IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI-2016-454-000023
[2016] NZHC 3098

BETWEEN	NEW ZEALAND POLICE Appellant
AND	PHILIP DEAN TAUEKI Respondent

Hearing:	12 October 2016 (Heard at Wellington)
Counsel:	F J Sinclair and F G Biggs for Appellant Respondent in person A Hunt - McKenzie Friend
Judgment:	16 December 2016

JUDGMENT OF ELLIS J

I direct that the delivery time of this judgment is 11 am on the 16th day of December 2016

[1] Mr Taueki is a well-known and passionate advocate for the care and preservation of Lake Horowhenua (the Lake) with which he feels a strong ancestral connection. His passion and his style of advocacy has caused him to be in a more or less permanent state of conflict with the Horowhenua Domain Board (the Board), local residents and the Council and, more recently, the Lake Horowhenua Trust (the Trust). The bed of the Lake, and much of the land surrounding it, is Māori freehold land, known as Horowhenua Block XI. Horowhenua Block XI is owned by the Trust. Mr Taueki is a beneficiary of the trust and (accordingly) a beneficial owner of the land.

[2] In the latest chapter of this conflict, Mr Taueki was served with a trespass notice, warning him to stay off certain buildings situated on Horowhenua Block XI. He was subsequently arrested and charged with trespassing in contravention of that notice, under s 4 of the Trespass Act 1980 (the TA).

[3] Judge Moss in the District Court dismissed the charge. Her basis for doing so was that the trespass notice was invalid because it had been issued by the Board, and the Board was not an "occupier" of the land as required by s 4 of the TA. Thus (she said) the Board could not lawfully warn Mr Taueki to stay off the land. The finding of invalidity was fortified by the Judge's concerns about the absence of a written resolution by the Board approving the issue of the trespass notice and about the authority of the person who served it on Mr Taueki to do so.

[4] The Police subsequently sought leave under s 296 of the Criminal Procedure Act 2011 to appeal Judge Moss's decision on three questions of law. Mr Taueki then sought leave to appeal on a single question that, in a sense, responded to the three Police questions. On 2 August 2016 Brown J granted leave to appeal on all four. This judgment is concerned with answering each of them.

[5] The approved Police questions are:

(a) was the District Court correct in law to hold that the Domain Board cannot issue a trespass notice because it is not an "occupier" for the purpose of s 4 of the Trespass Act 1980?

(b) was the District Court correct in law to hold that Mr Taueki could not be the subject of a valid trespass notice because of the rights reserved to the owners of the Horowhenua XI block under s 18 of the Reserves and Other Lands Disposal Act 1956?

(c) was the District Court correct in law to hold that the prosecution must be dismissed because there was no adequate evidence that the Domain Board had resolved to issue a trespass notice and no evidence that it had delegated the authority to trespass Mr Taueki to the person who served the notice on him?

[6] Mr Taueki's question is:

> As Mr Philip Dean Taueki is a direct descendent of Taueki who signed the Treaty of Waitangi on behalf of Taueki (Tauheke), and as these questions apply to ancestral lands that have belonged in fee simple estate to Mua-Upoko since a certificate of title was issued in 1899, will an affirmative response effectively nullify the Treaty of Waitangi upon which the jurisdiction of this Court is founded?[1]

Legislative Background

[7] As I have said, the bed of the Lake, and the surrounding land, is Māori freehold land. Title to it was granted in 1893. In 1898 the Māori Appellate Court determined the ownership of and relative shares in the land and ordered that it be vested in trustees. And so the trustees currently hold the land concerned on behalf of over 2,000 beneficiaries, including Mr Taueki.

[8] In 1905, Parliament enacted the Horowhenua Lake Act (the HLA), as a result of an agreement between representatives of the Muaupoko iwi and the government.[2] This agreement was subsequently referred to in the House, where the Attorney-General observed there "was no doubt the Natives had acted handsomely and generously".[3] The preamble to the HLA declared it:

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1 There is a clear error in the framing of this question in that it is a negative, rather than an affirmative, response to the Police questions to which Mr Taueki would take objection.

