IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2007-409-001971

BETWEEN	DENISE CLARKE Plaintiff
AND	NEHU TAKAMORE, DONALD TAKAMORE AND JOSEPHINE TAKAMORE First Defendants
AND	PUTI BROWN AND EDNA MAUI Second Defendants

Hearing: 13, 14 and 15 July 2009

Counsel: P N Allan, M Starling and S L Litt for Plaintiff
J Ferguson and M Tuwhare for Defendants

Judgment: 29 July 2009

JUDGMENT OF FOGARTY J

Introduction

[1] Mr James Takamore, known as "Jim" by his friends and family, died suddenly from an aneurysm at Christchurch on Friday, 17 August 2007. He was in his 50s. His partner was Ms Denise Clarke, mother of his two children, James and Jenna, and with whom he had spent his adult life since the 1980s in Christchurch. She phoned around family and friends to pass on the sad news. Those members of Jim's extended family who lived in Christchurch were quickly on the scene, particularly his uncle, John Manuel, his Uncle Robert and Aunty Sarah.

[2] Ms Clarke made arrangements with the funeral directors for the service to be held on 21 August: for Jim's body to be buried at Ruru Lawn Cemetery in Christchurch; and at John Manuel's suggestion, that the service should be held at Te Whare Roimata Marae in Gloucester Street where the body should lie in state. Ms Clarke approved of that suggestion as she believed that Jim would have wanted a link to his Maori heritage.

[3] As she thought Jim's body was to be taken by the funeral directors to the marae, she was surprised to find that it was taken not to the marae itself, but to a room at a community centre a few doors along the street. On the Saturday evening, the day after Jim's death, his mother, Mrs Nehutua Takamore, his brother, Donald, and his sister, Josephine, arrived. They were accompanied by Mr Henare Heremia, the partner of Josephine for more than 36 years and Mr John Mika. This party came from the Bay of Plenty, and were following Tuhoe tikanga (tribal custom, obligations, and conditions (legal)) to make a tono or claim for the tupapaku (body) of their son and brother.

[4] That night, around the body of Jim, his mother, and Josephine and Donald sought Jim's body to be buried at the urupa (burial ground) of their home marae, Kutarere, in the Bay of Plenty. The discussion grew heated as Ms Clarke and the children wanted to continue with the burial arrangements in Christchurch. Jim's son, Jamie, spoke and at one point with resignation said that they could have Jim. However, it is common ground between the parties that the discussions were not over and would continue the next day.

[5] The next day the Takamore family from Kutarere tried to telephone Ms Clarke and ask her and her immediate family to come back to the marae. She did not receive the call. Later in the morning a friend of Jim's, Mr Richard Price, who had gone to visit the body, found that it was being removed. He telephoned Ms Clarke, but by the time she arrived at the marae the body had been taken by his Takamore family from Kutarere.

[6] These proceedings were commenced in the High Court and an interim injunction was obtained on Tuesday, 21 August, which ordered:

1. That the burial of the body of James Junior Takamore be restrained pending further order of the Court.

2. That the New Zealand Police take into custody the body of James Junior Takamore pending further order of the Court.

3. That costs are reserved.

[7] This order was entrusted to the New Zealand Police to be served. Two members of the police force based at Opotiki took the injunction order to the Kutarere Marae. The burial service was already under way, although as I understand it the coffin had not been interred. The police officers did not attempt to serve the order.

[8] On 7 October Ms Clarke and her family met at Kutarere Marae with the wider Takamore whanau, a meeting which was largely conducted in Maori, though translated for the plaintiff. It did not resolve the differences between the two families.

[9] In these proceedings, Ms Clarke, as the executrix of Mr Jim Takamore's will, seeks four orders:

1. An order authorising the plaintiff and her representatives and agents to enter the Kutarere Cemetery and remove the coffin and the deceased's body which is contained within it.

2. An order authorising the plaintiff to deal with the coffin and deceased's body in any way she sees fit following its removal from the Kutarere Cemetery.

3. An order restraining the first defendants and any other persons acting at the request or at the direction of the first defendants from taking any action that would obstruct the plaintiff and her representatives and agents from doing anything pursuant to order 1 and 2.

4. Any other orders required to give effect to these orders.

The deceased's cultural identity

[10] Mr Jim Takamore was the son of Mr James Takamore from Waioweka, just south of Opotiki in the Bay of Plenty. His hapu is Ngati Ira. His mother's maiden name is Manuel. Her hapu is Te Upokorehe. Their marae is Kutarere.

[11] The deceased is of Whakatohea and Tuhoe descent. It is sometimes said that these two peoples were from the same waka (canoe), Mataatua, though Mr Henare Heremia said that Tuhoe do not trace back to a waka but have always been on the land. Their whanau (immediately family) marae, Kutarere, is a Te Upokorehe marae governed by the tikanga of Tuhoe.

[12] Mr Jim Takamore was the first born of 11 children. He has his father's name. His whenua (placenta) was buried on his whanau's farm in Hiwarau (approximately four kilometres from Kutarere Marae). He was born on 24 July 1952.

[13] Some time prior to 1985, in her teenage years, Ms Denise Clarke was living in Putaruru, though she had been born in Christchurch. While there Denise met Jim. During the first years of their relationship they remained in the same area as Jim's own family, living around the Whakatane area, especially around Taneatua. During this period of their relationship Jim was in very close contact with his family. In 1985 they had their first child, Jamie. By then Denise was missing Christchurch and her own family and returned there with Jamie. Jim followed about a month later. They settled in Christchurch and remained there. They had their second child, Jenna, in 1990.

[14] During this time in Christchurch Jim's contact with his family in the Bay of Plenty became infrequent. He did regularly speak to his mother by telephone. Denise can recall only two occasions, however, when he travelled back up to see them: when his father died about ten years ago; and, more recently when his daughter, Jenna, went to a sports tournament in Rotorua. Family members,

including his mother, Nehutua, came down to Christchurch for the 60th birthday of Jim's Aunty Sarah who also lived in Christchurch and for Jim's 50th birthday.

[15] Jim appears to have had a premonition of his death. Shortly before he died he told a number of his friends and work mates that when his time came he wanted to be buried in Christchurch, not taken back up to the North Island. He told one of his friends, Ivy Franklin, that he was now a "South Island Maori", and that he did not like the way his family lived in the North Island. He told another of his friends, Lindsay Harris, that his home was now in Christchurch and he intended to stay there and that he had said "*I got out of all that bloody rubbish*" referring vaguely, it seems to me, to the traditions of his tribe in the North Island. Their evidence was received without challenge.

[16] Shortly before his own death Jim went to his cousin's funeral at the Ruru Lawn Cemetery. He told his work mate, Richard Price, that Ruru Lawn Cemetery was a peaceful place with lovely trees and that is where he would want to be buried.

The issues arising in these proceedings

[17] The claim brought by Ms Denise Clarke relies on the fact that by Jim's will she is the executrix. She relies on a common law principle said to be that it is for the executor or executrix of a deceased person to make decisions about where the deceased is to be buried. In his will he did say he wished to be buried, though he did not say where.

