IN THE SUPREME COURT OF NEW ZEALAND

SC 131/2011

[2012] NZSC Trans 9

BETWEEN **JOSEPHINE TAKAMORE**
Appellant

AND **DENISE CLARKE**
First Respondent

NEHUATA TAKAMORE
DONALD TAKAMORE
Second Respondents

Hearing: 17-18 July 2012

Court: Elias CJ
Tipping J
McGrath J
William Young J
Blanchard J

Appearances: J P Ferguson, H K Irwin and M M Tuwhare for the Appellant
G J X McCoy, M Starling and K J McCoy for the Respondents

CIVIL APPEAL

MR FERGUSON:
May it please your Honours, counsel's name is Ferguson and I appear with Ms Irwin and Ms Tuwhare for the appellant.

ELIAS CJ:
Thank you Mr Ferguson, Ms Irwin, Ms Tuwhare.

MR McCOY:

May it please the Court, counsel's name is McCoy, I appear with Mr Starling and Mr Kim McCoy for the respondent.

ELIAS CJ:

Thank you Mr McCoy, Mr Starling, Mr McCoy. Yes Mr Ferguson.

MR FERGUSON:

If your Honours please, this is an appeal by Ms Josephine Takamore against the decision of the Court of Appeal on 23 November 2011. The appellant in that case was unsuccessful in her appeal against the decision of his Honour Justice Fogarty in 2009 and those original High Court proceedings, determined by his Honour, on the basis of proceedings brought by the first respondent Ms Denise Clarke, seeking various orders against the appellant in respect of the burial of Mr James Takamore.

Just by way of preliminary observation your Honours, it will be quite evident from a review of both the pleadings as well as the decisions of his Honour Justice Fogarty and the Court of Appeal that this case has evolved somewhat in terms of the focus at both an evidential level and in terms of the issues, as one has moved through the Courts. And that is perhaps reflective of two things. One, the novelty of the issues that are involved at the heart of this case, the complexity of the overlay between the two aspects of common law and, in particular, matters of tikanga Māori and matters of introduced or received English common law principle and also the understandable, very personal feelings that are heartfelt by both parties to this proceeding.

I suppose, to be frank your Honours, it has been a voyage of discovery, enlightenment, not always in a happy way, for both parties and that has been reflected in a way in which perhaps, as the Court of Appeal observed, the focus on evidence was perhaps, with a degree of hindsight, unusual in certain respects and one might have expected to have greater focus on certain issues that became particularly more relevant as the case proceeded into the higher courts.

I think a stark example of that, in terms of the change of approach, is that while ultimately reaching the outcome in terms of his Honour Justice Fogarty and the majority in the Court of Appeal, those judgments were on fundamentally different grounds, including on matters of fact. So we have a quite different finding by the

majority in the Court of Appeal on the question of whether Mr Takamore had opted out and then obviously a different legal issue as to whether that has any consequence in terms of the relevant legal application of the facts and –

ELIAS CJ:

Are you saying Mr Ferguson, that the hearing in the High Court was not adequately focused on some of the issues that became determinative in the Court of Appeal?

MR FERGUSON:

I think to be frank Ma'am, I think with a degree of hindsight one would have to concede to that. We were in a – the case, when one looks at it – is in a situation where if one looks at the statement of defence, the issue of tikanga Māori and its cognoscibility was raised in an affirmative manner. There was expert –

ELIAS CJ:

It wasn't pleaded that it was a total answer, was it? It was pleaded that what was done was in accordance with tikanga – can we go to the statement, to the pleadings because I'm anxious to know to what extent these still shape the questions for the Court?

MR FERGUSON:

Yes. In terms of the context of matters, after Mr Takamore, the tūpāpaku of Mr Takamore was taken to Kutarere in the Bay of Plenty. There was an application for an interim injunction by Ms Clarke which I, my friend can correct me, I understand was made on an ex-parte basis and that order was granted on its terms. That was made – we don't have the full papers I don't think in the bundle, in terms of what sits behind that but we've got the Court order but the statement of claim, of course, comes some nine months later.

So the statement of claim that we have at the commencement of these proceedings is not a statement of claim that sat in behind the interim injunctions –

ELIAS CJ:

Well the interim injunction was to hold the position –

MR FERGUSON:

That's correct.

ELIAS CJ:

– until the Court could make further orders.

MR FERGUSON:

That's right and so then we have this statement of claim which, with respect Ma'am, is I suppose a little unusual but again, it reflects, I imagine, the plaintiffs' solicitors grappling with where this sits, so it is essentially seeking a remedy in terms of – essentially, building on the disinterment licence and trying to give effect to that because of the issues that arose in terms of trying to implement the interim injunction and the difficulty with the issue of the disinterment licence that was granted, Ma'am.

ELIAS CJ:

The disinterment licence is addresses to a constable at Opotiki, I think.

MR FERGUSON:

Yes, that's right Ma'am.

ELIAS CJ:

It's not – was it one obtained by the respondent?

MR FERGUSON:

As I understand Ma'am, that's correct.

TIPPING J:

Were you really seeking an order that – sorry but was the plaintiff seeking an order that that not be frustrated or interfered with in some way because it's not entirely clear what exactly the cause of action is –

MR FERGUSON:

No, no –

TIPPING J:

– upon which the plaintiff founds the claims to relief.

MR FERGUSON:

And I think that was around about – my way was a round about way of getting to that point and the same with defence, kind of reacts in kind to a certain extent, so we haven't got this classic cause of action, be it based on the common law right to the executor per se and those matters – and therefore, I suppose an affirmative defence in the classical way to that –

TIPPING J:

There were no amendments to the pleadings –

MR FERGUSON:

No –

TIPPING J:

– the case went to trial on these rather spartan pleadings –

MR FERGUSON:

That's –

TIPPING J:

– and I'm not being critical –

MR FERGUSON:

No, no –

TIPPING J:

– of succinctness, I'm just saying they're not all that clear as to what was being alleged on either side, in legal terms.

MR FERGUSON:

Oh no, I think that is probably a fair comment, Sir. The issue certainly was raised regarding the customary matter but again, it's a little bit uncertain precisely what the status of that argument was. Now –

ELIAS CJ:

There is a pleading however, that the plaintiff was sole executrix.

MR FERGUSON:

Yes.

ELIAS CJ:

So that would be sufficient to be an allegation that the cause of action is based on her status as executrix, I would have thought.

MR FERGUSON:

Yes I think that's probably –

TIPPING J:

If the plaintiff had an exhumation licence or whatever is the correct terminology, why did the plaintiff need an order authorising herself and her representatives to act on it? I would have thought it would have been more logical to have it in the negative sense not to restrain anything from interfering with her claimed rights, but it probably doesn't matter in the end.

McGRATH J:

But that was the order that was sought, was it not, in the end against you. The order, the only order that was sought against your client was a restraining order to stop them from obstructing –

MR FERGUSON:

Against my client, Sir, yes.

McGRATH J:

Yes, yes.

ELIAS CJ:

Was that in the High Court?

MR FERGUSON:

I think, those were sought in, and my friend again correct me, I think the – in the submission itself I think –

McGRATH J:

I'm looking at page 7, Mr Ferguson –

TIPPING J:

And to be fair –

McGRATH J:

– third aspect of relief in paragraph 3.

TIPPING J:

Yes paragraph 3 does cover that.

McGRATH J:

That is the only order that is sought against your clients.

MR FERGUSON:

Against the first defendants, that's correct, so it's to do nothing essentially.

McGRATH J:

Well it – yes.

MR FERGUSON:

Yes.

TIPPING J:

Retraining you from doing anything.

MR FERGUSON:

From doing anything active, yes, yes. And I think the issue with the disinterment licence was the ability to give effect to that in terms of access to the urupā and those other parties who were not –

TIPPING J:

But it was all built presumably on the premise that your clients had wrongly, had acted wrongfully, in defiance of the plaintiff's rights as executrix?

MR FERGUSON:

Yes.

TIPPING J:

That must have been the underlying premise –

MR FERGUSON:

Yes.

TIPPING J:

– one would have thought.

ELIAS CJ:

Sorry, we interrupted you. You were going to take us to the statement of defence.

MR FERGUSON:

Yes I was saying, the statement of defence raises the issue as to, essentially in paragraph 11, the practice that was being followed in that regard. So what the tikanga entitles the Takamore whānau to do and I suppose what is not expressed in the statement of defence is the affirmative statement that that is the law over and above what might be viewed, certainly my friend's view, as the orthodox English common law position of the right of the executor, but that was the –

ELIAS CJ:

Well you've alleged the right to claim –

MR FERGUSON:

Yes.

ELIAS CJ:

– and to bury the body but you don't –

MR FERGUSON:

It's not as –

ELIAS CJ:

– you don't –

MR FERGUSON:

– it's not as stark as –

ELIAS CJ:

Well you don't assert that that is determinative and yet that is the way it's being treated. Have – did you shift your position to say that there was an absolute right to bury?