2 The Prime Minister, Richard Seddon, and the Native Minister, James Carroll.

3 (28 October 1905) 135 NZPD at 1206.

> ... expedient that the Horowhenua Lake should be made available as a place of resort for His Majesty's subjects of both races, in as far as it is possible to do so without unduly interfering with the fishing and other rights of the Native owners thereof.

[9] The HLA provided for a Board (which was deemed to be a Domain Board under the Public Domains Act 1881) to control 951 acres of the Lake, which was declared to be a public recreation reserve. One third of the Board members were to be Māori. Section 2 of the Act provided that the Māori owners were to have, at all times, the free and unrestricted use of the Lake and their fishing rights, but not so as to interfere with the full and free use of the Lake by the public for aquatic sports and pleasures.

[10] In 1916 control of the one chain strip around the Lake was also made subject to the HLA and control of it was vested in the Board.

[11] In 1934 a Committee of Inquiry investigated the Board's responsibilities, the effects that the relevant legislation had had on Māori ownership and rights over the Lake and its surrounds, and the effects of works that had been permitted by legislation in 1926. These works had lowered the level of Lake Horowhenua, creating a dewatered area between the lake itself and the one chain strip. Later, two buildings that were to house the Horowhenua Sailing Club and the Horowhenua Rowing Club were constructed on this dewatered strip.

[12] The status of Lake Horowhenua and the surrounding land was clarified by s 18 of the Reserves and Other Lands Disposal Act 1956 (the ROLDA), which remains in force today. Prior to the enactment of that legislation, the Crown had purchased from the Māori owners an area of 5.658 hectares known as Muaupoko Park, adjacent to the Māori-owned one chain strip.

[13] Section 18(2) of the ROLDA provides:

> Notwithstanding anything to the contrary in any Act or rule of law, the bed of the lake, the islands therein, the dewatered area, and the strip of land 1 chain in width around the original margin of the lake ... are hereby declared to be and to have always been owned by the Maori owners, and the said lake, islands, dewatered area, and strip of land are hereby vested in the trustees appointed by Order of the Maori Land Court dated 8 August 1951 in trust for the said Maori owners.

[14] Subsection (4) nonetheless reserves to the public the free right of access over, and the use and enjoyment of, the chain and dewatered strips fronting the Muaupoko Park.

[15] Critically, for present purposes, s 18(5) declares the surface waters of Lake Horowhenua, Muaupoko Park, and the part of the one chain strip and dewatered area between the park and the lake to be a public domain under the Reserves and Domains Act 1953 (the RDA). Māori title to the domain land was not affected by the declaration. Thus, s 18(5) continues:

> ... provided ... that the Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the [domain] ... and of their fishing rights over the lake and the Hokio Stream, but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under this section, to use as a public domain the lake and the ... land ... .

[16] Section 18 also directs that a Board was to be appointed to control the domain in accordance with the RDA. Half of the Board's membership would comprise persons appointed by the Minister of Conservation on the recommendation of Muaupoko. The purpose of this provision was to ensure that the Māori owners of the lake bed were appropriately represented on the body controlling the public domain. Other members were to be the Director-General of Conservation as chair and three persons appointed by the Minister on the recommendation of the local and territorial authorities. In 1961, the trustees holding the land granted the Crown a lease in perpetuity over a section of lake bed adjacent to the public domain at a nominal rental.

[17] The RDA was replaced by the Reserves Act 1977 (the RA). In 1981 the domain was classified as a "recreation reserve" and the Board has continued to operate as a "Reserve Board" under that Act.[4] As under the 1953 Act, the Domain Board has power to make bylaws for the management and preservation of the reserve and other purposes listed in statute. Section 40 provides that, as an "administering body" under the RA, the Board has "the duty of administering, managing, and controlling the reserve." The Board also holds powers under s 53, including the

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4 "Classification of Reserve" (9 July 1981) 80 *New Zealand Gazette* 1920.

power to close the area, grant exclusive use for limited periods, erect stands and structures, and set apart areas for camping, parking or footpaths.

