IN THE SUPREME COURT OF NEW ZEALAND SC 64/2012

[2013] NZSC Trans 5

BETWEEN **PHILIP DEAN TAUEKI**

Appellant

AND **THE QUEEN**

Respondent

Hearing: 11 March 2013

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: G J X McCoy, Q Duff and K J McCoy for the Appellant
F R J Sinclair and J E Mildenhall for the Respondent

CRIMINAL APPEAL

MR MCCOY:

May it please the Court. Counsel's name is McCoy, I appear with Mr Duff and Mr Kim McCoy for the appellant.

ELIAS CJ:

Thank you, Mr McCoy, Mr Duff, Mr McCoy.

MR SINCLAIR:

May it please the Court, Sinclair and Ms Mildenhall for the respondent.

ELIAS CJ:

Thank you, Mr Sinclair, Ms Mildenhall. Yes, Mr McCoy?

MR MCCOY:

Your Honours, in this case the appellant has been convicted of common assault. On the appellant's case to this Court, as below, it was a justified, minor technical assault that was reasonable in all the circumstances and did not consist of a strike to the body or cause bodily harm.

The area of land where the assault occurred can best be seen somewhat in terms of the image of the RAF insignia. The inner circle is the circumference since 1956 of Lake Horowhenua. The middle circle was the circumference in 1896 and the external circle is the one chain boundary of the lake. Between the 1956 and the 1896 circumference is the area called the dewatered area because since 1896 the lake has receded or shrunk because of drainage works in the 20s and 30s.

Over this land, and by now I refer to the chain and the dewatered area, and the dewatered area itself plainly is of variable size, but over that land is a small piece of land which was described as a recreation reserve since 1981. When I take you to the *Gazette* notice you will see that the recreation reserve itself is expressly subject to the rights given under section 18 of the Reserves and Other Lands Disposal Act 1956, which often enjoys the acronym ROLD.

Over that recreation reserve, a part of it was, in fact, subject to what was called a lease to the Horowhenua Sailing Club from 1961 to 2003. The lease expired in 2003 and there is the final component to the puzzle, a very small piece of Crown land actually part of the lakebed immediately adjacent to the public reserve.

CHAMBERS J:

Is there anywhere a map of the whole area?

MR MCCOY:

There is a map in the respondent's most recent instalment of authorities, number 22, right at the back. There is an imperfect map but at no stage at the trial did the Crown adduce surveying or cadastral evidence.

ELIAS CJ:

Sorry, did you say the respondent's?

MR MCCOY:

Yes, the respondent's more recent set of authorities, the ones filed on Thursday.

ELIAS CJ:

What tab?

MR MCCOY:

22, your Honour, the last document.

CHAMBERS J:

So can you just point out where relevant things are from that?

MR MCCOY:

You'll see, your Honour, there is a reasonably consistent lake edge that then in the right-hand side centre goes into a perfectly uniform shape. That is the area of the reserve and on that part of the reserve was the expired Sailing Club lease. You will see, straddling and effectively encircling the land, is the original 1896 circumference and the one chain strip.

CHAMBERS J:

And where is, can you just tell us where exactly the Sailing Club is on that?

MR MCCOY:

I cannot and nor was the Judge at trial, a point he himself made in his judgment. It was left to secondary evidence by the prosecution witnesses, who themselves have not seen the documents, to have a stab at identifying where it took place. But essentially, as I understand it, and this might prove to be common ground, in that three-sided rectangular part, the incident occurred on what is known as the dewatered area, that is undoubtedly Maori freehold land, on the dewatered area and the one chain strip area on one side of the Sailing Club before one came to the current 1956 lake edge boundary.

CHAMBERS J:

Just to complete the picture, there may not be evidence on this, but where is the house Mr Taueki lives in?

MR MCCOY:

I do not believe, from the evidence, that that's available but my understanding is it's reasonably adjacent to that but if there's – if that proves to be problematic I will confer with my learned friend and see if we can get an agreed fact –

McGRATH J:

But by "reasonably adjacent" you mean outside the three sides of the rectangular plot?

MR MCCOY:

I do, I do, but not too far from it.

McGRATH J:

Yes.

WILLIAM YOUNG J:

So is everything within the purple circle, is that public domain, or not?

MR MCCOY:

Yes. The domain is within the purple. The domain is the surface of the lake and that piece of land which has the three sides of the rectangle.

WILLIAM YOUNG J:

And then the uncoloured in strip that runs outside that, is that an original one chain boundary around the original waters of the lake?

MR MCCOY:

Yes, correct. So what happened was, when the lake was originally given in 1896 to the Muaupoko tribe, the lake shrank over time because of dairying and drainage. In 1956, an important section that I must take the Court to, the New Zealand Parliament legislated because there were by then real concerns as to the ownership of the land as it had been and the lake and what it had now shrunk to become, and the effect of the 1956 legislation was to give Muaupoko, and to declare that it had been and always had been their land, the land from the 1896 lake with the adjustment of the one chain around that, plus all the area now moving back into the lake, the watered area, plus the new circumference of the lake from 1956.

ELIAS CJ:

And is the 1986 legislation the one that says it's deemed always to have been Maori land?

MR MCCOY:

1956, m'lady, yes, section 18 of the 1956 says that expressly and, as Mr Justice Cooke said in 1975 in an appeal in the High Court at Palmerston North, "This legislation may be unique for New Zealand." I note the respondent indicates that there are other public-Maori interface models, however on the extremely short time we've had available to consider them, it seems that their analogy is at a high level of generality and the precise formula used in this 1956 legislation and the wording and the traction that one can derive from it is not available in terms of other legislation. We would submit, it still remains literally unique, as Mr Justice Cooke could say in 1975 and Mr Justice O'Regan in 1978.

So it will be critical for me to take you to section 18 because part of the burden of our appeal will be to respectfully submit that the learned Judges of the Court of Appeal below and the trial Judge gave, frankly, wholly insufficient weight to the terms and thrust of this very important legislation which recognised an injustice that had been brought to Muaupoko since before 1896.

Your Honours, the certified question in this case is a question looking at the parameters and meaning of section 56 of the Crimes Act 1961. That is found, for your convenience, in a number of places and there's a slim line bundle put forward by the appellants which bears the cover "Appellant's bundle of legislation," and you may find that convenient, very slim. And in it one will see that there are a fasciculus of sections extending from section 52 right through to section 58 of the Crimes Act and section 91 of the Crimes Act. These deal with defence of property. Section 53, for example, dealing with movable property, chattels, with claims of right. Section 52, movable property against trespasser. Section 53, defence of dwelling house, and it may be pertinent to note that the legislature has drawn a distinction in section 55, for example, the justification, you can use such force as is necessary to prevent the forcible breaking and entering of a dwelling house. Contrast 56, which is engaged in the present case, which looks more generically at defence of land or building, presumably building meaning other than dwelling house and it reads, if I may, "Everyone in peaceable possession of any land or building, and everyone 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."

So this is plainly a justificatory defence, it's not excusatory, and the operative expression "peaceable possession" is found in no less than six sections of the Crimes Act 1961 and the variant found, for example, in section 57, "peaceably entering" is found in two more. So the notion of peaceable possession and its variations is found in eight separate sections of the Crimes Act.

Disaggregating the section as it stands, and I will come to this seriatim in due course, but, at this stage, by way of introduction, it applies to everyone in peaceable possession. So the ingredients, as the Court of Appeal in Canada and New Zealand have said, are first of all possession. Second ingredient, is it must be peaceable. The third ingredient, it must be to prevent from trespassing or to remove the trespasser, so the third element looks at trespass. The fourth element looks at the nature of reasonable force and the two statutory exclusions from it are you must not strike and you must not do bodily harm and in this case the complainant himself said he was not struck and he suffered no bodily harm, so the only issue and the fourth element, is whether the force was reasonable in all the circumstances, a very minor force.

One can see that the justification is to prevent dot, dot, dot, from trespassing or the justification is to remove him, to wit, the trespasser, therefrom. If one comes across to the last section in this part, section 91, which is not engaged in the present appeal, one sees in subsection (3) that the Crimes Act provides that whether there was actual possession or a claim of right is a question of fact. That ties up neatly because the Court of Appeal in *R v Haddon* [2007] NZAR 135 (CA) concluded, in our submission correctly, that possession is a question of fact.

Section 56 has been in New Zealand statutory law since 1893 and has virtually never been considered prior to this case. It has its counterparts in Canada, in some of the Australian states and territories. It does not exist in English law, consistent with the irony that in 1879 the Indictable Offences Bill never got enacted into the United Kingdom law.

Now before going further into section 56 and making the discrete submissions in respect of the components, may I briefly invite the Court to understand the

appellant's case as to why he must succeed because the Court of Appeal essentially, if not entirely, decided the case on the basis that there was no peaceable possession. The Court of Appeal therefore did not need to go on to decide whether the complainant was, or might have been, a trespasser or whether the force used was reasonable in the circumstances. If that is correct as a basis, if this Court concludes that the appellant is, or may have been, in peaceable possession, it will follow that the prosecution could not have disproved beyond reasonable doubt that one of the four cumulative components of the defence and as it was those parts that were determinative in the Court of Appeal, this Court may itself be unwilling to embark on the further enquiry as to whether the appellant was correct –

ELIAS CJ:
I'm sorry Mr McCoy, I'm not sure I quite understand that submission. Can you just say it again? If in peaceable possession –

MR MCCOY:
I've sought to indicate that there are four elements to the defence –

ELIAS CJ:
Yes.

MR MCCOY:
– that cumulative, if the prosecution can disprove beyond reasonable doubt –

ELIAS CJ:
Oh I see.

MR MCCOY:
– any one, it succeeds.

ELIAS CJ:
Yes, thank you.

MR MCCOY:
In this case the Court of Appeal contented itself with the conclusion that the appellant was not in peaceable possession –

ELIAS CJ:

Yes.

MR MCCOY:

– therefore it did not go on – perhaps understandably – to decide the other two. So if I succeed on peaceable possession this Court itself may be unwilling to embark on what will be a first appeal from the District Court in relation to those other two issues.

CHAMBERS J:

What would you then say we did about it?

MR MCCOY:

Well the appeal would be allowed and the Court would then exercise a discretion whether to remit and it would not remit in view of the history and the insignificance of this case, bearing in mind the penalty and all the other circumstances. So you would decide peaceable possession. If the Court wishes me, of course, to advance submissions on the issue of trespass and the other parts, we're delighted to assist, and have done so in our written case. But it would be sufficient and determinative to conclude that the Court of Appeal erred in concluding that the appellant was not in peaceable possession.

ELIAS CJ:

But for my part I would want to be taken at least on a preliminary basis because it may be that you would argue against the findings of fact but I'd want to be taken to the findings of fact you rely on to say that the force used was to prevent any person from trespassing or to remove him.

MR MCCOY:

I'm delighted to accept that invitation and will do so then, your Honour, at the appropriate juncture.

ELIAS CJ:

Yes.

MR MCCOY:

Might I now please invite you to quickly, and I think this can be dealt with in two handfuls of minutes, look at the significant parts of the evidence because the

Court of Appeal, and I do not wish to be hypercritical, have dealt with this in a narrow basis, but there is much more to be said, because in terms of section 56 may I identify as my highlight submission that the appellant succeeds in either or both of two different ways. He succeeds because of section 56 he was acting by the authority of the Trust in what he did. So in terms of section 56, which reads, "Every one in peaceable possession of any land," that must include the Trust, "And every one lawfully assisting him or acting by his authority." Now the appellant, I will demonstrate, was acting by the authority of the chairman of the trustees. He therefore had the right under section 56 but he also had the right under section 56 in his own right because he was himself in peaceable possession, apart from under the devolved power given to him by the Trust. I wish that, I would like to very quickly identify the evidential basis for these propositions. The Court would be assisted if it came please to the document which is called, "Documents before Court of Appeal index to case." And if one comes into the notes of evidence taken before the learned Judge in the District Court and come please, the pagination is at top central, if one comes to page 2 –

ELIAS CJ:

Sorry are you going to take us – you're taking us through the evidence. Are you going to take us to the findings –

MR MCCOY:

Of course I am, your Honour.

ELIAS CJ:

Yes, that's all right.

MR MCCOY:

Yes, of course I am, it's just a question of identifying the fastest way to get the Court's understanding, of course I will. Page 2, and if one comes in, now let me identify the issue before asking you to read this. The appellant's case was that he had been instructed by the chairman of the Trust, who gave evidence for the defence, to enforce the bylaws and in particular to ensure that no unwashed boat went onto the lake, Lake Horowhenua being ranked as one of the 10 worst lakes in terms of weed pollution and eutrophication in New Zealand.

CHAMBERS J:

Why do you become a trespasser just because you may be in breach of the bylaw?

MR MCCOY:

Because you then acted unreasonably and section 18 of the Reserves and Other Lands Disposal Act concludes that you therefore have forfeited your right of access across the land. I will come to section 18 with a promise after I had taken you to this evidence. So the two points the appellant raises are one, you could not bring the boat of that size, it had a 40 horsepower engine, the reason being the bylaws provided that there cannot be any motor engine boat on the lake. This is wholly consistent with the position of the Maori owners since 1953 who had written to the trustees that the sanctuary of the lake had to be kept intact. So there is a bylaw made by the Domain Board, and I'll come to that momentarily, which specifically precluded boats with motor engines coming onto the lake. There was an exception and the exception was a rescue boat and everybody can understand the morality of that. So issue number 1 –

ELIAS CJ:

Sorry, I thought the exception was required prior approval?

MR MCCOY:

Correct, it did.

ELIAS CJ:

By the, was it by the Domain Board?

MR MCCOY:

It did. It did, your Honour, and that also is an issue but the –

ELIAS CJ:

The Judge said it hadn't been –

MR MCCOY:

That's right.

ELIAS CJ:

– proved by the defence.

MR MCCOY:

But we only had to raise the evidential burden, it was then for the prosecution to disprove it.

ELIAS CJ:

Yes.

MR MCCOY:

The important point is, when I show you the evidence, that this boat that was to come on had 40 horsepower engine and you'll see at page 2, at line 25, the answer, "And what is that boat used for?" "Its primary use is as a start boat," so this is like a committee boat I suppose in yachting terms, "and a rescue boat, well that's its sole use. I take it out, I place the buoys on the lake and set the course for where the boats, the yachts have to sail around and then I anchor the boat on the start line and that creates one end of the start line." Now I won't just wearisomely read on but one will see immediately that this is not being used as a rescue boat. It's being used as the committee boat and it's used to place the buoys.

The other objection that is found expressly in the bylaws, there is a biosecurity risk involving the lake, so one of the bylaws expressly provides no one may take a boat onto this lake with any weed species or substance or other material on board the boat or its propeller. All perfectly sensible. If I show you immediately at page 23, and I'm trying to be judicious in the short number of extracts that I need to take your attention, if one comes to page 23 you will find it's admitted by the Sailing Club they do not wash the boats before they enter the lake, page 23, line 14, "Those that are brought in, are they washed down before they go into the lake? No. Because they've been out of the water for 10 days or so. How would you know that? Just through people telling me. So they are not washed before they go in the –

WILLIAM YOUNG J:

Sorry, what boats are you talking about?

MR MCCOY:

My Lord, oh yes, forgive me your Honour, all of the vessels, yachts, anything that goes into the lake.

WILLIAM YOUNG J:
Is he talking about here, the rescue boat, if I can use that expression?

MR MCCOY:
Oh no, no, certainly not, he's talking about all of the boats.

WILLIAM YOUNG J:
Right.

MR MCCOY:
None of the boats are cleaned because the assertion is, while they've been out of the water for 10 days or so and people, other people with all their boats tell him that, therefore they don't wash before they go into the lake but they –

WILLIAM YOUNG J:
But this is about the rescue boat though?

MR MCCOY:
The issue is the rescue – the so called rescue boat, yes.

WILLIAM YOUNG J:
Yes and he's saying, is he not, that the rescue boat never goes on any other water?

MR MCCOY:
He did say that, he did say that, correct and if you just come with me and bear with me, if you come to page 45, you'll see the complementary entry because what they do is –

ELIAS CJ:
85?

MR MCCOY:
45, forgive me, 45.

ELIAS CJ:
45, sorry.

MR MCCOY:

What they do is they do wash the boats after they come out of the lake, 45, and we see it at line 20, "They wash them as they come out. Where does the runoff or discharge go to? Into a septic tank. Where is that? Behind the building," and at line 30, "Yes, the club does have a hose and facilities there to wash the boats", boats, it's all the boats, your Honour, that's why I said none of them are washed before they go in, to wash the boats down after they have been on the water. "We also have some didymo sprays which are approved by Biosecurity New Zealand, the same one that DOC and others use."

And then the question, "Well does the runoff – so you're now washing your boat down after it comes out of the lake, where does the runoff go? Well it goes into the grass," and page 46, line 15, "Where does it end up? Well, um, it goes back into the lake". That is the way the Sailing Club treats the lake –

CHAMBERS J:

Do you happen to have the booklet of photographs?

MR MCCOY:

I do not. My learned friends may have it.

CHAMBERS J:

It might be quite useful just to see the booklet, at some point.

MR MCCOY:

Yes. Sorry, yes, I'm without assistance in relation to that. So the two points are there are bylaws about the nature of the boat that can go on the lake and there's a specific bylaw requiring clean boats, I mean, that is utterly common sense, to go on the lake.

Now, the last component – my promise in terms of the evidence is to show you what the chairman of the trustees said when he was called as a witness. Now the relationship at trial was the appellant was in person but the learned Judge appointed an amicus curiae to assist the Court and the amicus called the witness and the witness was Mr Stevens, who was the chairman of the Trust and your Honours have the relationship, the Trust owns the lakebed and the islands inside the lake and the Trust owns the Maori freehold land that literally encircles the lake which means, apart

from coming through this modest public reserve, there's no other entrance into the lake and the reserve itself sits under, not on top of, under the title of the Maori freehold land.

The Maori freehold land has, not as a distraction from its title but a servient requirement, that there be this reserve and I'll come to the legal analysis of this in due course but you cannot cross to the lake without crossing Maori freehold land, albeit in terms of the relevant part of the lake and adjoining land, it also happened to be a public reserve.

Now the evidence of Mr Stevens, called by the amicus, commences at page 135, in the order of 135 but if you just quickly perhaps come with me to 136 and I'm trying to fulfil my self-imposed time obligation here, 136 at line 30, "Philip, the Christian name of the appellant, had quite an important role because one of the major issues for the Trust had been the governance of the lake, basically the job of the Lake Domain Board which includes trustee members and also then other members, council members and Department of Conservation members now, unfortunately the governance of the lake being left up to the Domain Board, it sort of looked after the interests of the local region . . . ," and one can see about line 8, "The result of that, Philip was asked to assist in that kaitiaki role, the guardianship role and he was to co-ordinate things that were required around the lake."

Now importantly, if one comes to 137, say line 30, put down portaloos and they weren't going to do that. Philip played an important role in co-ordinating with the club, yacht club, to ensure that those portaloo facilities were available and also to ensure that the wash down facilities were available and that indeed, they were available, they were utilised as such and now I'm about to show your Honours three or four specific references, where the chairman of the Trust states in terms that the appellant was authorised, on behalf of the Trust, to enforce the bylaws. The first one is at 138, line 30, I've taken you back but if you come to 144 please –

ELIAS CJ:
Sorry, just pause. The bylaws were made by the –

MR MCCOY:
Domain Board –

ELIAS CJ:

– Domain Board –

MR MCCOY:

– yes. The –

ELIAS CJ:

– but this is the Trust –

MR MCCOY:

Correct.