[18] These proceedings are defended by his mother, his sister, but no longer by his brother, Donald. Donald joined in the statement of defence but has since decided he wishes to take no part in defending the claim. The defence to the claim relies on Tuhoe tikanga, or customary law and practice. His mother and sister say that they made a tono (claim) for their son and brother to be returned to his urupa (burial ground) at Kutarere in accordance with their tikanga (customary practice). They say this customary practice has existed from time immemorial and has been continuously practised and upheld amongst the Takamore whanau, their hapu and iwi as an integral part of their lives and identity through to the present day. They admit that

Ms Clarke did not agree with their demand and insisted that Jim be buried, according to her arrangements, at the Ruru Lawn Cemetery in Christchurch. They say that the discussion between the two families were held in accordance with Tuhoe protocol which provides that only the whanau (immediate family) have the right to speak to the issues and the discussions continue until a consensus is reached. (Mr Heremia and Mr Mika withdrew during the discussions.) They admit that the discussions did not bring about a consensus and that they had asked for continued discussions the night before they took the body, and that they waited about two and a half hours for the plaintiff to return. They then continued discussions between themselves: (Nehutua, her sister, Sarah, and her brother, John Manuel) resulting in a decision to return Jim to his place of birth to be mourned and buried in accordance with their tikanga.

The issues

[19] Mr Ferguson (counsel having agreed that the onus was on the defence to justify the taking of the body) submitted that this case concerns the interface between two areas of common law:

(a) The common law principles which recognise the rights and duties of the executor of a will; and

(b) The common law principles which recognise that the customary laws and practices of indigenous peoples remain and are legally cognisable unless explicitly extinguished.

[20] This case concerns a tension or conflict between:

(a) The executor's prima facie duty to provide appropriately for the disposal of the tupapaku (body of the deceased); and

(b) The customary practice and tikanga whereby the tupapaku is returned to the deceased's home for burial in accordance with custom.

[21] Mr Allan agreed that it was about whether the wishes of a deceased person and the provisions of his will can be overridden by tikanga or customary practices and traditions which played little part in the course of his life. The plaintiff's argument is that Ms Denise Clarke, as executrix of his will, had the sole right to determine his final resting place, which in fact accorded with his own wishes.

[22] I see the issues arising as follows:

1. What is the common law of executors as to the power of executors to choose where the body of the deceased is to be buried?

2. Is the Tuhoe tikanga to be recognised as part of the common law of New Zealand?

3. Does the common law power of the executor and the Tuhoe tikanga collide in the circumstances of this case, given that for most of his family life through to his death, the deceased did not participate in the tribal life of Tuhoe?

The common law power and authority of executors

[23] There are few cases on this subject. The fact that there are very few cases is of no surprise because in New Zealand and in other common law countries the funeral arrangements are sorted out within the family, who resolve such issues as burial or cremation; the place where the service is to be held; the form of the service, religious or civil, or some combination thereof. There is normally no need to go to the law. However, for usually extraordinary reasons, the issues have from time to time come before the Courts.

[24] *Tapora v Tapora* CA 206/96 is the only decision of the Court of Appeal. Mr Tapora died in Auckland. He was survived by his widow, eight children and four step-children. He was Cook Island Maori. An annexure to his will directed that he be buried at his home village in Aitutaki, Cook Islands. His widow wished him to be buried in Auckland. The executors of the will, Arenau Tapora and Ngatokoroa

White, commenced proceedings in the High Court seeking to stop his widow making arrangements to bury his body in Auckland. They obtained an interim injunction to that effect including an order that his body be placed in their possession and custody. The widow then sought to set aside these interim orders and sought to have the body returned to her for burial. The High Court extended the order preventing burial for a further seven days and the matter went on to the Court of Appeal. The Court of Appeal in an oral judgment said:

> In her judgment the Judge [Cartwright J] directly summarised the law as it relates to the disposal of a dead body in circumstances such as these. Both the right and duty lies on the executors, to the exclusion of other persons – including here the respondent [the widow]. See *Re Clarke Deceased* [1965] NZLR 182; *Murdoch v Rhind & Murdoch* [1945] NZLR 425; Halsbury 4th Ed Vol 10 para 1017; Theobald on Wills 15th Ed 129 and Nevill's Law of Trusts, Wills and Administration New Zealand 8th ed 407.

[25] The Judges upheld the decision of Cartwright J extending the order preventing burial or removal. The purpose of that was to enable the widow to have an opportunity to apply for the recall of probate as that being the only way for any possible entitlement for a return to her of the body. (She may have had some prospect, the will was made about six weeks before Mr Tapora died and was signed not by him but by the Reverend Daniel on his behalf.) However, no application had been made by the time the case reached the Court of Appeal. The judgment ended:

> The members of the Court express the hope that with the assistance of members of the Cook Island community the parties are able to reach some compromise.

[26] Neither Mr Allan nor Mr Ferguson argued that this judgment should be regarded as binding on the High Court. Mr Ferguson argued that it was not binding because although the Court had recognised that cultural issues were involved on both sides, it had not examined the proposition being advanced in this case, namely that tikanga as customary law and practice is part of the common law of New Zealand and has to be accommodated with the common law of executors' powers. Mr Allan argued that the judgment was persuasive but not binding.

[27] The decisions of *Murdoch v Rhind & Murdoch* [1945] NZLR 425 and *Re Clarke (Deceased)* [1965] NZLR 182 in turn follow and adopt the United

Kingdom decision of *Williams v Williams* (1882) 20 Ch D 659. That authority is used by the learned authors of *Theobald on Wills* to support three propositions:

> The executor is entitled to possession of the testator's corpse, which cannot be detained for any claims against a deceased. Directions given by the will as to the disposition of the body are invalid. The executor has the duty of disposing of the testator's body.
>
> (*Theobald on Wills* 16th ed 13-23)

[28] By contrast to *Theobald, Halsbury's Laws of England* 4th ed 2005 re-issue vol 50 at paragraph 333 says:

> No person can make a binding disposition of his own dead body, so as to oust the executor's right to the custody and possession of it and their duties relating to the disposal of it.
>
> (Emphasis added)

For that proposition *Halsbury* cites the same case: *Williams v Williams*.

[29] In *Smith v Tamworth City Council* (1997) 41 NSWLR 680 Young J, sitting in the Equity Division of the Supreme Court of New South Wales, had occasion to write extensively on the common law on the right of burial, which is a topic wider than the duties on an executor. This was in a case where there was a dispute between the biological parents and the adoptive parents of ownership of the plot in which the deceased was interred. I am not going to unduly lengthen this decision by reviewing the same authorities as Young J has. In summary, he points out that the law is complicated; that originally the common law had nothing to do with the burial of bodies and left the matter to the ecclesiastical Courts. He reviewed the American authorities. He examined English common law cases apart from the ecclesiastical law. These included cases discussing the right of every person dying to have a burial; the right of executors to custody and possession of the body until it is properly buried; a recognition of the right of natural parents to choose the burial site; the right of executors to take possession of the ashes of a deceased who was cremated by arrangements made by his son; to the proposition that once a body has been buried it is not to be disturbed. I have set the propositions out from some of the cases only to indicate that there is more to this subject than the executor's responsibilities.

