IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2012
[2013] NZSC 146

BETWEEN	PHILIP DEAN TAUEKI Appellant
AND	THE QUEEN Respondent

Hearing:	11 March 2013
Court:	Elias CJ, McGrath, William Young, Chambers* and Glazebrook JJ
Counsel:	G J X McCoy, Q Duff and K J McCoy for Appellant F R J Sinclair and J E Mildenhall for Respondent
Judgment:	17 December 2013

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by McGrath J)

Introduction

[1] Mr Taueki, the appellant, is a member of Muaupoko, within whose rohe lies Lake Horowhenua and its surrounding land. That land, and the bed of the lake, are vested in trustees appointed by the Maori Land Court on trust for the beneficial owners, one of whom is Mr Taueki.

[2] Since it was formed in 1938, members of the Horowhenua Sailing Club have been sailing on the lake. For many years the Club has maintained a clubhouse on land by the shore.

* Chambers J died before this judgment was delivered. The remaining Judges have decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

[3] On 14 September 2008, an incident occurred on the shore of Lake Horowhenua in the vicinity of the clubhouse when Mr Taueki prevailed on Club members not to launch a motorboat on the lake. As a consequence Mr Taueki faced three charges of assault against members of the Club and, following trial in the District Court by Judge alone, he was convicted on two of those charges.

[4] Mr Taueki appealed to the Court of Appeal against his convictions but the appeal was dismissed. He has been given leave to appeal to this Court against one of the two convictions, on the ground that he had a defence under s 56 of the Crimes Act 1961, a provision authorising the use of force in defence of property. Mr Taueki's contention is that he was in peaceable possession of the land where the incident took place and was justified in using reasonable force to prevent the complainant, who was about to take his boat onto the lake, from trespassing on that land.

Background to prosecutions

[5] On 14 September 2008, the Club was holding its first training and racing day for the season on Lake Horowhenua. Anthony and David Brown, who are father and son and members of the Club, were present. Anthony Brown was the race officer for the Club. He had arrived at the lake early and was making arrangements for the start of sailing. He removed the Club's rescue motorboat from the shed, attached it to the tow bar of his car and started to prepare for putting the boat into the water.

[6] Mr Taueki saw this activity. He was concerned at the use of a motorboat. In his view it was a speedboat which was not permitted on the lake. As well, he was concerned that the boat had not properly been cleaned. Mr Taueki drove over to the Club and parked his vehicle in front of the clubrooms. He got out and approached Mr Brown, who was inside the rescue boat. Mr Taueki was angry and yelling. Precisely what he said was the subject of conflicting evidence, but the general tenor was that the boat should not be taken on the lake. Mr Taueki indicated that it was his intention to evict members of the Club if they intended to carry on with their boating.

[7] In order to speak to Mr Taueki, Mr Brown moved from the centre of the boat to sit on its edge, his legs hanging over the side. Mr Taueki approached and took hold of him by grabbing his clothing around the chest and neck area, as if to pull him off the boat. At his trial, Mr Taueki accepted that he had intentionally applied force. This incident gave rise to the charge of assault with which this appeal is concerned.

[8] David Brown and another Club member then intervened to separate Messrs Taueki and Brown. Mr Taueki continued to insist that those members of the Club had no right to be there and that they should leave. David Brown called the police. The disagreement between David Brown and Mr Taueki then escalated, resulting in two further charges of assault, which are not relevant to the present appeal.

[9] The trial Judge, Judge Atkins QC, rejected Mr Taueki's defence based on peaceable possession and convicted him on the charge of assault of Anthony Brown. This conviction is the subject of the present appeal.

Ownership and administration of Lake Horowhenua and its public domain

[10] In order to understand how the legal issue on which leave to appeal to this Court was granted arises, it is necessary to discuss Mr Taueki's interest as one of the beneficial owners of the land around Lake Horowhenua, the Club's use of its clubrooms and adjacent land, and the rights of the public to recreational use in respect of Lake Horowhenua.

[11] The bed of Lake Horowhenua, and the surrounding land, is Maori freehold land to which title was granted in 1893. In 1898 the Maori Appellate Court determined the ownership of the land concerned and ordered that it be vested in trustees. New trustees were appointed in 1951. The trustees of the Lake Horowhenua Trust currently hold the land concerned on behalf of over 2,000 beneficiaries, including Mr Taueki.

[12] In 1905, Parliament enacted the Horowhenua Lake Act, which provided for the Horowhenua Lake Board to control 951 acres of lake bed and surrounding land

as a public recreation reserve. That Act provided for the native owners 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. One-third of the Board members were to be Maori.

[13] In 1934 a Committee of Inquiry looked into the Board's responsibilities, the effects that current legislation had had on Maori 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 that surrounds it.[1]

[14] The status of Lake Horowhenua and the surrounding land was clarified by s 18 of the Reserves and Other Lands Disposal Act 1956, which remains in force. Prior to enactment of that legislation, the Crown had purchased from the Maori owners an area of 5.658 hectares known as Muaupoko Park, adjacent to the Maori-owned one chain strip. Section 18(2) of the 1956 Act provides:

> (2) 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 (as more particularly secondly described in subsection (13)) 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.