MR FERGUSON:

That is the argument that was the focus before his Honour Justice Fogarty. The argument from my friends for the first respondent, or there [in that Court] the plaintiff, was that the executor had the only right and there was no other interest that was cognisable in any way.

ELIAS CJ:

I understand that, that that's the argument for the respondent. That only the executor or executrix –

MR FERGUSON:

Yes.

ELIAS CJ:

– could determine that burial but in response to that it's not necessary to go so far as to say that the only right is that of the wider family to determine burial, to trump, as Justice Chambers put it –

MR FERGUSON:

Yes.

ELIAS CJ:

– another response is that there are two valid claims and that they need to be resolved. I'm just asking you what –

MR FERGUSON:

Yes, no, no I appreciate it.

ELIAS CJ:

– your position is because you are meeting an absolutist claim but it's only for the executor with, it seems to me, an absolutist claim that it's only for the wider family.

MR FERGUSON:

Yes, just looking at – reminding myself of matters some years ago, the High Court submission for my client concluded with the submission that any discretion that the plaintiff had as executrix is overridden by the exercise of the tikanga decision by the collective whānau grouping. Regardless of the position in relation to the rights of the plaintiff as executrix, in respect of the body of Mr Takamore prior to burial those rights ceased on his burial at Kutarere Urupā and no personal action can be mounted by the plaintiff.

ELIAS CJ:

Well that's a different point but we need –

MR FERGUSON:

Yes, but –

ELIAS CJ:

– we are going to need to address –

MR FERGUSON:

– no, that's right, but that's, as I say –

ELIAS CJ:

But that was –

MR FERGUSON:

– that's the concluding point.

ELIAS CJ:

So you did meet an absolutist – a point with –

MR FERGUSON:

That's right.

ELIAS CJ:

– with an absolutist point.

MR FERGUSON:

That's correct, and –

ELIAS CJ:

And your expert evidence doesn't go so far. It doesn't say that tikanga always trumps.

MR FERGUSON:

Oh, well, I think there are two ways of looking at that, Ma'am, and perhaps if I can just reflect on that because I think it's quite an important point and I think it's, it almost comes down, with all due respect, if I was to be so bold as to say what's the most – troubling isn't the right word but what's the real difficulty that we are all grappling with in this proceeding and with all due respect to the emphasis that the Court of Appeal and my friend places on the issue of reasonableness and we necessarily also focus on that. While I don't think the right lens or the right issue is the certainty concept that the Court of Appeal addresses in a relatively brief way, I think what sits behind the Court of Appeal's concern about the issue of certainty which they say they don't really need to rule on because they find on the issue of reasonableness, what's sitting behind this is the real sense of the unknown that sits behind the collective tikanga-based decision making process, which is relied upon by the appellants.

And I think when one looks at the evidence with respect to Professor Temara and Mr Kruger in that regard, in my submission one isn't saying that there's another view to the tikanga view but rather that the tikanga process itself and that engagement by, in this case, the collective whānau around the whānau pani grouping, the bereaved extended whānau grouping will consider and debate all relevant factors and more than, there's more than one possible outcome from that.

ELIAS CJ:

Yes.

MR FERGUSON:

And, therefore, it's within the exercise of the tikanga that those other solutions may fall out the other end and that –

TIPPING J:

No you've – sorry.

MR FERGUSON:

– and that may result in a decision that for, hypothetically speaking in another case, may result in a decision not to bury a deceased in the tribal urupā but to agree that the deceased can be buried elsewhere. Now that's not a decision that says the executor's has been allowed to trump or that, you know, the other view, tikanga hasn't been applied. Tikanga has been applied but in the circumstances that is the outcome of that process and as Mr Kruger indicates, and again I think there are lines in between these but he starkly says, there might be agreement, there might be compromise which is agreement of a different kind, or there might be an outcome through the use of will and influence of which I think, putting on my Pākehā lens, was an influence in itself in the decision-making processes and in advocacy and in other disputes, again there was an element of, there's at the very least, acquiescence. Someone's been allowed –

TIPPING J:

That's what troubles me, Mr Ferguson, what I find difficult is what does the tikanga say if agreement cannot be reached? What is the bottom line?

MR FERGUSON:

Well, I think the evidence and I think this is the – if one looks at the evidence of Professor Temara in particular, but Mr Kruger also notes this, is that the tikanga in relation to tangihanga and, in particular, this aspect in relation to the place of burial which is a subset of that, can't be compartmentalised in time and focus to the … doesn't stop and finish with the decision on the active burial, place of burial and the act of burial and therefore, it's quite clear on the expert evidence that even in a case where one, whether there is a difference of opinion, there isn't unanimity or consensus in that sense –

TIPPING J:

Well, that's what my question is directed to.

MR FERGUSON:

Okay, so if we've got, so let's – tikanga, it's quite clear doesn't require unanimity in order to be effective, but an outcome will occur. Now, what the means upon which that outcome or what that actually composes in a real process sense I think is fluid and there's probably a range of outcomes in relation to that, but in terms of the operation of tikanga, the experts are quite clear that where a decision is made that, to

look at it again through a adversarial lens that sees the view of some favoured over the view of others –

TIPPING J:

Is there any external body to whom the tikanga can look for resolution if the immediate parties cannot consensually resolve?

MR FERGUSON:

No, not in the sense that we would view that in a European process of, which is always focussed on or wherever you've got a dispute, there must necessarily, it's a natural instinct, be a sole arbiter at some point in the process, a sole high up body that can rule.

TIPPING J:

But on the ground how were these things ultimately resolved if agreement couldn't be reached? The impression that one might have from the evidence is that the side with the greater strength will prevail.

ELIAS CJ:

Well, Mr Kruger said the greater moral authority, which I think is perhaps a better way of putting it.

MR FERGUSON:

And I think that's the difficult thing because – we have the facts in this situation and then we have, well, what does, how does this operate in a practical sense if one's looking at it in the abstract … if we're looking at the principle of tikanga.

TIPPING J:

But if it's to become part of the law, one must have some idea mustn't one as to how it's going to play out, absent, a consensual resolution?

MR FERGUSON:

Absence unanimity –

TIPPING J:

Yes.

MR FERGUSON:

– then if I can approach it from a slightly different perspective and I know this isn't a precise answer to your question, but –

TIPPING J:

May be there isn't a precise answer to my question.

MR FERGUSON:

Yes and that may be the case, but it's quite clear and, unless anyone objects to me saying so, that tikanga is a fundamental part of Māori customary society and continues to be so, and there are, tikanga occur on a daily basis throughout the country and I'm sure on a weekly basis within Tūhoe. Each one of those events will involve some discussion within the whānau. It won't always be a contest between family members. It won't always potentially be a contest between this marae and that marae, this hapū and that hapū in the sense that one sees this as an inter partes issue, but there is a collective discussion and the nature of that collective discussion may change in the form it takes depending on the issues and the parties etcetera, but the fact that those discussions occur and have occurred, and burials have occurred and we've obviously, these contests one is aware of or certainly if one is involved in that part of New Zealand society, one's aware of the issues and the disagreements that can occur and yet this is the first case that has ever, to my knowledge, come before the New Zealand Courts on this issue and so to say it's, if one approaches it from the view of it's a little bit unclear how they get to the outcome and, you know, is, can we rely on that?

The fact is we haven't had huge litigation before the courts on this issue. The only case that comes close is a defamation proceeding in relation to issues surrounding the description by the media of the taking of the tūpāpaku of Billy T James. But again, ultimately that the other issue that sits behind that, namely the burial which was contested as we know because part of it was played out in the public, he was buried and it wasn't further disputed.

The fact of the matter is we don't have unburied tūpāpaku all round the country with disputes going on over lengthy periods of time, so the tikanga, with all due respect, and I don't, you know, must work. It must work and it must result in outcomes –

ELIAS CJ:

But if it doesn't work, Mr Ferguson, and one would have to say that if this case has come right through to the Supreme Court, it hasn't worked here and you are seeking, both parties are seeking Court intervention. Isn't it a question then of what is the common law of New Zealand? What mechanism for resolution does it have and I must say that in reading all the materials we were given, the cases and so on, I thought that that Tasmanian full Court case was very interesting because it also, it was *Jones v Dodd* [1999] SASC 125, (1999) 73 SASR 328, was it, a case of a cross-cultural issue with some of the same overlay in this case of the extent to which the deceased identified with his Aboriginal side or not and in the end the Court made the decision. In the end, is that the only way we can resolve this as a matter of New Zealand common law?

MR FERGUSON:

Well, perhaps if I can just deal with *Dodds*, not in a cursory way but perhaps as an immediate observation, in *Dodds* –

BLANCHARD J:

Where do we find that?