[30] The facts of *Williams v Williams* are unusual and in my view once the facts are taken into account two issues can be separated:

1. Whether or not the maker of the will can give directions to the executor as to the disposition of his or her body; from

2. Whether or not the maker of the will can deal in his or her body as an item of property.

[31] In that case Mr Henry Crookenden by a codicil to his will directed that within three days after his death his body should be given to his friend Eliza Williams to be dealt with by her in such a manner as he directed to be done in a private letter to her. He also gave her a Wedgwood vase. In the letter he asked that his body be cremated and the ashes placed in the vase. He was an advocate for cremation. The context is, of course, that cremation was a highly controversial practice at that time among Christian believers in the resurrection of the body. After he died (he was a Roman Catholic) his body was buried in the unconsecrated part of the Brompton Cemetery in London, according to the rights of the Roman Catholic Church, by the direction of his widow and one of his sons, with the assent of the executors.

[32] Miss Williams then wrote to the Home Secretary including copies of the codicil and the letter and seeking a licence to disinter the body. However, she was deceitful. She said she wanted to remove the body to the church yard of another parish, Manafan in Montgomeryshire. It appears that the Home Secretary thought she was concerned that it was buried in an unconsecrated portion of the Brompton Cemetery. She obtained a licence, and then caused the body to be disinterred and cremated. The ashes were then placed in the Wedgwood vase, and then buried by her in consecrated ground. Miss Williams then brought the action against the executors, who were neither the widow nor her sons, to be refunded her expenses in the order of £321 sterling, quite a sum of money in those days.

[33] Counsel for one of the executors, the widow and the sons argued that the executors had the right to possession of the body and they had the sole discretion as to the funeral arrangements.

[34] It is important to note that the codicil directed that his body should be given to his friend. Kay J treated that as an attempt to deal in the body treating it as property. He applied *R v Sharpe* Dea & Bell C. C. 160 where a defendant was indicted for unlawfully digging up and taking a body out of a grave without the knowledge or consent of the congregation to whom the burial ground belonged or of the trustees having the legal estate therein. That is the context of his finding:

> [T]hat the law of this country recognises no property in a corpse.
>
> (at 664)

[35] That also appears to be the context for the text books saying that directions given by the will as to the disposition of the body are invalid. Yet *Williams* had nothing to do with a wish stated in the will by the deceased person as to how he or she wishes the executor to dispose of his or her body, to be buried or cremated, and where.

[36] Turning to the rights of executors, Kay J summarised the law twice, and differently. First, he quoted from Justice Blackstone that the executor must bury the deceased in a manner suitable to the estate he leaves behind him and went on:

> It means, and I understand the law of this country to be, that *prima facie* the executors are entitled to the possession and are responsible for the burial of a dead body…
>
> (italicised in the original)

He concluded, after considering a case where a gaoler had refused to deliver up the body of a person who died while in prison to an executor:

> Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.

[37] So it was by combining both propositions that a man cannot dispose of his dead body to a third person with consideration of the rights of the executors that Kay J found that the codicil to the will was void. Before leaving *Williams* it is material to note that Kay J took some comfort in the fact that:

> The body was buried by the family with the assent of the executors.

That, of course, is what normally happens.

[38] From *Williams*, and other authorities, Young J in *Smith v Tamworth City Council* summarised at 693-694 what he considered was the current legal position in respect to the right of burial in New South Wales. I set out those parts of his summary which I think are relevant to this case:

> 1. If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as executor has the right to do so.
>
> 2. Apart from appointing an executor who will have the right stated in proposition 1, and apart from any applicable statute dealing with the disposal of parts of a body, a person has no right to dictate what will happen to his or her body.
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> 3. A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so.
>
> …
>
> 5. The right of the surviving spouse or de facto spouse will be preferred to the right of children.
>
> 6. Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue.
>
> …
>
> 14. The holder of the right of burial cannot use his or her right in such a way as to exclude friends and relatives of the deceased expressing their affection for the deceased in a reasonable and appropriate manner such as by placing flowers on the grave.
>
> 15. After the death of the executor or administrator, the right to control the grave passes to the legal personal representative of the original deceased, not the legal personal representative of the holder of the right of burial.

[39] An executor has no personal right to choose where the deceased should be buried. Nor would such a personal right be recognised by the common law including equity. As Young J explains, during the course of examining numerous cases, the common law approaches the right to burial as something distinct from the rights of an executor. This is for a number of practical reasons. Some persons die intestate. In some countries persons do not obtain the status of executor until the will has been

admitted to probate. Burials go on in the meantime. Sometimes burials are arranged by the families, not the executors. The Courts will recognise family arrangements to bury the body and then later require the executor to pay the costs from the estate. Some of the old common law cases impose the duty of burial on the householder in whose dwelling the person has died. This is obviously for practical reasons. There is therefore good reason for Kay J in *Williams v Williams* first, and in my view more accurately, saying that "*prima facie*" the executors are entitled to possession and are responsible for the burial of a dead body. Secondly, the Courts will always recognise that the executor has been chosen by the deceased. In the normal course of events the executor will respect wishes expressed in the will by the deceased as to how his or her body is to be buried or cremated and where. Similarly, in the absence of such an expression of wish the executor may know from discussions in the deceased's lifetime as to what the deceased wanted. In the absence of that, it is perfectly natural for an executor to take into account the wishes of the family before making a judgment.

[40] Should an executor be behaving inconsistent with the will and/or the law of fiduciaries, or should the will itself be capable of challenge, an application can be made under s 21 of the Administration Act 1969 to remove the executor. This was the step contemplated by the Court of Appeal in *Tapora*.

[41] Before summing up on what I think the law is in New Zealand it is appropriate to consider the cases of *Murdoch* and *Re Clarke*, the two authorities cited by the Court of Appeal in *Tapora*.

[42] In *Murdoch* the deceased had left a will naming his brother as the sole executor. The executor told the Court that his brother told him that he wanted to be buried at Hokitika where his father and mother were buried. His widow did not agree. She cancelled the funeral arrangements and arranged for the body to be taken to Christchurch for cremation. The Cremation Society refused to cremate the body pending resolution of the dispute. His widow argued that her husband said to her that he wanted his body to be brought to Christchurch and cremated. So there was a conflict between brother and widow as to the wishes of the deceased.

[43] In an oral judgment Northcroft J found the whole case "*very unseemly*". He believed both the brother and the wife. He followed *Williams* on the proposition that the executor has the right and duty to dispose of the body of the deceased. He then finished with some observations hoping the parties will find a way out of their impasse but made an order restraining the widow from interfering with the function of the brother as executor in disposing of the body.

[44] Two facts should be observed about the *Murdoch* case. First, there was no expression in the will as to the wishes of the deceased. Second, the evidence was that the deceased had expressed two inconsistent wishes.

[45] In *Re Clarke (Deceased)* Mrs Clarke died intestate. Her husband applied for letters of administration and her surviving son consented. The Acting Registrar granted letters of administration but before making an order dispensing with the sureties (guarantees) required that he be either satisfied that the funeral expenses had been paid or that the consent by a funeral director to dispense with sureties had been filed. So this was not a case about where the person should be buried but only about assurances as to who would pay the cost.