Other relevant litigation involving Mr Taueki

[18] As noted earlier there has been a long history of antagonism between Mr Taueki and others over the use of the Lake and the surrounding land and buildings on it. This antagonism has, on occasion, resulted in criminal charges being laid against him and, on others, resulted in other forms of litigation. For present purposes it suffices to note the following.

[19] First, in 2008 Mr Taueki was charged with assaulting two members of the Horowhenua Sailing Club. He admitted intentionally applying force to their persons but claimed that he had a defence under s 56 of the Crimes Act 1961, which essentially provides that every person who is in peaceable possession of any land or building is justified in using reasonable force to prevent any person from trespassing on, or to remove him or her from, the land or building in question. Mr Taueki's position was that he had been acting with the authority of the Trust to act as kaitiaki of the Lake and its surrounds and to ensure that the bylaws (promulgated by the Board) were enforced.

[20] Mr Taueki was convicted on both charges but was granted leave to appeal to the Supreme Court on one of them. The Court ultimately dismissed his appeal.[5] The focus of the Court's decision was on whether it could be said that Mr Taueki was in "peaceable possession" of the land in question. It is the discussion of the meaning of "possession" in this context that is potentially relevant here. In that regard the Court concluded:

> [58] Possession, as required by s 56, accordingly turns on whether the person raising the defence has actual control over the property in question. Whether a person has sufficient control to be in possession is a factual question turning on all the circumstances including, for example, the nature of the land in question and the manner in which it is usually enjoyed.

[21] Later, and in terms of the case before it, the Court said:

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5 *Taueki v R* [2013] NZSC 146; [2014] 1 NZLR 235.

> [66] The statutory overlay is an unusual feature of the present case because it regulates in a specific way the rights of the trustees, the beneficial owners of the land, and the public (including the Club members). The incident took place on land in front of the clubhouse, which was within the public domain. Section 18(7) of the Reserves and Other Lands Disposal Act directs that the Domain Board (rather than the Maori owners) is to control the domain. At the time of the incident the Domain Board was, consistently with that legislative provision, exercising actual control over the land where the incident occurred. For example, it had made bylaws regulating public use of the domain, and had entered into arrangements with the Club for use of the land and lake.
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> [67] These circumstances would not necessarily preclude Mr Taueki from being in possession if he nevertheless exercised a sufficient degree of control over the land where the assault took place. But we are satisfied that Mr Taueki was not in possession of that area as required by s 56. While the Reserves and Other Lands Disposal Act reserved to the Maori owners, of whom Mr Taueki was one, the "free and unrestricted use" of the lake and domain, this right of access to the lake and land does not confer any control over, or amount to possession of, the same especially given the nature of the land as a public domain. Nor is there any evidence that Mr Taueki had asserted or was exercising any actual control over the part of the domain in front of the clubhouse. He was not occupying the area where the incident occurred nor using it for his own purposes. On the other hand, the Club was actively occupying the area for its own purposes. On these facts, Mr Taueki did not have actual control. Given that Mr Taueki was not in possession of the land where the assault took place, the issue of "peaceable" possession does not squarely arise.
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> [68] Nor was Mr Taueki lawfully assisting or acting by the authority of a person in peaceable possession. It is not necessary to decide whether either (or both) of the Trust or the Domain Board was in possession or peaceable possession of that land because it is clear that the Trust had not asked for Mr Taueki's assistance or authorised him to forcibly prevent trespass or evict trespassers. There has not been any suggestion that the Domain Board had done so either.

[22] Secondly, in 2012 Mr Taueki brought proceedings in the Māori Land Court against the Horowhenua District Council in relation to alleged contamination of the Lake and the use of the buildings on the dewatered strip by the Horowhenua Sailing and Rowing Clubs.[6] In the context of the present proceedings the Court's decision is notable for its statement that:[7]

> ... It is the Trust that is the legal owner of the land and all of the responsibilities of and attendant to ownership are vested in the Trust subject to the role of the Board. It is well settled that where land is vested in trustees they retain control and access. As the Māori Appellate Court held in *Eriwata*

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6 *Taueki v Horowhenua District Council – Horowhenua (11) Lake* (2012) 294 Aotea MB 236 (294 AOT 236).