[15] Section 18(5) declared 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. Maori title to the domain land was not affected by the declaration. Section 18(5) continued:

> … provided further 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 … .

---

[1] A "one chain strip", also referred to as "the Queen's chain", is a strip of land extending around the perimeter of a lake (or other waterway). A "chain" is an Imperial measurement equal to 66 feet or 22 yards (approximately 20 metres).

[16] Section 18 also directed that a Domain Board control the domain in accordance with the Reserves and Domains Act.[2] Half of the Domain Board's membership would comprise persons appointed by the Minister of Conservation on the recommendation of Muaupoko.[3] The purpose of this provision was to ensure that the Maori 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.[4]

[17] The Reserves Act 1977 succeeded the Reserves and Domains Act. The domain became a "recreation reserve" and the Domain Board continues to operate as a "Reserve Board" under the 1977 Act. Under the 1977 Act, 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.[5]

Horowhenua Sailing Club

[18] The Domain Board entered into an agreement with the Club to use and occupy land within the domain for club purposes for a term commencing in 1961. Under the agreement, the Club built a clubhouse on the dewatered area. The initial term of the agreement was for 21 years, with a right of renewal for the same term, which was exercised in 1982. The agreement expired in 2003 and was not renewed again. Club members gave evidence that this was because the Domain Board was functioning without Maori representation and had therefore decided not to make any long term decisions.[6] Since then, the Club has occupied the land under a month by month licence from the Domain Board, for an annual fee of $60.00. Judge Atkins QC found that the perspective of Club members in 2008 was that:[7]

---

2 Section 18(7).
3 Section 18(8).
4 *Taueki v R* [2012] NZCA 428, [2012] 3 NZLR 601 [*Taueki* (CA)] at [7] (Arnold, Ellen France and Fogarty JJ).
5 Reserves and Domains Act 1953, s 32(1)(k) and Reserves Act 1977, s 106(2).
6 It was also suggested that the Domain Board was prevented from renewing the agreement by s 54 of the Reserves Act: see [19] below.
7 *R v Taueki* DC Palmerston North CRI-2010-031-0051588, 11 May 2011 [*Taueki* (DC)] at [3].

> … the Club had been in existence for 70 years and its use of the land, the more recently built Club building and the lake was well established in the minds of members of the Club.

[19] During Mr Taueki's trial, an issue arose concerning whether the occupancy and use of the land by the Club, since 2003, for its clubroom premises had been lawful in light of ss 53 and 54 of the 1977 Act, which respectively restrict the right to grant leases over Maori-owned reserve land, and to reach agreements on exclusive use of such land. Since then, the Maori Land Court has concluded that the Club does not presently have any legal right to occupy the land or buildings at Lake Horowhenua, although the Domain Board may issue new licences in accordance with its usual processes, which include consultation with the trustees.[8]

[20] As well, issues were raised at trial and before this Court concerning compliance by the Club with bylaws made by the Domain Board. The bylaws preclude use of motorboats on Lake Horowhenua without the Domain Board's written consent and impose further restrictions on the use of speed boats, including a requirement that consent could only be given for their use for rescue purposes. The bylaws also require that boats are washed before they are taken onto the lake and that this wash-down should be conducted in such a way that no detergent or runoff enters the lake.

[21] It was in dispute at the hearing whether the Club was complying with these requirements at the time and on the day of the incident and even to some extent exactly what the requirements were. Mr David Brown, in his evidence, accepted that Lake Horowhenua was in a fragile state which could be exacerbated by harmful human action.

Mr Taueki's involvement with the land

[22] Finally, we address Mr Taueki's own relationship with the relevant land. As indicated, he is a beneficial owner. His view that Lake Horowhenua is of "tremendous cultural and historical significance for his people" is not disputed. Nor

---

8 *Taueki v Horowhenua District Council* (2012) 294 Aotea MB 236 at [32(c)] and [32(d)].

is Judge Atkins' observation that in his actions Mr Taueki was genuinely motivated by a consideration of Maori land issues.

[23] Mr Taueki had since 2004 been living close to the lake in a building owned jointly by the Trust and the local and regional councils. Mark Stevens, who was Chairman of the Trust in 2008, had given Mr Taueki permission to live there. Mr Stevens said that Mr Taueki's role included ensuring that the nursery on the site was secure. Mr Taueki also assumed a role as kaitiaki, assisting in the management of the lake. This role, which was undertaken with the oral agreement of the trustees, involved seeing that the Trust and Domain Board maintain the interests of the Maori owners of the lake.

[24] Mr Stevens said in evidence that Mr Taueki had the authority of the Trust to ensure that the bylaws were complied with and, in particular, that boats going on the lake were washed down and did not cause further contamination. Mr Stevens did not, however, expect that Mr Taueki would directly intervene in exercising the role, but rather that he would communicate his concerns to the Trust as owners and to the Domain Board. There had, however, been no discussion of this expectation between them. Nor had there been any discussion with Mr Taueki about his having a right to evict anyone from the land. Mr Stevens was of the view that Mr Taueki had no such right and Mr Taueki accepted that he had no authority from the Trust. Had such authority to evict been sought by Mr Taueki, Mr Stevens would not have given it.