ELIAS CJ:

– seeking to enforce the bylaws?

MR MCCOY:

It is of course, a constitutional right, well recognised with respect in New Zealand law, that any individual or party can bring a prosecution under a bylaw. It's not confined to the statutory body that creates the bylaws. So the Trust, or indeed Philip Taueki in his own right, could bring private prosecutions for breach of the bylaws.

ELIAS CJ:

But that isn't what happened?

MR MCCOY:

It never happened.

ELIAS CJ:

No.

MR MCCOY:

But it could have happened and the Domain Board was in 2008, at the time of this case, it was effectively defunct, it had almost died of its own inanition because Muaupoko, who had the right to nominate members to it, declined to do so and the Board simply did not operate for a good number of years.

McGRATH J:

Was there a quorum requirement?

MR MCCOY:

There is a quorum requirement. I think they could have met it but they did not. Perhaps they wished not to displease, or affect the nature of the relationship which was one of obvious deterioration in any event –

ELIAS CJ:

Well is it fair enough to take the inference that the fact that members weren't appointed by Muaupoko that there was disapproval of the operation of the Domain Board?

MR MCCOY:

Oh yes, that's a completely fair inference to draw. There was very significant deep felt dissatisfaction –

ELIAS CJ:

In other words, they decided not to participate?

MR MCCOY:

They did. They were unwilling to participate.

ELIAS CJ:

Yes.

MR MCCOY:

So if one comes –

GLAZEBROOK J:

Mr McCoy, can I just ask you about the passage at page 138, line 24?

MR MCCOY:

Yes. Now the question that precedes it is, did he have authority to evict from the lake and the question is, "What authority from you did he have to conduct himself in that way? No authority." Now I fully recognise that and in fact, there is at least one other passage which says exactly the same thing but to counterbalance that and to give

context to it, Your Honour will find, when you come to page 144, the role that Philip Taueki the appellant had, was in fact one that was described as an oral job description.

The reference is on page 139 but if you to 144, here is the counterbalance to this, page 144, line 17, "You've also said in evidence today that he was residing at the nursery to make sure that the bylaws were being operated under, is that correct? Part of the role, yes. So what authority did you, as the chairman of that Trust, have any say over the bylaws? Well, the Maori Trust Act says that we must comply with statutory requirements and bylaws. By those bylaws, you're referring to you haven't been present during this case? No but we've decided here that there were certain bylaws that he may have breached that were made by the Domain Board, it's not the same body as the Trust, is it? No, that's right, it's not."

So he's been cross-examined, Mr Stevens, on the basis that the bylaws were bylaws not made by the Trust and nobody contended otherwise but the Trust, as much as any individual as a matter of constitutional law, has the right to enforce bylaws and there are a good number of reported cases in New Zealand law where individuals have done just that and it's very common in other common law jurisdictions. Often there's not sufficient money in the council or the statutory board, or they just don't care and prefer the bylaws simply to be on paper and have a hopeful deterrent effect.

Now at 145, at line 20 –

ELIAS CJ:
Is there a penalty –

MR MCCOY:
Yes, it's a criminal offence to breach the bylaws.

ELIAS CJ:
And that's under what?

MR MCCOY:
Under the bylaw itself and that is made by the Reserves Act. Yes, it's a criminal offence.

ELIAS CJ:

Okay.

McGRATH J:

So when you say “any citizen can enforce the bylaw”, you’re simply saying any citizen can bring a private prosecution?

MR MCCOY:

Exactly.

McGRATH J:

I mean, that’s the point –

MR MCCOY:

That’s the point.

McGRATH J:

– the point of principle?

MR MCCOY:

Exactly your Honour, yes.

WILLIAM YOUNG J:

Just looking at the bylaw. Is there not provision in this bylaw about speedboats, is that another bylaw?

MR MCCOY:

No. Your Honour, bylaw 19.

ELIAS CJ:

Where do we find this one?

MR MCCOY:

Now this –

GLAZEBROOK J:

It’s on a separate sheet.

WILLIAM YOUNG J:
Oh, I see, 19(3).

ELIAS CJ:
Oh, yes.

MR MCCOY:
It's on a separate sheet. Could I just explain why? My learned friends tried to be helpful but the version they put in was an earlier version that wasn't actually in force at the time of 2008. You now have the correct version in front of you and it's bylaw 19 –

GLAZEBROOK J:
Is this –

MR MCCOY:
Correct, correct, sub-bylaw (3).

ELIAS CJ:
Sorry, where is it?

WILLIAM YOUNG J:
It's a pretty awkwardly drafted bylaw.

MR MCCOY:
It's not to be emulated and in fact, I think contains at less two sound grammatical errors. The other one your Honour, whilst you have it in your hand, is bylaw 21 which is the biosecurity risk –

WILLIAM YOUNG J:
Right, okay.

MR MCCOY:
– and may I indicate that 21 did not exist in the earlier version of the bylaw. So that has been specifically brought in because of the increasing threat to the lake and it's of course sad and at minimum depressing, that when one looks at the evidence, neither the complainant, his adult son, or the commodore of the Sailing Club, even

knew of the existence of the bylaws, yet they had a duty to comply with them. So at page –

GLAZEBROOK J:
Can I just check, if they only did sail on the lake –

MR MCCOY:
Yes.

GLAZEBROOK J:
I mean, I suppose you might be carrying weed substances that were on the lake into the lake but what was the point about that, just checking?

MR MCCOY:
The real risk is if you do not wash your boat down before going onto the lake, then wherever you've come from, place X, travelling all the way to the lake, then spores get onto the propeller or the side or the bottom of the boat and then you simply are introducing those spores into the lake and that's why algal toxic bloom and other matters occur and that's been a substantial problem in the lake.

WILLIAM YOUNG J:
But is that true of a boat that's only used on the lake?

MR MCCOY:
Your Honour, I'm unable to give evidence of that.

WILLIAM YOUNG J:
Because that seemed to be the answer that one of the Mr Browns gave.

MR MCCOY:
It seemed to give the answer, their answer was, "We don't wash down because it will be 10 days between times that we use the boat," and the apparent life of the spore is 10 days, or less.

WILLIAM YOUNG J:
And also, we only use the rescue boat in the lake so it's not bringing stuff in.

MR MCCOY:
Correct, correct.

GLAZEBROOK J:
And wash it immediately after using.

MR MCCOY:
Yes and there is in the bylaw, of course, a general provision in terms of water, that the water not be impacted and anything to do with biosecurity engages that risk, we would say, immediately and directly.

Now I said I'd take you to page 145. If you would be good enough to come to line 20 please. "Here is why, in terms of section 56, the appellant had the authority." Right but just go back a little bit. Essentially, you've said that one of Taueki's roles was to make sure that the bylaws were being operated under but he had no authority directly to do that, did he? He had the authority of the Lake Trust through myself as chairman." So this is the chairman of the Trust being cross-examined by Crown representative at trial. "But you've agreed with me earlier that the Lake Trust had no ways of enforcing those bylaws, it would be up to the Domain Board to enforce them? I would say it would be up to the Domain Board and the Lake Trust to enforce those bylaws."

So the significance of this answer and I'll show you in a minute that the learned trial Judge himself was interested in this –

CHAMBERS J:
But keep reading, keep reading though.

MR MCCOY:
Oh, forgive me, I'm happy too. Yes, I would say it would be up to the Domain Board and the Trust to enforce those bylaws –

CHAMBERS J:
And then the next question, he appears to agree that Mr Taueki didn't have authority to evict anyone?

MR MCCOY:

No authority to evict and I think I said in answer to Justice Glazebrook, I think you find that at least twice in the evidence and you've now found the second one, your Honour, but what we have got is a clear statement. Putting aside conviction, if Mr Taueki has got devolved authority from the Trust to enforce the bylaws he also, on our case, in terms of section 18 of the 1956 Act, as a beneficial owner of the lake and the relevant land, never lost his right to be in possession of that land.

When I take you to section 18 and it's critical to see it, you will find that on analysis the public do have a right, of course, of access across the land but it is a conditional right and the condition that the statute requires is that it be reasonable and it cannot be reasonable to act contrary to the terms of the bylaws. Therefore, the price of entry set by the bylaws was not met by the Sailing Club that did not care less for the terms of the bylaws, they hadn't even read them and showed therefore their disdain for the overall management and they simply took the view that they had an untrammelled right to go across Maori freehold land and onto the lake, the treasure of Muaupoko. That –

CHAMBERS J:

Well is it your case that Mr Stevens is right or not, when he says that, "Mr Taueki did not have authority to evict anyone from the land"?

MR MCCOY:

That is true. I accept Mr Stevens said that. That was no authority from Mr Stevens but Mr Taueki had his own authority in his right as a beneficial owner and I come to make that as the alternative and second part.

CHAMBERS J:

So Mr Stevens was wrong, as a matter of law you say, when he said that?

MR MCCOY:

Correct, correct, that's exactly right, your Honour. I'm afraid much of the evidence in the trial was bedevilled by issues of law which was cross-examined on as though they were issues of fact. So I've shown you 145. May I just show you –

ELIAS CJ:

Just hold on a moment because you are putting it on alternative bases –

MR MCCOY:

Yes, I am.

ELIAS CJ:

– you're putting it on the basis that he had the authority of the Trust –

MR MCCOY:

To enforce the bylaws.

ELIAS CJ:

– to enforce the bylaws –

MR MCCOY:

And, I'm sorry if I'm cutting you off, that's not my intention, forgive me, your Honour.

ELIAS CJ:

Yes, and secondly, that he had his own authority, but I thought you had acknowledged that the first didn't give him authority to evict?

MR MCCOY:

Mr Stevens said, "I had not told him he had the right to evict." However, he also didn't tell him he couldn't evict. The issue was simply, "Go and enforce the bylaws." On the basis, if there has been a misapprehension about the extent of the delegation or the devolvement of power, that engages common law mistakes as well, in terms of its own overlay with the section 56 criteria.

CHAMBERS J:

Except hasn't the Maori Land Court also said that he didn't have that authority?

MR MCCOY:

With respect, the Maori Land Court have held that Mr Taueki was entirely correct in deciding in 2006, two years before the incident, that the Sailing Club was unlawfully in occupation of part of the public reserve, and I'll take you to that judgment.

WILLIAM YOUNG J:

But that's not quite, the question wasn't – and I haven't read the decision, I've only read what the Crown said about it – but I thought that the decision was to the effect

that Mr Taueki did not have, as it were, a freestanding right as beneficial owner to control access to and from the land or make decisions about it.

MR MCCOY:
May I make it clear, the Maori Land Court has no jurisdiction whatsoever in relation to section 56 of the Crimes Act and to the extent it's said anything about it, it has exceeded its role and misapprehended the true report. When I come very quickly through this I'll be able to develop the submissions, I, much more clearly for the Court's –

McGRATH J:
Was that Judge Hardy's decision –

MR MCCOY:
Yes, yes, in December 2012.

McGRATH J:
I thought that was – that wasn't, of course, related to section 56 at all –

MR MCCOY:
Not at all, not at all.

McGRATH J:
It was relating to the authority of the appellant –

MR MCCOY:
Yes.

McGRATH J:
– generally, wasn't it, and it seemed to be something I know that the Crown makes quite a lot of the decision in that respect. You've highlighted the other aspect of the decision which you say favours you.

MR MCCOY:
Yes, the Crown wish to embrace the notion based on earlier Maori land law jurisprudence that the beneficial owners of Maori freehold land have very limited rights. That appears to be what the Crown would like to affix to. When I come to

make that part of the argument soon I will respectfully seek to demonstrate that that is an unsafe conclusion and inconsistent, in any event, with the terms of section 56 because section 56 and the notion of possession can be activated by possession, for example, that's not even lawful, that is short-term and that is non-exclusive. In our case he owns the land as one of the 1500 Muaupoko as a beneficial owner. They've owned it since the beginning of time in terms of the 1956 Act and it's not short-term, it's forever, and it's the future. Now I will address each of those with the relevant common law authorities very shortly.

McGRATH J:
But your point is essentially that Judge Hardy was wrong in that respect –

MR MCCOY:
Certainly.

McGRATH J:
– in law.

MR MCCOY:
Yes, I do. Now the last part I wanted to take you to just in the interests of time is if you'd come along please to page 151, your Honours. These are questions from the Court. The questions from the Court actually start at page 150 at line 30 and the next page 151 is at line 10.

ELIAS CJ:
I don't have page 150 –

GLAZEBROOK J:
It's one over.

ELIAS CJ:
I see.

MR MCCOY:
Sorry, it's numbered backwards.

ELIAS CJ:

Is that true of all the missing pages because –

GLAZEBROOK J:

That must be.

ELIAS CJ:

I'm not sure that it is because I think there were quite a number that were missing in the decision of Judge Atkins.

MR MCCOY:

Yes, thank you, at 151 at 9, "What authority", this is the Judge now to Mr Stevens, "What authority did you give him in relation to the land?" And there's the eviction question ahead of me so I want to bring that to your attention again. "The main authority was we," that's the Trust, "wanted to ensure that any boats for use of going onto the lake were properly washed down and that the washed down facilities were not further contaminating the lake." So he was given very specific, that was the main authority to make sure the boats were clean. Well the boats, as we know, were not washed down before they went into the lake and we know that when they come out of the lake they simply recycle the dirty water back into the lake because there's no containment for the wash down. So that was the authority given by the Trust. Enforcement of the bylaws but the main issue was the dirty boats.

Now against that, and I've moved through it with some rapidity and I'm conscious of the fact that one can identify other passages for and against but those points are significant because it identifies the mindset of the appellant based on the authority that he believed that he was given and the specific passages to ensure the bylaws were being followed are very clear and I may have, forgive me, omitted one more which is directly in point at page 144. I have, I'm so sorry. It's the last one I'll take you to, 144, "And you've also said at line 20 that he was residing at the nursery to make sure that the bylaws were being operated under, is that correct?" "Part of the role, yes."

CHAMBERS J:

You did read that out, yes.

MR MCCOY:

I'm so sorry. I'll put that now to one side. Now may I introduce the argument to the advice in terms of section 56, that that has to be seen first by an examination of section 18 of the Reserves and Other Lands Disposal Act, and I hope for your convenience you'll find it in the slim volume containing the Crimes Act provisions I have already taken you to. And if you'd be kind enough to turn to page – tab 2, one has section 18. Now it's lengthy and I certainly will not dissect it slowly because much of it records the unhappy history of the lake, but it's section 18. Your Honours see there is a preamble all the way down one page but for the last line prior to subsection (1) and looking at the preamble, and conscious that I will not read it all out, it sort of goes like this. The Horowhenua Block Act of 1896, the Maori Appellate Court made a decision under it and they gave the land to Muaupoko. If you drop down an inch or so, or two inches, then the Horowhenua Lake Act of 1905 declared the lake to be a public recreation reserve under the control of a Domain Board but expressly reserved the fishing and other rights of the Maori owners over the lake and the land. Then we can drop down past the desultory history of drainage operations, identifying the creation of the dewatered area and about three inches from the bottom, and whereas a committee of inquiry was appointed in 1934, it ultimately confirmed that there had to be new legislation and we find the Maori Land Court making an order in 1951 appointing new trustees and the last recital, agreement has now been reached between the Maori owners and other interested bodies and the 1956 Act. This section follows.

If one turns the page we can avoid subsection (1). Subsection (2), notwithstanding anything to the contrary in any Act or rule of law the bed of the lake, the islands, the dewatered area and the strip and the one chain area dot dot dot are hereby declared to be and to have always been owned by the Maori owners dot dot dot in trust for the said Maori owners. We can leave out subsection (3) because that deals with a screen. Subsection (4) and (5) are very important. Notwithstanding the declaration of any land as being of Maori ownership under the section there is hereby reserved to the public at all times and from time to time the free right of access over and the use and enjoyment of the land fourthly, just accept from me if you would that that's the public domain area, the little triangle at the moment.

Now four and five have to be read together. Five, "Not withstanding anything to the contrary in any Act or rule of law. The surface waters of the lake, together with the land firstly and fourthly described, are hereby declared to be a public domain under

the Reserves Act . . . provided that such declaration shall not affect the Maori title to the bed of the lake, or the land fourthly described," and then the times, "And from time to time have the free and unrestricted of the lake and the land fourthly described . . . and of their fishing rights but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under the section, to use as a public domain the lake and the land." Sub (6), "The fishing rights granted under section 9 of the Horowhenua Block Act of 1896 shall not be affected." Sub (7), "The Minister of Conservation can appoint the Domain Board," and the membership is at (8), "And four of the eight people are to be of Muaupoko of the Maori tribe," and sub (10), "The Manawatu Catchment Board shall control and improve the lake and keep it at a particular level."

Now the critical part of the section is subsection (2) which discloses uniquely, as the High Court has said, Justice Cooke and Justice O'Regan, "uniquely", that the land is declared to be, and to have always been, owned by the Maori owners.

Then we come to (4), the creation of the public domain or reserve but that is absolutely conditional, that right of access is conditional by the chosen language, that the Maori owners who at all times have unrestricted and free use of the lake and the land, they are not to interfere with the reasonable rights of the public as may be determined by the Board.

Pausing there if I might. That means that the Domain Board decides the reasonable rights of the public and they are set out in the bylaws. The reasonable rights of the public, and the public cannot, cannot include Muaupoko because Muaupoko are not the public for the purposes of this section. Muaupoko are the Maori owners and are to be contra-distinguished from the public. The Domain Board has no jurisdiction, because of section 18, to impose any restrictions on Muaupoko on their land because the restrictions on Muaupoko could only, if at all, be imposed by the Trust and certainly not by the Domain Board.

So the critical point and the fascinating and I use the word "unique" in its proper sense, this unique legislation that arises in the present case is, whilst Maori are given unrestricted use, Muaupoko I should say, as opposed to Maori, while the Maori owners have free and unrestricted use and whilst they shall not interfere, as long as the public exercises reasonable rights, then the public can have access –

WILLIAM YOUNG J:

Well there are two ways of reading the section. One is that the "so as not to interfere", is a constraint on the exercise by the Maori owners of their rights which perhaps is the most natural reading of it. In which case the rights of the public come in under subsection (4). The other way you say is well, the only rights that the public have are as determined by the Domain Board and as they might – well and as might be also reasonable?

MR MCCOY:

Exactly. Now I respectfully submit, when one looks at the whole purpose of this legislation, this intention was not, as had been the position in the past, of the legislature to give with one hand and take it almost straight back with the other. The intention here – this was reconciliation legislation in its earliest days, 1956, long suffering – saw there needed to be a legislative formula that permitted the public to come across the land. Understood, but the price of crossing the land was conditional on compliance with reasonable rights and the reasonable rights were to be determined and the model used by the legislature was to determine that the Domain Board would identify the reasonable rights of the public, bearing in mind, if the Domain Board acted idiosyncratically it would be subject to judicial review because it's a public body making statutory decisions, but the Domain Board gave furtherance to its decision making and it identified the reasonable rights of the public by its bylaws, therefore it is completely reasonable to come onto this lake, do not use a motor powered boat and do not use a dirty boat and do not let your runoff come into the water.

Now, once the appellant apprehended, as was the fact on that particular day, that that's exactly what the complainant intended to do, he was – I come to the issue of possession and peaceableness soon. He was fully entitled to justify the defence of the land because the person who intended to cross the Maori freehold land had to comply with the threshold initiatory criterion set down by the 1956 Act which fundamentally was reasonableness and if you're going to act unlawfully, if you're going to infract the bylaws, that's the best evidence of acting unreasonably.