MR FERGUSON:

Sorry, it's in my friend's bundle, bundle, volume 3, tab 54 and in that case, I think with all due respect, the fundamental issue, well, your Honour notes what the Court's trying to grapple with is that the deceased died intestate.

ELIAS CJ:

I know that there's that difference and we do need to look at what New Zealand law is about the rights of the executor, so I'm just putting that to one side for the moment.

MR FERGUSON:

Yes, because I think it does raise – I mean if that circumstances are in New Zealand, you've got, we would say – in my view, Ma'am, I think to be frank about it again the reality is for, as you say, this case is the exception because we've got a dispute and the decision's been made to litigate and so here we are, but in behind my comment –

ELIAS CJ:

Sorry, South Australia, I said Tasmania.

MR FERGUSON:

Southern enough – certainly behind the comment that we, the tikanga must work, albeit in this case it hasn't. I think part of that is probably the reality that when that tikanga process is occurring, really there isn't a huge amount of contemplation, with all due respect, of the executor's ancillary duties in relation to the place of burial. I think by and large the role of the executor in those cases are seen as the –

ELIAS CJ:

Or later.

MR FERGUSON:

– the property-oriented things.

ELIAS CJ:

But I wonder whether that's very different in any families because certainly my experience of –

MR FERGUSON:

No I –

ELIAS CJ:

– bereavement is that families get together and there is discussion about where the deceased is to be buried and it's resolved.

MR FERGUSON:

Yes.

ELIAS CJ:

It doesn't seem to me so very different from the application of the decision making process in tikanga. What's different is perhaps the legitimacy of the role of a wider grouping that the immediate family and that may be the area where the common law of New Zealand may have to adapt from the view that it's simply the immediate family, I'm not sure. But as to the process surely it can't be the case that decisions as to burial in New Zealand families are taken by executors. I'm sure it wouldn't occur to most people to say, well, which among us is the executor, okay, it's your choice.

MR FERGUSON:

I think it –

ELIAS CJ:

Families debate these things.

MR FERGUSON:

I think if there's one clear thing that's come out of the history of this case over the last five years is the complete lack of understanding about that role and at English common law what is encapsulated by that and, you know –

TIPPING J:

Maybe in New Zealand we should concentrate on authority to bury rather than the right to bury in the sense that these things can perhaps not be absolutist.

MR FERGUSON:

I think, you know, coming back to her Honour Chief Justice's point about, well, the tikanga didn't work here because here we are in Court. I mean –

WILLIAM YOUNG J:

Well it hasn't produced an outcome that's acceptable on all sides or something.

MR FERGUSON:

Well it didn't work in the sense that there wasn't an outcome acceptable on all sides or something. Now one would say, well, could take a different approach to that and say, well, the tikanga did work and resulted in a burial which the appellants say was in accordance with tikanga. What we have is a party within, in this case, the executor, we have this issue about the first respondent being the executor but also being the de facto widow of Mr Takamore, being unhappy with that and, therefore, electing to test the law as it were. And I suppose we are asserting what our view of the law is which perhaps, as you say, has been assumed not only within Pākehā families and other ethnicities in relation to things just to go along with what the close family say, which I think is kind of assumed although isn't the legal position, and the assumption within Māori society that decisions are made in that broader collective.

The questions are leading towards this issue about who ultimately makes the decision and I think the lens through which one views is fundamentally important in

New Zealand and I think, with respect, what the Court is having to grapple with is the fact that it is a sole arbiter in this case in the form of the executor; is that a more appropriate or a better decision making vehicle than a collective body?

TIPPING J:

Mightn't the best decision-making body be the Court in the difficult situation where the parties can't agree because that's the common law tradition and to the extent that anything is absolutist outside the Court, and I speak in that sense both ways, surely the rule of law would suggest that the Court should be the final arbiter. Another side will like this very much because each is batting for an absolutist position.

MR FERGUSON:

That's right, and here we all are.

ELIAS CJ:

Well, except your experts, your experts aren't batting for an absolutist position. They are saying that there – which I why I wonder whether the correct view to pick up what Justice Tipping said, is that both parties have standing to achieve burial. If there is a conflict between them then there has to be a mechanism for resolution of that.

MR FERGUSON:

And I think – the point, I understand the point and I think there are a couple of things to be said about that and I think the first is that –

ELIAS CJ:

I'm sorry, that's subject to whether the respondents are correct in the contention that it's always only for the executor to determine matters which, I must say, I'm not sure that the cases support because –

MR FERGUSON:

No.

ELIAS CJ:

– because there are authorities saying that whoever has possession has the duty to bury. So I think that a really absolutist approach like that is not necessarily the common law of New Zealand in any event.

MR FERGUSON:

No, and there are shades of colours and glosses that various jurisdictions put on that quasi-property right, if it's called that –

ELIAS CJ:

Yes, it's a pretty horrible notion, isn't it?

MR FERGUSON:

Yes.

ELIAS CJ:

But there may be colour of right issues about standing to bury.

MR FERGUSON:

Well I think, yes. The point when I was coming back to in terms of, you know, the need, the need for this ultimate decision to be made. The issue is our submission would be that the collective tikanga based process provides for that, albeit that there isn't unanimity just as, with all due respect, if this Court is dealing with matters it can rule by majority and that's not unanimity either but if that's the ultimate arbiter that's valid. Why –

TIPPING J:

But what is –

MR FERGUSON:

I'm just –

ELIAS CJ:

A majority determination is not what your experts say tikanga is so –

MR FERGUSON:

Well they're saying that their – they say that will and influence will ultimately succeed and that might be moral or whatever. I'm being simplistic in saying well that means that something occurs whether the will of some overcomes all of others. Now that, it might end up in acquiescence, that's not consent, it's not consensus, it's not unanimity –

TIPPING J:

You mean you wear the other side down, putting it rather bluntly, Mr Ferguson, does it mean that?

MR FERGUSON:

No I –

WILLIAM YOUNG J:

Because it's also okay just to take the body anyway.

MR FERGUSON:

No, no –

WILLIAM YOUNG J:

But I mean, but that's – isn't that the thrust of it? That there wasn't consent, the body was taken and that's still in accordance with tikanga?

MR FERGUSON:

Well I think in the particular circumstances of this case the view in relation to that and one can say in hindsight whether from the perspective of the Takamore whānau from the Bay of Plenty, the discussions were had around this, that was debated at length. Matters were effectively adjourned, so the discussion ended. The first respondent and her immediate family left. The discussion was intended, or they wished it to continue the next day. It's accepted that a phone call was made by Mr Takamore's mother to the first respondent asking her to come back. We find out in evidence afterwards that she felt that she couldn't do so without support and that's her evidence before the Court, and she felt intimidated by that.

Looking at it, certainly at the other ones, the family are there having had that discussion, knowing the debate, waiting for her return. They wait several hours throughout the course of the morning, she doesn't return and they have taken that, essentially, as the will and influence that here we have is acquiescence, and things were very heated and tense and there were various things said the previous day about that and those that were advocating and supporting Ms Clarke and to Mr Manuel, etcetera. They were there and she accepts under cross-examination they were arguing her case for her that previous day. They are there that next

morning and they agree that in the circumstances the family should take Mr Takamore.

And so I think it's a –

ELIAS CJ:

That's why I wonder whether the notion of standing to achieve burial plus notions of colour of right maybe quite helpful in a case such as this, which is not necessarily to say that what was done was right or wrong but just to say that it's understandable in its own terms as legitimate. Not to say that the Court should give effect to it but to ignore what's behind it.

MR FERGUSON:

And also Ma'am and this isn't a position of the appellant in this regard, that with hindsight one could always look back on all of this and say well, maybe if we'd done this differently or, you know, if we'd waited around some more and we had had – would it have changed the outcome and the answer may well be yes, it may well be no. We don't know. Mediation subsequently failed and that had its own reasons for that and the Court doesn't need to be troubled by that but essentially, we're in a position where the bottom line and my friend can correct me, the bottom line for the first respondent is that disinterment needs to occur and what we're prepared to talk about is the terms upon which that happens. So we're necessarily in the position of –

TIPPING J:

Well we've got two problems here. We've got the wider one –

MR FERGUSON:

Mmm.

TIPPING J:

– the precedent that this case sets and we've got the resolution of the circumstances –

MR FERGUSON:

Particular case, mmm.

TIPPING J:

– of this case and both are very important but we've got –

MR FERGUSON:

Yes –

TIPPING J:

– to keep them –

MR FERGUSON:

– and while we are trying to focus on this case, you know, those – it's hard to draw lines around where the influence of this is –

TIPPING J:

Yes but I think we may have to go – may have to go a different way in relation to the future –

MR FERGUSON:

Mmm.