[25] In his evidence Mr Taueki maintained that, as a beneficial owner and kaitiaki of the lake, he has a responsibility to enforce bylaws so as to protect the lake. On 14 September 2008 his concern was that the Club's rescue boat had not been washed down and the Club's facilities, which lacked any means of catching the flow, were, in any event, insufficient to comply with the bylaws. As well, he was concerned that the Club was not complying with the consent requirements for use of a speed boat. As the authorities, including the Domain Board and the police, were "turning a blind eye" to these matters and no one else was stopping what in his view was illegal activity, Mr Taueki thought he had a duty to intervene. To this end he acted as he did, with the intention of removing everyone who, in his view, was breaking the rules. He accepted that, in laying hands on Anthony Brown, and trying

physically to remove him from the land, he was provoking an incident. The Judge held that, in the heat of the moment, Mr Taueki thought that such actions were all that was available to him to stop the Browns from continuing.[9]

District Court judgment

[26] The trial before Judge Atkins was a retrial on three counts of common assault,[10] following a successful appeal by Mr Taueki to the High Court against earlier convictions.[11] On the first charge, as indicated, Mr Taueki accepted that he had intentionally applied force to Anthony Brown,[12] but submitted that he acted in defence of property under s 56:

> **56 Defence of land or building**
>
> (1) Every one in peaceable possession of any land or building, and every one lawfully assisting him or acting by his authority, is justified in using reasonable force to prevent any person from trespassing on the land or building or to remove him therefrom, if he does not strike or do bodily harm to that person.

Mr Taueki's argument was that he was in peaceable possession of the land where the boat was being prepared. He was justified in using reasonable force to remove Anthony Brown, whose presence and actions on the land were improper because of the size of the motor on the boat he was about to launch, the absence of prior written consent from the Domain Board to launch a motorboat and the lack or insufficiency of wash-down facilities.

[27] The Judge decided that the right of Club members to enter the land and sail on the lake was subject only to the requirement that they observe the bylaws.[13] Mr Taueki could only have treated Club members as trespassers if they were in breach of a bylaw and had, in consequence, been requested to leave the land by a person with authority to require them to do so.[14]

---

9 *Taueki* (DC), above n 7, at [100].
10 Under s 196 of the Crimes Act 1961. Mr Taueki elected trial by judge alone.
11 *Taueki v New Zealand Police* HC Palmerston North CRI-2009-454-38, 25 June 2010.
12 *Taueki* (DC), above n 7, at [148].
13 At [157].
14 At [150].

[28] While Mr Taueki suspected that the bylaws were not being complied with, his suspicion was not justified on the information available to him.[15] He lacked a sufficient basis for his suspicions that the boat was a speed boat, that there had not been written consent from the Domain Board,[16] and that the boat presented a risk of contamination to the lake.[17] Judge Atkins decided it was not necessary or appropriate to determine whether the Club was in fact complying with the bylaws, on which question the evidence, in any event, lacked clarity. He said that if there were deficiencies in compliance with bylaws, the Club should rectify them and added that it would also be helpful if more stringent requirements and arrangements were made by the Club with respect to cleaning boats before they were placed on or in the lake.[18]

[29] Even if Mr Taueki's suspicions had been well-founded, or the Club had been in breach of the bylaws, Mr Taueki had not indicated to Club members, prior to his assaulting Anthony Brown, that they were trespassing. Nor on the evidence had he been given any authority by the Trust or the Domain Board to evict them.[19] The enforcement of the bylaws was the responsibility of the Domain Board.[20] As such, the Judge decided that even if Mr Taueki had been in possession of the land, he would have had no right to use force to prevent the Club members from sailing on the lake.[21] His options were limited to persuasion, or attempting to oblige the Domain Board to take action.[22]

[30] Judge Atkins also decided that, under s 56, resort to force is only reasonable and thus justified when "all reasonable steps to avoid it have been taken and when necessity has been properly established".[23] In the present case, there were alternative courses of action available to Mr Taueki. For example, he could have made inquiry of the Domain Board as to the Club's compliance with bylaw 19(3) regulating the

---

15 At [152].
16 At [152]–[153]. The Judge accepted that there "may exist *some* foundation" (his emphasis) to these first two concerns, but decided this evidence was insufficient.
17 At [155].
18 At [167].
19 At [153] and [155].
20 At [157].
21 At [157].
22 At [157].
23 At [152].

use of motorboats, and insisted upon a reply.[24] As well, the force used by Mr Taueki on Anthony Brown was not reasonable in the circumstances.[25]

[31] Finally, the Judge addressed the element of peaceable possession.[26] He said that peaceable possession does not necessarily follow from ownership of the property. It requires that there be possession which is acquiesced to by others, including any claimants to the property. The Judge decided that was not so in the circumstances of this case, as neither the Crown nor the Domain Board nor the Club were acquiescing in Mr Taueki's claims. It was more likely that one of them was in peaceable possession of the ground on which these events occurred.[27] He indicated that it would, however, have been sufficient had Mr Taueki had actual control of the property and if his asserted peaceable possession had not previously been seriously challenged by others.[28]

[32] The Judge accordingly decided that s 56 did not give Mr Taueki a right to use force or indeed to evict members of the public who would not desist from sailing on the lake when asked to do so. The Judge found the pushing of Anthony Brown to be an assault that had been proved beyond reasonable doubt, to which there was no defence. Mr Taueki was found not guilty on a second charge of assault, but was convicted on a third charge of assaulting David Brown. As already mentioned, the present appeal relates only to the first charge of assault. Mr Taueki was subsequently sentenced to 60 hours of community work.