So it didn't matter, it didn't matter whether he was going to bring a private prosecution himself or on behalf of the Trust Board, he was entitled because he was a beneficial owner of the, that land, to say to anyone seeking to cross over that land, your rights are conditional and you are acting unreasonably, as in fact you must know

and therefore you cannot cross and therefore the act he took of taking the man by the top, or epaulettes, of his t-shirt, was simply a gentle laying of the hands, molliter manus imposuit, which the common law has always recognised as lawful in terms of defence of your land and it was done to prevent a trespass by the complainant. It was pre-emptive. Yes, it was anticipatory but there was an imminent threatened trespass over Maori freehold land because what never changes in the appellant's submission is that this is Maori freehold land.

I've deliberately stated it's not overlaid, not overlaid with a reserves classification, it is underlaid with it because when one looks at the *Gazette* notice for the reserve it states expressly that the reserve is subject to the rights that exist under section 18 of this 1956 Act. This Act trumps the *Gazette* notice plainly. The rights of the reserve are subject to the rights under section 18 ROLD. Now this is almost certainly unique legislation.

I see my learned friends, in their efforts to assist the Court, have made some reference without specificity to the Lake Waikaremoana Act of 1971 and certain other legislation. As they didn't identify the sections in that legislation, it's not easy to discern what they claim they have found but the formula is quite different. The formula in the 1956 Act is, as Justice Robin Cooke said in 1975, unique.

ELIAS CJ:
Mr McCoy, I see the Domain Board is constituted under section 18(5). Is there general legislation under which a domain board so constituted has authority to make bylaws?

MR MCCOY:
It has because –

ELIAS CJ:
What's that?

MR MCCOY:
Yes. The Domain Board gets its powers and I'm sure this would be common ground because it's a public domain under the Reserves Act and the Reserves Act allows the managing body, whatever it's called, to make bylaws and there's in fact specific

powers in the Reserves Act for the administrating body to make bylaws and I can certainly put that on a piece of paper –

ELIAS CJ:

Well, the reason I raise it is, if there is some ambiguity as to whether subsection (5) is a restriction on Maori use, it may be that the Reserves Act makes it clear that public access under this Act is only reasonably in accordance with – it's only in accordance with any bylaws. Is that where we look to for that authority?

MR MCCOY:

I believe so. Can I just assist your Honour in that vein? The bylaws are actually made, not under ROLD, the acronym I've been using but they're actually made under the Reserves Act 1977, that's the power they use to make the bylaws. It says that at the very top of the bylaws. So there may, pursuant to the general power of the Reserves Act.

ELIAS CJ:

Do we have the Reserves Act provisions?

MR MCCOY:

I think my learned friends have helpfully incorporated certain extracts.

ELIAS CJ:

Oh, into their submissions?

MR MCCOY:

I think they have done that.

ELIAS CJ:

All right.

MR MCCOY:

And of course the Court will be grateful for that assistance.

WILLIAM YOUNG J:

The section is tab 7.

ELIAS CJ:

Of the respondent –

WILLIAM YOUNG J:

Of the respondent's submissions, 7 March.

MR MCCOY:

Now your Honours –

McGRATH J:

Mr McCoy, the statutory right to the beneficial owners is a right of free and unrestricted use of the lake under subsection (5)?

MR MCCOY:

Yes.

McGRATH J:

Now your submission is that Mr Taueki is entitled, as a beneficial owner, to say to members of the boating club that your rights are conditional and you're unreasonably. Now you don't, I take it, extract that right from subsection (5), you extract it from a common law principle?

MR MCCOY:

I take it from the combinative effect, grant of this unique right – this is unique legislation, to Muaupoko as beneficial owners. Then, as your Honour accurately forecast –

McGRATH J:

Yes but what's, that's – it's a unique right, we know who it is, it's unique but it's a right of use, is it not?

MR MCCOY:

It's a right of use and, as it says, to use and enjoy. Now what's missing of course, would be subsection (2) because subsection (2) is much more important because subsection (2) gives ownership, beneficial ownership and the classic incident of ownership is possession. So the two parties who can possess, bearing in mind it's Maori land, freehold land, it cannot be alienated, except with an order of the Maori

Land Court and there wasn't one. That's why the lessees – this is why the learned counsel of the Department of Conservation, representing the Domain Board before the Maori Land Court and Judge Harvey in December 2012, sent a detailed memorandum pointing out that the whole leasing structure had been unlawful because it's Maori land. It could not have been done because you cannot yield Maori land without a Court order and there hadn't been one –

McGRATH J:
But just perhaps pursue my question, that it doesn't arise from subsection (5) as part of the right to use, it arises solely from beneficial ownership –

MR MCCOY:
– from subsection (2)?

McGRATH J:
From subsection (2).

MR MCCOY:
Yes, it's the ownership that –

McGRATH J:
And ownership gives a right to possession and possession gives the right to regulate to say you're being unreasonable, your rights are conditional, you're outside the conditions, is that what your argument is?

MR MCCOY:
That is the linear aspect of it. I intend, if you prefer, to amplify that right now, if that's convenient to the Court because this is –

McGRATH J:
Well it's really what the con – what I think is interesting me, is what the concept of possession, peaceable possession, is in this respect, insofar as it's enjoyed by the appellant?

MR MCCOY:
Thank you. I'll turn immediately to answer that. Your Honour, our position is that the Court of Appeal, with respect to them, have adopted an ungenerous and technical

approach to possession for the purposes of section 56. What they have done, and with all respect, is they have wrongly subordinated and they've actually eliminated the fundamental connection of the beneficial owners to their land, tangata whenua, people of the land, Horowhenua.

We submit that an autochthonous approach, a Maori-centric approach, to this piece of land because of the history and culture that is fixed to it is required each time possession is to be decided, it's a matter of fact in all the circumstances. The Court of Appeal in 2007, under the President Mr Justice William Young, correctly held, in our submission, that possession for the purposes of section 56 is a matter of fact, it's a matter for the jury in all the circumstances and to identify and understand the concept of possession in this case, one has to understand not just the preamble and the blood and destiny of the 1956 Act but the nature of possession must vary with the nature of the land and the land is Maori freehold land and to understand Maori freehold land and possession and the right to justify the defence of it means one has to understand, of course, that it's not a commodity but it's a cultural treasure, a taonga and that is what it means to Muaupoko.

Now at the trial, counsel then appearing for the Crown, argued explicitly that Muaupoko just had indistinguishable rights from that of the public, that they were seamlessly blended in and therefore had no better right than, say, a visitor from Finland. That's obviously, with respect, wrong and it's a deeply hurtful and humiliating approach.

The true position in our case is this, Muaupoko have, by section 18(2) as beneficial owners, they have an indefeasible statutory property right in the lake and their land. For possession, for the purposes of section 56, the possession need not be, as I said to your Honours earlier, it need not be lawful, that's been decided for hundreds of years, need not be lawful because the whole nature of the law of adverse possession is a trespasser who, as your Honour well knows, commits a tort and if you commit the tort long enough then it's legitimised and you become the new owner, you displace the owner.

So possession does not have to be lawful. The trial Judge himself accurately noted that, although the authority he cited bears the wrong date, it's 1906 not 1966. Possession does not have to be exclusive, all tenants in common can and do have

the right of possession and all Maori beneficial owners are tenants in common. And any one of them has the right and possession need not be long-term.

ELIAS CJ:

Mr McCoy, I really wonder whether that is correct to say that they're tenants in common –

MR MCCOY:

The reason –

ELIAS CJ:

– because the land's been vested in the trustee.

MR MCCOY:

The reason why I said that your Honour is because the earlier 19th century legislation called the Equitable, the Native Equitable Owners Act of 1886, and it's in the bundle at tab 6, identifies that when a trust is created of Maori land, the persons who have beneficial ownership are to be called tenants in common of the land. Section 4 of the Native Equitable Owners Act of 1886.

ELIAS CJ:

Is this still in force?

MR MCCOY:

No. I equally was about to make that point. Your Honour, of course, will be more than conscious that the Te Ture Whenua Act in 1993 substantially revolutionised the law.

ELIAS CJ:

Well there were a few revolutions before that too.

MR MCCOY:

Yes, touché, yes, there were. But what we now have is a relationship in which the ownership is vested in the Trust, the beneficiaries of the Trust have themselves no rights to sell it, the land, nor would they ever want to do that, but they have rights under the section 18 role and they have rights at common law as beneficial owners to posses the land. They may not have a right to occupy the land. They may not have

a right to put a building on it. But you have the rights, in terms of your land, under section 18, an unrestricted right to be there. That right must carry with it a correlative duty to be able to repel a trespasser.

McGRATH J:
Well I can understand that concept if you were talking about the residential house that the appellant occupies, which I think you said was adjacent to but not on the reserve.

MR MCCOY:
Correct.

McGRATH J:
I can understand how peaceable possession could operate in the context of a beneficial owner there. What I'm not, don't yet quite understand is how you extend that concept of possession in this case to include the ability to, for a beneficial owner to stop a member of the public coming onto the land because that owner feels that the member of the public is not acting in accordance with the bylaws.

MR MCCOY:
It's the same right. The members of the public are statutory invitees and if they do not meet the terms of the legislation that permits them to have access over Maori freehold land, then the person who has possessory rights, given either by the Trust or in his own right, can exercise them and deny the access.

McGRATH J:
But there must be possessory rights that go to that issue, that the extent, is it not, of control they must have must go to the ability to regulate it. It's a different form of possession than the appellant would have in respect of the house he lives in?

MR MCCOY:
I understand that. The reason why this appellant on the facts of this case had that right, because he was given the right by the Trust as the lawful owner to enforce the bylaws. How he did that was a right which he was entitled to exercise. That was a controlling right. He had a capacity given to him by the legal trustees to disenfranchise any invitee who did not come for a lawful person. So –

McGRATH J:

I understand the trustees are the legal owners –

MR MCCOY:

Yes.

McGRATH J:

– whereas the appellant is a beneficial owner –

MR MCCOY:

One of them, yes.

McGRATH J:

But how do you move in from the, just putting aside the evidence point, because you've set a basis for that, how do we then move to say that the legal owners are able to exercise that form of control over the domain area?

MR MCCOY:

Ah. The significant point is first of all it remains Maori freehold land. I have expressly indicated that the reserve is not overlaid upon the Maori freehold land but is underneath it. It's a servient lesser interest because Maori, Muaupoko, have the right to be on their land by section 18. The public, which does not include Muaupoko for the purposes of section 18(5), the public have a differential, and qualitatively much less, different, and it's an abridged right. The abridged right of the public is the right to access the land upon compliance with the conditions. The conditions are the bylaws. Anyone who has got the possessory right, which is a natural function, an incident of ownership, legal and/or beneficial, is entitled to repel a trespasser from the property. That's what the appellant did.

CHAMBERS J:

Two questions coming out of that. I thought your argument was that Mr Taueki could have done this even if he did not have Mr Stevens' authority.

MR MCCOY:

Yes, that is my argument.

CHAMBERS J:

That's your primary argument?

MR MCCOY:

That either will succeed.

CHAMBERS J:

All right. The second thing is, would Mr Taueki have been allowed to take an unwashed boat onto the lake?

MR MCCOY:

He wouldn't have done that.

CHAMBERS J:

No but could he have?

MR MCCOY:

He couldn't have done that because the tribal authority would not have allowed that because it would be, of course, as grave an irony for him to do that and cause damage to the lake as to the Sailing Club.

CHAMBERS J:

So he would not have been bound by the bylaws?

MR MCCOY:

Absolutely not. The bylaws cannot apply to Muaupoko. The bylaws apply only to non-Muaupoko. All other Maori and the public. The bylaws can not constrain the owners and that is the natural and immediate analysis coming from section 18(4) and section 18(5). The critical distinction is between the public, which does not include in this context Muaupoko, and Muaupoko as the Maori owners. And that distinction is itself well made in section 18. So to answer, your Honour, he could do it, because he could not be constrained by the bylaws, but of course it would be as offensive for him to do it because of his culture and his dignity as the effect of the bylaws. But the bylaws cannot constrain Muaupoko over their own land.

May I submit to your Honours –

WILLIAM YOUNG J:

Can I just ask you a question please before we adjourn, because it may be something you can think about over the adjournment. It's clear there were photographs that were produced at the trial but we don't have them. Does anyone have them?

MR MCCOY:

We don't have them, not having appeared in...

WILLIAM YOUNG J:

Okay. Secondly, from the evidence of Mr David Brown it appears that the incident occurred between the Sailing Club building and the lake as the boat was taken out of the Sailing Club and was presumably directly between it and the lake.

MR MCCOY:

Correct.

WILLIAM YOUNG J:

And part of it on a concrete pad there.

MR MCCOY:

Yes.

WILLIAM YOUNG J:

Presumably all of this area was comprised of the original lease which had expired by 2003 but which the Sailing Club believed they were continuing to occupy under licence from the Domain Board because they were paying $80 a year or something?

MR MCCOY:

I want to answer your question directly. The evidence isn't quite clear but I think, with respect, the way you put it Your Honour is a fair appreciation of the evidence. It seems inherently probable that the boat was on the area that formerly had been within the lease and was close to the water, he was definitely going to the water.

WILLIAM YOUNG J:

So could the members of the Sailing Club claim to be in peaceable possession of that area because they thought they had a legal right to it and had been occupying it for many decades?

MR MCCOY:

Certainly not.

WILLIAM YOUNG J:

Why not?

MR MCCOY:

It's because the whole notion of peaceable possession means not simply someone challenging somebody else's title, because that would be absurd if that was the test, because that would mean a frivolous applicant could therefore put in jeopardy a title. The only party who can ever challenge in terms of peaceable possession is contrary to the position adopted by the trial Judge at the instigation of the prosecution, and contrary to the position of the Court of Appeal, the only party with a hierarchically superior title to the appellant, is the Trust. So –

WILLIAM YOUNG J:

But let's go at it a slightly different way. A tenant can have a right of peaceful possession as against the landlord?

MR MCCOY:

If he trespassed long enough, yes he can.

WILLIAM YOUNG J:

No, no, if he's got a lease?

MR MCCOY:

No, he doesn't. No, if you've got a lease you can never get adverse possession, that's the whole point –

WILLIAM YOUNG J:

Sorry, just listen to me for a moment. I'm the tenant of a property, I have a lease, the landlord comes onto the property, otherwise pursuant to the terms of the lease, I tell

him to clear off, he doesn't, I put my hands up and say, this far and no further. Will I not be entitled to rely on this section because I would be in peaceful possession of the property?

MR MCCOY:

I respectfully submit no because the party with the superior title, the landlord, has challenged it. Peaceable possession is an hier – cascades downwards. The person with the superior title impugns the alleged title –

CHAMBERS J:

Well I think you should look at a torts textbook over – I think what Justice Young has said to you is clearly right, that the tenant does have the right to exclude the landlord.

MR MCCOY:

Pye in the House of Lords would say otherwise but I'm happy to look at any recent edition of it, of any of the textbooks.

WILLIAM YOUNG J:

So sorry, what did you say would say otherwise?

MR MCCOY:

Pye, P-Y-E, *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 in the House of Lords which is the leading case on adverse possession prov –

WILLIAM YOUNG J:

But it's not an adverse possession case –

CHAMBERS J:

But it's not adverse possession, the tenant has got a legal right to possession.

WILLIAM YOUNG J:

The tenant has got a legal estate, a leasehold title.

MR MCCOY:

The tenant certainly does and I hope we're not at cross-purposes and I'm trying to avoid that. Of course the tenant does because the landlord has yielded possession and the tenancy is exclusive.

WILLIAM YOUNG J:

Okay, now let's just take – say the tenant thinks he's got a leasehold estate but he hasn't, would he still not be entitled, on your view, to use reasonable force because a mistaken belief is as good as a true belief?

MR MCCOY:

Ah, yes, he would.

WILLIAM YOUNG J:

So in this case, it may be that both the Sailing Club and Mr Taueki had a right to use force against each other. The Sailing Club people because they thought they had a licence and were thus in possession and Mr Taueki because he considered that they weren't entitled to be there?

MR MCCOY:

It's possible but the Judge did not find that but it's possible but may I just – I'm conscious of, this is the time I believe –

WILLIAM YOUNG J:

Well I've finished, so thank you.

MR MCCOY:

All right. Well may I just make one point. When it comes to the issue of peaceable possession and I haven't turned to that, the peaceableness means that the title acquiesced by others but it doesn't mean title that has to be acquiesced by someone with a lesser title. It only means acquiesced by a party with a superior title and that is why, with respect, the Court of Appeal erred. The only party who could, in terms of peaceableness, impugn the title of the beneficial owner to the land was the legal owner but the legal owner had actually given the devolved power to Mr Taueki. So the lessor limited abridged interests of the Sailing Club which had expired in 2003 anyway, could never possibly, under the Te Ture Whenua Act and the protection of Maori land because it's an ownership right by statute under section 18(2), ever have been imperilled.

So there was no prospect, in terms of peaceableness, of the rights of the Sailing Club. They were simply ignorant of their own position. They could not have

jeopardised the position of Mr Taueki. So that's the full and extended answer to Justice Young's question. Would that be –

ELIAS CJ:
Yes –

MR MCCOY:
– yes, thank you Your Honour.

ELIAS CJ:
– we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.55 AM

ELIAS CJ:
Yes, Mr McCoy.

MR MCCOY:
Your Honours, how possession is manifested and the required intensity of control must be determined with particular reference to the nature of the land, that will be a function of its history, culture and its other individualised circumstances. In this case, on the evidence, the appellant had devolved power to enforce the bylaws which meant the bylaws applied to the reserve. The reserve was the access point to the lake. So he had the right from the legal owners to control the access to the lake. The essence of possession, we would submit, is simply a relation of manifested power coextensive with intent. It's what Oliver Wendell Holmes said. One looks to the nature of the conduct rather than perhaps its eventual legal effect. We would submit it's an inherently behavioural phenomenon which incorporates a particular mindset. The defensibility of the right to the land. And it's a matter of inference, whether you're exercising control or authority over that land. De facto possession will suffice but here it was de jure possession as an incident of the ownership of the land.

GLAZEBROOK J:
Can I just check the submission. Is the submission that you had to be able to exercise control as well as possession or merely possession?

MR MCCOY:

Possession suffices but the evidence of that may be evidence of the control. Possession will suffice.

GLAZEBROOK J:

But your argument is possession just is inherent from both section 5 use and ownership, isn't it?

MR MCCOY:

Yes, indeed.

GLAZEBROOK J:

Or contained within that concept. So he wouldn't need the added exercise of control, he just happens to have it in this case.

MR MCCOY:

He also happens to have it. He had control because he was specifically given that right by the legal trustee. So the two ways that he has the section 56 defence come from the devolved power or from his own position. It will be, in our submission, a sterilisation of the rights of Maori, of Muaupoko in particular, if it means that the 1956 Act gave them very little indeed. It will be a very hollow outcome. And once you are the beneficial owner, to deny possession as a right flowing from that ownership would be a very strong step and in our submission each co-beneficial owner has the right to possession of the land whether it's exercised or not and the significance of this, for Maori land, is that that would be consistent with the aspirations of Maori and indeed attuned to the promise of the Treaty of Waitangi. It would give affirmative and reconciling meaning to the promise of the Treaty of Waitangi. And unless Maori is able to defend its own land then the value of ownership has been reduced to an absurdity.

CHAMBERS J:

Might it not be the case though, and this maybe something you want to come to later, that even assuming that was right, you could not exercise the right of using reasonable force unless and until you had told the person that they must leave because they were a trespasser and perhaps why they must leave.

