IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-404-0293
CRI-2025-404-0033
CRI-2025-404-0259
[2026] NZHC 68

BETWEEN	EMILY MAIA WEISS JOSHUA DYLAN JACOBSEN JULANNE TIMMINS Appellants
AND	NEW ZEALAND POLICE Respondent

Hearing: 29 September 2025

Counsel: S W H Fletcher, S J Vincent and J A H R Reid for appellants
K C Grant for respondent

Judgment: 30 January 2026

JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 30 January 2026 at 11am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Annette Sykes & Co., Rotorua
MC, Auckland

[1] Emily Weiss, Joshua Jacobsen and Julanne Timmins were each convicted, following Judge alone trials in the District Court at Auckland, of charges under the Trespass Act 1980.[1] They were found to have committed the offences while protesting on a pontoon located within a construction zone at the Kennedy Point marina at Waiheke Island. They seek this Court's leave to appeal, under s 296 of the Criminal Procedure Act 2011, against rulings by the trial Judge on questions of law.

[2] Mr Jacobsen and Ms Timmins also appeal more broadly, as of right, in respect of their convictions: while they join Mx Weiss in saying that the Judge determined questions of law incorrectly, they add that they should have received discharges without conviction.

[3] This judgment determines the matters of leave, and of substantive merit, common to all three proceedings. The broader appeals, brought against the Judge's refusal to discharge Mr Jacobsen and Ms Timmins without conviction, remain for future determination.

[4] The proposed questions are properly framed, and answered, as follows:

> Question One: When (in order to achieve the purpose of a coastal permit issued under the Resource Management Act 1991) it is reasonably necessary to exclude the public from the area covered by the permit, can the permit holder lawfully exclude the entire public, including persons entitled to occupy the area as a matter of tikanga?
>
> Answer: Yes.
>
> Question Two: Was the Judge's factual finding, that it was reasonably necessary to exclude the public from the pontoon within the construction zone at Kennedy Point, so clearly untenable as to amount to an error of law?
>
> Answer: No.

---

1 *New Zealand Police v Weiss* [2024] NZDC 11373; *New Zealand Police v Jacobsen* [2024] NZDC 11374; and *New Zealand Police v Timmins* [2024] NZDC 31445.

Question Three: Was any mistake, made by the appellants about whether they were entitled as a matter of tikanga to occupy the construction zone, capable of giving rise to the defence of honest belief in facts or circumstances which would make their presence lawful?

Answer: No.

[5] Questions One to Three are framed differently to the questions proposed by the appellants. I explain why they are framed differently, and the answers just stated, below. Before that, I set out essential matters of background.

Background

Construction and protest at Kennedy Point Bay

[6] Kennedy Point Boatharbour Limited (KPBL) applied for, and despite significant opposition was granted, a coastal permit to construct a marina in Kennedy Point Bay, within the larger Pūtiki Bay at Waiheke. Appeals against the grant were unsuccessful. Construction commenced in 2021. A beach occupation began around March 2021 and a series of protests at or near the marina site followed.

[7] Ngāti Paoa assert mana whenua for Waiheke, deriving from ancestral connections to Pūtiki Bay.[2] Mx Weiss has whakapapa to Ngāti Paoa, and felt obliged, as a matter of tikanga, to occupy the pontoon in protest to the construction to protect the kororā (little blue penguin) which inhabit the area.[3]

Undisputed events relevant to police case for trespass

[8] On 29 May 2021, the police as agent for Kitt Littlejohn, a director of KPBL, served a trespass notice upon Mx Weiss, warning them to stay off the Kennedy Point marina construction zone, described in the notice as "the area clearly signed and physically identified by construction fencing and buoys within the area marked on

---

2 *Weiss*, above n 1, at [16].
3 At [7].

[a map attached to the notice]". On 6 July 2021, a similar notice was similarly served upon Ms Timmins.

[9] On 7 July 2021, Ms Timmins was on a pontoon within the construction zone, upon which protestors had erected tents and had been staying. A KPBL employee warned Ms Timmins to leave, but she refused to do so.

[10] On 12 and 15 July 2021, Mx Weiss was on the pontoon. On 15 July 2021, Mr Jacobsen was also on the pontoon, along with one other person. From 11.23 am, Senior Sergeant Marty Brown, acting as agent for KPBL, used a megaphone directed at those on the pontoon. He commenced by addressing Mx Weiss and the other person by their given names and identifying himself. He then said he was present "to tell you to leave, you're trespassing in terms of s 3 and 4 of the Trespass Act 1980". He said, "we'd like everyone to come off without anybody being hurt". He proceeded repeatedly to issue requests and instructions to leave the pontoon. Mx Weiss and Mr Jacobsen did not do so, except once police officers came to the pontoon and removed them.

The offence of trespass

[11] A person may commit an offence of trespass in two ways: by remaining at a place after a warning to leave; or by going to a place having been warned to stay off.