Court of Appeal

[33] On appeal, the Court of Appeal agreed with the District Court Judge that, given Mr Taueki's admission that he had intentionally applied force to Anthony Brown, the only issue on appeal was whether he had a defence under s 56.

---

24 At [152].
25 At [158].
26 At [156].
27 At [93], [149] and [156].
28 At [93].

[34] The Court of Appeal considered the Judge's approach to peaceable possession, noting that, in its earlier decision in *R v Haddon*,[29] the Court had held that it was sufficient for an accused to have actual control of the property in peaceable possession as a possession not hitherto seriously challenged by others. The Court of Appeal discussed relevant authorities and adopted a statement in a leading New Zealand text that:[30]

> The key to peaceable possession is whether the possession is such, and the challenge to it is such, that the situation is unlikely to lead to violence.

"Peaceable" in this context was distinguished from "peaceful" so that it was not sufficient for an accused to show that he kept the peace while on the land.

[35] The Court of Appeal concluded that the Judge's approach was consistent with that in *Haddon*, the purposes of the section that were apparent from its history, and with the section's deliberate use of the word "peaceable". On the day in question, Club members believed they had an ongoing arrangement permitting them to sail on the lake and use the rescue boat. They would not acquiesce in Mr Taueki's claim.[31] While it was understandable that he became frustrated that it was taking so long to resolve his concerns about the care of the lake, resort to assault was not defensible under s 56. His appeal against conviction on the first count was dismissed. The appeal against his conviction on the third charge was also dismissed.

Limits on the use of force

[36] Under our system of government it is principally the role of the executive and the courts to protect the rights of citizens, including their property rights. Public authorities are not, however, in a position to resolve every dispute between citizens over their rights. The statutory law of defence of property recognises that there are limits on official capacity, and the need, in some circumstances, for immediate and direct private responsive action to be permitted if property rights and interests are effectively to be protected. That is achieved under provisions such as s 56 by

---

29 *R v Haddon* [2007] NZAR 135 (CA) at [44].

30 *Taueki* (CA), above n 4, at [44], quoting AP Simester and WJ Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at [15.2].

31 At [51].

allowing citizens a right, in particular circumstances, to use force to protect interests in property and to exclude those lacking such interests.

[37] Private action in defence of property often involves physical confrontation and is accordingly in tension with values of social order and stability. Limitations on the right to use defensive force reflects a balance between competing public policies. As Dicey once colourfully put it, when speaking of self-defence:[32]

> … the rule which fixes the limit of the right of self-help must, from the nature of things, be a compromise between the necessity, on the one hand, of allowing every citizen to maintain his rights against wrongdoers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help and loyal subjects become the slaves of ruffians. Overstimulate self-assertion and for the arbitrament of the Courts you substitute the decision of the sword or the revolver.

To similar effect are Lord Hoffmann's dicta in *R v Jones*:[33]

> … tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (*Leviathan* ch 13) called the state of nature … [i]n principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands … 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.'

So while the law has recognised the limits on the capacity of the State to resolve every dispute by allowing individuals in some circumstances to exercise defensive force to protect their interests, it also recognises the danger of permitting self-enforcement by those who may prove to be poor judges of their right to exercise force and of how much force they may legitimately exercise in a potentially volatile situation.[34] The law accordingly does not permit every right to be defended by the use of force that is necessary for its effective protection.[35]

---

32 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, MacMillan, New York, 1914) at 489.

33 *R v Jones* [2006] UKHL 16, [2007] AC 136 at [77]–[78] (citations omitted); and see also *R v Burns* [2010] EWCA Crim 1023, [2010] 1 WLR 2694 at [11]–[14].

34 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 532.

35 Dicey, above n 32, at 490.

[38] Section 56 is accordingly a limited right. It limits the scope of legitimate force in defence of possession of any land or building in three ways. First, it states who is authorised to use force to that end being "[e]very one in peaceable possession of any land or building and every one lawfully assisting him or acting by his authority". Secondly, the section defines the category of persons against whom such defensive force can be used, being actual or anticipated trespassers. Thirdly, it sets a limit on the nature and extent of force that can be used, which is reasonable force for the purpose of preventing a trespass or removing a trespasser, but striking or doing bodily harm to that person is not authorised. The satisfaction of each of these limiting requirements is necessary before the use of force is justified under s 56.

The history of s 56

[39] The statutory origins of s 56 can be traced to a Bill, introduced in England in 1880, based on the report of the Royal Commission on the Law Relating to Indictable Offences.[36] The Commissioners' Bill included several provisions justifying use of force in defence of property. Section 56 of the Crimes Act derives from cl 63 of that Bill. While in England the Bill failed after its second reading,[37] it was enacted with modifications in New Zealand, Canada and some Australian jurisdictions.[38] In New Zealand, this followed a report by the Statutes Revision Commission. The Bill was passed, with only minor modifications to the clause, as the Criminal Code Act 1893.