TIPPING J:

– as may have to be the position in this case. I'm just saying that as a possibility –

MR FERGUSON:

That's right and I think –

TIPPING J:

– and it's more for the future I thought, we were looking at the moment because, as the Chief Justice said, we'll come on to the difficulties of the present situation later.

MR FERGUSON:

And I think it's useful, I mean, if we focus for a moment on the future and at the moment the position, we've got the Court of Appeal's majority decision in relation to that and I think if one's looking to the future what that does, while through one view would say well, it's through the orthodox approach with the right of the executor having the ultimate decision-making power but with a procedural gloss of having to engage with the whānau pani and in fact the Court of Appeal goes so far as to, I might suggest and it's little bit, whether this is truly their intention, that essentially the

executor conducts that process, convenes the whānau pani together and essentially runs that process which is a troubling concept in itself in many respects.

Alternatively, is there a tikanga whānau pani conversation that goes on and they then make their decision in accordance with tikanga and while not cognoscible according to the Court of Appeal, that then is the fact or the information that then is loaded into the executor's discretion and he or she weighs that up against other things, be it statements in the will by the decease, views of other family members that are in the minority of that because they sit in both camps.

I think in this case, the difficulty with what the Court of Appeal grapples with and it's that overlay of not only to the future but looking here is that the first respondent sits in – has three hats, not two in this case. First, as the widow she has that personal relationship with the deceased and a view that is imbued with that relationship and her personal values and feelings which are acknowledged. Secondly, there was a little bit of confusion around this but the position, certainly from the appellant's point of view, is that to the extent it was taken at some point in this case that Pākehā members of a family are not part of the bereaved whānau grouping, that's not the appellant's position.

So then you have the whānau pani, this bereaved extended family, of which the first respondent is a member and fully entitled to participate in. Now that needs to obviously be facilitated in appropriate ways, if there are language barriers and others but again, that would be part of the tikanga as well.

Then thirdly, the first respondent is the executor and therefore has that legal fiduciary-like role. Now those three hats all exist and in the Court of Appeal's process arguably you sit in all three – Ms Clarke would have sat in all three camps.

ELIAS CJ:

But if she doesn't want to be part of it –

MR FERGUSON:

– oh, she doesn't want, she doesn't have to.

ELIAS CJ:

And it occurs to me that really looking at it as a matter of abstraction to begin with before getting more into the circumstances, the same sort of dispute may arise without any cross-cultural dimension and –

MR FERGUSON:

And that is –

ELIAS CJ:

– indeed in some of the cases we've got that has happened where there had been disputes within the family as to whether somebody should be buried and, you know, according to some religious rights or others, or cremated or all of those things, so the approach we're being asked to adopt here has huge ramifications for everyone. If we decide that only the executor can decide and that there is no access to the Court for determination in cases where there's an impasse that has implications for the whole community. Similarly with the Court of Appeal's decision that the custom was unlawful because it was unreasonable. I'm not sure quite where they draw the lines around the custom but it does have implications for people living wholly within tikanga perhaps, so we have to be very careful here about the penumbra. And if in the case of a dispute between family members about burial the only possible mechanism is resolution by the Court, why would that not be the case where there's a cross-cultural dispute where one party doesn't want matters resolved within tikanga?

MR FERGUSON:

Well, I suppose the issue would then come down to what is the criteria in context within which the Court, if the Court had that role, would judge it?

WILLIAM YOUNG J:

Well, in cases on that note –

MR FERGUSON:

So what's the status of the tikanga relative to the status of – because it's who are the parties I suppose in a sense, because this case from a legal perspective is an issue of legal rights being asserted by both parties, on that one part by the collective whānau grouping that says they are operating under this legally cognoscible tikanga in their view and the other we have the executor saying, "Is this right?". It's not a contest in terms of the legal rights, at the moment anyway, between wife and mother,

between son and daughter and brother and sister of the deceased, which are the personal relationships, you know. They imbue the broader context but that's not the contest that this Court has to grapple with as a matter of law.

So if one then looks forward to a situation where a Court might be asked to arbitrate on that, are they arbitrating between the legal tension between executor and collective whānau or between the personal tension between widow, son, mother, brother and sisters and those are quite different things, with all due respect, in terms of the lens and the approach that one takes and I say that because the Court of Appeal, if one takes that as their approach, whilst saying there's an obligation to take into account when the reason the tikanga if one, to use the language your Honour respectfully used, the tikanga didn't work, that is, we didn't have a consensus decision coming out of there is because the widow and her son did not agree. If they had agreed, we would have –

WILLIAM YOUNG J:

Well, it's the other way round though because it's equally because your clients didn't agree. You can't really say everyone agreed except the respondent –

MR FERGUSON:

Well, it depends, again, if you're looking at a collective decision, yes, okay, the broader – there wasn't, but we're not in a situation, I mean, for instance looking at, we would say in that situation the parties, you know, within the collective there wasn't agreement, we would say therefore, the collective process which we say comes to an agreement even if everyone doesn't like it and even if it involves ultimately someone who can acquiesce or feeling as a result of whatever strengths around that discussion that there's nowhere further for them to go that they have to accede to that – without consent, that's an outcome. Is any different from in the case of the Court of Appeal where they say that Ms Clarke and her son didn't agree and therefore, she's able to step back out of that discussion, put on her executor hat and now she's the sole arbiter. That's the, you know, there's a huge problem, with all due respect, in relation to that outcome.

WILLIAM YOUNG J:

But that is basically, not absolutely, but that is basically what would happen in any other dispute about what's going to happen to a body. At the end of the day, in 99 times out of 100, 999 times out of 1000 they'll agree but if there isn't an agreement

it's for the executor and then in behind that there's a default option, there's an ultimate option of going to the Court?

MR FERGUSON:

Well, going to the Court, that's a – so you've got the executor and then going to the Court –

WILLIAM YOUNG J:

But leaving aside the particular element this case raises, the, it's pretty hard to challenge an executor's decision about disposal of body.

MR FERGUSON:

Well, yes, and my point is in this case and it could be different in other cases, in this case, with all due respect, the executor has a fundamental conflict.

WILLIAM YOUNG J:

Well, yes, but I don't think that would normally be the problem. If someone appoints an executor because he or she thinks the executor will conform to his or her religious views, you can't really expect other members of the family to say, well, isn't it terrible that the deceased is being buried in accordance with the religious wishes of the person nominated to make the decision, but the normal rule is that it's got to be an unreasonable decision of an executor before the Court will intervene isn't it?

MR FERGUSON:

Well, it's a bit unclear I think –

ELIAS CJ:

Well, I suppose that's an issue –

WILLIAM YOUNG J:

That's the normal –

ELIAS CJ:

– that's an issue in the case.

MR FERGUSON:

I think, I think it's –

McGRATH J:

Well, it is because the Court of Appeal actually put around its decision an indication of mandatory considerations that is of that time –

MR FERGUSON:

That's right and if you look at the Court of Appeal in *Tapora v Tapora* (CA 206/96, 28 August 1996) for example, very stark, no, it's just the executor. There's no context around that in terms of glosses or reasonableness or otherwise.

McGRATH J:

But that was very different to the Court of Appeal majorities view here, wasn't it? I mean, in the case you're referring to the Court of Appeal really said, "Well, you've got to recall probate and get yourself appointed executor in effect," but if we sort of start from a premise both sides may put them that way, before having to disclose their characteristics totally, have authority in the normal course to make arrangements for disposition of the body. If there is an agreement it doesn't matter which of the two sides say … you'd then have a situation where you say but agreement can be as a result of, in the end, acceptance of a point of view, well, we understand that. Unanimity can at times reflect that sort of compromise, but in the end if that doesn't work, you need a decision-making mechanism. You've got the executor and you can have the executor either with a very wide discretion or we could say that in New Zealand, no, the executor has a discretion but must take into account certain matters, including important cultural matters or something of that kind, but you do need a mechanism to break the disagreement of two people who have authority in the normal course to make decisions where there's agreement being unable to do so if there's no agreement.

ELIAS CJ:

Or there may be a third option that the executor in the common law of New Zealand doesn't have the right to make the determination but only a prima facie right which can be then taken to the Court, because that I think on the authorities is an option too.

TIPPING J:

I think that might have been inherent that the executor has no absolute right, yes, but if, because if an executor has an absolute right, well, then that's the end of the matter and I'm not sure that I would be attracted to that.

McGRATH J:

I think we're more in the realms, aren't we, that the executor perhaps has generally been understood as having a very wide discretion and I don't think it's ever been understood to be absolute, but you could then have certain factors influencing the discretion, perhaps narrowing the discretion, but it looks to me as though that's the sort of area we should be examining to try and find the principles on which both views in this case can be properly accommodated.

TIPPING J:

Well, the Court in *Dodds* said the view of the executors having further rights shouldn't be elevated to a rigid principle of law, which applies that the executor has to weigh up a variety of factors and ultimately if there's a challenge to the Court. I can't see anyone else being able to do it under the rule of law than ultimately the Court. That's my fundamental problem.