MR MCCOY:

The issue of the formal conditions for bringing to the attention of the trespasser the fact that he is a trespasser will again depend on the circumstances. It can be by body language, it can be by language and it can be a combination. To make it clear that you are asserting a right of ownership to the land, and the Sailing Club members were very aware that it was Maori land, it was plain and obvious to them that the appellant was saying they could not cross because their boat was in a condition, two different ways, that failed to meet the access standards proscribed by law. The section 56 –

GLAZEBROOK J:

Can I just check, and it might be we need to go to the evidence on this, but it seems to me that Mr Taueki was trying to defend the land, I can understand that as a concept, rather, is that the case rather than in fact trying to evict a trespasser?

MR MCCOY:

He repeatedly stated, "This is Maori land." Now he was, by that language, unequivocally conveying that you could not come across my land with that boat and the boatees very well knew that they had a dirty boat and the boat was too big. He made that very clear and in fact the commodore who apart from expressing his own ignorance of the existence of the bylaws, the commodore, and I'll give you the reference, at page 80, line 20, the commodore accepted that the effect of Mr Taueki's statement was, "This is my property and you are not entitled to be here if you use that boat." Page 80, line 20, so he had indicated the source of his authority and he had indicated the fact that they were not to cross.

I'll come, in due course, to the steps that were taken to prevent the trespass but the nature, the essential nature of today's argument is to identify the parameters of the possessory right, because unless there's possession plainly there cannot be peaceable possession, and possession must carry the rights and aspirations of Maori and it's possession of Maori freehold land. If Maori freehold land cannot generate the right of possession then that has been such a diminution of the stature and status of Maori freehold land. It must carry with it, for Maori, the promise of the future. It has to be. And this would be consistent with the Te Ture Whenua Act preamble which expressly looks to Maori land in terms of the development and use of that land.

ELIAS CJ:

Is there anything in Te Ture Whenua Maori which bears on the right to possession?

MR MCCOY:

The preamble does not use the word “possession”.

ELIAS CJ:

No I meant in the substance.

MR MCCOY:

I’ll have to defer to others. It wasn’t readily apparent. The point I think one of your Honours had made to me earlier that the Judge, one of the Maori Land Court Judges had indicated that there was no right to possession but that was a view taken without understanding section 18 of the ROLD 1956 Act. The fact that Muaupoko have always had this land before the advent of Pakeha and its notions of land and property.

We would submit that it would be curious, indeed it would be counterintuitive not to give the concept of possession in section 56, a Maori-centric interpretation, that promotes the promise that is carried and integral with Maori freehold land. If the trustees have possession, as they almost always will because they cannot alienate their land, except in the truly exceptional case with the concurrence of the Maori Land Court, if they have possession there is nothing to stop individual beneficial owners also having possession, if they carry out steps which will manifest an intention to do so. Passive, remote in time or place ownership may not do that. The actual physicality and the effort of warning people off the land is the best evidence of your attempts to control the land.

CHAMBERS J:

Is it your argument that if the ownership, if the possession is legal possession, it must, for the purposes of section 56, be peaceable possession.

MR MCCOY:

It must be.

CHAMBERS J:

Yes.

MR MCCOY:
The statute says that.

CHAMBERS J:
It must be?

MR MCCOY:
Yes.

CHAMBERS J:
And – but others may have peaceable possession even though it turns out that their possession may not be legal?

MR MCCOY:
Yes and the introductory word of section 56 is "every one." Everyone has the right to claim it but realistically when you come to the analysis of what is peaceable, and this was a part of the argument I turned to just before the adjournment, the concept of without serious challenge, and perhaps I should turn to some of the authorities in a minute, without serious challenge means challenge from a party, if any, with a superior title. Where the Court of Appeal, with respect, erred and the Judge below in turn erred, is the Judges there saw the rights of the Sailing Club as being a serious challenge to what, to what, the freehold title of Maori? That's an impossibility. There's no sensible way that the Sailing Club had any sustainable challenge to Maori freehold land at all. The Crown were not involved, incorrectly as the Court of Appeal and the Judge said, the Crown's only interest was a small piece of the lakebed which was not engaged in this case at all. So there was no question of challenge from the Crown. There was not question of a sustainable, plausible challenge from the Sailing Club which had an expired, inferior, servient title. How could they challenge freehold land? That's a legal impossibility.

WILLIAM YOUNG J:
They don't have to challenge freehold land, all they have to do is say they've got rights over it.

MR MCCOY:
They had a right of access, of course, but that right of access had to be determined by, in terms of section 18 of ROLD by the reasonableness and it's not a self-serving

reasonableness, the reasonableness had been determined for Muaupoko and for the public by the bylaws. So the bylaws were there as the function of what was required in terms of section 18 to define the access permission criteria, and if you did not meet that, or there was an arguable case, then you could not cross the land. In my submission any argument from the Sailing Club is legally frivolous. That cannot challenge the, obviously the freehold title, and the Sailing Club's rights were expressly conditioned by section 18 of the 1956 Act.

I wonder if at this juncture I might ask the Court to finally look at one or two of the authorities and I'll try and do this with some alacrity. Would you be good enough to come to tab 5 of the appellant's authorities?

ELIAS CJ:
I'm sorry to interrupt but just thinking about your argument that the fact that this is Maori freehold land enters into the mix. Can you just remind me the circumstances in which trustees were put into this land? Was that under the Horowhenua Block Act, or was it under –

MR MCCOY:
Yes, it was from the 1896 Act and it was re-sustained by the 1956 Act.

ELIAS CJ:
So the 1956 Act follows on?

MR MCCOY:
Yes.

ELIAS CJ:
Oh, you mean the Reserves and Other –

MR MCCOY:
That's right.

ELIAS CJ:
– Disposal Act but how was the ownership of the block –

MR MCCOY:

Before then?

ELIAS CJ:

Yes. Was that under a –

MR MCCOY:

Yes, yes. Your Honour, the earliest legislation was 1896 and that's actually found in the slim appellant's bundle of legislation at tab 5 and you'll see it's the Horowhenua Block Act of 1896 –

ELIAS CJ:

Yes.

MR MCCOY:

– and it provides, you'll see in section 3, this is why I went to it, the Native Equitable Owners Act is revived and that meant the tenants in common provision had revived for the Horowhenua Block Act. Section 4, "To enable cestuis qui trustent to become certificated owners of certain portions of the said block." So the ownership was in the Trust, the cestuis qui trustent of the beneficial owners, were given their own individualised rights and then in 1956 the ROLD Act replicated that structure and that is set out in section 18 and the reference there to the ownership by the trustees is in subsection (2).

ELIAS CJ:

Of the 1956 Act?

MR MCCOY:

Of section 18, yes.

ELIAS CJ:

Oh, I see.

MR MCCOY:

Yes, yes. Trustees were appointed by the Maori Land Court in 1951 to hold the land in trust for the said Maori owners. What had happened, I'm instructed, was perhaps quite understandably, the original trustees of the 1896 Act had left the jurisdiction,

gone to a higher place and the 1951 trustees were then appointed, following by the five year gap before the legislation. So the Trust carried on and that was the intention of the 1956 Act.

ELIAS CJ:

So when it said that – and it's not in contention of course, that Mr Taueki is a beneficial owner, what is that pursuant to, is that pursuant –

MR MCCOY:

Oh –

ELIAS CJ:

Sorry?

MR MCCOY:

Sorry, yes. Your Honour, block 11, Horowhenua, is a registered block and his name is on the title as a beneficial owner. So the block says that the land is owned and it shows the trustees and it says, "And pursuant to section 18 of ROLD," the title says, "And it's held for," and it then lists the members of Muaupoko and he is one of them.

ELIAS CJ:

Well that must be a Maori Land Court determination –

MR MCCOY:

It's a land –

ELIAS CJ:

– is that the 1951 determination?

MR MCCOY:

It's actually a Land Transfer Act determination because you may recall that subsection (11) of the section 18, of 1956 Act, subsection (11) which we haven't looked at, tells the district land registrar to do these things, give effect to them. So it's given effect to by section 18(11) of ROLD, "The district land registrar is authorised and directed to deposit the plans, to accept the documents for registration," et cetera. So this well preceded the Te Ture Whenua Act by almost 40 years.

ELIAS CJ:

So do we have the certificate of title?

MR MCCOY:

I have seen one but it was never evidence but I have seen one and if the Court would like it handed up at some stage, I could cause that to be done. I have seen it.

ELIAS CJ:

It may be Mr Sinclair can help us with that later.

MR MCCOY:

Yes, thank you. Might I now invite your attention to tab 5 of the appellant's volume 1 please. This is the judgment of the Alberta Court of Appeal, *R v Born with a Tooth* (1992) 76 CCC (3d) 169 (Alb: CA) and if one comes to page 177 at (e), one sees a paragraph, "The defence contains four elements," and they're set out and we would submit that that paragraph is entirely correct and I do not apprehend that the Crown today disagrees with that first paragraph.

Then the learned Judges continue, "As to the first, the word 'possession' has here its usual meaning in criminal law. Avoiding the citations, the defence will fail if the accused in fact or in law has no control over the land in question –

ELIAS CJ:

Sorry, what page?

MR MCCOY:

Sorry, forgive me, 177 of tab 5, *R v Born with a Tooth*.

ELIAS CJ:

Yes, I've got that, thank you.

MR MCCOY:

At (g), I commenced your Honour, at (e).

ELIAS CJ:

Yes, thank you.

MR MCCOY:

"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." Over the page, "The demand that the possession be peaceable greatly limits the defence." The word is not synonymous with "peaceful", it's 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," Stephen, *History of the Criminal Law*. "In real property law," so we now move to adverse possession, "Peaceable possession means a possession acquiesced 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."

Now in our submission, acquiescence is an irrelevancy, say for a person with a superior title. Rival claimant would be the person seeking to dispossess you on the basis that you as an adverse possessor are a trespasser and the rival claimant is the person seeking to recover their land. That's why it reads on, "And not disturbed by any forcible attempt at ouster, that means by them, the rival claimants, nor by adverse suits, a suit for adverse possession to recover the possession of the estate."

So what has happened, it would seem, is that in bringing into the law of New Zealand in 1893, the phrase "peaceable possession", as was noted by the Crimes Consultative Committee in New Zealand in the '80s, when there was (inaudible 12:18:09 – audio glitch) rejected the Bill failed. It was acknowledged that peaceable possession is a difficult conception, difficult and it was said, almost impossible to define but, in our respectful submission, it does not require lawful possession, that's plain by the word "peaceable" and it's plain it doesn't have to be lawful because adverse possession, the adverse possessor is acting tortuously by trespassing to land until it's consecrated by a limitation period and the adverse possessor becomes legitimate –

ELIAS CJ:

But why is a necessary part of your case to go beyond the fact that he is an owner of the land? I thought your answer to –

CHAMBERS J:

Yes, that's what I haven't followed either.

ELIAS CJ:

– Justice Chambers, was that your contention is that an owner is someone in peaceable possession?

MR MCCOY:

That is my primary position and it's only a lesser and contingent position that I come to this analysis because there had been consideration in the Court below that the notion of rival claimants and adverse suits is enough to suggest a lack at acquiescence by others and the Court of Appeal identified the others as the Sailing Club and/or the Crown and/or the Domain Board. Now the Crown, with all respect, have no place in this –

CHAMBERS J:

But why – I still can't see why, if you go onto the next paragraph here –

MR MCCOY:

Which I had intended to do, yes.

CHAMBERS J:

– why the Sailing Club doesn't come within that because it may be that their licence had expired. It maybe they weren't paying a licence fee but the fact of the matter was the Sailing Club was there, the Sailing Club was regularly using the lake for sailing purposes, and everyone knew that, so it was that the Maori – the freehold title wasn't being challenged but the exclusive right to possession was effectively being challenged, wasn't it, by the presence of the Sailing Club and the use that was being made of the lake?

MR MCCOY:

What the Sailing Club needed to do in terms of this Canadian law would be to show it was not acquiescing in the Maori position by as a rival claimant taking proceedings to challenge the position. That is how you fail to acquiesce.

WILLIAM YOUNG J:

But they were just continuing to do what they'd always been doing.

MR MCCOY:

They had done it for 70 years.

WILLIAM YOUNG J:

Doesn't that make it clear that they were not acquiescing in Mr Taueki's claim to be able to control what was happening on the land adjacent to the Sailing Club.

MR MCCOY:

The answer is I understand that point, of course, but I respectfully submit again it's an irrelevant approach because ownership in terms of freehold land is, it's an irrelevancy to look at the position of lesser claimants. They cannot have a title that impacts on the Maori freehold title. The issue was –

CHAMBERS J:

But hold on Mr McCoy. An owner of land who has leased or licenced it to somebody else does cede possessory rights to those others.

MR MCCOY:

In a lease I would agree, in a licence I would respectfully not because a licence is non-exclusive, and they had no lease, it had expired. If they had a licence it would be non-exclusive as a matter of law.

WILLIAM YOUNG J:

Wasn't the position that the lease was being rolled over on a monthly basis?

MR MCCOY:

It became a licence thereafter because it was held that there cannot be a lease because it's Maori land. You cannot lease Maori land the way the Reserves and Domain Board had been doing it.

McGRATH J:

But the way the Domain Board was doing it was in accordance with its statutory powers?

MR MCCOY:

That's right.

McGRATH J:

And the –

MR MCCOY:

Was in accordance.

McGRATH J:

Was in accordance with the statutory powers presumably when it granted the term licence.

MR MCCOY:

No. It was wrong from inception. There was no power for the Domain Board. The Domain Board was represented by the Department of Conservation in the Maori Land Court, very experienced counsel. I have it, and the Court can have it if it likes, a very detailed meticulous analysis of why the lease from its inception in 1961 could never have been granted under the statutory arrangements and the Maori –

ELIAS CJ:

That was acknowledged in the Court of Appeal, wasn't it?

MR MCCOY:

Yes it was, it was. That's right, your Honour. There was a joint memorandum by the Department of Conservation counsel and Mr Taueki's counsel and a very detailed analysis, which I can certainly provide, showing that it's simply impossible for there to be a lease and I understand my learned friend today does not disagree with that. So from 61 it was an unlawful arrangement and Mr Taueki actually presently had reached that conclusion in 2006. The Court of Appeal notes this in its judgment because he'd written to the Domain Board pointing out that there was no legal foundation for the lease or the licence two years before the event in this case. The Court of Appeal, at paragraphs 45 of its judgment and thereafter said, "That's irrelevant because it wasn't until later that Mr Taueki's prior belief was vindicated." But his belief was expressed in writing and formally two years before the incident so his state of mind was there and it should have been taken into account. The mere fact that he was vindicated later was just surplusage.

ELIAS CJ:

Sorry, how is that vindication?

MR MCCOY:

The Maori Land Court accepted –

ELIAS CJ:

Oh in the Maori Land Court, yes.

MR MCCOY:

And with the express concurrence of counsel for the Department of Conservation –

ELIAS CJ:

Yes.

MR MCCOY:

That Mr Taueki had been right and the leases were unlawful ab initio from 1961.

ELIAS CJ:

Thank you.

GLAZEBROOK J:

Can I just check, as I understood your argument, and actually I must say as I understand the Canadian case, that what must be challenged in order not to be in peaceable possession, is the perpetrator if you like, so the person's possession of the land who's asserting possession. Now the Sailing Club was never challenging, in fact, as a matter of fact, was never challenging Mr Taueki's possession of the land.

MR MCCOY:

That's exactly the point that I failed to clearly identify in the last 15 minutes.

GLAZEBROOK J:

So they were never challenging that, they were just asserting an equal right to posses, or a right to posses –

MR MCCOY:

Correct.

GLAZEBROOK J:

– not an equal right to posses –

ELIAS CJ:

Or to use.

GLAZEBROOK J:

Well they were asserting a right to use and they presumably believed that on the basis of thinking that the licence was actually a true licence, but they were never saying that that was to the exclusion in any way of Mr Taueki's right.

MR MCCOY:

Correct and that's why –

GLAZEBROOK J:

But in the Canadian case the issue was whether there was a right to possess of the person that was seriously challenged.

MR MCCOY:

Exactly. If one now comes – sorry. Staying with *Born with a Tooth*, there's another passage I would ask the Court to consider please at page 178 at F for freehold. The strength in law of a claim to a right, and that's an original emphasis, 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 an illegal title. I think I must properly bring that to your attention.

ELIAS CJ:

So you say that's wrong?

MR MCCOY:

Yes I do but I felt I must bring it to your attention.

ELIAS CJ:

Yes.

MR MCCOY:

To avoid –

GLAZEBROOK J:

But again that's still a challenge to the person's right of possession not merely an assertion of an equal or other right to possession.

MR MCCOY:

Precisely, precisely, your Honour. If you would now permit me to come to number 7. This is *Etherton v Western Australia* (2005) 153 A Crim R 64 (WA:CA), a judgment of the Western Australian Court under their version of our section 56, and if you come please to para 124 on page 87.

GLAZEBROOK J:

I'm sorry, I missed the tab number?

MR MCCOY:

Number, *Etherton* is tab 7, *Etherton v WA*. Page 87, paragraph 124, "The use of force to defend connotes a temporal and physical connection between the invasion of the right and what is done to prevent or resist it including the retaking of property taken by a trespasser." And we would submit that must be correct. There must be a temporal and physical connection. There's got to be, if where you have a pre-emptive or anticipatory trespass, or an imminent one, that is the limit of your right under section 56, and that would be consonant with the policy behind section 56.

One can then move to *Haddon*, tab 10, our Court of Appeal, and if one comes please to page 142, and paragraph 40, the learned Judges there consider the circumstances as an occupier, now you need not be an occupier, it's the circumstances as a possessor believes them to be, is a subjective test as to force being necessary. "But we are of the view that the reasonableness of the force must be assessed on an objective not subjective standard." Now we respectfully accept that. It's an objective standard for the fourth element, the reasonableness of the force, but the other three are subjective and therefore they embrace the notion of a mistake or a misapprehension as to the circumstances. And if one comes to paragraph 46 at 144 referring there to section 55, before it can come into play, four elements are required, be in possession, possession peaceable, victim of the assault must be intruder, or intended intruder acting without lawful justification, force used to eject the intruder must be in the circumstances no more than is necessary, which equates with reasonable, and the accused must have had no reasonable and probable grounds for the belief that lawful grounds exist for the entry or threat of entry.

I would ask you then, please come if you would, your Honours, to tab 15. Now this is slightly out of place but I had promised you I would take you to the judgment of Mr Justice Cooke. Now this is the judgment of Mr Justice O'Regan in 1978 at

Palmerston North and it deals with the lake and the land but it actually more deals with fishing rights but at the bottom, the very last line you see, was considered by Justice Cooke in *Regional Fisheries v Tukapua*, SC Palmerston North, M33/75, 13 June 1975.

Now despite the most earnest searches by the appellant, by the respondent to whom I'm indebted and indeed your own Supreme Court staff, no one can find a copy of this judgment of Mr Justice Cooke from 1975, from the Levin District Court, from the Palmerston North High Court, which is a sadness in itself but it's replicated substantially by Justice O'Regan and that is why we have the second judgment and if you come into it please, page 2, the last paragraph. "Further, the 1956 Act of Parliament ROLD specifically states that the Maori owners shall at all times have the free and unrestricted use of their fishing rights over the lake and the stream."