[40] Section 56 originally provided not only that a person in peaceable possession of property was justified in using defensive force, but also that it was an assault without justification or provocation for a trespasser to resist an attempt to prevent entry or to remove him or her from the land.[39] The provision remained

---

36 This Bill was, in turn, based on the English Criminal Code (Indictable Offences) Bill 1880, which was drafted by Sir James Fitzjames Stephens.

37 Statutes Revision Commission *Report on the Criminal Code* (1883) at 1.

38 England has not since given statutory effect to this kind of right to use force in defence of property. There is some limited recognition of defence of property in legislation. The Criminal Damage Act 1971 sets out when a defence of property will be available for property offences (rather than offences against the person). There is also statutory provision for the use of force for the prevention of crime, which would be applicable where the threatened interference with property would amount to a criminal offence: see s 3 of the Criminal Law Act 1967 and s 76 of the Criminal Justice and Immigration Act 2008.

39 See s 65 of the Criminal Code Act 1893 and s 82 of the Crimes Act 1908.

unchanged until the Crimes Act 1961, when s 56 was divided into two subsections, the first dealing with the defence and the second defining the assault offence.

[41] The relevance of making resistance by the trespasser an assault was that, until 1980, rights of self-defence under the Crimes Act varied, depending on whether the party relying on self-defence had or had not provoked the initial assault from the other person.[40] With the abolition in 1980 of the distinction between provoked and unprovoked assaults, s 56(2) became redundant and was thus repealed.[41] With that deletion, the provision remains in force today.

The statutory context of s 56

[42] The meaning of "peaceable possession" in s 56 must be considered in its statutory context. "Peaceable possession" is an element of each of the provisions in the Crimes Act relating to the defence of property (ss 52–55). Each addresses directly the rights to use force in defence of possession of property:

> **52 Defence of movable property against trespasser**
>
> (1) Every one in peaceable possession of any movable thing, and every one lawfully assisting him, is justified in using reasonable force to resist the taking of the thing by any trespasser or to retake it from any trespasser, if in either case he does not strike or do bodily harm to the trespasser.
>
> **53 Defence of movable property with claim of right**
>
> (1) Every one in peaceable possession of any movable thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending his possession by the use of reasonable force, even against a person entitled by law to possession, if he does not strike or do bodily harm to the other person.
>
> **54 Defence of movable property without claim of right**
>
> (1) Every one in peaceable possession of any movable thing, but neither claiming right thereto nor acting under the authority of a person claiming right thereto, is neither justified in nor protected from criminal responsibility for defending his possession against a person entitled by law to possession.
>
> **55 Defence of dwellinghouse**

---

[40] See sections 48 and 49 of the Crimes Act 1961 as first enacted.

[41] The same applies in respect of the similar provisions in ss 52, 53 and 54.

> Every one in peaceable possession of a dwellinghouse, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of the dwellinghouse by any person if he believes, on reasonable and probable grounds, that there is no lawful justification for the breaking and entering.

[43] Reading together those sections using the term "peaceable possession", the concept must encompass:

(a) Possession with an associated claim of right to possession. Under s 53 such a person is protected against criminal liability for using reasonable force to defend movable property, even against a person entitled to possession. Such a person may also invoke ss 55 and 56.

(b) Someone who is in possession of property but has no claim of right. Such a person:

(i) may invoke s 52 to defend possession of movable property against a trespasser; and

(ii) in possession of moveable property, under s 54, is given no justification or excuse for using force in defence of his or her possession as against a person entitled by law to possession; and

(iii) may invoke s 55 in defence of a dwellinghouse if he or she believes on reasonable and probable grounds that there is no lawful justification for the breaking and entering of that house; and

(iv) may invoke s 56 against a trespasser.

[44] Another part of the statutory context in which ss 52–56 are to be read is s 91, which provides for the offences of forcible entry and detainer:

> **91 Forcible entry and detainer**
>
> (1) Every one commits forcible entry when, by force or in a manner that causes or is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, he enters on land that is in the actual and peaceable possession of another for the purpose of taking possession, whether or not he is entitled to enter.
>
> (2) Every one commits forcible detainer when, being in actual possession of land without claim of right, he detains it, in a manner that causes or is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against another who is entitled by law to possession of the land.
>
> …

[45] Although s 91 creates an offence rather than a defence, its connection with s 56 makes it an important part of the context in which s 56 is to be interpreted. The common ingredient of "peaceable possession" controls and aligns the scope of the two provisions. Within a single incident, a person in possession may have a right under s 56 to use force to defend land or a building against a trespasser who, under s 91, if entering forcibly, will have committed the offence of forcible entry. However, a person whose possession is not peaceable has no right to use force to defend that possession and in those circumstances it will not be an offence if the other person forcibly enters the land or building.[42]

[46] Section 91, like s 56 and other provisions, regulates the use of force, and also strikes a balance between the competing policies of allowing for self-help to assert property rights, and the maintenance of social order and stability. The High Court of Australia observed in *Prideaux v Director of Public Prosecutions*:[43]

> The statutes of forcible entry protect the peacefulness of actual possession of land … and that is an object as appropriate to a modern civilised society as it was to the society of fourteenth century England.[44]

---

42 Assuming that no one else is in peaceable possession of the land.

43 *Prideaux v Director of Public Prosecutions* (1987) 163 CLR 483 at 487, citing *Lows v Telford* (1876) 1 App Cas 414 (HL); and *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720 (CA) at 752.