[12] The former mode of trespass is set out in s 3 of the Trespass Act 1980 as follows:

> **3 Trespass after warning to leave**
>
> (1) Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place **by an occupier** of that place, neglects or refuses to do so.
>
> (2) It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.
>
> (emphasis added)

[13] The latter mode is set out in s 4:

> **4 Trespass after warning to stay off**
>
> (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.
>
> (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.
>
> (3) Where any person is convicted of an offence against this Act committed on or in respect of any place, the court may warn that person to stay off that place.
>
> (4) Subject to subsection (5), 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.
>
> (5) It shall be a defence to a charge under subsection (4) if the defendant proves that—
>
> (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.
>
> (emphasis added)

[14] The added emphasis confirms that the Trespass Act protects rights of occupation rather than ownership. Under s 2(1) of the Act:

> **occupier**, in relation to any place or land, means 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

[15] For the offence to be committed, the refusal to leave or stay off upon warning must be wilful.[4] This renders it subject to the defence of "honest belief (in circumstances or facts which, if true, would make the act innocent)".[5] As that description implies, the defence operates where the defendant may have mistakenly

---

4 *Hanna v Police* [2012] NZHC 218, [2012] NZAR 129 at [18].
5 At [19].

failed to appreciate the facts establishing the occupier's authority to issue the warning. The defence cannot operate where the defendant's mistake as to the occupier's authority was one of law.[6]

The effect of a coastal permit

[16] Section 12 of the Resource Management Act 1991 (RMA) provides that no person may, in the coastal area, do a range of things such as erect a structure fixed in, on, or over any seabed, unless expressly allowed by (amongst other things) a resource consent. A resource consent to do something in a coastal marine area that would otherwise contravene s 12 is called a "coastal permit".[7]

[17] Under s 122(5) of the RMA:

> Except to the extent—
>
> (a) that the coastal permit expressly provides otherwise; and
>
> (b) that is reasonably necessary to achieve the purpose of the coastal permit,—
>
> no coastal permit shall be regarded as—
>
> (c) an authority for the holder to occupy a coastal marine area to the exclusion of all or any class of persons; or
>
> (d) conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.

[18] In s 122(5), the word "and" is to be read disjunctively; that is, a coastal permit authorises the holder to exclude others from occupation, even if the permit does not expressly provide such authority, if to do so is reasonably necessary to achieve the permit's purpose.[8]

---

6 Crimes Act 1961, s 25. See also *Crockenberg v Police* [2017] NZHC 2704, [2018] NZAR 53 at [37]; and *Hanna v Police,* above n 4, at [26], citing *Police v Shadbolt* [1976] 2 NZLR 409 (HC).

7 Resource Management Act 1991 [RMA], s 87.

8 *Hume v Auckland Regional Council* [2002] 3 NZLR 363 (CA) at [17]–[22].

The Judge's decisions

[19] Relevantly to this appeal, the Judge convicted each appellant on the basis of findings that:

(a) On those occasions when the appellants were on the pontoon (described at [9] and [10] above), KPBL's exclusive occupation of the construction zone was, in terms of s 122(5), "reasonably necessary to achieve the purpose of" KPBL's permit. KPBL was accordingly, under s 122(5), entitled to issue effective warnings under the Trespass Act to leave or stay off the construction zone.

(b) On that basis, and in light of the undisputed facts outlined above, each appellant was, at the relevant time and in terms of ss 3 or 4 of the Trespass Act, trespassing on a place having been warned by an occupier to leave or stay off.

(c) None of the appellants could rely on a defence of honest belief in facts or circumstances which would make their presence lawful. Views that tikanga took precedence over the Trespass Act involved a mistake of law.[9]

(d) Nor were the defences of necessity or emergency, set out in s 3(2) and s 4(5)(b), available.

---

9 *Weiss*, above n 1, at [123].

Question One: When (in order to achieve the purpose of a coastal permit issued under the Resource Management Act 1991) it is reasonably necessary to exclude the public from the area covered by the permit, can the permit holder lawfully exclude the entire public, including persons entitled to occupy the area as a matter of tikanga?

The Judge's reasoning relevant to Question One

[20] Mx Weiss admitted being present in the construction zone on the dates in question but contended for a whakapapa-derived tikanga entitlement and obligation to occupy the area to protect the kororā.

[21] However, in her judgment relating to Mx Weiss, when addressing the question of KPBL's authority, as an "occupier" under s 2(1) of the Trespass Act, to issue Mx Weiss with its trespass notice, the Judge referred only briefly to the issue of Mx Weiss' tikanga entitlement. Instead, the Judge referred more fulsomely to provisions of the Trespass Act, RMA and Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). Citing s 11(5) of MACA, the Judge observed that that Act "allows for lawful restrictions to marine areas imposed under other enactments". The Judge added:[10]

> In this case the right of exclusive occupation of the construction zone is derived from the resource consent granted to build the marina. Section 122(5) of the [RMA] is said to provide the ability for exclusive occupation reasonably necessary to complete construction.