MR FERGUSON:

I suppose if I put the contrary, not the contrary proposition but a different perspective on that because the focus is very much here on and it's all about starting points, and to get to where you –

TIPPING J:

It's not really about starting points, it's about finishing points.

MR FERGUSON:

The starting point from which you begin the journey that ends where you say it ends, Sir.

TIPPING J:

Yes, the starting point is important, yes.

MR FERGUSON:

And, with all due respect, and this is a fundamental proposition for the appellant, the starting point in New Zealand is a starting point and so in this conversation that we have been having, if I may call it a conversation, we focus or your Honours are focusing on looking at the executor, viewing that as having, because it understandably is viewed with orthodoxy, it's a legal position, it's recognisable by the English common law and looking at that, and in terms of that legal decision-maker

let's look at what principles around process and consideration are needed to be put in there to make it a safe decision that better reflects all of the interests.

Can I equally say, if one focuses on the starting point in New Zealand as the customary law and that that continues, and that the executor law in relation to executors in that common law only gets introduced to the extent it's not inconsistent. We're talking there about, in our submission, a legal right and then there's a question about the manner in which that legal right is exercised by the whānau collective and, with all due respect, one also needs to if one is going to grapple with, because of the executor, should be grappling with whether in terms of the exercise of that right there are procedural issues of reasonableness and consideration and other things that should be attached to that in terms of moving forward. It's not, with all due respect, it would be sad if the focus became on the executor as the status quo when equally there's another view that this is the status quo and it's a question of modifying that.

TIPPING J:

I'm not looking at the status quo. I'm looking at what you're proposing, but with a means of resolving the issue of unanimity can't be achieved. But I don't think I'm captured by the executor. I might be in the end but at the moment I'm looking at it from your point of view in saying, how do we resolve it if there's an absolute standoff?

BLANCHARD J:

I think it was said a while ago that the side with greater moral authority prevails according to the tikanga. The problem is how do you determine which side had greater moral authority because if there's a dispute, each party is likely to say, "We have the greater moral case," and I think it would be difficult for a Court to accept that one party in that situation can simply say, "We judge ourselves to have the greater moral authority and therefore, we are going to proceed with the burial in the way that we think it should happen."

MR FERGUSON:

Although, with respect, while it didn't happen because of the events, that's essentially the approach that the first respondent was taking albeit saying that the moral authority is, and is backed up by legal authority in that case.

TIPPING J:

But they shouldn't have all this way either. It worked both ways.

MR FERGUSON:

Well, with respect, I think on the Court of Appeal's judgment it doesn't work both ways –

TIPPING J:

I know that, I'm not worried about the Court of Appeal's judgment, I'm just thinking about it for myself and I agree with my brother Blanchard that ultimately whatever the test is, moral authority, whatever it is, surely there has to be an external arbiter –

MR FERGUSON:

Well ...

TIPPING J:

– otherwise it is tantamount to saying he with the greatest force, literally will window and I don't shirk from saying that.

MR FERGUSON:

Well, I think that comes down to the same fundamental proposition that, as you say, your Honour doesn't shirk from saying that but if you're saying, well, force could be used to cause the outcome, the appellant's position is that that would not be reasonable. That would not be a valid exercise of the tikanga.

WILLIAM YOUNG J:

But they do say that taking a body by stealth might be, don't they? I thought that was implicit in the expert evidence.

MR FERGUSON:

That's the, describing the nature of the engagement. I don't think it's expressed in as stark terms as to say that, you know, wait till – and this, certainly it's not there that it would be done under, you know, cloak and dagger in that case, you know, there is reference to stealth and cunning and in a tikanga sense when one's viewing that, I mean, that's what –

ELIAS CJ:

Well, it's –

MR FERGUSON:

– oratory whaikorero and all of that's all part and parcel of that, and I think if I can get to a related point, the difficulty with the situation where, which your Honours are grappling with and where one I think there needs to be extraordinary caution is, and it is that interface between the facts of this case and what that represents and what the effect, whether intended or not, but what is the effect of that on the broader exercise of this tikanga, which as I say, occurs on a daily basis and –

TIPPING J:

Well, if you're right that this is the first time that there's been a dispute in living memory and it's not very likely, they'll be many disputes in the future.

MR FERGUSON:

Well, with –

ELIAS CJ:

Well, most disputes are intracultural rather than intercultural and I must say reading the evidence I was left with an overwhelming feeling of sadness that nearly 200 years on there's such misunderstanding about the different cultural practices in our community. But I wondered whether, I don't think, I think this is still on the same point, I just wondered whether if we looked at paragraph 20 of Justice Fogarty's decision whether he's really stating the tension or conflict accurately there, because he says it's a tension between the executor's prima facie duty to provide appropriately and the customary practice or tikanga whereby the tūpāpaku is returned to the deceased's home. Now, I don't read your expert evidence as saying that that is the inevitable outcome.

It seems to me that the antithesis in this case is between the executor's prime facie duty, which I think perhaps is probably quite an accurate way of putting it and the whānau pani's authority to equally to provide for burial and then, but then you're left with two claims and ultimately if it's not resolved intraculturally, it will have to be resolved by some lawful authority and the only potential lawful authority I can see is the High Court.

MR FERGUSON:

As matters currently stand.

ELIAS CJ:

As matters currently stand. I mean, I'd look to see whether there's any statutory authority that might be exercised, but I don't think there is. I mean –

MR FERGUSON:

No, there's not and if I could make three points slightly different. I think in relation to paragraph 20, I think the tension or conflict in this case that it's talking about there is the fact that, sorry, the customary practice tikanga whereby tūpāpaku in this case has been returned so that's why, so it's been exercised and it has been returned as opposed to –

ELIAS CJ:

Well, but that's the subsequent issue that we still have yet to open up.

MR FERGUSON:

Yes, but I think, I mean, as I wrote, as it's my paragraph that he's cited essentially –

ELIAS CJ:

Well, you're responsible for it going off on a wrong track.

MR FERGUSON:

It was talking about that was the underlying tension that sits in behind it of the, you know, there's a view that this is what should occur and that's what should occur, I'm not saying that necessarily –

ELIAS CJ:

I see.

MR FERGUSON:

– where it must sit.

ELIAS CJ:

Yes.

MR FERGUSON:

One then has to explore exactly what we're exploring. So that was the first point.

The second point, and I say this quite vehemently is that as with all due respect, as soon as you introduce into a tikanga process, and let's put to one side the intercultural concept. If we're talking about that this would apply to Māori into, say, disputes as well. So whether there is an agreement through the tikanga process which the experts would say, which is impossible, there would be an outcome. Now, whether one calls that agreement is a different matter but as soon as you put place into that or over that or behind that, the notion that if there is no agreement here the Court is the arbiter then the whole exercise, with all due respect, the whole exercise that that tikanga changes immediately.

ELIAS CJ:

Well I totally accept that and if it's within tikanga it stays within tikanga but if it's not, because one of the parties with a legitimate interest does not want to participate in that process and is asserting prima facie rights, surely – and that's a claim of legal right, surely the only arbiter available then is the Court. That's not to say that tikanga is determined by the Court.

MR FERGUSON:

And I think where we – if one's looking at the notion of reasonableness and not the reasonableness the Court of Appeal talks about, but the reasonableness of parties' positions and therefore the reasonableness of an ultimate decision maker, I think whether that's the Court, whether it's the executor or whether it's the whānau collective in the course of a tikanga, there's notions of reasonableness in that, then it's not only, with all due respect, and I think tikanga relies on this too. It's not only the reasonableness of the majority or the decision maker it's the reasonableness of the parties and their position and how they engage as well.

ELIAS CJ:

Well that's the sort of thing that Courts have to deal with every day.

MR FERGUSON:

That should – oh, precisely but again, hypothetically looking forward if one was to say there is a Court, Court as an arbiter, that should be, with all due respect, a fundamental factor that the Court is able to look at about the reasonableness of the positions of the parties dealing with the facts in question.

ELIAS CJ:

Well that's why I thought the *Dodds* case was useful because the Court did conscientiously grapple with that and it says some quite wise things about the inadequacy of Court processes after the event in working out where people's cultural affinity was, matters like that which I would have thought had resonance in this case.

MR FERGUSON:

Now this – of course this whole area is one where when one reads through the decisions and quite understandably, I mean the issues are fraught, highly emotionally charged and the Courts in many cases, you can hear their exasperation with having to actually deal with these issues.

TIPPING J:

Mr Ferguson, a moment ago I understood you to be hinting that if the Court was the ultimate arbiter it would alter the dynamics of the tikanga process because one side would have the ability to say –

MR FERGUSON:

Just no – yeah.