Those strong words "at all times" and "free and unrestricted", first appeared in the 1905 Act, that's an Act in the respondent's bundle. "I think it would be inconsistent with them to hold that the Maori owners are nevertheless restricted in the use of their rights by the Fisheries Act and regulations, including requirements as to permissible equipment, close seasons... the rights under the 1956 Act are special statutory rights . . . they are rights reserved to the Maori owners because of the special history of this area, they may be unique. I think the result that best accords with the spirit and words of the 1956 section and with the history, is to treat the maxim generalia specialibus non derogant as applicable. No doubt this is not the first time that a Latin tag has been found convenient to solve a Polynesian problem."

Mr Justice O'Regan himself, in his own judgment at page 14, the last page if you would, in the interest of time, with original underlining, identifies the top 4 or 5 lines, an extract from section 18(2), "to be and to have always been owned by the Maori owners," he says, Justice O'Regan, "the declaration that such was always owned by them. So it seems to me, is statutory recognition, that such ownership preceded the advent of the Pakeha and the introduction of his artifices for the making of laws and for creating and recording property rights."

The next judgment if you would, to prevent occupational overuse syndrome, we move in the one direction, 16, is a recent judgment of Justice Woolford, *Walker v Walker (Maori freehold land)* [2012] NZAR 607 (HC) and if the Court would please come into it, there's just a short extract from this learned Judge at page 616,

paragraph 43. Now he's looking not at ROLD but the Te Ture Whenua Act and the learned Judge says, "I am of the opinion that the scheme and purpose of the Te Ture Whenua Act should be taken into account. I take it as a starting point, the comments of Judge Ambler in *Re Te Whata*."

In that case, the applicant sought to change the status of Maori freehold land to general land, Judge Ambler stated and he introduced the preamble, in three or four lines down, "That is not only a statement of aspiration but invariably a statement of fact. It points to three important characteristic of Maori land. First, Maori land is not seen as a commodity but a cultural heritage. Secondly, Maori land is expected to be passed from generation to generation and the current generation is merely a custodian for the next and the third point is that it's done without payment of money."

If you just equally turn to paragraph 48, there's a citation from the Court of Appeal in *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 (CA), where it said that, in the middle, there's a reference to the Te Ture Whenua Act, there's a reference to the Treaty of Waitangi and the effect of a double helix and how the Act is intended for the use, development and control of Maori land by Maori.

The *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) case at 17, is very well known and one of the points it makes is at page 557, that, "Section 4 of the Conservation Act," the Director of Conservation of course represents the Domain Board in this case, "Act, to give effect to Treaty of Waitangi, this Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi."

If I move perhaps even faster into the second bundle, the very first case, *Perry v Clissold* [1907] AC 73 (PC), an appeal from the High Court of Australia to the Privy Council 107 years ago and the significance of this judgment, which has hitherto never been doubted, is at page 79. Lord Macnaghten as I recollect for their Lordships, yes, at 79, 44 per cent down the page says this, "Their Lordships are unable to agree with this contention. It cannot be disputed that a person in possession of land, in the assumed character of owner and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner."

We don't care about the Sailing Club. The other party who was relevant in this case for the law of peaceable possession was the Trust and the Trust had allowed us to be present. Tab 19, *Shaw v Garbutt* (1966) 7 BPR 14 (NSW SC), Mr Justice Young of the New South Wales Supreme Court, sets out at some length authorities on peaceable possession, collects them from the four corners of the common law, even extending to less obvious places like India and he points out, as is set out in the appellant's case, that one incident of peaceable possession is telling people to get off your land and that's exactly what the appellant did in the present case and that's set out in that judgment in a number of places.

Your Honours are asked perhaps to come to 20, *Ezbeidy v Phalen* (1958) 11 DLR (2d) 660 (NS SC) and the significance of this judgment is at 665 because here is now a very useful conceptual approach to possession, 665, right at the bottom, having looked at various authority, "Possession may be roughly defined as the actual exercise of rights incidental to ownership as such. That is, the person who claims to be in possession must exercise these rights with the intention of possessing." So you don't need control, it's the intention of possessing. "Where a man acts towards land, as an owner would act, he possesses it." That's what the appellant did. "The visible signs of possession must vary with the different circumstances and physical conditions of the property possessed.

For your convenience at 21, I won't read this out but Lord Rodger, as he was wont, has given a classical overview of the nature of peaceable possession at page 102 of the judgment and right at the top, one sees from the preceding page, the expression as of right in the Commons Registration Act was to be construed as meaning nec vi, nec clam, nec precario, the parties agree that the position must be the same. The Latin words need to be interpreted, however their sense is perhaps best captured by putting the point more positively, the user must be peaceable, open and not based on any licence from the owner of the land because of course you can't have adverse possession if you are possessing by virtue of authority from the owner.

The opposite of peaceful user, is user, which is to use the Latin expression vi but it would be wrong to suppose that user is vi only where it's gained by employing some kind of physical force against the owner. Now I won't read all of this out but the point that Lord Rodger powerfully makes is the peaceableness is between the person who has the legal right to the land, in our case the trustees, and the person who would have the challenge to the legal right. The beneficiaries are not challenging the

trustees. There is no question here of the beneficiaries' possession being other than peaceable. Peaceable looks at the superior relationship, the person from whom you could be ousted and one sees, in paragraph 89, an extract from the judgment of Lord Justice Thesiger in *Sturges v Bridgman* [1879] and it shows the requirement, it's italicised, which he contests and endeavours to interrupt, that's what someone has to do before they can engage a challenge to peaceableness. None of the sort was done by the Sailing Club and it would've been legally frivolous in any event if they had done that.

22 is a judgment of our Court of Appeal of which the learned Chief Justice was a member back in 1999 and the head note, with respect, may suffice, holding that under section 56 Crimes Act an occupier of property may use reasonable force to prevent trespass, force includes a threat of force. And even perhaps relevantly at paragraph 15, all that there has to be, page 676, paragraph 15, all that you have to have is a technical trespasser, a technical. If you apprehend, if you have an imminent threatened trespass that will do because section 56, as it says, it's preventative because it allows you to prevent the trespass as much as cause it to desist.

Now I'm moving very quickly, I hope, to an issue of dealing with the notion of what constitutes the trespass. We submit that intentional unlawful behaviour cannot be reasonable, therefore the intention of the boaties or the boat, the complainant, is intentional and unlawful behaviour because of the size of his boat and his dirty boat, that could not be considered reasonable and he had forfeited the right of access across the land because he would have or may have breached the bylaws.

WILLIAM YOUNG J:
There's no evidence, is there, of a breach of bylaw 21? There's no evidence at all.

MR MCCOY:
The best evidence is that their own statement that they don't clean their boats before they go in, that's right.

WILLIAM YOUNG J:
Yes but they denied that they were taking boats on to Lake Horowhenua with weed species.

MR MCCOY:

They do deny that but they admit they don't clean them.

WILLIAM YOUNG J:

But there's no evidence that they're on –

MR MCCOY:

I agree that's the state of the evidence.

WILLIAM YOUNG J:

There's no evidence that the Board had ever made a determination that this particular boat was a speed boat.

MR MCCOY:

No and therefore you've got –

WILLIAM YOUNG J:

So all you've got really is the question whether there was written consent to use this boat.

MR MCCOY:

And there couldn't have been written consent because the evidence shows the last time the club had communicated was 1993 which was three years before the 1996 bylaws were even made.

WILLIAM YOUNG J:

Yes but there may have been consent and I know that they'd been using the boat there for 50 years. I don't know what the terms of the lease said or whether –

MR MCCOY:

The terms of the lease required them to comply with the bylaws.

WILLIAM YOUNG J:

Yes but the terms of the lease may contemplate the use of a boat.

MR MCCOY:

I do not know, yes.

WILLIAM YOUNG J:

Okay but the point I'm getting, it's uncertain, it is possible there was no consent.

MR MCCOY:

Yes. It's not critical for me to show that the Sailing Club had or didn't have a defence. It's only important for me to show the state of mind of the appellant at the time, that he apprehended that there was to be an imminent trespass, inasmuch as there was a reasonable case that the boat was dirty or too big and once it becomes, with respect, a compound issue of law and fact, you're into the analysis from Justice Dickson in *Thomas v R,* that that's itself a question in fact whether that speed boat was a power boat and on the wrong side of the bylaw.

WILLIAM YOUNG J:

But your argument is that if it's not proved beyond reasonable doubt that they weren't trespassers, they should be treated as trespassers and, sorry, they should be treated as being in breach of the bylaw and for that reason as trespassers?

MR MCCOY:

Exactly, that's it. Now tab 23 is a classic situation case, because there you had a mall –

CHAMBERS J:

Could I just check one thing?

MR MCCOY:

Yes.

CHAMBERS J:

Here of course the complainant didn't even know about the bylaws but do you accept that before you become a trespasser, the person with authority would have to say, give a chance to the person who was allegedly in breach of the bylaws to correct the position before they would become a trespasser and therefore before action under section 56 would be justified?

MR MCCOY:

No, I do not accept that proposition, your Honour. In my submission once there has been a regular course of conduct, which was obvious in terms of the Sailing Club

regularly using its boats, knowing that that boat is going out on the lake and its size and dimensions, knowing that they do not wash the boats before they put them in and knowing when they come back they wash them but allow the run-off to go onto the grass, back into the lake, that run-off is itself a breach of the bylaw, that's yet a third infraction.

CHAMBERS J:

I appreciate that but they didn't know they were breaching the bylaw because they didn't even know there were bylaws.

MR MCCOY:

But that's blissful ignorance for which they should be condemned.

CHAMBERS J:

So there is no need to give a warning prior to using force?

MR MCCOY:

Oh, the warning was you cannot cross the land onto the lake with that boat and they knew that the size of the boat and they would know that the fact that it had not been washed would've been the matters actuating the mind of the appellant and as Commodore Feek said, because he was the most neutral of the three, he understood the man was – the appellant was holding the line, "This is my land, that boat's not coming across". Now that's the best answer I can give but my respectful submission is there's no formal requirement to do any more than indicate your position that over your land the invitation has been removed. The invitation was, and I'm about to come to this –

CHAMBERS J:

But don't you, for instance, under the Trespass Act –

MR MCCOY:

Which it's not. Which this is not, this is not a Trespass Act matter. This is trespass in terms of a notion. The Trespass Act has no application, with respect, to this case, so its body of learning cannot be necessarily incorporated into this case. Here you're looking at trespass from its original tortious basis, that's what it's doing. Peaceable possession, a property law concept, trespass, a property law concept defending the land. What has happened is our pioneer legislature, in my submission, has decided

that there is an importance in being able to protect your land or your dwelling and has given a limited right to interfere with actual trespass or prospective trespass. You certainly do not have to wait. The Boat Club was an invitee, a statutory invitee. If it could not meet the criteria of the invitation, it failed. The position would be exactly as set out in –

CHAMBERS J:
Could it be said, however, that force was reasonable in circumstances where you haven't given any warning?

MR MCCOY:
That would be the fourth issue and I'm tending towards this with as much speed as I can. I fully understand this and I look forward to answering your Honour's question very soon. Could I indicate, footnote 56 of the appellant's case found on page 22 would be convenient because it sets out the classic dictum of Lord Justice Scrutton in *The Calgarth* [1927] P 93, "When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters". Now that was approved by Lord Atkin in the House of Lords in paragraph 55, *Hillen and Pettigrew v ICI (Alkali) Ltd* (1936) AC 65 and the cleverness of the image it conjures up is that it coincides with the fact that if you have a right to enter, you will breach the invitation, then you are a trespasser of the land and as a matter of convenience, you will see set out at paragraph 47 a reference to *R v Keating* (1992) 76 CCC (3d) 570 (NS:CA), a judgment that's been widely followed. *Keating* goes like this, Keating was in charge of a mall, there was a sign up "No skateboarders", somebody wanted to skateboard, he was thrown out and it was held lawfully done using the equivalent of section 56 because the unreasonable conduct of the skateboarder violating the proscription against skateboarding meant your invitation had been ripped up and section 56 was available, that's *Keating*.

If one comes to paragraph 49 we've got the *R v Pratt* [1855] 4 E&B 860 and this has been picked up by the High Court of Australia, the Mason Court, which I will come to and Justice Crompton, all these years ago said, "I take it to be clear law that if a man used the land over which there is a right of way for any purpose lawful or unlawful other than that of passing and re-passing, he is a trespasser." And this is consistent entirely with the case at our paragraph 52, the case, it's a criminal case, *Taylor v Jackson* (1898) 78 LT 555, Divisional Court of Justice Wills and Justice Kennedy, it demonstrates that a person who is authorised by statute to enter or cross private

property for one purpose makes it a trespass by that person if he goes there for another unauthorised purpose and you will see the footnote at 57, your Honours, *Baker v R*, four Judges, "Entry for an unlawful or unauthorised purpose constitutes the trespass". That's what it is. So the complainant was going to enter for an unlawful or unauthorised purpose, that was trespassory conduct and it could be stopped and everybody had the right and perfectly the rights of the owner, reinforced by the devolved authority of the Trust.

ELIAS CJ:
So here you say because they were, you say, in breach of the bylaws, they were trespassing?

MR MCCOY:
They forfeited their right of access to the land.

ELIAS CJ:
Yes.

MR MCCOY:
Exactly.

CHAMBERS J:
Did they in fact breach the bylaw at the time of the altercation?

MR MCCOY:
Unclear, sorry, it's a staccato answer. It's not clear but the bylaw definitely applies to that land and it applies to the surface of the lake. It seems most likely that being there with a boat, with the manifested intention, I mean it's inevitable that the boat's there, as was said for going onto the lake, that that's the threat to the lake.

CHAMBERS J:
When do you become a trespasser? When you breach the bylaw or when you threaten to breach the bylaw?

MR MCCOY:
Oh, an attempt, an attempted breach of a bylaw will be an offence. In fact a conspiracy would be just as good. Either will do, either will do. On any view the

bylaw is a geographical bylaw in terms of all of the domain and the domain includes the surface of the water of the lake plus that three-sided rectangular piece of land, rather like the diamond on a ring.

55, if your Honours would, we have Lord Atkin in the House of Lords and this judgment has been repeated many times "... sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation, he's not an invitee but a trespasser". And we would submit that the authority to enter or over the land of another without his permission, conferred by the general law, whether statutory or otherwise, will ordinarily be limited to entry for the lawful purpose for which the authority exists and not otherwise.

Now the last component is the matter of reasonable force. Now I will very briefly introduce this and with your Honour's leave invited my learned friend, Mr Duff, to make very short submissions, just to complete this part. If you would come to paragraph 58 of the appellant's case, you will actually find at footnote 61, there is the common law right which exists in the law of tort to gently lay your hands and if you go to *Shaw v Hackshaw* [1983] 2 VR 65 and I won't ask you to turn it up, you will find that it sets out the pleading from *Bullen & Leake* which is almost 200 years old, showing that this is the right of any person even without section 56. So section 56 is complementary with the right under the law of tort. Now the only issues in terms of section 56, there are two statutory exclusions, one is you mustn't strike and one is you must not commit bodily harm.

May I just tell you that the complainant himself admitted, reference page 25, line 30, he was never struck. So strike the strike. In terms of bodily harm, he said he suffered none either. So the only issue is, your Honours have already raised to my attention, is whether it's reasonable in the circumstances to do what he did.

WILLIAM YOUNG J:
Isn't there an issue as to whether it was for the purpose of preventing the trespass?

MR MCCOY:
Oh, that is why if you come to paragraph – footnote 63, I have taken you to that your Honour, you see there the use of force, there has to be a connection between the invasion of the right and what's done to prevent or resist it. He put his hands onto the epaulettes, had they been there, of his shirt and said, "You're not going onto my

land" and that was to prevent him from doing it and that's the only reasonable construction.

WILLIAM YOUNG J:
He said, in his evidence that, "It was then I attempted to pull him off the edge of the boat to evict him by once again grabbing his clothing".

MR MCCOY:
Yes.

WILLIAM YOUNG J:
That's not quite the evidence of the prosecution, which was more that it was just an act of physical force in the context of an increasingly acrimonious interchange.

MR MCCOY:
I think the difference between the sets of evidence is the complainant's son and Commodore Feek all accepted that he had asserted that this was his land and you weren't coming onto my land but hadn't used the word "evict" at that time, although used it shortly thereafter the actual first assault and it would be admissible to show that that's what he intended in any event. In terms –

WILLIAM YOUNG J:
But how – looking at it perhaps in a blinkered sort of way – is pulling Mr Brown off the boat logically connected with preventing a trespass?

MR MCCOY:
I think he would find it hard to drive the boat if he wasn't in it. I think that's the point.

WILLIAM YOUNG J:
But he couldn't drive the boat because the boat wasn't in the water.

MR MCCOY:
I think the point is, it's a remonstration with him to show he's exercising control in a negative sense, to reinforce that there was to be no way that the boat would go onto the lake and the land. Now, it is obscure in part and sometimes counsel's submission can be better than the evidence and I'm conscious of that but it should be seen in the round, that he clearly was making his position clear.

Now I think that is all I would wish to say. I'm sure if your Honour permitted my learned friend Mr Duff to make his submissions, he would complete in less than five minutes.

ELIAS CJ:
Carry on? All right.

MR MCCOY:
That would then give a clean break to our learned friends.

MR DUFF:
(inaudible 13:00:50).

ELIAS CJ:
That's right Mr Duff, you'll be five minutes, did you say?

MR DUFF:
If that, Ma'am.

ELIAS CJ:
Thank you. Thank you, Mr McCoy.

MR DUFF:
Yes, may it please your Honours. It's really just this question and, I mean, obviously I can see that it is taxing the Court's mind as to whether or not there has been any attempt to alert him of the trespass because certainly we say that, when one considers the evidence that was given at trial, it's been absolutely accepted and particularly the notes of evidence are – line 5, sorry, page 5, line 31; page 25, line 30; and page 30, line 13. These are the references to the fact that Anthony Brown, the complainant in this case, accepts that there was no strike as such.

GLAZEBROOK J:
Can you just give those references again please?

MR DUFF:

Yes, I did go through those rather quickly. The first is at page 5, line 31 and that shows where he simply grabbed the shirt, Mr Taueki has grabbed the shirt –

CHAMBERS J:

I think the point I was getting at Mr Duff was, do you accept that there may not be a strike, there may not be bodily harm, but the use of force nonetheless might not be reasonable, yes?

MR DUFF:

Well yes, but here we have a situation where in fact the trespass that he was seeking to prevent was quite clearly articulated to Mr Brown right from the get-go. So you see that there and the notes of evidence, effectively the confrontation that occurs between the two of them, where Mr Brown is saying – this is at the notes of evidence at page 30, starts off suggesting that it was abusive but in effect he was saying, "What are you doing with that boat, what is your intention with that boat?" So there's a pulling back effectively of the suggestion by Mr Brown that Mr Taueki does start off, if you like, aggressively, where the grounds for the confrontation are well articulated, in my respectful submission.

WILLIAM YOUNG J:

Well he makes it clear he doesn't want the boat to be launched?

MR DUFF:

Indeed.

WILLIAM YOUNG J:

Yes.

MR DUFF:

That's right and then certainly the – there is a warning and in fact, if you do look at page 30, line 11 and this is again coming from Mr Brown himself as well and unfortunately, when we look at those two propositions, he says initially that you're not going to do this and then he says, you know, you're not going to take it across my land.

This is the point where I ef – I say that in fact Mr Taueki has specifically articulated the kind of warning that you're alluding to, Sir. So he is saying to them, I mean, this hasn't been just simply a pre-emptive thing, if you – I mean, it's pre-emptive in the sense it's tried to prevent a trespass but it hasn't been – my learned friends for the Crown tried to suggest that there has been a manhandling and in fact, when one looks at paragraph 158 of the decision of Judge Atkins, there is a suggestion there that he says well, without the sort of warning of the trespass well – as I say, when you look at the evidence, in fact Mr Taueki is saying to them, is articulating exactly that, that is not to go across, that is not going across my land, that boat with that engine in that state of uncleanliness is not going into the water.