7 At [21]-[22] (footnotes omitted).

v Trustees of Waitara SD s6 and 91 Land Trust Waitara SD 26 and 91 Land Trust:

> The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Maori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

Then again at paragraph [8] of the judgement the Appellate Court makes the point that even owners can be subject to injunctions and trespass orders where they attempt to enter and occupy the land without the permission of the trustees:

> As a matter of general law, when legal ownership is vested in trustees they are prima facie entitled to an injunction if the land is trespassed upon whether by a beneficial owner or not. It is for them to control the land. They have a power to permit occupation. That is the power that is vested in them. It is not vested in the Court, and so long as they are acting within the terms of their trust order, then the Maori Land Court will not interfere.

[23] As well, the Court found that the buildings previously used by the Clubs were the property of the Trust. The Court noted that both the Domain Board and the Department of Conservation accepted that the Clubs had no right to occupy the buildings or the land but that the Board could, in consultation with the Trust, issue the Clubs with licences to occupy.

[24] Thirdly, in 2015 the Trust brought proceedings in the Māori Land Court seeking to injunct Mr Taueki from continuing to occupy a converted skyline garage on land owned by the Trust adjacent to the Lake.[8] In the course of his judgment

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[8] *Horowhenua 11 (Lake) Part Reservation Trust v Taueki – The Horowhenua 11 (Lake) Block* (2015) 343 Aotea MB 254 (343 AOT 254). The building was located near the area controlled by the Domain Board.

granting the injunction Judge Doogan noted that, on 3 April 2014, the trustees had passed the following resolution:[9]

> ... the Lake Trust authorises the Lake Domain Board to take any action it considers appropriate in relation to any unauthorised entry by Phil Taueki into the buildings administered by the Lake Domain Board, such as the buildings commonly known as the rowing club buildings and the Horowhenua Sailing Club building, including but not limited to serving a trespass notice.

[25] The Court later observed:[10]

> Mr Taueki asserts an exclusive right to occupy. The extent of his rights as a beneficial owner are, however, at law no different from those he shares with all the other beneficial owners. As the Supreme Court has made clear, the rights recognised under the ROLD Act do not confer on the beneficial owners any control over, or amount to possession of the land. His rights as a beneficial owner do not confer such an entitlement.

[26] The Māori Appellate Court later rejected Mr Taueki's challenge to the injunction.[11]

This case

The alleged trespass

[27] On 30 October 2015, Mr Kriven, an employee of Main Security, served a trespass notice on Mr Taueki. The notice records that the Domain Board, as lawful occupier, had reasonable cause to suspect Mr Taueki was trespassing or was likely to trespass in the Rowing Club building and the Sailing Club building. The notice warned Mr Taueki to stay out of the buildings. The notice is signed by Mr Krivan as the "duly authorised agent" of the Domain Board.

[28] According to the Summary of Facts, at about 4:00 pm on 11 November 2015, Mr Taueki parked his car outside the Rowing Club building.[12] He proceeded to enter the building through the front door. The Police were called and observed Mr Taueki walking inside the building. When spoken to, Mr Taueki acknowledged he had been

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9 At [16].
10 At [91].
11 *Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake) Block* [2016] Māori Appellant Court MB 184 (2016 APPEAL 184).
12 It is necessary to refer to the Summary because the evidence at trial was not completed.

served with a trespass notice. He said in explanation "the trespass isn't worth the paper it's written on". The trespass charge followed.

The District Court trial

[29] The case was heard before Judge Moss, sitting alone, on 5 May 2016.

[30] Mr Krivan's evidence about serving the notice was not challenged. The notice was produced in evidence. The chairman of the Domain Board, Mr McKenzie, gave evidence that the Domain Board administers the Domain, including the Rowing Club buildings.