TIPPING J:

– going off – no, that I rather thought was what you were suggesting –

MR FERGUSON:

Yes.

TIPPING J:

– but, and are you saying that that's going to, in effect, defeat the tikanga process to have the Court standing there as an ultimate arbiter –

MR FERGUSON:

Precisely.

TIPPING J:

– because if so I would like to know a little bit more about why you say that?

MR FERGUSON:

Well because the parties aren't engaged in a –if the parties know that this is the process that needs to occur, it's the tikanga process. Now putting to one side the issues about if there are misunderstandings or if someone doesn't understand how the process will work or what will be involved, let's assume one can address all of those issues and that the parties understand the process at the beginning, so we're talking in the hypothetical, understand the process in the beginning and know what's involved, if one of those clear understandings at the beginning is that, well if we don't agree in this then we can go to Court, then essentially at best it's a mediation or a negotiation and little more than that. There isn't – because when one looks at the tikanga and this is the point –

TIPPING J:

Whose interests would that damage?

MR FERGUSON:

The –

TIPPING J:

Whose interests would that concern damage? The stronger party?

MR FERGUSON:

Well I think that's the difficulty with view – look, to be frank, the interests that that damages is the interest of the tikanga itself.

ELIAS CJ:

Mmm.

TIPPING J:

Well I can –

MR FERGUSON:

It's not a – the tikanga isn't a – while the process looks, goes through this and there's the interchange and the will and influence and Your Honour may wish to express that as the stronger party through a range of –

McGRATH J:

You're really saying it damages the ability of tikanga to get –

MR FERGUSON:

To operate to –

McGRATH J:

– consensus, is that what you're saying?

MR FERGUSON:

– to get consensus, or to get the outcome because tikanga isn't a process that – and this is the point that I was going to get earlier, when one reads the evidence, it's quite clear by both Professor Temara and Mr Kruger that the tikanga process doesn't end with this decision about where the burial is. Where that decision occurs and there are people within the whānau who are unhappy with that, i.e. the very question of lack of unanimity or agreement in that sense, then the tikanga recognises that and must atone for that and it must resolve that and that may take weeks, months, years –

ELIAS CJ:

Well it may take a generation –

MR FERGUSON:

It may take a –

WILLIAM YOUNG J:

But it may never resolve because the –

MR FERGUSON:

Well the experts' view is it will.

WILLIAM YOUNG J:

But it hasn't here and there's no occasion to think that it would.

MR FERGUSON:

Well, with all due respect, these are intergenerational issues ultimately and –

WILLIAM YOUNG J:

Well in terms of solving it within the lifetimes of the immediate participants.

MR FERGUSON:

Well precisely but tikanga is not confined to one's lifetime and the fact the whole notion of tangihanga and these customs reflects the fact that death is life in Māori society and that the dead are there with you and are acknowledged every day in every respect of life.

ELIAS CJ:

Oh yes and this is not just about the immediate generations involved, it's about the generations to come –

MR FERGUSON:

To come –

ELIAS CJ:

– but one can readily accept that but what we are talking about here is a conflict and it is right to think of it in part as a conflict of laws, although it's not law, it's different cultural contexts and of course one would not want the Court deciding what is tikanga, that would be quite wrong but these conflicts are about whether people do wish to be within or without tikanga, may well be more frequent in the future for the reasons that one of the witnesses, I don't know whether it was Mr Temara or Mr Kruger, said in terms of the discussion about urban Māori, of which this may in a way be a harbinger.

So we do need to have some understanding about how that conflict, not to determine what tikanga is but how to determine when tikanga must not apply, is to be resolved.

MR FERGUSON:

Well I think, I'm not sure that it, with respect, oh well – not where it doesn't – where it shouldn't apply or perhaps –

ELIAS CJ:

Well it doesn't apply in law –

MR FERGUSON:

– where it should, or where –

ELIAS CJ:

– where the law won't give to effect to it –

MR FERGUSON:

– or perhaps the issue is where – or to counter that, where tikanga should apply in law, sorry to –

ELIAS CJ:

Yes, yes.

MR FERGUSON:

Perhaps I could just make a comment in relation to that which was with me a second ago and if you just bear with me for a second. In relation to this notion of people who don't want to be in the tikanga, there's obviously an issue there, well who are we talking about? Are we talking about the deceased which is where Justice Fogarty went and where the Court of Appeal disagreed on the facts and we would say the Court of Appeal was right in that regard –

TIPPING J:

Well two members and for me, I don't want to get into this at the moment but I just signal I think that is on the table if we have to go there.

MR FERGUSON:

The issue of – that factual finding?

TIPPING J:

Yes, because we have two Judges at the moment saying one thing and two saying another. It's not concurrent finding. But park that, park that Mr Ferguson.

MR FERGUSON:

Yes, no I will reflect on that Sir having regard to the – and I appreciate the ground on which leave was granted, it was fairly broad but it was on my grounds of appeal and there isn't a cross-appeal on that point.

WILLIAM YOUNG J:

There doesn't have to be a cross-appeal.

MR FERGUSON:

No I take the point but I'll just, all I say is I will reflect on it Sir.

TIPPING J:

I wouldn't want you to be misled.

MR FERGUSON:

No because that opens up an entirely thing, it isn't addressed at all in the submissions.

TIPPING J:

Well just park it, Mr Ferguson, for the moment.

MR FERGUSON:

No I appreciate that Sir. Or whether, are we talking about the widow being, the Pākehā being able to opt out or, you know, who is it that doesn't want to be subject to the tikanga.

ELIAS CJ:

Well surely the whole context has to be looked at and it will include the future generations as well as the immediate people and the people who have been here before heads the whole world view.

MR FERGUSON:

But in terms –

ELIAS CJ:

But isn't that what the sort of thing that was considered in *Dodds.* They did look at those things, they did worry about the extent to which what was, how people were behaving reflected their overall identification and matters such as that. It's just a multi-factual inquiry.

MR FERGUSON:

Yes, yes, it's a –

TIPPING J:

What would your position have been if in the will the deceased had said, “I direct my body be buried in the Ruru Lawn or whether it might be.”

MR FERGUSON:

In the urupā?

TIPPING J:

No in Christchurch. No, would the tikanga still have applied in that situation?

MR FERGUSON:

I think we're going to talk past each other on this. The tikanga is a process –

ELIAS CJ:

It is a process, yes.

TIPPING J:

Yes, yes I understand that but it's a process that –

MR FERGUSON:

The outcome –

TIPPING J:

– designed to lead to an outcome.

MR FERGUSON:

No, with respect, not –

TIPPING J:

It's not just going through the process –

ELIAS CJ:

Not one outcome.

MR FERGUSON:

Not one outcome though.

TIPPING J:

Not necessarily one outcome –

MR FERGUSON:

So if that was another factor that would go dropped into the tikanga conversation –

TIPPING J:

Yes.

MR FERGUSON:

– then it may or may not have had an impact. One can't hypothesise about that. Equally if the son Jamie, with all due respect, had taken a different view from his mother then that conversation would have been in different context.

Every single relevant fact, and I think the experts are clear on this, goes into the mix and including this urbanisation and the increasing –

TIPPING J:

But it would simply have been part of the discussion, it would have been a factor.

ELIAS CJ:

It would have been a factor.

MR FERGUSON:

And the experts will agree that in many cases, but depending on the circumstances and what the broader discussion is, that has resulted in the decision being made not to bury a deceased in the urupā. So this isn't a – this is all about, this is the outcome and we're just going through this, you know, façade or a process because of a predetermined outcome.

WILLIAM YOUNG J:

I thought that, what I thought they – it was accepted that it was a factor, I'd rather had the impression that it wasn't seen as a very big factor.

MR FERGUSON:

No, I would disagree with that, with respect Sir. I think – it was acknowledged that in many cases – in cases that the fact that somebody has led that life and done those

things had been taken into account and has led in cases to people being buried other than in their marae. So, and there are numerous cases of that, that exist.

TIPPING J:

But it all comes back in the end, doesn't it, to how to resolve an impasse.

MR FERGUSON:

Well that's right but – and the difficulty I suppose when one converts this through into the notions of a European legal system as we're used to. So more used to dealing with in many respects and when one talks about, well you take into account these and take into account those, a bit like a statutory decision maker or in here a case somebody with a legal duty, be it the Court or be it that that –

TIPPING J:

Can you propose any better solution than the Court if an impasse is reached in this context?

MR FERGUSON:

Well I think, in my view, the outcome in this case is better than that for two reasons, (a), there may well be – I will move on to a possible other approach which I don't think is within any of our ability to deliver but because the acknowledgement by the experts and by the appellants that this, this family, Mr Takamore's son and daughter are Tūhoe and they will be always be Tūhoe, and there is an obligation to them and therefore, there is an obligation because of what has occurred to continue to address and look to redress that over time and over generations, and beyond the passing of the first respondent, beyond the passing of the appellant or her mother, Nehu, that those matters are in the firmament of the tikanga and the whānau that exist.