Now what's important though is also that at page 33, line 33, you'll see from Mr Anthony Brown that regardless of that, he had articulated the intention that –

CHAMBERS J:
Sorry, what was that reference, page?

MR DUFF:
Page 33, line 33.

CHAMBERS J:
There's not a line 33 on my page 33.

MR DUFF:
Hang on, let me get this right. Oh sorry, yes, look, it's line 8, "And I said to him, 'You know what? I'm going to take the boat on the lake'," and the appropriate inference from that is that this discussion has occurred prior to the point that hands had been placed upon the shirt because this is Mr Anthony Brown saying, this is what I had articulated to him, I was taking the boat on the lake regardless of what Mr Taueki was saying.

So those really are the submissions that I need to make on that point, your Honours.

ELIAS CJ:
Yes, thank you Mr Duff. Right, we'll take the lunch adjournment now.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:
Yes, Mr Sinclair.

MR SINCLAIR:
May it please the Court. We've handed to Madam Registrar the photographs from the trial and also the judgment of his Honour Justice Cooke, as he then was, that my friend referred to.

ELIAS CJ:
Thank you. How did you find it if nobody else – was there a copy –

MR SINCLAIR:
We have a pile of papers concerning the lakes for some reason.

ELIAS CJ:
Right. Good.

MR SINCLAIR:
And we are still debating between ourselves as to the best representation on the certificate of title which I think your Honour also enquired about.

ELIAS CJ:
Yes.

CHAMBERS J:
You haven't got the photos though?

ELIAS CJ:
Yes, you've got them.

MR SINCLAIR:
Yes, they should be with the Court.

CHAMBERS J:
Thank you, thank you.

MR SINCLAIR:

May I also enquire, your Honour, we took the liberty of filing a short outline of these oral submissions, I just wanted to check that the Court had that as well?

ELIAS CJ:

Yes, we have those, thank you.

MR SINCLAIR:

From the discussion this morning, it seems that the crux of the case is the concept of peaceable possession and, in that respect, it seemed to us that what had to be grappled with here is the fundamental change in 1905, by which this Maori freehold land became also a public reserve, subject to the control of the Board. That is of course by virtue of the gracious gift of Muaupoko as referred to in the debates that we've included in our materials.

In the outline, we made passing reference to the fact that what we see here which is a kind of a blend of relationships involving a title vested in Maori and public reserve status co-existing with that, is now a reasonably common state of affairs and I think it's probably fair to say that every modern Treaty settlement will have some kind of so-called cultural redress in which land is vested in Maori but subject to public access.

So the verbal formula used in this particular instance may well be unusual or unique but the – in a general sense, the set of relationships that we find here is not unusual. So in our submission –

ELIAS CJ:

Do we have the – sorry, do we have the Horowhenua Lake Act?

MR SINCLAIR:

The 1905 Act, your Honour, should be in the respondent's materials.

ELIAS CJ:

Thank you, that's fine, don't take us to it, that's fine.

MR SINCLAIR:

By that statute, actual control of the lake passed from the Trust, the lake assumed the character of a public reserve and since then it's regularly been used in that way. So from that date, in our submission, it couldn't be said that the Trust maintained actual control of the lake, that had passed as a result of the agreement in 1905 and it would seem, from what's said on page 105, 145 I'm sorry, of the notes of evidence, that Mr Stevens accepts that that is the position now.

The proposition in these circumstances that a beneficial, an individual beneficiary could claim peaceable possession acquiesced by others is, in our submission, in a public reserve setting, even further removed from any control that the Trust might have been able to assert and my friend this morning, if I understood him correctly, advanced as the primary ground for the appellant's actions, the fact that he was a beneficial owner and it was submitted, I think, that a hallmark of ownership is the right to possession. Therefore in his submission, the appellant had possession – in fact, I think that was the submission made but of course, as the discussion this morning highlighted, there are many circumstances in which ownership and possession are severed –

GLAZEBROOK J:

Are you suggesting he doesn't have possession, so that he only has the same right of possession as the public and that he's subject to the bylaws in the same way that the public is, or do you – because that's not the submission that was made by Mr McCoy?

MR SINCLAIR:

Our submission, your Honour, is that he does not have possession in the required sense as explained in the authorities –

GLAZEBROOK J:

Well does that mean, what does he – does he have the right to enter the land and use the land, other than as a member of the public?

MR SINCLAIR:

He has rights additional to those of members of the public, so the Act makes it clear that there are rights of use and fishery which vest solely in the beneficial owners. Although it also makes clear that those rights cannot be exercised in a way that

interferes with the public enjoyment of the area. That public enjoyment, as my friend submitted and we accept, is conditioned by the Board's ability to promulgate bylaws and a person acting in defiance of those bylaws exceeds the extent of the public right.

CHAMBERS J:
Does he have to comply with the bylaws?

MR SINCLAIR:
That I'm not sure, I have to say, your Honour, I haven't, I hadn't really considered that point until it came out this morning. Although, in our submission, it's not material to the issue that has to be resolved here which is the content of the concept of peaceable possession.

CHAMBERS J:
Do the trustees have peaceable possession?

MR SINCLAIR:
In our submission, no, that's what has changed from 1905 and in relation to this particular piece of the land, I suppose, to be strictly accurate, the changes come at 1956 but –

CHAMBERS J:
Just as a matter of interest, looking at the photographs, do you happen to know for instance, looking at the clubhouse, where exactly it is located, in terms of the dewatered strip –

MR SINCLAIR:
We've accepted –

CHAMBERS J:
– and the little rectangle?

MR SINCLAIR:
Yes, yes. The impression we got from the notes of evidence is that the incident took place somewhat in front of the yacht club premises, outside the sliding doors that should be visible in those photographs, and we've accepted that it's likely that that is

the dewatered strip and I understand that there's quite a considerable distance from there to the edge of the water, something like 90 metres.

ELIAS CJ:
Can I – sorry, had you finished that?

CHAMBERS J:
Yes, thank you.

ELIAS CJ:
I've lost the sort of legal thread. The 1905 Act, has that been superseded?

MR SINCLAIR:
It has been as to – at least as to the extent of the land involved so...

ELIAS CJ:
What do you mean by that?

MR SINCLAIR:
Well my understanding is that in 1905 the lake and the one chain strip were declared to be public reserve. There were difficulties which came –

ELIAS CJ:
This Act doesn't seem to refer to the one chain strip.

MR SINCLAIR:
The 1905 Act?

ELIAS CJ:
No, it doesn't seem to. Is it the 1916 Act, there's another one?

MR SINCLAIR:
Mmm, I have to say I'm not sure, your Honour, but the – in light of the difficulties about the dewatered strip, I think that's one of the main factors driving the change in 1956, that has been clarified as being Maori freehold land and the reserve status has been clarified as extending from the area of the domain, that small piece of Crown land –

ELIAS CJ:

Yes and it's also made clear that the access for the public is confined to the waters and access –

MR SINCLAIR:

Yes, so the –

ELIAS CJ:

– which in the 1905 Act isn't clear, it seems to be the whole lake that is a public reserve and that's not the effect of the 1956 Act, is it?

MR SINCLAIR:

The waters of the lake – well, it's illustrated also by the plan that was looked at this morning –

ELIAS CJ:

Yes.

MR SINCLAIR:

– but the public reserve comprises the surface waters of the lake and then the small piece of Crown land which is now the domain and between the lake and the domain there is a section of –

ELIAS CJ:

No, I understand that but that's all pursuant to – that's not under the 1905 Act, is it, it's the later legislation?

MR SINCLAIR:

Yeah, yes, that's right. Certainly that is the state of affairs brought into being in 1956.

GLAZEBROOK J:

Yes.

MR SINCLAIR:

I'm not sure why I'm thinking that the one chain reserve was part of the public reserve in 1905, I may have seen a plan that suggested that but it was certainly pre World War Two, some controversy about certainly the dewatered strip.

GLAZEBROOK J:

So can I just get this submission? Is this submission that there is no peaceable possession for the trustees because it's a public reserve and therefore the only people who have the right to remove trespassers are the Domain Board, is that – so, well, perhaps can you articulate what peaceable possession means because these people have possession in the sense that under 1956 Act they have both ownership and use rights subject to not restricting public use rights?

MR SINCLAIR:

Perhaps if I can begin by addressing your Honour's last made point. We don't accept my friend's proposition that because the appellant is a beneficial owner, that he has a right of possession and that may be illustrated by what the Maori Land Court in a passage that –

GLAZEBROOK J:

Well I'd prefer you actually answered it in respect of the trustees first. So why don't – so do the trustees have a right of possession? Well, what do you mean by possession in that sense because I can't see that he can't have, because he's got use rights and he's got ownership, beneficial ownership, what do you mean by possession?

MR SINCLAIR:

We mean possession in the sense as explained in *Born with a Tooth* and –

GLAZEBROOK J:

Well, do you want just tell me what you mean by it rather than telling me that it's a case? Can you just put a sentence and say what you mean, sorry, I might be being obscure but I just need to understand what you say it means.

MR SINCLAIR:

Yes, the features that we emphasise from the authorities are that there must be actual control.

GLAZEBROOK J:

What does control mean in those circumstances?

MR SINCLAIR:

Well I suppose it must be –

GLAZEBROOK J:

Because peaceable possession seems to include people who have no lawful right to be there, who may not exercise control. So what do you say that has to happen, what's the control they have to have?

MR SINCLAIR:

I think the distinctive feature of the situation is that this is a public reserve and activities on that reserve and the relationship between the rights of the public and the rights of the owners are controlled by the Board and so in answer to the question who has actual control in this place, we say in fact and in law it is the Board.

McGRATH J:

That's because of subsection (7) of section 18 is it, that you say that?

MR SINCLAIR:

I'd need to look at –

McGRATH J:

So you tell me why you say it then?

MR SINCLAIR:

Yes, it is a product of what was done originally in 1905 and modified but without material change in this sense.

ELIAS CJ:

Well I don't think 1905 really comes into it except as background because the 1956 Act seems to totally supplant all of that.

MR SINCLAIR:

Well that's correct, your Honour, there's no –

ELIAS CJ:

And it's the '56 Act that introduces the trustees identified by order of the Maori Land Court in 1951 and vests the lake, islands, dewatered area and strip of land in the trustees.

MR SINCLAIR:

The trust relationship had been established before 1956. It's certainly confirmed –

ELIAS CJ:

1951, I think, by the order of the Maori Land Court.

MR SINCLAIR:

Well there was a trust in existence much earlier than that. There were trustees before the First World War and new trustees had to be –

ELIAS CJ:

Oh yes, yes.

MR SINCLAIR:

- appointed after the war.

ELIAS CJ:

Yes.

MR SINCLAIR:

Because the named trustees had passed on.

ELIAS CJ:

Yes.

CHAMBERS J:

Your argument seems to render the fact that they own the fee simple almost irrelevant.

MR SINCLAIR:

Well, the connection with the land is expressed now in a different way. It's expressed through the Trust's right to appoint 50 per cent of the Board. To go back somewhat, I

was endeavouring to answer your Honour Justice Glazebrook's question by enquiring what – to say that someone is a beneficial owner of Maori freehold land, what does that mean and where we part company from my friend is that it doesn't necessarily confer a right to possession, that the Maori Land Court has made that very clear in a number of judgments, including one that we've set out in our original submissions.

ELIAS CJ:

But that's as between trustees and beneficial owners. In this case, surely, one way of looking at it is that the Domain Board has control only over the matters within the public domain which it's entrusted with which is public access to the waters and access. How does that affect the interests of the owners of the land, leaving aside whether they're the trustees or the beneficial owners for the moment? Your argument seems to be that the Domain Board has all the possession of the lake and that can't be right in terms surely of the 1956 Act.

MR SINCLAIR:

Yes, the Board has certain powers and they extend only so far.

ELIAS CJ:

Yes.

MR SINCLAIR:

But that does not entail the conclusion that the appellant, as the beneficial owner, has possession.

ELIAS CJ:

No because you say the trustees do, do you, of the ownership interest?

MR SINCLAIR:

Well I think in a *Born with a Tooth* sense, neither of those – neither the beneficial owners or the Trust have possession in the sense of actual control.

ELIAS CJ:

Well who do – well are you saying then that only the Domain Board has actual control?

MR SINCLAIR:

Yes that is our submission, your Honour.

GLAZEBROOK J:

But it can't be right, can it, because they have the exclusive use rights don't they? I mean they certainly have use rights, there's absolutely no doubt about that because subsection (7) says so.

MR SINCLAIR:

Yes, yes, so –

GLAZEBROOK J:

And those can't be controlled by the Domain Board because it doesn't come within the Domain Board purview does it?

MR SINCLAIR:

Well, it can in a sense. So a member of the tribe can enter this area either to exercise the public right, although in reality that right is co-extensive with the untrammelled right of use that is confirmed by the statute, but those –

ELIAS CJ:

But it's not an untrammelled right of use.

MR SINCLAIR:

It isn't, no, it's qualified and that is where the Board does have a role to play in making sure that the beneficial owners do not exercise their special rights in a way that unreasonably conflicts with the public right.

WILLIAM YOUNG J:

Well, it may be that the concept of who has control or who has possession can't be helpfully answered in the abstract in relation to this land or this area but rather has to be looked at in relation to whatever is in controversy.

MR SINCLAIR:

Yes, and it might be submitted in response to that that, whoever has possession, it is not the appellant.

WILLIAM YOUNG J:

I mean it may be that up until 2003 and subject to the issues about the lease, that the Sailing Club had control and possession of the area in the vicinity of its building.

GLAZEBROOK J:

I'm still not sure where control comes from though. So where do you say – I still would quite like to have a one sentence indication of what peaceable possession means. Somebody has to have the exclusive control of it, the exclusive possession.

McGRATH J:

Actual control.

GLAZEBROOK J:

Actual, exclusive, only control. What exactly has to happen for peaceable possession?

MR SINCLAIR:

I think where the authorities lead us, when they refer to "actual control", must mean that it is a species of visible or tangible control that anybody entering upon the area recognises, or has the ability to recognise, and here, it's the Board who makes the bylaws, it's the Board who puts up signs –

GLAZEBROOK J:

So possession doesn't mean anything of the sort, it means control, is that the submission and you have to have exclusive control because it just doesn't seem to fit in with the authorities that's all, that says you don't actually have to have a legal right, it doesn't have to be a lawful right?

MR SINCLAIR:

I think this is where the trouble has begun in this situation, that a user of the reserve would think that, if asked who controls this area, would say it's the Domain Board, look they put up signs saying this and that and I am in –

GLAZEBROOK J:

Well let's leave public access the reserve aside for the moment because this doesn't just apply to reserves, does it? So what do you have to have to be in possession of land generally? You have to be exclusively in control of it or –

MR SINCLAIR:

Well, not necessarily so.

GLAZEBROOK J:

Well then, what is the one sentence test?

MR SINCLAIR:

Well it –

GLAZEBROOK J:

Or the three sentence test if you like –

MR SINCLAIR:

Three sentences, well –

GLAZEBROOK J:

– but just what's the test?

MR SINCLAIR:

– we'll start with the two formulations which is actual control, acquiesced by others and from that, we would gloss that test as extending to – as requiring a form of control that is tangible.

CHAMBERS J:

So does this mean that if my home is owned by a family trust and I am there with the consent and live there with the consent of the trustees because I am a beneficiary of the trust, that I am not in peaceable possession of the dwelling house?

MR SINCLAIR:

Well I think your Honour would be in that situation, in the same way that was discussed this morning, that the tenant has peaceable possession of land that they lease.

CHAMBERS J:

Yes but I'm not necessarily leasing it, I'm just there with the permission of the trustees.

MR SINCLAIR:

Yes but –

WILLIAM YOUNG J:

Well you're still in control of it in a practical sense and your right to be there is undisputed by anyone.

MR SINCLAIR:

Yes, while the trust suffers you to remain you have the –

CHAMBERS J:

Well, why aren't the members of this tribe there in the same way, they're there with – they can all use it by consent of the trustees, why aren't they in possession?

ELIAS CJ:

I don't even know that they need the consent of the trustees under this legislation that –

CHAMBERS J:

Well, they may not –

ELIAS CJ:

Yes.

CHAMBERS J:

– they may not but I just can't see why they're not in possession?

MR SINCLAIR:

Well it –

CHAMBERS J:

It's a circumscribed possession because they have to acknowledge the rights of the public in certain regards but surely they are in possession?

MR SINCLAIR:

No, with respect, Sir, I think we would say that they are users, albeit users on a different footing of what is in essence a public space and they –

ELIAS CJ:

Well that can't be right, that they're simply put into a cat – isn't it a question of rendering unto Caesar the things that are Caesar's and doesn't this Act make a distinction between the recreational use of the public which the Domain Board is responsible for, and I've looked at the Reserves Act and that certainly seems to carry on, I don't know whether that's the operative provision at the moment, but that seems to carry on the notion that the Domain Board only has authority in relation to the matters conferred upon it, and doesn't that leave quite a lot of interest which is the only ownership interest, which must be sufficient to give peaceable possession in some circumstances?

MR SINCLAIR:

Perhaps if we start with a situation that would apply to the Maori land that is not subject to public reserve and then come to consider the reserve itself because the Maori Land Court has made clear the fact that Mr Taueki, or any other beneficial owner is a beneficial owner, does not confer upon them a right of possession. So they can only occupy the land with the express consent of the Trust –

ELIAS CJ:

So what authority are you referring to there?

MR SINCLAIR:

Your Honour will find, in paragraph 21 of the submissions filed in February.

ELIAS CJ:

Not the oral submissions?

MR SINCLAIR:

No, your Honour, no, the earlier submissions and this is Judge Harvey I think.

ELIAS CJ:

I don't know that I've got it actually.

CHAMBERS J:

Yes, well, that's clearly in your favour that – incidentally, was the Maori Appellate Court there applying common law or equity, or was that statement taken from statute, i.e. that there are special rules applying to Maori trusts?

MR SINCLAIR:

Yes, I'm not quite sure. I think that the – these are orthodox statements of principles in Maori land law which may well reflect the underpinnings of how equity would regard the same situation but that is, in our submission, clearly the law that applies to Maori freehold land. So it's not sufficient to say that, in our submission, for Mr Taueki to say that he is a beneficial owner therefore he has –

CHAMBERS J:

Right.

MR SINCLAIR:

– possession even of Maori land and that is illustrated, as Judge Atkins pointed out, by the intents of the trustees to evict him from the nursery that he is occupying.

CHAMBERS J:

So he must have, on your argument, the approval of the trustees –

MR SINCLAIR:

Yes.

CHAMBERS J:

– to be able to use and occupy. Is Mr Stevens –

GLAZEBROOK J:

But you say even the trustees don't –

CHAMBERS J:

– is Mr Stevens' say-so sufficient as chairman?

MR SINCLAIR:

If the authority to determine occupation has been devolved to him then it would be but the Trust does not purport to confer any right of possession on Mr Taueki to the extent that he is then able to avail himself of section 56 and use force.

GLAZEBROOK J:

I didn't think that there was any suggestion that he wasn't able to occupy the house that he occupies?

MR SINCLAIR:

Yes, I don't know what the current position –

GLAZEBROOK J:

Do you say he's not allowed to occupy it?

