2012 decision and the commencement of the present proceedings.[73] Similarly, the much smaller number of offerees under the 50 per cent offer, as compared to the 100 per cent offer, means that the logistical difficulties that would have applied to an order affecting the validity of the former do not apply to a declaration in relation to the latter.[74]

[166] We cannot see any valid reason not to make a declaration in relation to the September 2012 decision. The Crown will then be required to respond in a way which addresses the findings made by this Court. This will allow sufficient flexibility for a reconsideration of the policy relating to vacant land and uninsured residences in the red zone if necessary.

[167] Accordingly, we conclude that the making of a declaration is the appropriate outcome in the present case.

Result

[168] For the reasons we have set out, we allow the appeal in part. We set aside the orders made in the High Court, and in their place we make a declaration that the September 2012 decision by the Chief Executive to offer to purchase the properties of owners of vacant land and owners of uninsured improved properties in the red zone was not lawfully made.

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[73] Fowler filed its application for review five months after the announcement of the September 2012 decision, and before the time for accepting the Government's offer had closed. Quake Outcasts filed their application just under three months after Fowler's application was filed.

[74] The Cabinet paper noted that there are 65 vacant sections in the red zone and 50 uninsured improved properties. The June 2011 paper indicated that there were 5,176 total red zone properties at that time.

Costs

[169] Although the relief granted in this Court differs from that granted in the High Court, Fowler has been largely successful in upholding the High Court judgment, and for that reason is entitled to costs in this Court. The Quake Outcasts cast the net of their proceedings more widely, and in this Court have not succeeded in having the Judge's orders in relation to the June 2011 decision upheld. They have, however, upheld the finding that the September 2012 decision was not lawfully made, and the relief granted in this Court substantially vindicates their position. In the circumstances we consider they are entitled to their full costs as well. We therefore make an order that the appellants must pay both Fowler and the Quake Outcasts costs for a complex appeal on a band B basis, plus usual disbursements. We certify for two counsel in relation to both respondents (but not for three counsel in relation to the second respondents).

Leave reserved

[170] We reserve leave to apply for further directions in the event that there are any practical difficulties in relation to the relief granted in this Court.

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