IN THE DISTRICT COURT
AT LEVIN

CRI-2015-031-001523
[2016] NZDC 8014

NEW ZEALAND POLICE
Prosecutor

v

PHILIP DEAN TAUEKI
Defendant

Hearing:	5 May 2016
Appearances:	Sergeant M Toon for the Prosecutor Defendant appears in Person supported by S Hewson as Amicus Curiae
Judgment:	5 May 2016

ORAL JUDGMENT OF JUDGE J F MOSS

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[1] In this matter Mr Philip Taueki faces one charge laid under s 4(4) and 11(2)(a) Trespass Act 1980. I have heard some of the prosecution evidence but not all of it and having enquired at the end of the evidence related to the issuing of a trespass notice whether further evidence would be addressing that matter and having been assured it would not, I indicated that I did not need to hear further evidence and that I would dispose of the matter.

[2] I have taken that unusual step because in my view the foundation for the prosecution is fatally flawed. The obligation to prove all elements of the offence have rested throughout on the police prosecution. The standard of proof is beyond a reasonable doubt.

[3] There are three essential elements of a trespass prosecution. The first is that a trespass notice has been properly created. The second is that it has been executed, signed and served and the third is that the named person has acted in such a way as to enter onto the place, building or land defined in the trespass notice.

[4] Creation of a trespass notice requires a number of elements. The first is proof of occupation. The second is proof of authority to act as a representative where the occupier is a corporate body. The third is proof of a delegation to sign the trespass notice.

[5] Occupation is an often used term but surprisingly little defined. In the Trespass Act an occupier is a person in lawful occupation of a place or land. A person can, of course, be a corporate body, it may include an employee of that body. The prosecution evidence before me establishes that the place to which the trespass notice refers is a building. The evidence established that the building is situated on Māori freehold land owned by Muaupoko iwi. The evidence establishes that the buildings are fixtures on the land and I record in particular that Mr McKenzie giving evidence as a chair of the board accepted the decision in the Māori Land Court in February 2012 called *Taueki v Horowhenua District Council* and in that decision the Judge recorded that it was agreed that the buildings were fixtures on the land, fixtures form an indivisible part of the land.

[6] Mr McKenzie's evidence was also that the board accepts that the rowing club does not occupy the building and in that regard I refer to the Supreme Court's decision in *Taueki v R*. The board's power in respect of the building which is part of the land derives from the Reserves and Other Lands Disposal Act 1956 and the Reserves Act 1977. The 1956 Reserves and Other Lands Disposal Act focussed on Lake Horowhenua and its immediate surroundings. By s 18(7) the Domain Board was established by the Minster of Conservation. The other provisions in s 18 provide a number of powers to the Domain Board. Subsection (7) enables the Domain Board to control the domain which is in this case the Horowhenua Lake, the dewatered area, the Queen's Chain and Hokio Stream but subs (7) is subject to other provisions and critically in this matter the Domain Board's control is subject to this provision in 18(5):

> ...Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the land fourthly described in subsection (13) 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 said land...

[7] The right of control of the domain cannot in my view supersede the s 18(5) right for Māori owners to have free and unrestricted use of the land. Thus, 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. The drafting seeks to set a balance of use between the Māori owners and members of the public who are entitled, by virtue of the declaration of the space as a reserve, to enjoy the space. The balance, however, remains that the Māori owners are owners and that they have free unrestricted use of the lake.

[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 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.

[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.

[10] If I am wrong, alternatively I consider that s 18(5) rights of Māori 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 Māori 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.

[11] There are also fatal problems with proof relating to the trespass notice. I heard evidence from Mr Kriven and Mr McKenzie. There is no proof of the resolution to issue the trespass notice but there was oral evidence. Mr McKenzie said (from my notes rather than in the formal transcript) "on 30 October we passed a resolution to trespass three individuals including the defendant." The resolution was not introduced which was somewhat surprising. The evidence of Mr McKenzie did not establish who was delegated to sign the trespass notice. Mr Kriven appears to have signed it but his evidence did not say that. He did not identify his signature. There is no proof that Mr Kriven was an authorised agent, neither Mr McKenzie nor Mr Kriven referred to his being an authorised agent. Mr McKenzie's evidence indeed was specific, he said that Main Security for whom Mr Kriven was working, were employed to serve the notice. Service indeed was accomplished by Mr Kriven, but in the absence of authority to sign and proper evidence of a delegation by the board to enable Mr Kriven who as far as I am aware is not a board member, to sign, in my view the trespass notice is flawed.

[12] Thus both in terms of the occupation issue and the validity of the notice I am not satisfied that this prosecution can succeed.

[13] As an aside, because it is a matter, I think, of some importance to retain in terms of the evidence, I record my concern that the resolution process as represented by Mr McKenzie appears to be have been compromised. Mr McKenzie took up a role on the board on 30 October. He had previously been a member of the board in the early 2000s and he agreed to resume chairmanship of the board in 2015. His first day was 30 October 2015. At about 11.00 am that day a special meeting of the board convened. I assume that notice had already been given but there was no evidence of that. The meeting began at about 11.00 am. There was before the board, unsurprisingly, a draft resolution and a draft trespass notice. The difference between

the draft and the final trespass notice is not before the Court and the trespass notice is very ordinary in its form and any amendment is unlikely to have been substantial. Mr McKenzie estimated that the meeting took about 90 minutes.

[14] The trespass notice was served about an hour later at 25 past one. This gives the appearance that the resolution by the Board may have, in practical terms, been effected outside of any meeting prior to 30 October. That too is not unusual in the workings of community agencies. Often most of the work is done outside of meetings but the documentation before the Court in relation to the resolution is not given. No copies of minutes were provided. Nothing actually turns on this in terms of the validity of the prosecution but it does seem unsavoury. It seems incomplete that there is no record of formal consultation. It leaves uncertainty about how broadly the board considered the way it would exercise its powers in terms of s 18 Reserves and Other Lands Disposal Act and s 53 Reserves Act.

[15] I record this only to record that that is unfortunate because the degree of community confrontation about this issue does appear to be distracting from resolution of other issues. Mr McKenzie conceded in his evidence that the state of Lake Horowhenua, accepted as a taonga of its local people is a shame. It is unfortunate that this prosecution which must fail has distracted people's energy from the actual issue here which is how to advance the use of this important waterway.

[16] The charge is dismissed.

JP Moss
District Court Judge