[22] And it was in that context that the Judge set out her essential reasoning on this question of KPBL's authority:

> [58] Ms Reid submits that Mx Weiss was exercising kaitiakitanga under the *mana tuku iho* of Ngāti Paoa. Therefore, Mx Weiss was acting in accordance with tikanga, which cannot be extinguished, and can override KPBL's right of exclusive occupation or at least be co-existent with it.
>
> [59] It is accepted that Ngāti Paoa continues to have customary interests within Pūtiki Bay. Tikanga predates the arrival of the common law in 1840 and includes the core value of kaitiakitanga. The marine equivalent of mana whenua is mana moana.
>
> [60] While coexistent rights may exist in a general sense, I find that KPBL had the right to exclusive occupation of the construction area itself. This includes not only the equipment but the necessary safety zone around the

[10] At [57].

> equipment. Exclusive occupation was necessary for safe construction to occur.
>
> [61] This accords with common sense as well as expectations under the Health and Safety at Work Act 2015. Businesses who create hazardous environments need to be able to control who enters those hazardous environments.
>
> [62] Accordingly, I find that KPBL were entitled to trespass people from the construction zone and to issue trespass notices.

[23] The Judge adopted these findings and reasoning in her judgments relating to Mr Jacobsen[11] and Ms Timmins.[12]

The appellants' position

[24] The appellants complain that the Judge did not properly address the legal consequence of Mx Weiss' entitlement under tikanga. They say that KPBL's coastal permit did not authorise it to exclude Mx Weiss from occupation of the construction zone. This is the basis on which they propose the following question of law (and sub-questions):

> II. Did the Judge err in law by finding that rights of exclusive occupation under s 122(5)(b) of the [RMA] overrode and extinguished rights of tikanga at place within the specific marina area?
>
> A. Did the Judge err in not attempting to reconcile the rights of exclusive occupation of KPBL with the tikanga rights at place of Ngāti Pāoa and the defendants?
>
> B. Did the Judge err in holding that rights conferred under s 122(5)(b) of the RMA can extinguish rights in tikanga?
>
> C. Did the Judge err by not determining, as part of an assessment of the lawfulness of Mx Weiss', Mr Jacobsen's and Ms Timmins' actions, whether they were in accordance with tikanga?

[25] More particularly, the appellants submit that:

(a) Mx Weiss has a customary interest in Pūtiki Bay, arising as a matter of tikanga, which exists independently of whether that interest has received recognition under pt 4 of the MACA. In particular, they assert

---

11 *Jacobsen*, above n 1, at [12].
12 *Timmins*, above n 1, at [9].

"a general right to go, repass and occupy the common marine and coastal area in accordance with tikanga".

(b) If Mx Weiss could lawfully be required to refrain from occupying the construction zone, it follows that Mx Weiss' tikanga entitlement must have been extinguished. Yet, on the authority of the Court of Appeal's judgment in *Attorney- General v Ngāti Apa*,[13] the RMA does not extinguish customary property interests in the seabed or foreshore.

(c) The Judge's reasoning suggests that health and safety concerns were seen to justify "some form of partial temporary overriding or extinguishment of rights in tikanga". But such a finding would be "entirely unorthodox and novel", and unsupported by authority with which their counsel are familiar.

Assessment

[26] The proposed question and sub-questions are unsatisfactory. The Judge did not find, either expressly or implicitly, that "rights of exclusive occupation" under s 122(5)(b) of the RMA "extinguish… rights of tikanga".

[27] Instead, as her reasoning (set out at [20]–[22] above) shows, the Judge implicitly found only that s 122(5)(b) applies a certain priority as between the holder of a coastal permit and others who hold a more general entitlement in respect of the area covered by that permit. That is, the Judge observed that the Court of Appeal has confirmed the interpretation to be given to s 122(5)(b): a coastal permit authorises the holder to exclude all others from occupation of the particular area the subject of the permit, but only to the extent the permit expressly provides such authority or is reasonably necessary to achieve the permit's purpose.[14] The interests of others are not extinguished. Rather, to this extent, they are overridden.

---

13 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [77] and [123].
14 *Hume,* above n 8, at [17]–[22].

[28] The distinction between the extinguishment of a property interest and its mere limitation is significant. It is confirmed by the authority upon which the appellants rely: *Ngāti Apa*.[15]

[29] In that case, the Court of Appeal addressed the status of Māori customary interests, held according to tikanga, in the foreshore and seabed. The Court found that the Crown's radical title was subject to such customary interests, and that such interests continued until they were lawfully extinguished.[16] The onus of proof of extinguishment lay on the Crown and the purpose had to be clear and plain.[17] And further, the RMA did not effect extinguishment of such customary interests.[18]

[30] On the other hand, the Court in *Ngāti Apa* confirmed that the RMA will, on occasion, operate to override (but not extinguish) property interests. Chief Justice Elias wrote:[19]

> The management of the coastal marine area under the Resource Management Act may substantially restrict the activities able to be undertaken by those with interests in Maori customary property. That is the case for all owners of foreshore and seabed lands and indeed for all owners of land above the high water mark. The statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.