MR SINCLAIR:

There's has been an attempt. It's referred to in the judgment of Judge Atkins which I can probably find for you fairly rapidly, your Honour, but that –

GLAZEBROOK J:

But Mr Stevens' evidence is that he's there and has authority to enforce the bylaws?

MR SINCLAIR:

Yes, that was his evidence, although he –

GLAZEBROOK J:

Well there wasn't evidence that he wasn't allowed on the land, was there?

MR SINCLAIR:

He's certainly allowed on the land, that's correct, your Honour. Mr Stevens also –

GLAZEBROOK J:

Well it's just that your argument seems to be that even the trustees don't have peaceable possession of this land, that's what you told us earlier?

MR SINCLAIR:

Yes, Mr Stevens gave evidence that he didn't regard the Trust as controlling the reserve he –

ELIAS CJ:

But that's hardly determinative?

MR SINCLAIR:

No, except in the –

GLAZEBROOK J:
Well, if actual control is a requirement it might be, if they're not exercising control.

ELIAS CJ:
Maybe, maybe.

MR SINCLAIR:
Now he did say that he regarded the appellant as having the role of monitoring or enforcing the bylaws which appears to be something that was unknown to the complainant and his associates but even on that theory, that he can take an interest in or enforce the bylaws, does not, in our submission, translate to peaceable possession in the required sense.

Now my friend said that a member of the public can enforce bylaws by private prosecution, I don't know, but that, in our submissions, is a different thing from saying that therefore a person who can do that has possession.

GLAZEBROOK J:
So your one sentence is that you have to have control and here the Trust has no control because it's all devolved to the Domain Board?

MR SINCLAIR:
Yes and that is the change in –

GLAZEBROOK J:
And what's the control they have to have?

MR SINCLAIR:
It's set out – your Honour may be assisted in paragraph, probably in both our written submissions but in paragraph 18 of the outline of oral submissions. The two distinct features are actual control, possession not seriously challenged by others – I just want to make a quick submission in relation to that in a second and –

GLAZEBROOK J:
Well, what's actual control mean?

MR SINCLAIR:

Well again, I think it must fact specific but in this case –

GLAZEBROOK J:

Well, what do you do to have actual control?

MR SINCLAIR:

I think it's probably easier to answer that by reference to this reserve. Everyone can see it's a reserve, it's been treated for many decades as a reserve –

GLAZEBROOK J:

Well it's not easier for me. Can you just tell me what you would have to have, if you've got a piece of land, what you need to have to be in control of it?

MR SINCLAIR:

Well, his Honour Justice McGrath I think made a helpful point, that the situation would be different if, say, the yachties were presuming to enter Mr Taueki's house and store their boats in it, for argument's sake. There would be visible manifestations of Mr Taueki's actual control of that place, while the Trust permits him to be there at any rate, it's a nursery, I presume it's fenced off, there will be building, presumably they would find –

GLAZEBROOK J:

Well, do you have to fence it off to have control?

MR SINCLAIR:

Not necessarily, no, but that would –

GLAZEBROOK J:

Well what do you mean by actual control, do you mean the ability to throw people out, what exactly does "actual control" mean?

MR SINCLAIR:

Authority perhaps would be another adjective that would give flesh to the concept.

ELIAS CJ:

Mr Sinclair, I really wonder whether you can get away from the 1956 Act because it establishes what the function of the Board is and it's really only to control use of the public domain to permit public access and the use of the particular land reserved?

MR SINCLAIR:

Yes, your Honour, we don't seek, with respect, to evade the 1956 Act at all. The role of the Board is one thing, the fundamental feature here in our submission, is that the Act made or confirmed that this area was a public reserve and in that public environment, our fundamental submission is you don't have the platform to assert the quality of peaceable possession that section 56 requires.

ELIAS CJ:

But the Act refers to use by the public and it confirms use by the Maori owners, free and unrestricted use, so there's two uses. I'm just really wondering whether some of these analogies with cases taken from very different concepts, in different concepts, are very helpful and whether you don't have to come back to what the point of the authority given under the Act to the Domain Board is, which is not necessarily inconsistent with the Maori owners having themselves co-existing rights?

MR SINCLAIR:

Clearly, yes, your Honour I'm sure is correct that the statute envisages the blending of rights and shared –

ELIAS CJ:

Yes.

MR SINCLAIR:

– activities in the same place.

ELIAS CJ:

Yes, and where the access is on certain terms one would have thought that just, using the expressions a bit loosely, the residual owners would have standing to object?

MR SINCLAIR:

Yes, certainly they can be present in the area, they can use it in accordance with the bylaws and the rights conferred by the statute and they may object, certainly, to things going on that they disagree with –

ELIAS CJ:

Well, or that go further than the licence given to the public under the legislation?

MR SINCLAIR:

Where we feel constrained to draw the line, your Honour, is that this does not amount to a platform of peaceable possession from which the section 56 defence becomes available.

GLAZEBROOK J:

So if the public went on there and started chopping down a stand of trees and setting fire to it, the person, like Mr Taueki, who happened to be one of the beneficial owners on the land couldn't say "get off the land"?

MR SINCLAIR:

No, in our submission, he –

GLAZEBROOK J:

He'd have to ring up the Domain Board and say, "Can you please send someone down because you have authority over the land to throw these people off"?

MR SINCLAIR:

Or the police, yes, but –

GLAZEBROOK J:

And neither could the trustees, you say, if they happen to be down there?

MR SINCLAIR:

In our submission, no, no –

GLAZEBROOK J:

And they don't have peaceable possession of the land because there is public access, is that the submission, that's what I'm hearing?

MR SINCLAIR:

Yes, that's correct, your Honour, yes.

GLAZEBROOK J:

So the ability to regulate the public access rests with the Domain Board, that means that the owners have no peaceable possession of the land, is that the submission?

MR SINCLAIR:

Yes, they're not entitled to avail themselves of what is essentially a self-help remedy.

GLAZEBROOK J:

So you're really restricting this to the public reserve, it doesn't apply to private land, private in the sense that isn't the public reserve?

MR SINCLAIR:

The other Maori freehold land in the vicinity would –

GLAZEBROOK J:

Yes.

MR SINCLAIR:

– clearly stand on a different footing.

GLAZEBROOK J:

Right, I think I understand the submission now.

MR SINCLAIR:

Now my friend this morning, advanced the submission that the – this is in relation to the notion of a possession acquiesced in by others, my friend submitted that the only relevant challenge is one that comes from the holder of a superior title and that, with respect, is a proposition that we cannot see reflected in the authorities.

GLAZEBROOK J:

So the submission, I think, was it has to be the person who is exercising the self-help whose authority or possession has to be challenged by others. So is your submission something wider than that? Your submission is, it's the control has to be not challenged by others, or what's the submission?

MR SINCLAIR:

What I'm seeking to question, your Honour, is the proposition that if the appellant asserted possession that could only be challenged, this is for the purposes of this notion of an acquiescence in possession, it can only be challenged by someone having a superior title and in our submission that's not something that one can find in the authorities.

GLAZEBROOK J:

What I'm asking you, though, is: is it the person's possession or is it the fact that they also have a right to possession, because I don't think the Sailing Club was ever saying Mr Taueki didn't have a right of possession. I mean, they didn't care, did they, as long as they had the right to use the lake for their sailing activities? They didn't care what else happened on there. They weren't challenging the usage as long as it didn't interfere with their rights.

MR SINCLAIR:

Yes, it seemed important to us to try and unpick the incident as it evolved and it starts with, I think we set this out in the oral submissions, it starts with the appellant demanding to know what the intentions of the complainant are and he's told, we're going to launch, there's a race, we're going to launch this boat, this is on page 3 of our outline in the oral submissions.

GLAZEBROOK J:

Before you get into the facts I just wanted to know what you say the Sailing Club wasn't acquiescing in because I would have thought the only thing they weren't acquiescing in was their rights as they saw them being interfered with. Is that...

MR SINCLAIR:

Yes. In a slow way I was endeavouring to answer your Honour's question. That, I suppose to come to the point, it doesn't appear from the evidence that Mr Taueki asserted a claim to possession, or gave any signal that he regarded himself as the possessor of this place, until after the count 1 assault occurred. So the comment about 'this is my land, my lake, I'll evict you', if we have read the evidence correctly, occurs after the assault has taken place, so the discussion preceding the assault focuses on the issue of launching the boat, with discussion about the horsepower of the motor, the complainant doesn't accept that the 40 horsepower motor attached to a dinghy is out of line and I think I'm correct in saying also that there was no

reference at this stage to the issue of washing down of the boat. So the contest between the two men is not really a clash of ideas about possession, at least not immediately, it's a difference of view about how the bylaws are being interpreted.

GLAZEBROOK J:
So just in summary, "When Mr Taueki arrived he asserted that the land and the lake were his, is that correct?" "Yes, that's what he told me." So he said it's my lake and you're not going to take that boat onto it.

MR SINCLAIR:
Yes I'm not sure which passage we're looking at there, your Honour, but –

GLAZEBROOK J:
It's page 29.

MR SINCLAIR:
– I think that – yes, he clarifies I think what he means on page 30, about line 7, it's put to him, he's said, "It's my lake, you're not going to take that boat onto it." And the response from Mr Brown is, oh, his first comment was, '"You are not taking that boat onto the lake," then later he said, "It's my lake and it's my land." I think there are other indications, I hope we've footnoted in the outline, that the prosecution witnesses, I think the Judge accepted this also, maintained there was no discussion of ownership or eviction until after the first assault occurred.

So at that point we submit it should have been apparent to the appellant that whatever right he was claiming, in our submission, it wasn't a claim based in possession, it was a disputed claim. That's just another respect in which the resort to force couldn't be justified.

If that exhausts the subject of peaceable possession, your Honours –

CHAMBERS J:
Could you just tell me why the matter went to the Maori Land Court, what was the purpose of that proceeding?

WILLIAM YOUNG J:
It's been there rather a lot I think, hasn't it?

MR SINCLAIR:

Yes, it has been. I'm not fully familiar with the –

ELIAS CJ:

Have we got the decision, I haven't looked at it?

MR SINCLAIR:

Well there are several things, as I understand it, going on, your Honour. One is, there is a difficulty –

ELIAS CJ:

We don't have a chronology, do we?

MR SINCLAIR:

Of the recent litigation?

ELIAS CJ:

No, of the whole history of the lake. That's all right if you don't. I just wondered if there was one.

MR SINCLAIR:

Not that I'm aware of, your Honour. But currently in the Maori Land Court, my friend may be better able to assist, there is difficulty with appointing the trustees, which of course I think flows into the difficulty of nominating Maori members of the board. There has been litigation about Mr Taueki's occupation of the nursery and the terms of trust, I gather, are also somewhat up in the air and Judge Harvey, a matter of a few weeks ago, released an oral decision I think, which is, amounts to guidance or explanation of what the role of the trustees is. I do have copies of that if that would assist the Court.

ELIAS CJ:

I'm not sure that really it necessarily would. Is there any reason why we should look at it?

MR SINCLAIR:
Only perhaps as an illustration of what we were discussing about the relationship, the duties of the trustees, their relationship to the beneficiaries, it may shed some light on that.

ELIAS CJ:
I don't think we would be assisted by that.

MR SINCLAIR:
It's a decision of January this year so it should be easy to locate if it becomes important.

ELIAS CJ:
Yes, thank you.

MR SINCLAIR:
So, your Honour, that is, the short answer is, there were a number of things in train in the Maori Land Court.

Trespass, the issue of trespass, in our submission it's not entirely clear that the Judge has accepted that the appellant did enough to put the section 56 defence in play. He certainly seemed to consider that there was, at best, a fragile basis for suspecting a trespass and he dealt, his Honour dealt with the matter on the basis that any such suspicion was not reasonably held, which may have been intended to signal that the Court regarded this as something of a pretext. Be that as it may, the Judge did apply a requirement that the defendant's belief that a trespass has occurred, or was imminent, has to be a reasonably held belief, and as we've noted there was some support for that in the authorities, in particular *Haddon* and the case of *Keating*, both referred to this morning. So that if – and they are somewhat brief statements of that proposition, that if that is indeed the case then there is a requirement that the apprehension of a trespass be reasonably held. The trial Judge found that there was no – the suspicion that the appellant had formed was not reasonably formed.

CHAMBERS J:
Do you accept if someone breaches the bylaw they become a trespasser?

MR SINCLAIR:

Yes, I think that proposition can't be resisted so, in a sense, the public enters the area in a kind of bubble which is represented by the public right. If they – and that bubble is given a certain shape by the bylaws. So if one breaches a bylaw, one in effect steps outside the bubble and there is a –

CHAMBERS J:

Well, wasn't it pretty clear here that there was going to be an imminent breach of the bylaws?

MR SINCLAIR:

Well it was a very contested point. The bylaw doesn't require – I think, in fairness to the appellant, he may have thought that because the Board had been dysfunctional for a while, there couldn't have been permission to use this boat but that would have to depend on the boat being classified by the Board as a speedboat because the bylaw does not require case by case authorisation of a powerboat which is not a speedboat. The yachtsman –

CHAMBERS J:

Where do you get that from? The one I'm looking at just says, all it has to be – you can't be a passenger in a boat driven by a motor engine, except with the prior written consent of the Board. Where do you get about the speedboat?

MR SINCLAIR:

Further down that bylaw, your Honour. So I read the passage your Honour has just read as a requirement that there be written authorisation to use a powerboat but that, on my construction, that authority could be a kind of standing authority and, in fact, there was evidence from Mr Brown Junior that that –

GLAZEBROOK J:

Sorry which copy of the bylaws are we looking at?

WILLIAM YOUNG J:

The one you've got.

MR SINCLAIR:

I don't think it changes, your Honour –

GLAZEBROOK J:

It is this one so –

WILLIAM YOUNG J:

Yes, I think so, yes.

MR SINCLAIR:

– I think it's clause 19 in both versions.

ELIAS CJ:

It's 19(3), isn't it that –

MR SINCLAIR:

Yes.

ELIAS CJ:

– Justice Chambers is looking for.

CHAMBERS J:

Yes, I've got – yes but – yes but I'm right, aren't I, that under the first part of that, you couldn't use any boat with a motor engine, except with the prior written consent of the Board and then there's a further qualification below that, "Except for rescue purposes, the Board can't give permission for something that might be a speedboat," but here, isn't the problem that there wasn't prior written consent?

MR SINCLAIR:

Yes, the yachtsmen believed they had that consent and there was reference in the evidence to, in the evidence that –

GLAZEBROOK J:

Well, who has to prove that?

MR SINCLAIR:

Well –

GLAZEBROOK J:

Because nobody is really suggesting that they were – the Sailing Club was acting anything other than that they thought they were within their rights, I think, but that's not really the point is it, or is it?

MR SINCLAIR:

This is where we found some trouble with the way, with respect, his Honour's judgment was expressed. So it's not clear that the Court has found that the defence is in fact in play but, if it was, then obviously the onus of proving the complainant was not a trespasser would lie with the Crown. The only evidence that could be offered in discharging that onus is Mr David Brown saying that he, at home, had a document from the Board.

WILLIAM YOUNG J:

Do we have a copy of the lease, the expired lease, it was produced as an exhibit I think?

MR SINCLAIR:

Yes, I'm sure that could be done, your Honour. I tended to regard the – and I may be wrong in doing so, but the whole issue of the premises is something of a distraction in this situation, given that the only issue before this Court is the first phase of the incident, the first assault, where the issue is not the legitimacy of the occupation of the premises –

WILLIAM YOUNG J:

Right, but –

MR SINCLAIR:

– but the issue of the trespass –

WILLIAM YOUNG J:

– but Mr Taueki's case –

MR SINCLAIR:

– through the bylaw –

WILLIAM YOUNG J:

– has a number of premises, one of which is that there was an imminent trespass involving the use of a motorboat on the lake and he goes on from that to say well, any breach of the bylaw would effectively make those responsible trespassers. Now the evidence as to whether there was a written consent was, I suppose, pretty unsatisfactory. There was, however, a lease at some stage and it may be that the lease encompasses the usage of the lake which you could expect of a yacht club and that might indicate whether that trespass component was made up because, at least on the evidence of the prosecution witnesses, the lease arrangement had been rolled over on a monthly basis?

MR SINCLAIR:

Yes, and at one level it might be seen that that is sanctioning the continuing activities of the club which, evidence from Mr Anthony Brown, that they submitted their sailing plan on each occasion and received some sort of approval of that. I don't know whether that refers to powerboats but that, the narrow focus, and I think we have to accept this, is the use of a powerboat which can be disconnected I think from the status of the yacht club buildings.

WILLIAM YOUNG J:

Oh absolutely, it's just – forget about the yacht club buildings, it's just that it may be that the lease provided for the use of a powerboat.

ELIAS CJ:

Of course, that would be a question of fact that the Judge didn't get to at all because of the rather unsatisfactory way, which you acknowledged, he dealt with the elements of the offence because he –

MR SINCLAIR:

Yes, I don't think I can –

ELIAS CJ:

– thought that it was for the accused to prove that the club, or that the person he assaulted, was trespassing because –

MR SINCLAIR:

Yes, the –

ELIAS CJ:

– he'd exceeded the licence in the, you know, implicit in the bylaws.

MR SINCLAIR:

Yes, I think the trial Judge in effect said that if you were going to form a suspicion that someone is trespassing, it must have a reasonable foundation and you don't have it here.

ELIAS CJ:

Because they might have had written authority – was it written authority, prior written consent?

MR SINCLAIR:

Yes and it seems that the discussion never got to the point of –

ELIAS CJ:

Whether they did –

MR SINCLAIR:

– the Browns being able –

ELIAS CJ:

– have prior –

MR SINCLAIR:

– to say, oh well look –

ELIAS CJ:

– written consent –

MR SINCLAIR:

– it's okay because we have this. I think they're referring to the standard operating conditions on the lake but I don't know that I can shed much light on the –

ELIAS CJ:

Well, except you've just said that you didn't get to that point because the Judge – and I'm paraphrasing you here, effectively decided that the defence was not raised but

the reason the defence wasn't raised, it seems to me, was very much wrapped up in whether the club did have prior written consent to use a speedboat?

MR SINCLAIR:
Yes, I was going to try to make the point that the discussion between the two men didn't seem to advance far enough for the Browns to say look, it's all right, we have permission to use this boat. The assault occurred before that.

ELIAS CJ:
Well presumably, though, the accused knew that written consent to use a speedboat was required, didn't it?

WILLIAM YOUNG J:
Well it's a little bit confused because there's references to whether the motor was over 10 horsepower but –

ELIAS CJ:
Oh yes.

WILLIAM YOUNG J:
– he did certainly put an issue to the entitlement of the club members to use the motorboat?

MR SINCLAIR:
Yes and they equally –

WILLIAM YOUNG J:
And they joined issue on that?

MR SINCLAIR:
Yes.

WILLIAM YOUNG J:
And then there was the altercation.

MR SINCLAIR:

Yes and our submission is that, however, whatever view one takes of that discussion, it seems an unsatisfactory foundation to say that there's a claim to possession yet it's acquiesced in by others. There's certainly no acquiescence to the –

ELIAS CJ:

But that doesn't really, well, I mean that's a different question, isn't it, the question of possession, but you acknowledge, as I understand it, that the Judge was wrong to say that the accused had the onus of proving that the Club was trespassing?

MR SINCLAIR:

Our –

ELIAS CJ:

In this respect.

MR SINCLAIR:

Yes, our difficulty with respect to the learned Judge is that, it's not entirely clear to us at any rate, that he thought the defence was truly in play –

ELIAS CJ:

No.