With all due respect, a decision by a Court as a win, loss, costs, entrenched intractable, there's no resolution from that. There's a resolution in a sense, there's a decision but is there a resolution to the problem where all really that underpins us that we're trying to solve and if we look at where we're struggling in many aspects of the law, in criminal justice, in family disputes of many other kinds, with notions of restorative justice and conciliation and counselling, and all of those things, all of those instruments are there and there is greater move towards those ahead of here's the arbitration, here's the arbiter, here's the half decision. The tikanga is about that. That's what's it's trying to grapple with.

ELIAS CJ:

But we're dealing with the wife and son who were not equipped to participate. Now, I'm not –

MR FERGUSON:

Yes, well, my –

ELIAS CJ:

– but they didn't know that the shouldn't have left Mr Takamore alone. They didn't know, they –

MR FERGUSON:

Well, I'm not sure, well, I don't know if we've got that expressed statement in evidence, Ma'am, with respect.

ELIAS CJ:

Well, all right, but, so where you have that, it seems to me that it's unrealistic to expect matters to be wholly resolved by tikanga, because –

MR FERGUSON:

Well, not immediately, Ma'am, not immediately, no.

McGRATH J:

But your answer to Justice Tipping's question is a better process for the ultimate decision in a case of disagreements being by the Court is to say that tikanga is the better process –

MR FERGUSON:

Yes.

McGRATH J:

– because tikanga does take account of the views of those who prefer the matter, the deceased to be buried outside of the Māori areas and that it takes account of their views, and they can sometimes prevail and in the end it cannot accommodate Court review, because it's an ultimate authority in itself, and I'm not trying to put words in your mouth, but it's important we understand what you say about tikanga.

MR FERGUSON:

And further than that I would say on the evidence it imposes obligations that ensue beyond the decision and, with respect, the Court cannot compel those of any party in the sense of that restorative long-term process and, you know, I don't know what will be the situation, but in a generation's time when, as I say, Mr Takamore's mother has passed, if Ms Clarke has passed, is it, would it be a different conversation that those future generations are having about all of this and where they all sit? Possibly, one can't guarantee that.

McGRATH J:

Yes, but you're coming back into the merits of it but you don't shrink, do you, from your basic proposition –

MR FERGUSON:

I don't, no. No, I –

McGRATH J:

– that tikanga is an ultimate process and it cannot accommodation judicial review or decision altering it?

MR FERGUSON:

In that sense, yes, Sir, yes. That inserting that is the arbiter above that I think changes the entire process.

McGRATH J:

Which probably brings us back, if you like, to the way this case has been approached which is saying that tikanga is a matter of Māori custom, is a matter of customary law, it should be allowed to continue to exist and the way it's worked in the Tūhoe area without the common law or as Chambers J put it, the pure or perhaps unadulterated, whatever you want to call it, common law is getting in the way and that the authorities that recognise custom can exist in an area and common law should accommodate it, should have cognisance of it, they should allow tikanga to be recognised to the full extent. I think you're putting your argument in the end in that way. You're also helping us by explaining the merits of tikanga, but you don't shrink from putting it in that way.

MR FERGUSON:

I don't shrink from that, but I'm trying to be as helpful as I possibly can with those other factors that Your Honours are all grappling with but, no, with respect, I think there is a lot that tikanga offers in so many ways that aren't necessarily apparent from the outside looking in that respect but this is hugely difficult, there's no two ways about that in this case and you do have a situation where the close family in Christchurch are aggrieved with the decision and I still think there's an issue as to – and it might be relevant or irrelevant, as to whether that's the standing of the executor or the standing of the widow, is able to advance that issue and I think the conversation we're having is actually about the standing of the widow, we've put the executor to one side in that respect, in the conversation we've been having about where there is not agreement there needs to be – and one party is dissatisfied, that there needs to be an ability to resolve that, the parties there, you would be talking about the individual family members, not the tikanga collective which we would say incorporates all of them anyway, or the executor, they aren't the parties in that scenario because the dispute is the personal issue about what should happen with him, not the fight after legal right in that respect.

One is talking about the precise factual matrix that sits in and around that tikanga and the circumstances of Mr Takamore in this case are life and death and relationships.

ELIAS CJ:

We've interrupted you a great deal. I wonder whether you might indicate to us how you would like now to take your agreement, what structure, what order you want to address us.

MR FERGUSON:

It's a very fair question.

ELIAS CJ:

You might like to –

MR FERGUSON:

I think we have been somewhat – we've probably traversed a whole range of things in part in relation to that –

ELIAS CJ:

Yes. It will be necessary for you to address both the common law position of the executor I think and also the question of whether events have been overtaken, as I think is your submission, by the fact of burial. I'm surprised no one has referred to the Burial and Cremation Act in this context but –

MR FERGUSON:

Well I think it was –

ELIAS CJ:

– the exhumation has been – the licence has been authorised under that. I have a query as to whether the cases support the view that after burial the executor continues to have any right outside that statutory regime –

MR FERGUSON:

Yes, the issue of the disinterment licence hasn't been the focus –

ELIAS CJ:

No.

MR FERGUSON:

– of any substantive discussion at all in the two lower Courts and it's – and I'm just trying to reflect on why that is and I think there was always a sense I think from Justice Fogarty's view where, how he deals with it, that that was almost severed off as a remedy issue rather than a issue of substance and I'm not sure if it is – there are such pure lines in relation to that but I saw that issue and the issue note about the ongoing role of the executor, if any, post-burial as being part of ground two, as it were, of the lever that was encapsulated –

ELIAS CJ:

Yes, yes.

MR FERGUSON:

– within that. I wasn't sure, in my submissions, stopped short of going into the remedy issue but are your Honours wanting to discuss that as well?

ELIAS CJ:

Well it may be necessary because Justice Chambers felt that he should give some indication of possible remedy.

MR FERGUSON:

I think it's not in dis – I don't think there's any difficulty in advising –

ELIAS CJ:

But there is to be, on the Court of Appeal outcome, a remedies hearing in the High Court.

MR FERGUSON:

Yes, there's an extent – this is the point I was just about to mention, my friend can clarify any of the detail but there is an extent application before the High Court in Christchurch. There might be issues around – we might have issues between us around the form of that but it was filed as an ex-parte application for remedies which I'm not quite sure is what the Court of Appeal contemplated but I was served on a perhaps, was it a Pickwick basis or shortly thereafter, so I don't think it truly is ex-parte, that seeks various remedy orders in that regard. Now, that's not in the bundle

ELIAS CJ:

Well the –

MR FERGUSON:

– but if your Honours would like that documentation –

ELIAS CJ:

Well I had, perhaps mistakenly, had the impression that the whole proceedings were being returned to the High Court for consideration of remedy because that had not been addressed.

MR FERGUSON:

Well that would have been my – there would have been two options essentially Ma'am, or three options. One, we have appealed so we're dealing with this matter but putting that to one side, the parties would either reach an agreement or it would need to be dealt with by the High Court. The process has resulted in an indication from the solicitor for the first respondent, towards the end of last year, that unless there was a change of position on my clients' part, don't need to go into the details of

that, that they would be applying to the High Court for remedies. I would have thought that would be bringing – asking to have the remedies hearing brought on –

ELIAS CJ:

Well the only remedy that's sought against your clients that's alive, it seems to me, is the non-interference order?

MR FERGUSON:

That's right Ma'am.

WILLIAM YOUNG J:

If you lose the case do your clients want to interfere? If you lose this appeal, is there any need for the remedy because would your clients which to interfere with exhumation?

MR FERGUSON:

(a) I don't know – I can't answer the question through knowledge Sir. If the – but you're saying if the Court rules against them on this, in the absence of remedies, then they – let's put it this way. Would my clients have an interest in being heard on the issue of exhumation, if that's what we're dealing with, then the answer would be yes because –

ELIAS CJ:

But why is there any need for that because all of that surely is covered by the Burial Act licence? I mean, I'm not sure whether that's right or not, or whether there would have to be some joinder –

MR FERGUSON:

Well I think that was the point that had been intimidated by the solicitor for the first respondent in terms of the matters filed in the –

TIPPING J:

Once a body is buried, as I understand it and this is consistent with what the Chief Justice has just been saying, isn't there in effect a statutory code as to how one then deals with questions of exhumation and so on? The fact of burial is what the Act is engaged with and after that, whether the burial was right or wrong. If the burial was

wrongful that might well be a very material fact in the statutory code but isn't that the position? I think we have to look at it –

MR FERGUSON:

Yes, I think we –

TIPPING J:

– because we don't want to set the High Court off on the wrong track.