[31] Similarly, Gault P considered the position that would arise if certain parts of the foreshore or seabed were vested as Māori customary land under Te Ture Whenua Maori Act 1993, and observed:[20]

> Of course, should any land become the subject of a vesting order as a result of the claim, it would continue to be subject to all of the relevant provisions of the Resource Management Act.

---

15 *Ngati Apa,* above n 13.
16 At [30]–[34], [49]–[51] and [54] per Elias CJ; [101]–[102] per Gault P; [143] and [147]–[148] per Keith and Anderson JJ; and [183]–[186] per Tipping J.
17 At [185] per Tipping J.
18 At [76] per Elias CJ, [123] per Gault P, and [192] per Tipping J.
19 At [76].
20 At [123].

[32] Indeed, Tipping J wrote that the RMA "represents a formidable barrier to the existence of any 'as of right' activity within the coastal marine area which may be said to derive from the establishment of the status of Maori customary land".[21]

[33] The context in which Tipping J made that remark is noteworthy. Justice Tipping had previously written the judgment of the Court of Appeal in *Hume v Auckland Regional Council*.[22] *Hume* is the judgment by which that Court confirmed the proper interpretation of s 122(5). In the paragraph preceding Tipping J's "formidable barrier" remark in *Ngāti Apa*, the Judge referred to s 122(5) and *Hume,* and their consequence, that "unless expressly or implicitly provided otherwise, no coastal permit will of itself give any exclusivity of use or occupation of the coastal marine area". On this basis, the Judge concluded:[23]

> The coastal marine area generally, that is, those parts **which are not subject to a coastal permit**, must be the subject of an even stronger presumption of non-exclusivity of use, occupation and enjoyment.

[34] Thus, when Tipping J referred in *Ngāti Apa* to RMA as a formidable barrier to as of right activity, the Judge was proceeding implicitly on the basis that a coastal permit, providing expressly or implicitly for exclusive occupation, would to that extent override any customary entitlement. That the Judge in the present case proceeded implicitly in the same fashion is unsurprising.

[35] This is the basis for my view that proposed questions of law, framed in terms of any customary interest being extinguished, are inapt. Such questions seem designed to take advantage of the Court of Appeal's findings in *Ngāti Apa* that the RMA does not extinguish customary property interests, without acknowledging the Court's obiter observations in that same case that the RMA may (and implicitly according to Tipping J in respect of certain coastal permits will) override customary property interests.

[36] Nevertheless, the core of this aspect of the appellants' case is that a coastal permit expressly or implicitly providing for exclusive occupation by the permit holder

---

21 At [192].
22 Above n 8.
23 At [191] (emphasis added).

will not, to that extent, override a customary entitlement to occupation, arising as a matter of tikanga. Framing this core of their case in an appropriately narrow fashion gives rise to the question of law I have framed as Question One.

[37] As indicated above, my answer to Question One is in the affirmative. In my view, when (in order to achieve the purpose of a coastal permit issued under the RMA) it is reasonably necessary to exclude the public from the area covered by the permit, the permit holder can lawfully exclude the entire public, including persons entitled to occupy the area as a matter of tikanga. This is because:

(a) My view is supported by the obiter observations of the Court of Appeal in *Ngāti Apa*, described at [30] to [33] above. The submission of the appellants' counsel, suggesting that customary interests being overridden on the basis of reasonable necessity is "entirely unorthodox and novel" and "unsupported by authority" cannot be sustained.

(b) Following *Ngāti Apa*, Parliament enacted the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA). The purpose of the MACA is to:

> (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand; and
>
> (b) recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua; and
>
> (c) provide for the exercise of customary interests in the common marine and coastal area; and
>
> (d) acknowledge the Treaty of Waitangi (te Tiriti o Waitangi).

In pursuit of that purpose, s 11 accords the marine and coastal area a special status.[24] Under s 11(2), "[n]either the Crown nor any other person owns, or is capable of owning, the common marine and coastal area". However, s 11(5) provides that this does not affect:

> (a) the recognition of customary interests in accordance with this Act; or

[24] Marine and Coastal Area (Takutai Moana) Act 2011, s 11(1).

(b) any lawful use of any part of the common marine and coastal area or the undertaking of any lawful activity in any part of the common marine and coastal area; or

(c) any power to impose, by or under an enactment, a prohibition, limitation, or restriction in respect of a part of the common marine and coastal area; or

(d) any power or duty, by or under an enactment, to grant resource consents or permits (including the power to impose charges) within any part of the common marine and coastal area; or

(e) any power, by or under an enactment, to accord a status of any kind to a part of the common marine and coastal area, or to set aside a part of the common marine and coastal area for a specific purpose; or

(f) any status that is, by or under an enactment, accorded to a part of the common marine and coastal area or a specific purpose for which a part of the common marine and coastal area is, by or under an enactment, set aside, or any rights or powers that may, by or under an enactment, be exercised in relation to that status or purpose.