[46] Returning to the summary in *Smith v Tamworth* above, it is important to read Young J's proposition 1 with proposition 3 and to note the phrase "*no right to dictate*" in proposition 2. I would state these three propositions slightly differently. To explain why, I first comment on the fiduciary nature of an executor's duties. Persons are appointed executors by the maker of a will in order that the dispositions in the will are carried out. They hold the legal estate in the character of fiduciary or trustee. None of their actions as executors can be taken for their own self-interest. All actions are justified ultimately as a fiduciary.

[47] Accordingly I summarise the relevant common law in New Zealand, as it pertains to executors, (setting aside for the moment the question of recognition of Tuhoe tikanga):

1. If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's

body, the person named as the executor has the right to possession of the body against all other persons.

2. If there is any issue about it such a person who has been named as an executor must decide how the burial is to be arranged.

3. An executor will, as a fiduciary, take into account the wishes of the deceased, whether expressed in the will or otherwise known, and will listen to the surviving spouse or partner, children and other relatives and where appropriate friends or confidants of the deceased, without being legally bound to carry out the wishes of the deceased or the wishes of his spouse, family and other persons.

4. Rather, having taken all these matters into account the person who is executor then makes what he or she considers to be the best and right decision, as executor. This decision can include leaving it to other persons, likely family, to make the arrangements.

[48] Applying those principles to this case, Ms Clarke has to distinguish between her status as the intended executor and her position as a life-long partner. As executor she was entitled to take into account the stated wish of Jim to be buried, her own views as his life-long partner as to where he should be buried, the views of his son and daughter and obliged to listen to views of his mother, and brothers and sisters, with a discretion as to how far she would listen to other more remotely connected members of the family. But at the end of that exercise she was entitled to make the final decisions as to the funeral arrangements. In that context she was entitled to claim possession of the body at all times until its final and proper burial.

[49] Mr Ferguson argued that whatever rights Ms Clarke had came to an end after the burial of Mr Takamore's body at Kutarere. Mr Ferguson argued that the right of an executor to decide upon burial of the body is exhausted once the body is in the earth. He relied on this proposition from *Williams v Williams* at 665:

> … [T]he law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.
>
> (Emphasis added)

[50] He also relied on a passage in the judgment of Higgins J (dissenting) in *Doodeward v Spence* (1908) 6 CLR 406 at 423:

> … [S]ubject to such regulations as Parliament may frame in the interests of science, all considerations – whether of public health, or of decency or of religion – seem to point to the importance of maintaining the long-standing British law, to the effect that the only lawful possessor of a dead body is the earth (unless there be cremation, which has been held to be lawful *R v Price* [12 QBD 247]).
>
> (Emphasis added)

[51] Mr Ferguson submitted that once buried, whether at the hands of the executor or by anyone else, the executor's rights and duties in respect of the deceased's body are at an end. No other person can found a subsequent lawful claim for possession of the body of the deceased. In reply, Mr Allan emphasised the qualification in the dictum of *Williams* as "*until it is properly buried*".

[52] There is no doubt, from the cases discussed in *Williams*, that a body might be temporarily buried (say after an execution) but the executor still have the right to obtain the possession of the body for a proper burial.

[53] It is also offensive to any suggestion of justice that an executor could have the right to the possession of a body until it is properly buried and be denied that right by other persons taking the body unlawfully and burying it in a place other than where the executor, with the support of the immediate family, would have had the body buried. This is all the more so, when the deceased's wish to be buried in Christchurch is now known. For these reasons I reject the proposition that there is not a continuing course of action available to Ms Denise Clarke. The question now becomes whether and how Tuhoe tikanga collides with the common law; a question I have divided into two parts.

Issue 2: Can the tikanga of Tuhoe be recognised as part of the common law of New Zealand?

[54] Three witnesses were called to prove Tuhoe tikanga relating to the making of decisions as to where the tupapaku of a member of Tuhoe would be buried. They were two experts, Mr Tamati Kruger, and Professor Pou Temara, who followed upon a family member, Mr Henare Heremia. The tikanga was proved by way of an introduction to the religious beliefs of Tuhoe from Mr Heremia and by a narration of practices and examples from the two experts. Mr Heremia was responsible for the party from the Bay of Plenty adhering to tikanga at all times.

[55] Tangihanga (mourning the dead) and the customs relating to it are a fundamentally important part of Maori life. European New Zealanders are familiar with the practice of Maori to leave their work for some days and travel long distances to the tangi of relatives and for the associated phenomenon of persons of an iwi, with little recent contact with the marae, being taken to the marae for burial.

[56] As the expert evidence proved, the right of a whanau to claim and remove the tupapaku is a custom that has long existed and has been and continues to be actively practised. The choice of an appropriate marae and burial place can be a matter giving rise to conflict and negotiation among the members of the whanau, hapu and different iwi. The response to a tono or demand to claim a body is determined by the customs and traditions of iwi, hapu or whanau groupings.

[57] Mr Ferguson helpfully summarised the evidence that this Court received, in paragraphs 61 and 62 of his submissions, which I adopt and set out in their entirety:

> 61. It is clear from the expert evidence that the application of Tuhoe tikanga is not rigid and is capable of adaptation, but its essential principles are clear:
>
> (a) When a person is born, by virtue of their whakapapa or genealogy they are a member of a collective Whanau, hapu and Iwi. Decisions on burial location seek to avoid the severing and breaking of continuity of the whakapapa.
>
> (b) According to custom the pito or umbilical cord and whenua or placenta which has sustained them for 9 months in their mother are buried in the land (also known as whenua) forever

connecting them to mother earth (Papatuanuku) and their tribal domain.

(c) Where one is born is where one ought to return to regardless of whether they have been actively or physically in that location during their life.

(d) The dead are as equally important as the living and are recognized in every day practices and customs.

(e) The claiming and retention of a deceased person is an acknowledgement of their importance and their identity as part of the Whanau, hapu and Iwi. It ensures continuity of the whakapapa and attracts and enhances the prosperity of the whanau, hapu and Iwi by drawing back to them the descent lines and their progeny.

(f) To not claim a person is to not look after your whakapapa and to not care about oneself, whanau and hapu. It is an act of irresponsibility and negligence in respect of one's identity and one's potential. One has a duty of care to the deceased.

62. Characteristics of the application of the tikanga include:

(a) Making the claim to a person. There is an open right to challenge and to contest where the burial will take place, out of that discussion and debate options or choices will emerge. This can result in either (1) consensus, (2) a compromise, or (3) if there is no resolution or agreement then who has the greater influence and will.

(b) debating why the claim is a strong one and should be preferred over the claim of others:

(i) always those who do not agree or have a similar claim based on other grounds have the opportunity to put their case forward;

(ii) those who have a strong claim according to the principles as outlined and/or are persuasive and strong advocates with a knowledge of tikanga have an advantage over others who do not;

(iii) the principles as outlined above will be referred to and brought to bear;

(iv) willpower is also an advantage;

(v) where possible, resolution is reached;

(c) considerations which will assist to form a conclusion will include:

(i) where was the person born;

(ii) where the persons whanau, hapu and Iwi are;

(iii) what sustained his or her life? Not just in a physical sense but intellectual, spiritual and emotional sustenance that informed the way they think and imbued their values;

(iv) where is that person? Do we have a memory of their own prerogative in their own lives; where did they give priority to?