[31] He explained that on 30 October 2015 the Domain Board passed a resolution to trespass three individuals, including Mr Taueki, from the buildings in the Lake Domain, including the Rowing Club building. Mr McKenzie said that Main Security was employed to serve the trespass notice.

[32] Mr McKenzie accepted in cross-examination that the Domain Board was not the "occupier" of the Rowing Club building, but said that the Board administered that building. He explained that members of the Lake Trust had been spoken to before the Domain Board determined to trespass Mr Taueki.

[33] At the conclusion of this evidence, the Court ascertained that the remainder of the prosecution witnesses would give evidence only about what happened on 11 November 2015. Judge Moss then said that she did not need to hear from those witnesses because the prosecution "haven't proved the fundamentals of the case".

[34] The Judge issued an oral decision that same afternoon.[13] She noted that a prosecution for trespass was contingent on the prosecution being able to prove that the issuer of the trespass notice was an "occupier" of the land in question. She said:

> [8] To occupy is, as I said earlier, surprisingly little discussed and defined by legislation. By dictionary it is defined as the right to control or possession of a place. The control by the Domain Board is subject to the legislation enabling it and it is enabled to control the public domain. But, of course, as I have already said that is limited by s 18(5) Reserves and Other

[13] *Police v Taueki* [2016] NZDC 8014.

> Lands Disposal Act and it is also limited by specific powers contained in the Reserves Act in s 17(40) and (53). The Domain Board is the administering body exercising power under s 40 Reserves Act but it is subject to the limits in s 53 and it is in my view limited by the overriding presence of freehold owners who have their s 18(5) entitlements.
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> [9] Thus in terms of control I do not consider that the Domain Board is in occupation as it is generally understood and as the meaning can be understood from various legislation such as the Land Transfer Act, the Residential Tenancies Act 1986 and the Domestic Violence Act 1995.
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> [10] If I am wrong, alternatively I consider that s 18(5) rights of Maori owners cannot be ousted by a trespass notice. Owners have a free and unrestricted use of the land even if another is in occupation unless by lease or the like. To give meaning to the unrestricted use proposition is to require that the owners may not be excluded. Any limit on use by Maori owners, for instance, to enable improvement of the recreational facility which is envisaged in s 53 or for specific events which is also envisaged in s 53 does not amount to enabling the Domain Board to have the status of occupier. Thus, in my view, the prosecution has not and indeed cannot prove that the Domain Board which purported to issue the notice is in occupation.

[35] Judge Moss had earlier noted Mr McKenzie's evidence to the effect that the rowing club "does not occupy the building", although in fact his concession was that the Domain Board was not the occupier.

[36] The Judge's view about occupation was fortified by what she termed "fatal problems with proof" relating to the trespass notice.[14] In particular, she said there was:

(a) an absence of documentary evidence in relation to the Domain Board's resolution to issue the trespass notice; and

(b) an absence of evidence about who was delegated to sign the trespass notice, or that the person who did sign the notice was the Doman Board's authorised agent.

[37] The Court concluded that "both in terms of the occupation issue and the validity of the notice I am not satisfied that this prosecution can succeed".[15] She dismissed the charge.

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[14] At [11].
[15] At [12].

The appeal questions

[38] I have set out the approved questions above. I address each in turn.

Question one: Was the District Court correct in law to hold that the Domain Board cannot issue a trespass notice because it is not an "occupier" for the purpose of s 4 of the Trespass Act 1980?

[39] Section 4 of the Trespass Act 1980 relevantly provides:

> **Trespass after warning to stay off**
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> (1) Where any person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time thereafter, warn him to stay off that place.
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> (2) Where an occupier of any place has reasonable cause to suspect that any person is likely to trespass on that place, he may warn that person to stay off that place.
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> ...
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> (4) Subject to subsection (5) of this section, every person commits an offence against this Act who, being a person who has been warned under this section to stay off any place, wilfully trespasses on that place within 2 years after the giving of the warning.
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> (5) It shall be a defence to a charge under subsection (4) of this section if the defendant proves that—
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> (a) The person by whom or on whose behalf the warning concerned was given is no longer an occupier of the place concerned; or
>
> (b) It was necessary for the defendant to commit the trespass for his own protection or for the protection of some other person, or because of some emergency involving his property or the property of some other person.