44 When the first forcible entry statute was enacted.

Authorities on "peaceable possession"

New Zealand

[47] New Zealand commentary provides only limited assistance as to the meaning of "peaceable possession" in the Crimes Act. In 1991, the Crimes Consultative Committee described the term as "virtually impossible to define".[45] The Committee nevertheless recommended that the phrase be retained in the law of defence of property, because it ensures the protection afforded by the defence, and the right to use force, is not "defeated by a mere technical defect in the possessor's title to the property".[46]

[48] The term "peaceable possession" has also received little judicial attention in New Zealand but, in *R v Haddon*, the Court of Appeal said:[47]

> … it is apparent that it is sufficient for an accused to have actual control of the property and that peaceable possession is a possession hitherto not seriously challenged by others.

On this approach, peaceable possession is not necessarily lawful possession and may, for example, be possession without legal right that an owner appears to tolerate. Whether there is possession and that possession is peaceable are questions of fact to be determined in the context of the circumstances.[48]

Canada

[49] The Canadian Criminal Code came into force in 1892. Like that of New Zealand, the Code was based on the English Bill of 1880. It contained provisions on defence of property very similar to those in the New Zealand legislation of 1893. These provisions remained substantially unchanged until they were amended in 2012. Before that amendment, s 41 of the Canadian Criminal Code provided that everyone who is in peaceable possession of real property is justified in using force to prevent a person from trespassing or to remove trespassers if he uses

---

45 Crimes Consultative Committee *Report on the Crimes Bill 1989* (1991) at 26.

46 At 26.

47 *R v Haddon*, above n 29, at [44] citing the judgment of the Alberta Court of Appeal in *R v Born with a Tooth* (1992) 76 CCC (3d) 169 (ABCA).

48 At [45].

no more force than is necessary. The Canadian Code also contained provisions for a defence in relation to moveable property.

[50] The decision of the Alberta Court of Appeal in 1992 in *R v Born with a Tooth*[49] has generally been recognised in Canada and elsewhere as the leading case on what amounts to "peaceable possession". Earlier Canadian judgments had established that legal ownership was not a prerequisite to being in peaceable possession.[50]

[51] In *Born with a Tooth*, the Court allowed the appeal because, although there was no evidential foundation for the peaceable possession defence, that may have been due to trial rulings excluding evidence that tended to show peaceable possession, thereby precluding the defence from advancing the theory. The Court of Appeal went on to make some general comments on the s 41 defence to avoid confusion at the retrial. On "peaceable possession" the Court said:[51]

> … the word "possession" has here its usual meaning in criminal law. The defence will fail if the accused, in fact or in law, has no control over the land in question. But, for possession, control need not be exclusive. Because control is largely a matter of fact, this element includes a question of fact to be decided by the jury.
>
> The demand that the possession be "peaceable" greatly limits the defence. That word is *not* synonymous with peaceful. It is not enough for the accused to show he kept the peace while on the land. Historically, it meant a possession that did not provoke a breach of the peace.[52] In real property law, peaceable possession means a possession:[53]
>
> > … acquiesced in by all other persons, including rival claimants, and not disturbed by any forcible attempt at ouster nor by adverse suits to recover the possession of the estate.
>
> For the purpose of the *Code*, the term must mean a possession not seriously challenged by others. If it were otherwise, then every property dispute could be resolved legitimately by force. The evident object of the law is the exact opposite: the defence should be available only to those whose possession has not been seriously questioned by somebody before the incident in question. It is not necessary for us to make a definite statement how serious and

---

49 *R v Born with a Tooth*, above n 47.

50 *Nykolyn v R* [1949] SCR 392; and *R v Figueira* (1981) 63 CCC (2d) 409 (ONCA).

51 At 177–178 (Emphasis in original. Some citations omitted, others recorded in footnotes).

52 Citing James Fitzjames Stephen *A History of the Criminal Law of England* (Macmillan, London, 1883) vol III, at 13–14.

53 Citing HC Black *Black's Law Dictionary* (6th ed, West Publishing, St Paul, 1990).

> immediate must the challenge be before the defence is lost. That is a question to be decided on the precise facts of each case. We put aside, as not necessary for decision, the question whether one can invoke the defence against a trespasser totally unaware that one's possession is under challenge from some third party.
>
> Whether a previous serious challenge existed is a question of fact for decision by the jury. But the judge often will be required to inform the jury about questions of law to assist them in that determination. The strength in law of a claim to a *right* of possession, for example, will often be determinative. But the seriousness of the challenge will turn more on the likelihood of a breach of the peace than on the strength of a legal title. This is because, as the Law Reform Commission has suggested, the key to peaceable possession is whether the possession is such, and the challenge to it is such, that the situation is "unlikely to lead to violence".