(v) the views of those that are suffering the loss and in mourning are contributive to the conclusion. Have they got children or partners or parents that they left behind and what do they say? What do they want? That would include the widower, the children, out to nieces and nephews, grandchildren, brothers and sisters and so forth, all can have a say. It can be one or two people or it can be the whole community that has an interest.

(d) resolution can be reached with compromises and/or conditions which satisfy the party who does not get their preference;

(e) there are people who will facilitate the whanau pani making the decision; or alternatively;

(f) simply taking the tupapaku without debate through cunning, courage and determination and willpower that it is the right thing to do.

(i) again the principles as outlined above will be understood and brought to bear. It is not acceptable for example to take a tupapaku and not provide them with an appropriate tangihanga and burial afterwards;

(ii) the party who takes a tupapaku then also takes on the responsibility of ensuring that the tikanga pertaining to tangihanga are also fulfilled.

(iii) the party who takes the tupapaku may be required to provide something to reciprocate and satisfy the aggrieved party from whom the tupapaku has been taken from.

(g) The right to make the decision as to where somebody is buried falls to the living although the deceased's wishes will be a consideration for them. An individual can make known a wish or a view and that wish or view is then assessed in terms of the interest of the whanau hapu and Iwi and the tikanga. Where there is a dispute between the wishes of the deceased and the interests of the collective, under tikanga, the collective takes priority.

(h) Whilst place of birth is a significant factor, the underlying principle is one of continuity of the whakapapa. Therefore, somebody born outside of the tribal domain can be claimed and taken to their tribal domain for burial.

(i) Also, in cases where a person who has died is not strong in their tikanga or had little knowledge and adherence to it, they can still be claimed and taken to the tribal homelands for burial although it is perhaps less likely that this will occur.

(j) The key factor is that the right falls to those who are alive to decide, and therefore the strength of understanding and knowledge and adherence to tikanga may or may not exist for those who elect to make the funeral arrangements. The point being that when it does exist, or when the tikanga is invoked or activated then it becomes relevant to that deceased persons burial arrangements.

(k) As was stated in evidence in instances where Tuhoe people die elsewhere outside of their tribe or territory there is sincere effort to repatriate that person, even to the point where they exhume or have just part of their person brought home. There is always an earnest attempt.

(l) In circumstances where there is no agreement as to where a person should be buried, tikanga provides limitless opportunities for that to continue to be addressed and resolved both before the actual burial and after it.

(m) Tikanga is sympathetic to both parties and allows for a win/win situation through discussion, debate, compromise and compensation or some satisfactory arrangement that the parties can live with.

[58] Mr Allan did not take issue with this summary except to seek to separate the tikanga seeking consensus from the tikanga followed when a body has been taken without that consensus and a claim for retribution is made.

[59] It is arguable that they are two separate tikanga. Mr Allan was seeking to separate them because he was relying on the fact in this case that on 18 August there was an agreement within the family that there be further discussions on 19 August but that these discussions did not occur and the body was taken without there being a consensus.

[60] I would note, moreover, that when the body reached the marae it would appear that some Tuhoe criticised the taking of the body, an issue which was, Mr Heremia said, settled by a speech that he made.

[61] However, Mr Allan did not call an expert to seek to distinguish the tikanga into these two parts nor did he squarely put the point to either Mr Kruger or

Professor Temara. As it happens, for other reasons, to be discussed shortly, I do not find it necessary to address the distinction Mr Allan is drawing nor to its associated argument that in this case tikanga was not followed and therefore the taking of the body was not justified.

[62] The common law of England has always been ready to consider local custom within England as being law for a borough or other local area. Accordingly, there is a long history of common law Judges recognising that the common law of England will be adapted to different societies to the extent that the indigenous peoples follow different customary law and practices. The Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561, at 577-578 recognised that customary law of Maori can be taken cognisance of by the New Zealand Courts. This decision was applied by the Court of Appeal in *Attorney General v Ngati Apa* [2003] 3 NZLR 643.

[63] Mr Allan sought to confine the law on recognition of indigenous customs to customary "rights". He defined these as "rights in relation to property and rights which protect freedoms".

[64] He argued that the right contended for by the defendants in this case cannot be exercisable against other parties [such as Ms Denise Clarke and her children] in conflict with their own rights, freedoms and autonomy.

[65] Mr Allan was not able to point to any authority which confined recognition of customary law of indigenous peoples to recognition of customary rights according to his definition. On the contrary, the language of the Courts when recognising customary law does not particularly distinguish part of customary law to be incorporated according to its character and other parts to be rejected according to its character. Chilwell J in *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, at 215 said:

> …customs and practices which include spiritual elements are cognisable in a Court of law provided they are properly established, usually by evidence.

[66] In the case of *Hineiti Rirerire Aranui v Public Trustee* [1920] AC 198 the Privy Council considered the status of the Maori customary law of adoption in a case

which concerned a Maori couple's capacity to adopt a European child. Their Lordships found that the Maori customary law of adoption had legal status in the absence of a legislative provision to the contrary and that the customary right of Maori to adopt was not affected by a further right to adopt being given under the Adoption of Children Act 1895.

[67] Moreover, the Board recognised the dynamic character of Maori customary law. Their Lordships approved dicta from the Native Appellate Court in 1906 in a case called "*The Blake-Wellwood Appeal*" where the Appellate Court said:

> It is, however, abundantly clear that Native custom, and especially the Native custom of adoption, as applied to the title of lands derived through the Court, is not a fixed thing. It is based upon the old custom as it existed before the arrival of the Europeans, but it has developed, and become adapted to the changed circumstance of the Maori race of to-day.
>
> (at 204)

The Board went on to say:

> It may well be that this is a sound view of the law, and that Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on the level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority that can modify it.
>
> (at 204-205)

[68] It was the expert opinion in this case that the Tuhoe tikanga is capable of adapting, and will adapt in the future to the changing circumstances of Tuhoe. I also note that this approach by the common law of recognising customary internal self-government for resolving disputes, as this tikanga does, is not undermined by any statute.

[69] All that said, Mr Allan does, however, squarely raise the question as to what extent Tuhoe tikanga can bind European New Zealanders such as Ms Denise Clarke and persons of Tuhoe descent, including the deceased and his two children, who have not either recently, or at all, participated in Tuhoe tribal life.

Issue 3: Does the Tuhoe tikanga collide in the circumstances of this case with Ms Denise Clarke's decisions as executor and long term partner of the deceased?

[70] As I have just noted, Mr Allan argued that customary tikanga could not be recognised where it contends for the right to exercise power against other persons in relation to those persons' rights, freedoms and autonomy.

[71] I had framed the point by questions to Professor Temara in oral argument more prosaically: should the tikanga be enforced against persons of Tuhoe descent, who are living in the cities, and who have turned their backs on tribal practice? Or it can be put more particularly: can the Tuhoe tikanga be applied to the body of the deceased, given the decisions that he had made in his life, to live in Christchurch with his partner and children, and never to return to his tribal lands or to participate in his iwi's practices?