[40] The term "occupier" is defined in s 2 to mean:

> in relation to any place or land, ... any person in lawful occupation of that place or land; and includes any employee or other person acting under the authority of any person in lawful occupation of that place or land.

[41] Notwithstanding the observation by Judge Moss that there the concept of occupation was "surprisingly little defined" it has been considered by the Court of Appeal in both *Polly v Police* and, more recently, *Police v Abbott.*[16]

[42] In *Polly*, the Court said: [17]

> The phrase "in lawful occupation" where used in s 2(1) of the Trespass Act is appropriate to describe the status of a person who has the right for the time being to control the place or land.

[43] In *Abbott* the Court was concerned with who was the "occupier" of a public road. Mr Abbott had been involved in a protest against the redevelopment of part of central Christchurch. He entered a fenced-off work site that was designated as a road. After being warned to leave he was arrested and charged under the TA. His conviction in the District Court was overturned by the High Court on appeal, on the grounds that the Council "was not by reason of statute an occupier with exclusive right of possession" such that it could invoke the Act.[18]

[44] The Court of Appeal disagreed. The Court's reasoning focused not on legal ownership of the road[19] but on:

(a) the Council's power to control roads under s 317 of the Local Government Act.[20]

(b) its earlier decision in *Polly.*[21]

[45] The Court held that the TA could operate in relation to a public place to which the public have a statutory right of access.[22] Accordingly the Council was an occupier capable of issuing a trespass notice.

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16 *Polly v Police* [1985] 1 NZLR 443 (CA); *Police v Abbott* [2009] NZCA 451, [2009] NZAR 705.

17 *Polly* at 448. In that case an assistant manager of a hotel was sufficiently in control of the hotel, acting on behalf of the hotel company who employed him. The Court were also satisfied that the assistant manager could authorise police officers to give the required trespass warning.

18 *Abbott v Police* [2008] NZAR 285 (HC) at [27].

19 The fee simple was vested in the Council.

20 *Abbott*, above n 16, at [22].

21 At [21]-[22].

22 At [25].

[46] It seems to me that *Polly* and *Abbott* are also consistent with the Supreme Court's approach to the concept of "possession" in *R v Taueki*, where the question of control was also found to be determinative.

[47] Applying these dicta to the present case:

(a) the ROLDA created the Board "to control the said domain" and to determine when the rights of the public are interfered with by the owners' right of access;[23]

(b) as an administering body under the Reserves Act 1977, the Board has the power to make bylaws for purposes such as:[24]

(i) the control of all persons using or requesting a reserve;[25] and

(ii) "generally regulating the use of a reserve, and providing for order therein, the prevention of any nuisance therein, and for the safety of people using the reserve";[26]

(c) bylaws have in fact been promulgated by the Board which prohibit interference with the use or enjoyment of the Reserve by others and empowers the Board to request people to leave.[27]

[48] The only doubt as to whether the Board has the requisite control to qualify as an "occupier" for the purposes of the TA. Such control must arise as a result of the status of the Trust as the owner of the land and the associated rights of the beneficiaries to free and unrestricted use of it (provided such use does not interfere with the reasonable rights of the public). In that regard I note that at [68] of *Taueki*

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23 At [66] of its judgment in *Taueki*, above n 5, the Supreme Court confirmed that s 18(7) of the ROLDA directs that is the Domain Board rather than the Māori owners is to control the domain and that at the relevant time the Board was in fact exercising such control.