So that they function effectively together and in accordance with the MACA's purpose, the subsections of s 11(5) can only be read on the basis that coastal permits, providing expressly or implicitly for the exclusion from occupation of customary interest holders, take that effect. The MACA's scheme and purpose thus recognises customary interests, to the extent that such interest holders are entitled under the RMA to consideration when the issue of any coastal permit is being decided.[25] But once issued, s 11(5) of the MACA applies so that the express and implied terms of a coastal permit take precedence in accordance with s 122(5) of the RMA.

(c) A reading of s 122(5) that allows customary interest holders to occupy areas where coastal permits provide, expressly or implicitly, for exclusive occupation on the part of the permit holder would require that customary interest holders be regarded as falling outside that provision's reference to "all or any class of persons". This cannot have been intended. Put another way, a legislative intention to exclude all

---

25 RMA, ss 6–8.

persons, including customary interest holders, from coastal areas in accordance with the express or implicit terms of a coastal permit is made clear by the choice of that phrase for s 122(5), which forms part of a statute where careful provision for recognition of customary interests is made.[26]

(d) A reading such as that described at [37](c) would be unenforceable. It would be impossible for coastal permit holders or the police to identify customary interest holders who are allowed to occupy areas from which others (that is, "all or any class of persons") are excluded.

Question Two: Was the Judge's factual finding, that it was reasonably necessary to exclude the public from the pontoon within the construction zone at Kennedy Point, so clearly untenable as to amount to an error of law?

The Judge's reasoning relevant to Question Two

[38] The Judge observed that each appellant's reasoning as to whether, as a matter of fact, KPBL's coastal permit implicitly provided for the exclusion of all others (which in light of her findings, and my conclusions, in respect of Question One would extend as a matter of law to customary interest holders) was brief.

[39] The Judge referred to the obiter observation, made in this Court by Gault J, when considering whether to grant KPBL an injunction to restrain protesters, that:[27]

> Exclusion of the public from the immediate vicinity of an active construction area – based on a 60 m setback in the [coastal marine area] – during construction hours appears reasonably necessary. Operating in the marine environment has its challenges. In exercising its coastal permit, KPBL has its own health and safety obligations.

[40] And, as seen in the passage cited at [22] above, the Judge proceeded to find that:

> … KPBL had the right to exclusive occupation of the construction area itself. This includes **not only the equipment but the necessary safety zone around the equipment**. Exclusive occupation was necessary for safe construction to occur.

---

26 *Weiss*, above n 1, at [60]–[61] (emphasis added).
27 *Kennedy Point Boatharbour Limited v Barton* [2022] NZHC 257 at [7].

> This accords with common sense as well as expectations under the Health and Safety at Work Act 2015. Businesses who create hazardous environments need to be able to control who enters those hazardous environments.

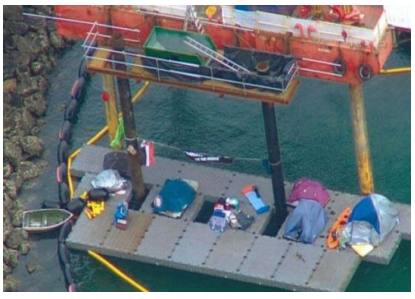
[41] This was the foundational finding of fact underpinning the Judge's conclusion that "KPBL [was] entitled to trespass people from the construction zone and to issue trespass notices". As discussed above, a coastal permit confers upon its holder an entitlement to exclusive occupation, where such occupation is "reasonably necessary to achieve" its purpose.

[42] Having reached that conclusion, the Judge went on, in the case of each appellant, to consider whether (as a matter of fact) they trespassed within the construction zone having been warned to stay off or required to leave.

[43] A feature of the evidence in that regard was that the precise boundaries of the construction zone were not clear, at least to Mx Weiss. The Judge accepted Mx Weiss' evidence in that regard,[28] and acquitted Mx Weiss of a charge alleging trespass within the construction zone through climbing a fence erected for the purpose of establishing a boundary so as to take up a position on a rock wall near where a digger was operating. But the Judge considered that the remaining charges relating to the appellants positioning themselves on the pontoon were clearer.

[44] The Judge observed that those occasions:[29]

> [T]he construction zone contained a large barge with a crane on it and a jack-up barge with a large digger on it. A pontoon floated on the water interconnecting with the jack-up barge, as shown in photographs below.



> There is no dispute that the jack-up barge was within the construction zone. Mx Weiss accepted the pontoon was within the construction zone.

---

28 *Weiss*, above n 1, at [70].

29 At [99]–[100] (footnotes omitted).

[45] The Judge therefore found that, on each occasion, each appellant was present within the construction zone the subject of KPBL's coastal permit (and in particular on the pontoon which was within the "necessary safety zone around the equipment"), contrary to its entitlement to exclusive occupation.