[52] These principles have been adopted in subsequent Canadian cases, including by the Ontario Court of Appeal in *R v George*[54] where the Court affirmed that:

> … "peaceable" means possession that it is "not seriously challenged by others" and any challenge to the possession "should not lead to violence".

The Supreme Court of Canada declined leave to appeal in *George* and has not had occasion to consider "peaceable possession".[55]

Australia

[53] A defence of property based on peaceable possession is provided for in each State jurisdiction except Victoria.[56] The applicable legislation in Queensland, Tasmania and Western Australia is based on a Code that drew on the English Bill of 1880.

[54] State courts have considered the nature of the element (additional to possession) that must be present for possession to be peaceable. It has been held in Western Australia that possession must be neither intended to nor likely to cause a breach of the peace and it must be possession without challenge in the sense that

---

54 *R v George* (2000) 145 CCC (3d) 405 (ONCA) at [41].

55 The Supreme Court considered s 41 in *R v Gunning* 2005 SCC 27, [2005] 1 SCR 627 but peaceable possession was not an issue in that appeal.

56 In Victoria, the right to use force in defence of property is governed by the common law.

there is no live issue involving a rival claim.[57] These principles have led to the view that peaceable possession must involve lawful possession.[58] This conclusion has, however, emerged from decisions concerning moveable property,[59] including where the possession was property that was stolen or otherwise unlawful to possess.[60] It is the characterisation of peaceable possession being without a rival claim that is of particular relevance to this case.

Conclusions on peaceable possession in New Zealand law

[55] As already indicated, peaceable possession operates within s 56 to impose some limits on situations in which the defence is available. The provision is directed to protection of rights arising from an individual's possession of land or a building.

(i) Possession

[56] The authorities referred to have focused on when possession will have the necessary peaceable character, rather than on what will constitute possession itself in the context of s 56. In the absence of any evidence to the contrary, a legal owner of property will be in possession of it. But, while possession is often an incident of ownership (or other legal right), in this context, ownership of the property is not necessarily required, nor even is a claim of right, before a person will have a defence under s 56.[61] At the same time, something more than mere presence on the land or a mere right to use or enter a property is required.

[57] The characteristics of possession were identified by Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd v Graham*:[62]

> … Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an

---

57 *Etherton v Western Australia* [2005] WASCA 83, (2005) 153 A Crim R 64 and the authorities referred to therein.

58 At [13] per Steytler P, with whom McLure JA agreed.

59 For example, *O'Callaghan v MacDonald* [2000] WASCA 88; and *R v Van Bao Nguyen* [2002] NTSC 38, (2002) 139 NTR 15.

60 As in *Etherton v Western Australia*, above n 57.

61 This interpretation is consistent with how s 56 was understood by the Crimes Consultative Committee: see [47] above.

62 *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 at [41], quoting from the judgment of Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 (ChD) at 470–471.

> owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

Possession of this kind would give rise to a claim in trespass for interference with the land in question.[63] That approach is appropriate. The legislative provisions in which "peaceable possession" appears require reference to the underlying principles of the law of trespass in order to determine whether or not the person against whom force was used was a "trespasser". In this way, the statutory context indicates that the concept of possession in "peaceable possession" is that which underpins the principles of the law of trespass.

[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.

(ii) Peaceable possession

[59] The defence under s 56 is available only to persons who are in "peaceable possession" of property. In the overseas authorities discussed,[64] for possession to be "peaceable" there must be no serious rival claim to possession being maintained in challenge to the possession of the person claiming justified use of force. This has led to the view that "peaceable possession" must be possession that previously has not been seriously questioned, such as by demonstrated opposition or legal attempts to recover exclusive possession, at the time of the exercise of defensive force.

---

63 This was acknowledged by both Lord Browne-Wilkinson and Slade J: *JA Pye (Oxford) Ltd v Graham*, above n 62, at [32]; and *Powell v McFarlane*, above n 62, at 469.

64 Which were judgments that were followed in *R v Haddon*, above n 29, and by the Court of Appeal in this case: *Taueki* (CA), above n 4.

[60] Giving "peaceable possession" this meaning narrows the scope of the right to use force in the defence of property, an approach which helps limit the right becoming a general licence for those in possession to take the law into their own hands when their possession is interfered with by a trespasser. But this meaning would create difficulties when the term is applied in s 56 and in other sections of the Crimes Act.

[61] For example, under s 53, a person in peaceable possession of moveable property under a claim of right can use reasonable force to defend his or her possession even against the true owner who disputes it. The meaning drawn from, in particular, the Canadian cases would allow little scope for that provision to operate because it could be expected that opposition from the true owner would almost invariably amount to a serious rival claim such that possession would not be peaceable and the defence would be unavailable.