[72] It is quite clear from the evidence that according to Tuhoe tikanga that it does not matter how or where the tribal member lived. The wishes he or she may have expressed, though relevant considerations in the dialogue, ultimately do not dictate the decision as to where he is buried. That decision is a collective one. No one individual, be it the deceased in his or her lifetime, his wife/partner, son, mother and so on, can dictate, as distinct from vigorously demand, where the tupapaku will be buried.

[73] Accordingly, on the evidence that I have heard, Tuhoe tikanga in its current form has not adapted to accommodate a personal right on the part of an individual of Tuhoe descent, living outside tribal life, to make decisions for him or herself, or for their immediate family to make decisions on their own behalf, as to where his or her body is to be buried. This is not to say that Tuhoe tikanga may not adapt in that direction in the future. That, however, is a matter for Tuhoe and not a matter for this Court.

[74] Mr Ferguson submitted that the way I framed the question was dangerous. He submitted it was a dangerous avenue to go down if one were to suggest there be some assumption that the tikanga did not apply to urban Maori. He gave as an

instance Professor Temara being an urban Maori. It is appropriate to set out Professor Temara's response in evidence to my invitation to him to comment on this subject which, after some preamble, I framed as:

> … I'm just struggling to accommodate, to work out how does one accommodate the Maori dignity of the urban Maori who aren't in daily participation in the tribal life with the tikanga of that tribe which works very well in, for people who are very much involved.
>
> (at 54 Judge's notes of evidence)

[75] Professor Temara replied:

> … [A]t another level there is the ongoing and developing issue of urban Maori. Now 86% of Tuhoe live outside of the traditional tribal lands. The greatest concentration is around the Bay of Plenty. We're talking about Ruatahuna about Whakatane Urewa around that land of Opotiki but it doesn't include the home lands. The next concentration is Auckland. The next concentration is Wellington the next big population of Tuhoe is Hamilton. Now you begin to see a picture emerging that Tuhoe has become urbanised. There has been the great drift into the cities. Your point about a new Tuhoe emerging is a relevant one. Try as we might by different methods which I would like to mention to you there is this emerging Tuhoe urbanite which are growing up in the cities. They are Tuhoe born in Wellington now I pick on Wellington because I've spent more than 30 years living in Wellington before moving to my present place of habitation in Hamilton. Our generation is okay because we were born in Tuhoe, we still have that affinity with Tuhoe. Our children seem to be okay although all of my children were born in Wellington, 4 of them, but because I always take them home at every chance we get they view Ruatahuna or Tuhoe as home. Wellington is home too but Tuhoe is home. I can't say the same for their children. In fact I'm beginning to notice that while it is glib for them to mention their mountains of identification in Tuhoe, their Marae in Tuhoe, their rivers in Tuhoe, their hearts actually lie in Wellington. Tuhoe is a place of interest for a short time but they want to get back to Wellington as soon as possible because what they find in Wellington is the things of home that they are used to. So that's a phenomena that's happening in Tuhoe. We have since 1971 tried to address that by holding the Tuhoe Festival and that festival is when Tuhoe wherever they might be comes back for four days to be Tuhoe where leading up to that festival they enact their Tuhoe tikanga under the tutorage of teachers wherever they live practising their Tuhoe tikanga or Tuhoeness and having done that they then come back to compete in the Tuhoe homeland for the trophies of the Tuhoe festival. It is a time when we are Tuhoe when we speak Tuhoe when the language of administration is Tuhoe, when everything we do is Tuhoe, when debates are debated in Tuhoe language. Now that is a format that other iwi are now following and we've provided the template for that but we have been going since 1971. I am the current chairperson of the Tuhoe festival and our philosophy or our philosophy is it is good to be Tuhoe and that's where we try to inculcate our Tuhoeness into those of our grandchildren and the generations who have been born outside of Tuhoe. It is an attempt to turn back the tide of urbanisation. Tuhoe is a barometer into the health of the

> Maori nation of the Maori people. If things are well in Tuhoe then it follows that things are well in the Maori iwi. If things are not well in Tuhoe then it follows that things are not well in Maoridom generally so Tuhoe has always, I've always used Tuhoe and others before me have used Tuhoe as the barometer to gauge the cultural and the language health of the Maori people. So having been vilified in the past 60 years for being backward, for being bush bound, the greater Maori people look to Tuhoe and to the examples of Tuhoe and its retention of language and culture and tikanga as a template to be followed. So now you have southern tribes of the North Island moving into trying to resurrect their language and culture. The South Island tribes trying to do that the Waikato area where I presently reside moving in that direction in a big way and also the Northern people. I note that the leaders of the northern tribes have been spending time with Tamati Kruger to find out more about the Tuhoe format. So from being vilified as a backward people we now find ourselves in the unusual position of being the template for Maori survival of tikanga and language.

[76] I readily accept that it would be remarkable if upon Professor Temara's death, Tuhoe tikanga was not applied. For plainly Professor Temara not only accepts the application of Tuhoe tikanga, he actively works for its survival and continued application for all Maori of Tuhoe descent. Yet, he himself can be characterised as an urban Maori.

[77] It is, however, abundantly plain that Professor Temara's life as Tuhoe is in marked contrast to the late Mr Jim Takamore's life, where he described himself as "South Island Maori".

[78] I am aware this description "South Island Maori" may be seen as an affront to tribal Maori, both of Tuhoe, and Ngai Tahu. For within tribal Maori culture the identity of all Maori is, as I understand it, by whakapapa (geneaology) to whanau (immediate family), hapu (family groups/sub-tribe) and iwi (the tribe), all of which are tribal groups. In the recent Sealord Fisheries quota application litigation most of the New Zealand tribes fought successfully against any concept of urban Maori iwi: *Treaty Tribes Coalition and Ors v Urban Maori Authorities* [1997] 1 NZLR 513 (Privy Council).

[79] It is one thing for Tuhoe tikanga to be left with Tuhoe to develop, or not, as the case may be and as to how it should apply to its own people. But, when it comes to this case it is necessary to decide whether or not that tikanga will be recognised as a customary law which applies to the body of Mr James Takamore and whether its

process binds that part of his family being Ms Clarke and their two children, Jamie and Jenna.

[80] Mr Ferguson argued that one of the dangers of recognising Tuhoe tikanga, but seeking a limit as to its legal recognition vis-à-vis urban Maori, is that it would make the application of the tikanga "*fraught with uncertainty*". That is so, but uncertain application is not a vitiating quality as to whether or not a practice can be lawful. Indeed, it certainly cannot be suggested, and was not by the expert witnesses, that the application of Tuhoe tikanga was certain. In the recovery of a tupapaku, it is more of a process pursuing goals than a set of rules. There are many New Zealand laws, common law and statutory, the application of which can raise questions of degree. In these situations there is always a process by which questions of degree are resolved. There is room for argument within the tikanga, as I understand it, as to whether or not it is reasonable to apply it to Mr Jim Takamore's tupapaku. It is significant that Mr Heremia's evidence was that there was consternation at the marae when the body arrived, which led to further debate. Mr Donald Takamore, one of the defendants who participated in the discussions in Christchurch has deliberately taken no further part in these proceedings. He is not speaking out against the claim of Ms Denise Clarke for the return of the body.