24 Reserves Act 1977, s 106(1).

25 Section 106(1)(e).

26 Section 106(1)(j).

27 Breach of the bylaws is punishable under s 104 of the Reserves Act 1977 by a fine not exceeding $5,000.

the Supreme Court said that it was not necessary to determine whether either (or both) the Trust or the Board was in possession of the relevant land.[28]

[49] It seems to me that the appropriate analysis must be that the Board's control of the land is not total. In particular, a purported exercise of control by the Board that restricted access to the land by Māori owners in a way that was not demonstrably connected with ensuring, or necessary to ensure, that the "reasonable rights of the public" were not interfered with would not, in my view, be permitted. It may be that, to that extent, there may be shared control. That possibility was expressly recognised by the Supreme Court in *Taueki*.[29]

[50] Be all that as it may, however, the possibility that the Trust may also qualify as an occupier is of no present moment. The TA does not require an occupier to have exclusive control. Moreover, the Trust's resolution quoted at [24] above suggests that the Trust and the Board were ad idem on the trespass issue. And Mr McKenzie's evidence was that the Board consulted with the Trust before issuing the notice.

[51] In short, it seems to me to be clear that, the Domain Board was and is an occupier of the relevant land for the purposes of the TA by virtue of the control it is required to exercise and does in fact exercise over it.[30] The answer to question one is therefore "no".

Question two: Was the District Court correct in law to hold that Mr Taueki could not be the subject of a valid trespass notice because of the rights reserved to the owners of the Horowhenua XI block under s 18 of the Reserves and Other Lands Disposal Act 1956?

[52] This question is related to the first. In effect, the District Court found that any control the Board did have was subject to s 18(5) of the ROLDA. For convenience, I repeat the relevant wording of that subsection here. It affirms that "the Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the land ..." but makes it clear that that right is "*not*

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28 Because all that mattered in that case was that Mr Taueki was not in possession.

29 *Taueki v R*, above n 5, at [68].

30 Mr McKenzie's statement in evidence that the Board was not an occupier of the land is not relevant. It was a response to a legal question which should not have been asked and which he was not qualified to answer.

to interfere with the reasonable rights of the public, as may be determined by the Domain Board".

[53] The Court construed this section as providing a superior right to the owners. The Judge said:[31]

> ... although the Domain Board may grant or define reasonable rights of the public, this right is subsidiary to the right for the Māori owners to have at all times and from time to time free and unrestricted use of the land.

[54] But I agree with Mr Sinclair that this interpretation inverts the meaning of the subsection, which is to qualify the owners' "free and unrestricted" use of the area. While it was no doubt hoped the respective rights would peacefully co-exist, if push came to shove, the owners' rights are not to interfere with the reasonable rights of the public. And in the first instance, the Board is charged with determining what is "reasonable" and when the rights conflict. Given that iwi representatives comprise (or should comprise) half the Board, its assessment of such matters may be expected to reflect a Muaupoko perspective.

[55] While I would not go so far as to say that the Board's decision to issue the trespass notice is not contestable at all it is certainly not the case that it was precluded by the rights reserved to the beneficial owners under s 18 of the ROLDA. Any such contest would need squarely to be based on the contention that the notice was not valid because it was not reasonably necessary to protect the reasonable rights of the public. In light of Mr Taueki's history of sometimes dangerous conflict with members of the public using the land, a challenge on those grounds would be difficult. But in any event, the matter was not presented in that way in the District Court.

[56] The answer to the second question must also be "no".

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[31] *Police v Taueki*, above n 13, at [7].

Question three: Was the District Court correct in law to hold that the prosecution must be dismissed because there was no adequate evidence that the Domain Board had resolved to issue a trespass notice and no evidence that it had delegated the authority to trespass Mr Taueki to the person who served the notice on him?

[57] As I have said, Judge Moss found there were "fatal problems with proof relating to the trespass notice" because there was no "proof" of the resolution to issue the trespass notice and there was no evidence establishing who was delegated to sign the trespass notice.

[58] The starting point is that a trespass notice is a "warning" for the purposes of s 4 of the TA. Section 5 of the TA provides that such warnings may be given orally or in writing. A warning should be given by an occupier, and the s (2)(1) definition of occupier includes "any employee or other person acting under the authority of any person in lawful occupation of that place or land".