The appellants' position

[46] The appellants say it was not proved that KPBL could exclude the public, let alone a customary interest holder such as Mx Weiss, from "areas where the [alleged] acts of trespass occurred". They say that KPBL's coastal permit was not produced in evidence, and that its director, Mr Littlejohn, simply claimed when giving evidence that exclusion of the public from the construction zone was "reasonably necessary" in terms of s 122(5). They say this means there was a lack of proof of:

(a) the purpose of the permit; and

(b) the extent of the area from which the public could lawfully be excluded.

[47] The appellants take issue with what they say was an assumption, on the Judge's part, that it was reasonably necessary to exclude the public from the pontoon for health and safety reasons. In this regard, they note that protesters, including Mx Weiss, had been living on the pontoon, in tents, for some days prior to their arrest, while construction work continued elsewhere within the construction zone. And that Mx Weiss had only taken up residence when a construction worker pulled her onto the pontoon, from the kayak in which she had been paddling near it. The appellants say that the test of reasonable necessity "does not justify a blanket approach to an entire space".

[48] This is the basis on which they propose the following question of law:

> I. Did the Judge err in finding that [KBPL] had an exclusive right of occupation that was "reasonably necessary" for the purposes of its coastal permit?

Assessment

[49] Again, the proposed question of law is not ideal. The core of this aspect of the appellants' case is that the Judge was wrong, as a matter of fact, to find it was reasonably necessary to exclude all of the public, including those claiming an entitlement to occupation by way of customary interest, from the pontoon within the construction zone at Kennedy Point. But factual findings, made in the determination of criminal proceedings, cannot be challenged on appeal in a manner requiring separate treatment, unless they were so improperly founded as to give rise to an error of law. Reframing this core of their case so as to state a question of law[30] gives rise to Question Two.

[50] As indicated above, my answer to Question Two is in the negative. In my view, the Judge's factual finding, that it was reasonably necessary to exclude the public (including the appellants) from the pontoon within the construction zone at Kennedy Point, was not so clearly untenable as to amount to an error of law. This is because:

(a) The test for an exclusive entitlement of occupation under a coastal permit, to the extent such entitlement derives implicitly from its purpose (rather than it express terms), is one of what is "reasonably necessary" to achieve the permit's purpose. The starting point is that occupation of the area covered by a coastal permit is not exclusive.[31] However, fine-grained analysis of whether, at any particular moment during the course of construction works, each particular space within the area in which construction is to be carried out requires exclusive occupation is inappropriate. Requiring such analysis would, of itself, be likely to undermine the permit's purpose, and it is the purpose of the permit which drives the enquiry.

(b) The Court of Appeal's judgment in *Hume* reflects that this is so. There, the Court observed that:[32]

---

30 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
31 *Hume,* above n 8, at [26].
32 At [23] (emphasis added).

> The capacity for implication which [s 122(5)(b)] recognises removes to a large extent the difficulties which [the appellant] suggested would arise with general public access to other types of structure within the coastal marine area, such as marine farms, moorings or restaurants built out over coastal waters. If the matter is not expressly governed by a condition of the permit, *the inter-relation between public and private use of authorised structures within the coastal marine area can fairly and reasonably be governed by a sensible process of implication under s 122(5)(b)*. In the ordinary case of moorings, for example, reasonable necessity must imply exclusivity of use by the permit holder.

And, having resolved upon the proper, disjunctive interpretation of s 122(5), the Court went on to consider whether the coastal permit at issue, which allowed adjoining landowners to construct a jetty, gave rise to an exclusive entitlement of occupation, during either its construction phase or a subsequent phase when the jetty would merely be occupied or otherwise used. The Court observed simply that:[33]

> The activity of construction of a jetty must by necessary implication exclude others to the necessary extent. The activity of occupying and using the jetty does not do so, except to a very limited spatial and temporal extent.

There is no suggestion that the Court contemplated exclusion from each part of the jetty while it was being constructed would form part of a further enquiry into what the permit's purpose "fairly", "reasonably" and "sensibl[y]" required.

(c) That KPBL's permit was not itself produced as an exhibit does not make the Judge's finding, as to what was reasonably required for the achievement of its purpose, untenable. There was no suggestion that the marina was being constructed in the wrong place. The evidence that was formally produced, including photographs such as those reproduced at [44] above, and Mr Littlejohn's evidence that certain construction activities at the marina ceased while protestors were on site as "contractors actually were not prepared to continue work that

---

33 At [27].

would potentially place members of the public in harm's way", provided considerable objective foundation for the Judge's finding.

(d) In any event, it is apparent that the permit was properly before the Judge, and that the Judge considered it: it is annexed to the Environment Court's judgment which dismissed an appeal against its issue. The Judge cited and described the judgment in some detail, including by referring specifically to the condition of the permit which addressed the monitoring of kororā.[34]

(e) The evidence upon which the appellants rely, suggesting that incidental aspects of construction were undertaken while the protesters were on site, says little about the risk levels to which protestors were exposed, or about whether exclusive occupation was reasonably necessary to achieve the permit's purpose (that is, complete construction of the marina). And it says nothing about whether the Judge's finding to that effect was untenable.