[81] In *Public Trustee v Loasby* (1908) 27 NZLR 801 the Supreme Court (as the High Court was then called) had to consider whether the cost of a tangi could be properly paid out of the estate of a deceased Maori chief. In this case the Public Trustee was the administrator of the estate of Hamuera Tamahau Mahupuku. Letters of administration were originally granted to his principal wife, Arete Mahupuku, and Henare Parata. Those letters were cancelled by a later Native Appellate Court on appeal by other widows of the deceased Chief and the administration of the Chief's estate was placed with the Public Trustee. Mr Loasby was the supplier of numerous goods for the tangi. He was seeking payment for them from the estate. The goods had been ordered by Arete Mahupuku and Henare Parata. The Stipendiary Magistrate at Greytown had ordered that the estate be charged with the cost. The Public Trustee appealed. The Supreme Court dismissed the appeal. Cooper J in part relied upon Maori custom. He said at 806:

> In considering a question of this nature, dealing with the ancient customs still followed by a race like the Maori people, no decisions in the English Courts can be directly in point. One has to consider, I think, three things, - 1. The question of fact whether such custom exists as a general custom of that particular class of the inhabitants of this Dominion who constitute the Maori race; and this I find to be proved. 2. Is the custom contrary to any statute law of the Dominion? The answer is, No statute has forbidden it. 3. Is it reasonable, taking the whole of the circumstances into consideration?
>
> In this connection the judgment of the Privy Council in *Mullick v Mullick*[1][a case from India] is of some assistance. The Maori people have for as long as records of history can show been accustomed to hold upon the death of their important chiefs these *tangis* as a part of the funeral ceremonies, and the time has not yet arrived when these ceremonies can be omitted without seriously wounding the feelings not only of the relatives of the deceased chief, but of, at any rate, a considerable proportion of the race. Now, Lord Wynford, in delivering the judgment of the Privy Council in *Mullick v Mullick*, made some observations very pertinent to the present question. He said, "the interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government; and no person can be happy whose religious feelings are not respected."
>
> …
>
> I am of opinion, therefore, although I am not free from doubt, that the *tangi* was really a part of the obsequies of the deceased chief, and the reasonable cost ought, in accordance with Maori custom, to be paid out of his personal estate.
>
> (Italicised in original)

[82] To me, the ultimate question of law in this case is whether or not the third criterion of Cooper J applies to the recognition of Tuhoe tikanga in this case: "Is it reasonable, taking the whole of the circumstances into consideration?"

[83] Whenever any local custom is recognised in common law there must inevitably be a question as to whether or not the custom is consistent with other principles of common law. For any legal system, including common law, has to be internally consistent. I would interpret the third consideration of Cooper J to be similar to the second consideration and thus put a limit on the reasonableness. It is not for the Court to judge the reasonableness of the custom, given that the Court does not have the power to decide the content of the custom. But what the Court does have is the power of the extent of <u>recognition</u> of the custom as part of the common law. In exercising this power it is inevitable that the Court must take into

account whether it is reasonable to fit it in and accommodate it with other principles of common law.

[84] Mr Ferguson submitted that I should be careful only to decide as much as had to be decided to address the issues in this case. I agree. The particular decision I have to make is whether or not the Tuhoe tikanga can justify the actions of the defendants.

[85] In my view it does not for these reasons. The common law was brought to New Zealand by the Europeans. The Chiefs who participated in the negotiations prior to the signing of the Te Tiriti o Waitangi Treaty of Waitangi understood clearly that one of the advantages of entering into the Treaty was the ability of the Crown to bring some peace and good order in place of the disorder between Maori and Päkehä from time to time, and between Maori and Maori, from time to time. By reason of the third article all Maori were entitled to the rights and privileges of British subjects, which obviously includes the benefit of the application of the common law. I note that their Lordships in *Hineiti*, invoked a statute giving effect to Article 3:

> It was pointed out by counsel for the appellant that the Native Land Court had found that the Maori custom of adoption did not admit of the adoption of European children, and that the Appellate court had accepted this view, and that consequently their Lordships had to treat this as a settled matter. This may be so, and therefore it may be that Matilda Lindsay was not and could not have been adopted according to Maori custom, but she may well have been adopted according to the general law of New Zealand.
>
> In this connection it may be well to notice that by Act No. 11 of 1865, s. 2, "Every person of the Maori race within the colony of New Zealand … shall be taken and deemed to be a natural born subject of Her Majesty to all intents and purposes whatsoever." These provisions are re-enacted, by the consolidating Act of 1908, No. 126.
>
> It would, therefore, appear that a Maori has the same rights of availing himself of the Adoption of Children Act as a person of European descent. The maxim "Generalia non derogant specialibus" was relied upon on behalf of the appellant, but this is no case of derogation but of facultative addition. The right of the Maori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

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[1] 1 Knapp, 245

[86] The common law proceeds from a general presumption that everyone is free to live life as he or she wishes. The common law imposes remedies when a person does wrong and causes harm and helps people live with one another, by enforcing promises, and recognising property rights. It is fair to say that there is a fundamental difference in starting point between the individual freedom assumed by the common law against the collective decision making of tribal custom.

[87] In my view, whatever the bounds of consideration of the reasonableness of Maori tikanga, before any tikanga is recognised as part of common law in New Zealand, there come some considerations as to its implications on individual freedom. The common law readily acknowledges many situations in which individuals give up their freedom of decision making over their affairs. These can include when people participate in partnerships, or as shareholders in limited liability companies, or appoint attorneys to act on their behalf, or join clubs and associations, or live their life in a tribal community which has binding customs, obligations and conditions.

[88] In this case it is beyond doubt that the late Mr Jim Takamore chose to live outside tribal life and the customs of his tribe. Under the common law he was entitled to expect the choices he made during his life to be respected by the executor of his will when it came to the decision as to his funeral. This is even more so because he chose as the executor of his will his life-long partner. He has personal rights as a New Zealand subject to the benefits of the common law of New Zealand. The collective will of the Tuhoe cannot be imposed upon his executor and over his body, unless he made it clear during his life that he lived in accord with Tuhoe tikanga.

[89] I have reached this decision, using the reasoning process of the common law, without the need to formally decide:

(a) The content of the relevant Tuhoe tikanga; and

(b) Whether it is part of the common law of New Zealand.

That said, as my reasoning reveals, there is clearly a powerful argument in support of both propositions. But the critical decision I reach in this case is that however those two questions are answered the Tuhoe tikanga does not apply to Ms Clarke's funeral arrangements for the late Mr Takamore's body.

Conclusion as to legality of the taking of the body by Tuhoe

[90] There was, therefore, no legal authority for the defendants and other members of Tuhoe to dispossess Ms Denise Clarke of the body. The taking of the body was unlawful, and so it is not properly buried. Ms Denise Clarke is entitled now to possession of the body, as the executor.

Remedies

[91] Mr Allan framed his submission by arguing that "the common law will right a wrong". That is certainly a common law ideal, but it is not a rule.