[59] In the present case, the record makes it clear that:

(a) Mr McKenzie referred in his oral evidence to the Domain Board's written resolution to trespass Mr Taueki;

(b) Mr Taueki and the amicus had a copy of the minutes containing the resolution and cross-examined on it, but neither the minutes nor the resolution itself were formally produced;

(c) Mr Taueki was invited to have the document produced but did not wish to do so;

(d) when the evidence was brought to a close, the Court noted that it did not have the resolution. The transcript suggests that the prosecutor began to suggest that it be produced to which the Judge's response was "That is fine, just as long as I was yes, no that is fine".

[60] In short, therefore, Mr McKenzie, in his capacity as chairman of the Domain Board, had given evidence of the resolution and its terms. There was no challenge to the veracity or reliability of that evidence from Mr Taueki or the amicus, both of

whom had the relevant document in front of them. In my view it cannot on any analysis be said that the proof of the resolution was either inadequate or equivocal.

[61] As to the question of delegation, the evidence was that:

(a) Main Security was contracted by the Domain Board to serve the trespass notice on Mr Taueki;

(b) Mr Krivan, an employee of Main Security, served the trespass notice; and

(c) the notice was signed on behalf of the Lake Domain Board. The notice records Mr Krivan is the Board's "duly authorised agent".

[62] The notice was produced as an exhibit and it was confirmed by Mr McKenzie that it was the notice that the Board had employed Main Security to serve.

[63] I have already recorded my view that the Board was a relevant "occupier" of the land. Once that point is reached it seems clear that Main Security was an agent of the Board and that its employee, Mr Krivan, was also an employee or agent of the Board. No question of delegation arises and I can see no basis for concluding that Mr Krivan was not authorised to serve the notice.

[64] The answer to the third question is "no".

Fourth question: Do my responses to the first three questions above effectively nullify the Treaty of Waitangi upon which the jurisdiction of this Court is founded?

[65] Rather paradoxically, this Court has no jurisdiction to answer the first part of this question. While I appreciate that Mr Taueki takes issue with the statutory modification of the original owners' rights in the Horowhenua Block XI land, the appropriate forum for the exploration of his complaint is the Waitangi Tribunal, not this Court. Indeed, as I understand it, Mr Taueki has advanced just such a claim in the Tribunal in which he challenges the propriety of the legislation and the

underlying arrangements on which it is based. In the meantime, however, this Court is required to interpret and apply the relevant statutes enacted by the legislature.[32]

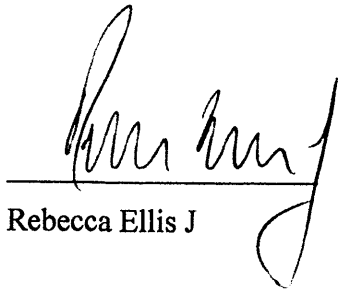
[66] As to the second part of Mr Taueki's question, the jurisdiction of this Court in criminal (or civil) matters is not derived from the Treaty. As Heath J stated in *R v Mason*:[33]

> Objections to the jurisdiction of the District and High Courts to try alleged offenders for criminal offences have been roundly rejected in cases leading up to *Wallace v R*. Courts derive their authority to hear and determine criminal cases from the exercise of Parliament's legislative powers.

[67] The answer to the fourth question is "no", accordingly.

Result

[68] The answer to each of the four questions is "no". The decision of the District Court dismissing the trespass charge against Mr Taueki was wrong, and must be quashed accordingly. The matter is to be remitted to the District Court (with the opinion of this Court) for case management and retrial.[34]



Rebecca Ellis J

Solicitors: Crown Law, Wellington, for Appellant

Copy to: Mr Taueki, Respondent

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32 See *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *Berkett v Tauranga District Council* [1992] 3 NZLR 206 (HC); *R v Toia* [2007] NZCA 331.

33 *R v Mason* [2012] 2 NZLR 695 (HC) at [32], referring to the Supreme Court's decision in *Wallace v R* [2011] NZSC 10. See also *Berkett v Tauranga District Council*, above n 32.

34 Criminal Procedure Act 2011, s 300 (1)(d).