(f) It should not be overlooked that at least one apparent purpose of the protestors' occupation of the pontoon was to prevent or delay achievement of the purpose of KPBL's permit. To that extent, their very conduct forms part of the evidence suggesting that exclusive occupation of the pontoon was reasonably necessary to achieve the permit's purpose.

---

[34] *Weiss*, above n 1, at [20]–[26] and fns 32 and 33, citing the Environment Court decision—*SKP Incorporated v Auckland Council* [2018] NZEnvC 081—and para 24A of the permit, which permit was annexed to that decision.

Question Three: Was any mistake, made by the appellants about whether they were entitled as a matter of tikanga to occupy the construction zone, capable of giving rise to the defence of honest belief in facts or circumstances which would make their presence lawful?

The Judge's reasoning relevant to Question Three

[51] The Judge acknowledged the principles relating to the defence of "honest belief (in circumstances or facts which, if true, would make the act innocent)", outlined at [15] above. These acknowledged principles include that the defence cannot operate where the defendant's mistake as to the occupier's authority was one of law.[35]

[52] In that regard, the Judge observed that:[36]

> [115] The distinction between a mistake of fact and a mistake of law is not always straightforward. While it is from a Canadian case, this quote making the distinction between a mistake of fact and mistake of law is useful:
>
> > As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter. By contrast, a mistake of law exists when the mistake relates not to the actual facts but rather to their legal effect.

[53] The Judge proceeded to find against Mx Weiss' claim of an honest belief Mx Weiss was acting in accordance with tikanga and was therefore entitled to occupy the pontoon.[37] But, in any event, the Judge found the claim to amount to one of mistake of law:[38]

> The belief that tikanga and actions taken as kaitiakitanga takes precedent over the Trespass Act in this case is a mistake. In my view this is a legal mistake, rather than a mistake of fact.

[54] Similarly, in respect of Mr Jacobsen, the Judge found the belief claimed by way of defence to be not honestly held,[39] but in any event, to the extent that as

---

35 Above n 6.
36 *Weiss*, above n 1, at [115], citing *R v Latouche* 2000 CMAC 431, (2000) 190 DLR (4th) 73 at [12].
37 At [143].
38 At [123].
39 *Jacobsen*, above n 1, at [44].

manuhiri he sought to found his claim upon Mx Weiss' customary interests, found it a claim of mistake of law.[40]

[55] In respect of Ms Timmins, the Judge found her claim, that tikanga and kaitiakitanga take precedence in her case over the trespass notice with which she had been served, to amount simply to a claim of mistake of law.[41]

The appellants' position

[56] The appellants propose the following questions in respect of this aspect of their appeals:

> III. Was the Judge's approach to the defence of honest belief and its application correct at law?
>
> A. Did the Judge err in law by holding the defence of honest belief was not available on the evidential foundation provided at trial?
>
> B. Did the Judge err in law by failing to consider how the defence of honest belief should be interpreted in light of tikanga?

[57] Of course, the appellants maintain that they made no mistake: they say that the Judge was wrong to find Mx Weiss and Ms Timmins' customary entitlement to occupy the pontoon to have been overridden by KPBL's coastal permit and the consequential effectiveness of its trespass notices. But, in case this Court agrees with the Judge on that issue (as it does), they say that their mistake was not one of law. Instead, they say they honestly believed in facts or circumstances which would (if correct) have made their presence on the pontoon lawful.

[58] Counsel for Mx Weiss say that belief in the entitlement to practice kaitiakitanga on the pontoon, if incorrect, is "suggestive of a mistake of fact". They note that Mx Weiss was acquitted of the charge relating to their occupation of the rock wall that the Judge found them accurately to believe may not have been within the construction zone covered by KPBL's coastal permit. On this basis they suggest there may have been a mistake "as to spatial boundaries".

---

40 At [45].
41 *Timmins*, above n 1, at [41].

[59] Mr Jacobsen says that he was present on the pontoon because he "'answered a call' as manuhiri from Mx Weiss as mana whenua" for support to protect the kororā. He says his intention was genuinely held and (if mistaken) did not involve a mistake of law.

[60] Ms Timmins says that she believed her actions involved an exercise of kaitiakitanga and tikanga, and that she lacked a guilty mind. She says that the nature of her beliefs "as to the precedence of tikanga rights over any other rights" is irrelevant.

Assessment

[61] It is simplest, and I therefore prefer, to address this aspect of the appeal in terms of whether any mistake the appellants made was one of fact or circumstance, or one of law. Contrary to the last described submission for Ms Timmins, the nature of her beliefs are highly relevant to the question whether they render her liable to conviction for trespass; in particular, if they involve her mistaking the law on the topic of whether she had any entitlement to ignore a trespass notice. In that event, her defence (amounting to a defence of honest but mistaken belief as to the law) had to fail. Section 25 of the Crimes Act 1961 provides that:

> The fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her.