[92] There are, however, major legal and practical problems with the remedies the plaintiff seeks. The body is buried on private land. It is not immediately apparent, let alone likely, that the two defendants who oppose Ms Clarke's claim have in fact control over the burial place and can consent or otherwise to facilitate the disinterment. These two defendants are Jim's mother and sister living in a Tuhoe community, living according to Tuhoe tikanga, which requires collective decisions. The second defendants, joined as owners of the private cemetery, are themselves deceased. Mr Patrick Aramoana gave evidence on behalf of their relatives. His evidence [translated] to the Court was:

> Judge I came here on behalf of kin children of Edna [Maui] and Puti [Brown] [both deceased] and also because the names of my aunties and mothers have been dragged through the courts so I am here to convey their love and their pain and also I'm here because of my Aunty present here has also been dragged through the courts and as for the customs on urupa Mr Kruger has explained it thoroughly as I can see.
>
> (at 46 of Judge's notes of evidence)

I understand Mr Aramoana's answers to be a confirmation that any decision to disinter the body will be a collective decision, according to Tuhoe tikanga.

[93] Mr Aramoana clarified that his aunty was Jim's mother, Mrs Nehutua Takamore, one of the first defendants. In cross-examination he was asked whether it is the marae that administers the cemetery. He stated: "in my knowledge no". He was asked that if the Court were to grant the orders that Ms Clarke seeks whether his family would accept that. He answered:

> I don't have a say for that, my family has the say.

He was asked whether there was anything he would like to say to the Court about what would happen if the Court granted orders that Mr Takamore's body should be disinterred and what the process should be. He answered:

> Judge I don't know if you heard Mr Kruger's statements when he spoke of a matter which the term for it is Hahu, exhumation as for that tikanga hahu and the mana resides with the iwi and the trustees of the urupa, it is not for me to say yes or no.
>
> (at 47 of Judge's notes of evidence)

[94] Mr Kruger gave evidence as an expert witness and did not in fact discuss the question of any compliance with the orders. His main point in this regard was that in his view the parties in this case should continue talking:

> … My view is that the greatest gift that the Takamore family can give to each other is peace and happiness and no-one else in this Courtroom can give them that except themselves, no-one else in this Courtroom can do that that's why I would urge the Court to create as many opportunities as there is a will in the Takamore family to find their conclusion.
>
> (at 43 of Judge's Notes of Evidence)

[95] Common law remedies do not normally authorise the entry of persons who have no property right onto private property. Rather the Court makes orders such as these against the persons in control of the property so that if those persons do not allow entry they are in contempt of Court. Persons alleged to be in contempt can be brought before the Court if contempt is proved against them personally and penalties can be imposed including fines or imprisonment. In my view, to give effect to the remedies the plaintiff seeks, orders would have to be made by this Court against

named persons. These would have to be persons who in the judgment of the Court would have the ability to carry out those orders of the Court, so that if the orders were not complied with they would be in contempt.

[96] I have no confidence that that is the position of any of the first defendants. I have had little to no evidence as to who is the collective of persons actually in control of the urupa. The only evidence of any significance has been set out above. I would not assume that the executors of the deceased second defendants or whoever holds the legal title has in fact control of the urupa.

[97] It is appropriate also to keep in mind the history of Tuhoe since the Treaty: of unhappy relationships between the tribe and the settlers, the police, and the law. Right now there is litigation pending consequent upon entry by armed police into the rohe (territory) of Tuhoe north of Ruatoki in October 2007.

[98] It is abundantly plain that within Tuhoe there is some controversy as to the rights and wrongs of the taking of the body. Mr Henare Heremia was one of the party coming back with the body to the marae. Here is his account [translated] of what happened when they arrived:

> ... On arrival at Kutarere we were greeted by some of the whanau and hapu. They expressed their misgivings about the matter. I stood to explain and describe the two kete [literally baskets but metaphorically the first kete contains the tikanga customs, the whanau and genealogy and the second kete contains the toki, adze, with two faces, one for death and one for life which functions as a warning to take care in the carrying out of the works of hapu so that tikanga may continue forever and the whanau and iwi may flourish]. … It was at this point the hapu agreed with us. The word of the hapu of Upokorehe was given as follows. Leave this matter in the hands of the hapu they would manage this matter until the point I outlined and that is that this matter be settled for now and forever. At this point in time this day and this year 2008 this matter is in the hands of the hapu. Because of the actions of the law our kin James is not able to enjoy eternal rest.
>
> (at 70 of Judge's notes of evidence)

[99] It is plain from Mr Kruger and Professor Temara's evidence that discussions can be reopened within Tuhoe and with Tuhoe as to the merit of what has been done. A large number of Tuhoe, of all ages, paid courtesy to the serious nature of the claim by Ms Clarke and to the status of this Court by travelling down to the cold South,

and attending throughout the hearing, including during the legal argument, (at which time we lawyers often lose our public audience).

[100] Recognition by the law of the tikanga is important. Although Tuhoe did not sign the Treaty Professor Temara said:

> Your Honour it's a truism that Tuhoe did not sign the Treaty. One of the reasons why Tuhoe did not sign the Treaty it's not because it didn't want to but it is an inland tribe with its then headquarters at the head waters of the Whakatane River which is 40 plus miles from Whakatane towards the east. That's one of the reasons why it didn't but even though Tuhoe did not sign the Treaty it abides by the Treaty because the leaders of Tuhoe both religious like Te Kooti encourage that Tuhoe should abide by the treaty and in fact Te Kooti describes it as one of the manas that Tuhoe has to abide by the Treaty of Waitangi was one of them. My understanding of the treaty and I'm in no way an expert on the Treaty but discuss the Treaty in the terms that you and I are discussing is that the administration of New Zealand was given to the Crown but the mana of the lands and the customary rights were to be retained by Maori. Now of course that has not happened because the administration has taken precedence and relegated tikanga to another level which is below the level that the Crown and all its laws deem tikanga to be. That's at that point, at that level.
>
> (at 54 Judge's notes of evidence)

[101] With the Treaty came the Judges and Court proceedings. In these Court proceedings the Judge endeavours to provide for a reasonable exchange of arguments. The difference between this process and Tuhoe tikanga is that it is to the Judge to make the decision rather than the parties achieve a consensus. However, Judges always hope that the parties will reach a settlement themselves, both before judgment and after judgment.

[102] There is no doubt that the Takamore whanau can, if they have the support of other members of the Tuhoe iwi, return the tupapaku of Mr Jim Takamore to his life-long partner, Ms Denise Clarke, and to his children, Jamie and Jenna. There is no doubt that this would cause grief to his mother, Mrs Nehutua Takamore and his sister Ms Josephine Takamore. There is no avoiding that. Grief is inescapable but it is my judgment that the law says that on the facts of this case Ms Denise Clarke is entitled to possession of the tupapaku of the late Mr Jim Takamore. I invite the first defendants and other members of their whanau and hapu to arrange for the disinterrment of the tupapaku and return it to Ms Denise Clarke.

[103] In the meantime these proceedings are adjourned. Costs are reserved. I also reserve leave to make a further application for remedies. Any such applications are to be on notice to the first defendants. I also reserve the power to apply to add additional parties.

[104] It remains for me to endorse the sentiments of Mr Kruger that the parties should continue discussions, but I would add as a qualification my expectation that they do so now knowing that this Court has judged that Ms Clarke is entitled to possession of the tupapaku. This Court has decided that. That decision is final, subject only to appeal, and no aspect of that decision is reserved.

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