[62] Contextual difficulty also arises with s 91 as the meaning of peaceable possession directly affects its scope. Confining peaceable possession to a situation where there is no serious rival claim would make the scope of the offence of forcible entry very narrow, and would be inconsistent with the provision in s 91 that an entitlement to enter is no defence to a charge of forcible entry, indicating that the offence can still apply where the person entering the land has a serious rival claim. A wider meaning of peaceable possession avoids such limitations on the scope of s 91, while at the same time respecting the need for limits on forcible entry, which of course, is another method of self-help.

[63] Finally, the view that peaceable possession is possession that is not seriously challenged by others would have the unsatisfactory result of making the earlier actions of a trespasser determinative of the scope of the defences under ss 52–56 of the Crimes Act and the offence of forcible entry in s 91. By previously demonstrating his or her opposition to possession in a sufficiently serious manner, whether by lawful or unlawful means, a trespasser could defeat the necessary "peaceable" quality of possession. The result would be to deny the person in possession the right to use defensive force, and to permit the trespasser to enter forcibly on land without committing an offence. In that way, the earlier conduct

would have essentially secured for the trespasser a licence to enter forcibly upon the land.

[64] "Peaceable possession" must be given a meaning that gives due scope to both the ss 52–56 defences and the s 91 forcible entry offence. The character of the possession in s 56 which justifies limited use of defensive force is not concerned with the quality of the possessor's title to the property, nor, generally, the basis on which possession was acquired. Overall, the meaning of "peaceable possession" which best fits the context of the Crimes Act is simply possession that has been achieved other than in the context of an immediate or ongoing dispute. In brief, it is possession obtained and maintained before the employment of the physical force the use of which the person seeks to justify.[65]

Application of s 56 in this case

[65] A defence under s 56 is only available to Mr Taueki if he was in peaceable possession of the land where the incident took place, or if he was lawfully assisting or acting by the authority of a person who did have peaceable possession of that land. Mr Taueki claimed to have peaceable possession of an extensive area of land surrounding Lake Horowhenua, including, but not confined to where he lived, where the nursery he supervised was located and the area between the clubhouse and the lake where the incident took place. It was not seriously in dispute that he had possession of the first two locations. Over that land he appears to have exercised actual undisputed control. The area relevant to this case, however, is that between the clubhouse and the lake, where Anthony Brown was preparing to launch the boat and where the incident took place.

[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

---

[65] See *Lows v Telford*, above n 43.

the Maori owners) is to control the domain.[66] 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.

[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.

[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.

[69] As well, the force used by Mr Taueki exceeded the scope of s 56. In order for the use of any force to be reasonable, it will normally be necessary that the person seeking to rely on the s 56 defence has first given the trespasser both notice that he or she is trespassing and a reasonable opportunity to leave. Mr Taueki had

---

[66] It is therefore not necessary in the present case to consider the relationship between the trustees and beneficial owners of the land at Lake Horowhenua, and what control, if any, beneficial owners had over the land and lake.

not, prior to the assault of Anthony Brown, indicated to the Club members that they were trespassing. As well, s 56 only permits force directed at preventing a trespass or removing a trespasser. To the extent that Mr Taueki's actions expressed his frustration with the slow pace at which his concerns about the lake and surrounding land were being addressed, he could not rely on the defence.

[70] The final issue of whether or not Anthony Brown was a trespasser involves two questions: whether or not the Club was in breach of the bylaws and, if so, whether a breach of the bylaws sufficed to make the Club members trespassers on the public domain. In the absence of any clear evidential basis that the Club was in breach of the bylaws means it would be inappropriate for this Court to attempt to resolve these questions. As well, in view of our finding that there was no basis in the evidence to conclude that Mr Taueki had peaceable possession or used force only for a purpose permitted under s 56, it is not necessary to determine the answer to them.

Relevance of mistake of fact

[71] At the hearing, Mr McCoy submitted that, reasonableness of force aside, the elements of s 56 allowed a party seeking to justify the exercise of force although under a mistake or misapprehension as to the circumstances. That is to say, a mistaken belief by Mr Taueki that he was in peaceable possession would suffice for him to rely on the defence even though he was not in fact in possession of the land. We disagree.

[72] Some of the Crimes Act provisions conferring the right to use force are expressed in subjective terms that require regard to be had to the state of mind of the defendant. For example, ss 53, 54 and 91 refer to "claim of right", which is an honest and genuine belief in a right to possession of property. Under those provisions it is not necessary that the belief be reasonable or that it have any foundation in fact or law.[67] As well, s 55 is available to a person who "believes on reasonable grounds" that breaking and entering by another person is unlawful.

---

[67] *Dharam Singh v Police* [2003] NZAR 596 (HC).

[73] But s 56, along with other provisions in the Crimes Act, is expressed objectively. The legislative scheme, accordingly, is to be specific as to the circumstances in which a bona fide mistake as to entitlement to possession may be taken into account. There is no scope for applying s 56 on the basis of beliefs (reasonable or otherwise) on the part of the defendant as to whether he or she enjoyed peaceable possession of the land, nor as to whether the other party was a trespasser.

Conclusion

[74] This appeal fails because Mr Taueki was not in possession of the area of land on which the incident involving Anthony Brown took place.

[75] The appeal is accordingly dismissed.

Solicitors:
Chris Marshall and Co, Christchurch for Appellant
Crown Law Office, Wellington for Respondent