[62] As indicated above, my answer to Question Three is also in the negative. In my view, any mistake, made by the appellants about whether they were entitled as a matter of tikanga to occupy the construction zone, was not capable of giving rise to the defence of honest belief in facts or circumstances which would make their presence lawful. This is because any view they held, that they were entitled as a matter of tikanga to occupy the construction zone, amounted for the following reasons to a mistake of law:

(a) My answers to the questions of law framed as Questions One and Two establish that:

(i) as with the general entitlement of all members of the public to occupy the area in which the pontoon was positioned, any customary entitlement of the appellants to occupy that area was overridden by KPBL's coastal permit, to the extent KPBL's exclusive occupation was reasonably necessary to achieve construction of the marina; and

(ii) the Judge's finding, that on the occasions giving rise to each conviction exclusive occupation was reasonably necessary for that purpose, is not susceptible to challenge in this proceeding.

(b) The appellants do not claim that they made a mistake about whether exclusive occupation was reasonably necessary for the purpose of construction. Instead, the essence of their claimed mistake relates wholly to the question whether KPBL's entitlements under its coastal permit took precedence over their entitlements deriving from tikanga.

(c) The submission of counsel for Mx Weiss, that they may have made a mistake "as to spatial boundaries" cannot be supported. As the Judge observed, Mx Weiss specifically accepted while giving evidence that when present on the pontoon they were within the construction zone. The position relating to the pontoon charges was thus quite different to that relating to the rock wall charge. Mx Weiss was acquitted of that charge because the Judge was not sure the rock wall was within the area covered by KPBL's permit, and in any event Mx Weiss may have made a mistake of fact about that.

(d) The Courts have repeatedly confirmed that questions of tikanga are properly questions of law:

(i) The Court's declaratory jurisdiction extends to declarations about rights at tikanga: "because tikanga is law, iwi and hapū

may seek legal remedies relying on recognition of tikanga by the courts in particular cases".[42]

(ii) The Supreme Court in *Ellis v R* acknowledged that tikanga Māori was the first law of Aotearoa, and forms part of the common law.[43]

(iii) Similarly, the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* described tikanga values, including kaitiakitanga, as "principles of law" which ought to be taken into account in the resource management context as "applicable law".[44]

(e) However, tikanga as law is subject to the precedence of statutes issued by New Zealand's fully sovereign Parliament.[45] If it were otherwise, constitutional order (including this Court's authority under s 12 of the Senior Courts Act 2016) would be in jeopardy. This point, and s 25 of the Crimes Act 1961 (see above), together dispose of the appellants' argument that a mistake as to the authoritative extent of tikanga might properly form part of an expanded defence of honest belief.

[63] In summary, the appellants' mistake (if any) was as to whether they were entitled as a matter of tikanga to occupy the pontoon. The legal consequence of the

---

42 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [366].

43 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [19], [107]–[108], [172], and [257]–[259].

44 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [296]–[297].

45 *Ellis v R*, above n 43, at [98] and [117], citing *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [133]–[134]. See also other cases citing *Ellis,* for example, *Huata (ato Te Huawhenua) v Mangaroa 26N2 Trust* [2024] NZHC 2756 at [32]; *Kaiwai v New Zealand Police* [2024] NZHC 2491 at [50]; *Bamber v Official Assignee* [2023] NZHC 260, [2023] 2 NZLR 636 at [32]; *Official Assignee v Honey* [2024] NZHC 2216, (2024) 25 NZCPR 871 at [68]; *Director-General of Ministry of Health v Wakaminenga Kaunihera Hauroa | Health Council* [2023] NZHC 1683 at [47]; *Te Ara Rangatu O Te Iwi O Ngati Te Ata Waiohua Inc v Attorney-General* [2018] NZHC 2886, [2019] NZAR 12 at [14]; *McMillan-Schmidt v New Zealand Police* [2024] NZHC 2250 at [62]; *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521 at [76]; and *R (CA219/2025) v R* [2025] NZCA 470, [2025] 3 NZLR 336 at n 46. See also *Gregory v Thames Coromandel District Council* [2017] NZHC 3002 at [59]; *Hata v Attorney-General* [2025] NZHC 519, [2025] NZAR 241 at [101]; and *Ngati Apa,* above n 13, at [106].

precedence of statute over tikanga, and in particular the operation of s 11(5) of the MACA and s 122(5) of the RMA in cases where a coastal permit has been issued, is that they were not. Any mistake the appellants made was one of law.

Result

[64] In light of the above:

(a) I exercise the Court's power under s 299 of the Criminal Procedure Act, to amend or restate the appellants' proposed questions of law, in the terms set out as Questions One to Three (above).

(b) I grant the appellants leave to appeal those amended questions under s 296(2) of that Act.

(c) In terms of s 300(1)(a), the Judge's rulings in respect of the amended questions are confirmed.

_____

Johnstone J