MR SINCLAIR:

– so the onus passed to the Crown to disprove trespass and it may be that he did regard that point as having been passed. So if the Crown carried the onus, as we've submitted, there was some evidence from David Brown that he had a document. Prosecution didn't go to the next step which would have been to produce that document.

ELIAS CJ:

But the Judge's approach was wrong, wasn't it?

MR SINCLAIR:

Well it may well be an issue in this appeal whether the suspected – a suspicion of trespass has to be reasonably founded or –

WILLIAM YOUNG J:

It might not matter if it's true. It could be unreasonably founded but true.

MR SINCLAIR:

Yes, I suppose it could.

WILLIAM YOUNG J:

Well, the Judge has sort of rather suggested that, hasn't he, that it wasn't – it was a bit of a shot in the dark but it so happened to be probably true.

MR SINCLAIR:

Well it's certainly debatable whether it is true or not. The Board, it is the Board's classification that matters here. The Board must form the view that we're dealing with, this is on the assumption that there's a standing authorization for power boats, but whether or not a boat is a speedboat –

WILLIAM YOUNG J:

I don't think it matters if it's a speedboat because there's no determination that it was a speedboat. It's a terribly drafted bylaw but it's only if the Board reasonably determines that the boat is a speedboat that special consent is required.

MR SINCLAIR:

Yes.

WILLIAM YOUNG J:

And there's no suggestion that the Board ever had made that determination.

MR SINCLAIR:

No, no, Sir.

WILLIAM YOUNG J:

I think it's the first part of the bylaw that's more problematical.

GLAZEBROOK J:

And doesn't Mr Taueki's question of the – well, he certainly seemed to be suggesting they shouldn't be putting the powerboat into the water for whatever reason, didn't he?

MR SINCLAIR:

He did and I realized this morning that I haven't completely described the event because on page 33, I think, my friend Mr Duff noted that the complainant did say, "Well I'm going to take the boat on the lake." So there's clearly disagreement about whether the boat is authorised or not and it concludes with the complainant saying that he was going to carry on and do what he was intending to do. So I've omitted that from my analysis of the event and should draw that to the Court's attention. I don't think I can shed much more light on the issue of trespass Your Honours.

The issue of reasonable force I can deal with very swiftly. In our submission the findings of the trial Judge ought not to be disturbed on this point. His Honour noted that there was no enquiry about whether the Board had authorized the boat to be used or not. The use of force intervened, it would seem, before David Brown could have explained that they believed they did have that written permission. The Judge found that the trespass was not truly imminent in the sense that I think that Mr Brown was still in the boat. He was going to launch it. He'd have to get down, get into his car, so we're not at the point where it was certain that a trespass would occur.

WILLIAM YOUNG J:

It was unrelated to trespass.

MR SINCLAIR:

Well –

WILLIAM YOUNG J:

Pulling him off the boat wasn't going to stop the trespass. He had to get off the boat anyway to get in the car, to drive the boat down.

MR SINCLAIR:

Yes. Well the anticipated trespass would have been the breach of the bylaws –

WILLIAM YOUNG J:

Yes.

MR SINCLAIR:

– occasioned by launching the boat.

WILLIAM YOUNG J:

But grabbing him and pulling him off the boat, as I understood what the Judge was saying, didn't have anything to do with stopping him, it – stopping him backing the boat into the water.

MR SINCLAIR:

No. Well the appellant's own evidence is that he used force to evict the complainant and our submission is that if he could use force at all it could only be to avert the anticipated trespass.

GLAZEBROOK J:

So what, he'd have to wait until he got into the car, did he wait until he had to get down to the water?

MR SINCLAIR:

I think the trial Judge formed the view that the use of force had been pre-emptory –

GLAZEBROOK J:

So if somebody says I'm going to launch this boat anyway, whether you want me to or not, so at what point, if he was able to stop him, could he stop him, did he have to wait until he got in the car and throw himself on the bonnet? Did he have to wait until he was right down at the water before –

WILLIAM YOUNG J:

The point may be, what's the purpose of the Act? Is it just an irritable response to an assertion I'm going to launch the boat anyway or is it an attempt to stop him?

MR SINCLAIR:

Yes. Just to deal firstly with Justice Glazebrook's question, I think the Judge considered that it was wrong to have grappled with the man on the boat. The talk was still continuing and at the very least Mr Brown could come down –

GLAZEBROOK J:

Well, when could he stop him then?

MR SINCLAIR:

Well our case is that he couldn't use force.

GLAZEBROOK J:

I understand that but let's assume we've got to what's reasonable force, because that's what we're looking at, at the moment.

MR SINCLAIR:

Yes. I find that hard to answer. I suppose other things could have been done, he could have parked his own ute in front of the car that was towing the boat, something of that kind, but his explanation of the use of force was that he was going to evict Mr Brown and that raises problems of its own because he could act on this theory to prevent the trespass, but if he prevented the trespass that was as far as he could go because Mr Brown was entitled to remain as a user of a public reserve.

GLAZEBROOK J:

Well actually I doubt that's the case if it was the Domain Board and he said he was going to breach a bylaw, I wouldn't have thought you could say oh well, the Domain Board couldn't evict him. Let's imagine it's the Domain Board and Mr Brown says, I don't care about the bylaw, I'm still going to continue, I would have thought the Domain Board could say, well no, you can't, you're to leave immediately. Couldn't they?

MR SINCLAIR:

Yes. Maybe we're drawing too fine a distinction but the use of force, in our submission, could only go as far as averting the trespass which the launching of the boat might have represented. To evict, by which I take the appellant to mean that he was going to throw the man off the reserve, is going too far.

GLAZEBROOK J:

So the man's a trespasser but can't be thrown off because you've accepted if he breaches the bylaw he's a trespasser? So he's only a trespasser for so long as he's breaching the bylaw is it?

MR SINCLAIR:

Yes, if he's prevented from breaching a bylaw then he's no longer a trespasser.

I made the point earlier, your Honours, that it seemed there was no claim to possession made at the stage that the count 1 assault occurred, and nor was it apparent to the complainants that the appellant was in possession. The Court also

found that the appellant laid hands on Mr Brown without warning him. Again, that was a point traversed this morning and I won't labour that but the requirement of warning and reasonable opportunity to desist is apparent in the – not only in the Trespass Act but the law of tort generally, and it's a feature also of the way the English courts have interpreted this defence.

It might also be worth noting that this was not the, I suppose, the classic sort of confrontation and encounter between an occupier and an intruder. The appellant went to the reserve, he was not already there, the yachties were the people already there, he went there to confront them. In our submission, it seems that the appellant would not be a person with authority to issue notice under the Trespass Act, incongruous if the criminal law authorised him to use violence in the same setting –

WILLIAM YOUNG J:
Why would he not be able to issue a notice under the Trespass Act, as not an occupier?

MR SINCLAIR:
Yes, Sir. I've dealt very briefly with the argument founded on the Treaty that my friend raises. In our submission, because of its public character, this was simply not a place where an individual can justify use of force on the plea of peaceable possession. The Treaty, in our respectful submission, doesn't sanction the use of force in a public place and circumstances where the criminal law would not permit it. Indeed the Treaty promised good order and that's consistent with the very cautious approach criminal law adopts to self-help remedies. And, very quickly, your Honours, and finally, it maybe helpful to consider the case of *R v Burns* [2010] EWCA 1023 which is in tab 14 of the respondent's authorities. It's dealing with quite different facts.

GLAZEBROOK J:
That's your new bundle, is it?

MR SINCLAIR:
Yes. I'm sorry, I hadn't realised that we'd already filed a previous one, but yes, it's the second one, your Honour.

ELIAS CJ:

Tab 14?

MR SINCLAIR:

Tab 14 and – so the facts are very different in *Burns*. A person has brought a prostitute into his car, taken her somewhere, decided that he doesn't wish to use her services and then uses force to expel her. We rely on it for the general statements on page 121 which, in our submission, express the, and correctly so, the attitude of the law to these sorts of self-help defences which section 56 is one. At the number 2 there's a statement from Lord Justice Edmund-Davies, he describes how, "The law regards with the deepest suspicion any remedies of self-help and permits these remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy," and then the next cited passage, "Self-help involving the use of force can only be contemplated where there is no reasonable alternative." The Court goes on to observe that expanding the very limited circumstances in which self-help may be used has to receive as close as possible scrutiny.

GLAZEBROOK J:

Does that apply to a statutory defence which already has the limits embedded within it?

MR SINCLAIR:

We would submit, your Honour, that the – if the proposition is that the Treaty can be used to gloss our section 56 in a way that expands the circumstances in which violence can be used, the defence of property, that is a proposition that's inconsistent with the general philosophy of the criminal courts to a remedy of this kind.

GLAZEBROOK J:

I must say I haven't thought that was the submission. I thought the submission was that not enough notice had been taken of the Treaty in working out whether Mr Taueki was in possession but – rather than expanding the other end of it but I can understand your submission and the context you're making it in.

MR SINCLAIR:

Unless I can further assist, your Honours, those are submissions for the respondent.

ELIAS CJ:

Thank you, Mr Sinclair.

MR MCCOY:

Your Honours, hopefully a short and crisp reply. My learned friend's principal submission comes to this, and it's radical because it thwarts and undermines the purposes of the Land Transfer Act. My learned friend's submission on behalf of the Crown is that the legal owners and/or the beneficial owners of property under the Land Transfer Act, which is also Maori freehold land, do not have possession, for the purposes of section 56 of the Crimes Act, of that property. That is to eradicate the very thrust and significance of the fee simple regime because what that submission from the Crown disguises is the point secondly made by my learned friend which is this. His argument was that the Domain Board has exclusive possession i.e. removes, destroys the possession of the legal owner and the beneficial owner. The Domain Board has got nothing of the sort. It has not possession at all, whatsoever. The Domain Board is simply a function of Reserves Act legislation and the Reserves Act is general legislation that could never override section 18 of the ROLD and could not possibly override the Land Transfer Act and the indefeasibility provisions that that provides. It is, in our submission –

CHAMBERS J:

But the Board could surely tell somebody to leave if they were in breach of the bylaws?

MR MCCOY:

They could also do that.

CHAMBERS J:

So they do have some possessory right –

MR MCCOY:

No. They can do it as a function of management, which is not the same thing as possession. They have a managerial role and the Chief Justice with respect articulated this in one of her questions to my learned friend, under the Reserves Act it's to further the recreational interests of the public but the Reserves Act provision does not apply to Muaupoko at all because Muaupoko are beyond the purview of the Domain Board. The Domain Board only has rights in relation to the public which

contextually, in terms of section 18 of ROLD, means non-Muaupoko. Everyone else is caught but not Muaupoko. So the Domain Board has no possessory rights whatsoever. All it does is administer and manage for a limited statutory purpose and that purpose cannot trump or exhaust the underlying formidable nature of the fee simple regime.

ELIAS CJ:

I just wonder if that's really a bit overstated because isn't it the Domain Board that is given management of the reserve land in paragraph 13 of section 18 and which has leased it – well, you would say unlawfully leased it but it certainly can give people exclusive use rights, can't it?

MR MCCOY:

It can't in relation to Maori freehold land at all –

ELIAS CJ:

No.

MR MCCOY:

– the end of this case but as a generality, what it can do is grant limited powers that must not be continuous for more than a certain period of days for a year. It's not allowed –

ELIAS CJ:

Yes, where's that to be found, is that in the Reserves Act?

MR MCCOY:

Yes, it is. Your Honour, what I thought might be convenient was, I referred earlier this morning to the joint memorandum from counsel for the Department of Conservation –

ELIAS CJ:

Oh yes.

MR MCCOY:

– and I've had that copied for your Honour and I'd like to have that perhaps distributed at your convenience. It's a five or six page detailed analysis from the

Department of Conservation, identifying the relativities between individuals and rights under the Reserve Act.

ELIAS CJ:

Yes. Mr Sinclair, are you happy for us to receive that?

MR MCCOY:

It's the document that was before the Maori Land Court.

MR SINCLAIR:

It's not a document I've seen, your Honour, but I doubt that we would have any objection.

ELIAS CJ:

All right, thank you –

MR MCCOY:

That's very gallant.

ELIAS CJ:

– it's just that in the absence of anything like a chronology, I'm getting a little bit lost, so it may provide some assistance to us.

MR MCCOY:

Well, I fully understand and of course, Muaupoko have been, in a sense, lost for 117 years in relation to this land.

Your Honour, in relation to the Reserves Act point, might I repeat by way of reply, that the *Gazette* notice that creates this recreation reserve expressly says on its face –

ELIAS CJ:

Well where do we see that?

MR MCCOY:

Yes, there is just – the appellant having been in person throughout, there have been various documents –

ELIAS CJ:

Yes. I understand that. Do we have it?

MR MCCOY:

I have it and I can hand that to the Court as well and in fact, just to assist you I –

ELIAS CJ:

Perhaps we could have all that in now and Mr Sinclair, you wanted to put in the Maori Land Court determination. If we're having material that was presented to it, perhaps we better have that as well.

MR MCCOY:

Entirely, yes, yes. The *Gazette* notice expressly states that the rights in terms the public are given, are subject to the rights under section 18 of ROLD. So that is the clearest legislative position, ROLD overrides–

GLAZEBROOK J:

Mr McCoy, can I just check with you because as I – I did have some difficulty understanding the Crown's submissions but, as I think I got to understand the Crown's submissions, it was that what is needed for possession, or peaceable possession in this context, is the ability to control which seemed to mean the ability to control access, so it wasn't anything to do with possession, it was to do with the ability to control access of presumably everybody other than yourself, and the argument, as I apprehended it, it was that control was with the Domain Board because they controlled public access and that the Maori owners, while having use rights and ownership rights, did not, including the trustees, have that power of control?

MR MCCOY:

I understand that's their argument but it gets cut off –

GLAZEBROOK J:

So what do you say is the actual test for possession –

MR MCCOY:

The –

GLAZEBROOK J:

– in these circumstances –

MR MCCOY:

Thank you –

GLAZEBROOK J:

– just so that I can put them side by side if that's –

MR MCCOY:

Understood entirely, thank you. Their argument gets cut off at the knees because control is not a requirement for possession, it is possible evidence of possession but possession exists irrespective of control –

WILLIAM YOUNG J:

Judges summing up to juries on possession, do tend to refer to control.

MR MCCOY:

They may do so in terms of control and capacity but when you have to deal with the specifics of a case like this, it's going to require a demanding examination of specifics, rather than more nebulous generalities because there carries with the word "control" the capacity for imaginatively misleading oneself. Control of what has to be asked and what's the purpose of the control?

The best authority is the judgment of *Ezbeidy* that I put before your Honours this morning, which sets out that the essence of the requirement of possession is to stand in the assumed character of the owner, and that owner has all the rights of ownership including possession. So the assumed rights of the owner may include control but it allows disposition of the property and it allows the use and enjoyment.

So to the extent it permits use and enjoyment, in this case it's very special because the statute has already done that for us. If we have use and enjoyment, we have possession and we've had it since before the advent of the Pakeha, section 18(2) of ROLD itself.

McGRATH J:

Did you say the phrase you used, “assumed character of the owner”, did you say that came from one of your cases?

MR MCCOY:
Yes, *Ezbeidy* E-Z-B-E-I-D-Y which is tab number 20, your Honour.

McGRATH J:
Thank you, that’s fine.

GLAZEBROOK J:
So you say, contrary to what’s said for the Crown, that control isn’t necessary, just use and enjoyment is sufficient?

MR MCCOY:
Yes, it’s functional and behavioural. It does not require control. You act like the owner, you therefore possess it. This is in relation to land, not perhaps suitcases, but that is the definition that is important and the definition must also vary with the nature of the property, how you would exercise possession of a large or an irregularly shaped piece of land, would be different from this one where there is a single effective entry point for the public.

So the 1956, or ROLD Act, is special legislation. That’s the generalia specialibus point Mr Justice Cooke himself had made many years ago and the Reserves Act must be read with it, be subordinate to the special legislation and the Domain Board has no control and no possession over Muaupoko because the 1956 Act gives Muaupoko rights which the Domain Board cannot diminish in any sense.

My learned friend in his submission, referred to paragraph 21 of the respondent’s submissions, the earlier version, 19 February 2013 and in that paragraph 21 an extract has been taken from the judgment of Mr Taueki against the Horowhenua District Council and more importantly, for present purposes, inside paragraph 21 of the Crown’s submission, there is that extract and the extract is also capable of diverting from the true legal analysis because it starts off, “It is the Trust that is the legal owner.” Well that’s fine and, “All of the responsibilities of and attendant to ownership are vested in the Trust, subject to the role of the Board.” I disagree immediately. This is wrong in law, with all respect, it’s vested in the Trust full stop. It’s not subject to the role of the Board.

If it was subject to the role of the Board, there would be a serious breach of trust by the Trust and it would be to fracture section 18 of the 1956 Act, and it then continues, "It is well settled that where land is vested in trustees they retain control and access," but we have to see the context in which that utterance is made because when one looks to the *Eriwata v Trustees of Waitara SD* case, your Honours will see that this is about occupation, "Do not have the right to manage the land or to occupy." Occupation is a very different concept from possession. Occupation means a permanence in terms of a structure or a placement on the land. We are examining possession in terms of section 56 and not occupation. And indeed even the second extract from the judgment set out talks about power to permit occupation. That's not the issue. An owner may permit occupation; possession and occupation must be separately considered.

In relation to the learned District Judge's approach to this case it's reasonably apparent that the onus of proof was reversed in part in relation to the issue of whether there was written consent. That was a point that, with all respect, the Court of Appeal perhaps didn't have it presented to them the way it has been and secondly, in the multitude of papers, if it was there at all, no doubt it was hidden very securely from them. But the point plainly arises and it's a responsible approach by our learned friends to promptly acknowledge that before the Court. And again that in itself will be a free-standing basis for this Court reversing the decision below.

My learned friend made a number of references to the Trespass Act. Well, may I respectfully submit that the Trespass Act is not relevant to section 56. Section 56 is not predicated on that much later statutory arrangement. Section 56 precedes it by 100 years and turns on the notion of property law and not the hyper-modern version found in the Trespass Act. If the legislature wanted to link the concepts it could have done so but it has not done so.

Lastly, there was reference to the judgment of the English Court of Appeal in *Burns*. Well there is no section 56 in United Kingdom legislation and our section 56 carries it's own limits and parameters and therefore the policy that my learned friend was advancing to your Honours has already been dealt with, adopted and assimilated by our Parliament since 1893 and the only way it could be changed would be by statutory recognition. So the generalised policy matters my learned friend refers to won't take him over the line because the line has already been defined by the 19 – sorry, section 56.

Finally, your Honours, my learned friend argued, and I touched on this already, that the Trust has devolved its power to the Domain Board, or might have. I respectfully submit it hasn't and it can't because it would be wholly unlawful for it to do so. The Domain Board has a very limited and attenuated role to preserve recreational interests. Recreational interests, aquatic splashing, et cet. has got nothing to do with the fundamental nature of title to Maori freehold land and the peaceable possession of that land remains, as it has to, it must do, in the owners of both variations. The only way it could ever be removed would be by an Act of Parliament or an alienation. The alienation would require the sanction of the Maori Land Court. Those circumstances do not exist and we must respectfully submit that the basis for this Court reversing the Court of Appeal's judgment is it's misunderstood or failed to apply the proper approach to peaceable possession. There was in any event here clearly trespassory activity intended by the complainant and the response here was reasonable. It was virtually the least physical contact that the criminal law would understand.

Those are our respectful submissions.

ELIAS CJ:

Thank you, counsel, for your assistance. We will take time to consider our decision in this matter.

COURT ADJOURNS: 3.54 PM