MR FERGUSON:

No, no and I think – well I think, I mean, the horse hasn't bolted exactly but I think we've got a notion of an appli – there's an application which again is unusual, seeking orders which are different from the orders that are sought here that's extent in the High Court and it –

ELIAS CJ:

Is that application in these proceedings? Well perhaps we'll ask –

MR FERGUSON:

Yes, perhaps my – I'll reflect on that –

ELIAS CJ:

– Mr McCoy about that –

MR FERGUSON:

– by going and looking at the papers, so I can't answer that off the top of my head. It's certainly been viewed as being within this, the broader circumference of the proceeding but whether it's strictly in the proceeding, or as a fresh application and again, whether it needs to join other parties, my friend, I think in his submission, talks about the Commissioner of Police may need to be joined, I'm not sure if to here or to there, or wherever but this is presumably all about the physical act of how one would carry this out but if I can just touch on that just ahead of the break which is probably upon us, is it?

Just briefly, there are obviously two issues. (a) I think, I'm not sure that the Burial and Cremation Act and I will check this for your Honour but I know I looked at it and it's just slipped my mind – focus on your standard public cemetery approach. Here

we've got a private urupā, private land and that may well give rise to slightly different implications but secondly, and probably most importantly, with respect, where this is a case where we are grappling with this interface, where we're grappling with tikanga, where one or other party may be unhappy with wherever we get to on this inevitably I'm afraid, but if we are, if this Court is grappling with all of those things and is trying to find a way through that is appropriately cognisant of all of these factors including the tikanga then there must be and this is in the event that the Court, Your Honours find yourself in this place, there must be within that, a place first and foremost for the opportunity for any exhumation to occur in accordance with the appropriate tikanga that relates to that so, which would, which is noted in the evidence of Professor Temara in that regard that there is another whole tikanga around that that would need to be and, again, to do anything other than that would be hugely problematic.

So there would have to be therefore, a conversation at that point again talking in the hypothetical about what other practicalities around that and is that viable and do those, who would need to be involved in that, are they prepared to or do they not wish to participate in that because they find it abhorrent to have come out of this process as opposed to out of a tikanga process, for example and I'm not pre-determining what those views would be but there's a –

ELIAS CJ:

Sounds very threatening.

MR FERGUSON:

It's very complex and I wouldn't want to hazard a guess to what those conversations would be and –

TIPPING J:

You better just say like to be involved.

MR FERGUSON:

Which is I think the point I was, I started with.

ELIAS CJ:

It would be necessary – I think you've made the point well that it would be necessary for there to be some opportunity to be heard on the manner of exhumation.

MR FERGUSON:

And that's whether it's in this particular case or whether as a result of a more general principle, your Honours might identify a process where if it isn't here, it might happen in the future and in that case what would you have to do because there's a different issue as to what's proper here.

COURT ADJOURNS 11.37 AM

COURT RESUMES: 11.57 AM

MR FERGUSON:

Your Honours, I'd hazard to say I had a clear path forward but I've tried to think through, based on what we've traversed this morning thus far, what might be the most helpful way to advance matters. I think in saying that, we've touched on a lot and we've gone into some detail on a number of those matters and, therefore, it may still be a little fluid in that respect but I was proposing first to touch on the issue raised by His Honour Justice Tipping about, you know, whether there is another option here beyond or related to the Court and I just wanted to offer a reflection on that for what value that might be.

Secondly, I think before moving on to, I think, is probably a more significant body of material that in view of some of those questions just before the break needs a little bit more reflection in terms of, for example, the Burial and Cremations Act and that into relationship with some of those remedies issues. I think there's a series of things that need to be addressed there but I think it's better to leave those off for the moment. I think it is important to just touch back on and address the approach that the Court of Appeal adopted and just look at those factors in terms of both the starting point and then those four tests because while the conversation is kind of, probably delved in and around those, that's certainly the Court of Appeal approach and, again, it's a question of exploring those in a little bit of detail.

As I say, I think we've covered some of that to a degree this morning and I think then there's the issue that, again from Justice Tipping, has indicated is still of interest and live in relation to – and just to make sure I'm clear on that, I'm taking the issue that's live to be the finding of fact by His Honour Justice Fogarty and supported by His Honour Justice Chambers and the minority around Mr Takamore having in fact disassociated himself with it and then following on from that –

TIPPING J:

Well I think those issues may need to be addressed, I'm not saying they will but I think it's desirable that you have the opportunity of addressing them and supporting the majority of the Court of Appeal on that point.

MR FERGUSON:

And I think, if we get to that point, then I think the remainder is in relation to the second ground which has a series of issues in relation to where the rights of the executor start and stop close to burial in that regard.

TIPPING J:

Could we call those post-burial issues?

MR FERGUSON:

Post-burial issues.

TIPPING J:

Sorry to be so clinical.

MR FERGUSON:

Yes, no, I think that's fair enough. The one question I had is, is there a desire to further explore the role of the executor generically, as a matter of common law but for the New Zealand context, or with me, my friend deals with that extensively, I'm not sure whether that's something that – and relies on that.

His starting point – to go back to starting points, to an extent our submissions are very different, not only in what we both say should be the position but also in the manner in which we have approached them and at one blush they've got a potential or a tendency to talk past one another because my friend very much focuses on the rights of the executor first and foremost and then moves on from there, whereas I start at the other end of that spectrum with the rights, we say, in terms of customary law that remain cognoscible unless extinguished or otherwise deemed to be, seen as repugnant, as we would say it and therefore the introduced common law position in relation to the rights of the executor only apply to the extent not inconsistent with that which I think, in itself, opens up quite a breadth of material for where that might sit in the present case, depending on where the Court ultimately ends up in terms of the

nature and extent of the tikanga and any procedural or adjudicatory glosses, or additional steps one might be considering around that, all goes into that mix about how that interfaces with the role of the executor and whether, really what arises out of that is a need for a markedly modified executor role at common law in New Zealand because it really hasn't been grappled with to any great extent.

We've got the kind of glosses here and there but it hasn't been given, to use a crude term, a good hard shake which this interface kind of does bring an opportunity for and to see not only what it is and how it sits against the other but, you know, what aspects of that are appropriate moving forward because, by and large, once one gets to the burial, up the point of burial, it's not – it's still uncodified by and large and so when one goes to the Administration Act and the Wills Act and the Burial and Cremation Act, they don't deal with this right, the burial decision making right and so that hasn't been substituted by statute and if it had in a material way then we would possibly be having a different conversation but there are a range of issues in relation to that that we can deal with in that respect.

So anyway, that's a sketch of where I hope to go and I'll try to do that without losing sight of where I was intending to go to start with and hopefully that will cover the key issues but I might reflect over that at luncheon as well, just to make sure that I have done that.

I think dealing then, if I can, with the first point that I indicated which is the notion of perhaps other options or if one was to have a fresh look at this in a policy setting perhaps, in terms of how one ultimately resolves these issues if the Court finds itself in the situation where it is not satisfied that tikanga is the answer and, again, my first proposition that that is. I think very much one needs to be focused if one is on, as I said earlier, what can facilitate, if I was looking at the tikanga process in its pure sense, what if there are concerns about how that works in a conflict situation in this intercultural setting, what mechanisms are available by way of facilitation and assistance, perhaps in a more removed fashion and I think this is a classic example.

And I just make this observation more generally that it's probably one of an increasing number of issues that has the potential to arise where I suppose the Courts, in their current form, are at, not to take this the wrong way, somewhat of a blunt instrument for dealing with matters that involve both the emotion and the custom that's tied up in these things and, again, because we end up with this winners

and losers type scenario which doesn't necessarily, is that any less or any more satisfactory to be the losing party when the Court adjudicates to being, as one would say, the weaker party, to use his Honour Justice Tipping's – the opposite of his wording within the tikanga decision-making process. Is that any better for the parties in terms of outcome whichever party you happen to be if you're on that side of the fence and I'm not sure whether it does.

But I think there's a stark gap in our legal system in the broader sense, so the legal system including dispute resolution processes. There is still a gap, in my view, in terms of having experts who are able to straddle those cultural and legal matters and that are in a position to act in that environment and that facilitative way which is short of being an adjudicator in a formal judicial setting.

Now certainly there is an ability for Judges in certain cases to facilitate settlement conferences and other matters of that but I think, you know, with respect there's, there is an opportunity there for, or there is a gap there that could usefully be explored in a broader policy setting about what other things can be used or made available within the legal system to facilitate resolution of these things. And one already sees in other areas of dispute when one is dealing with specialist cases that Judges with appropriate skill sets often sit on particular cases involving technical or other matters be they taxation or other issues, and often with lay members that sit alongside the Judiciary for that purpose, and I suppose we are moving slowly to a situation where, you know, there are some members of the bench already that have some of that experience and that understanding across matters of tikanga and Māori culture but also a very firm foundation and grip on the law. And I think it is critical that if one is going to be grappling with these types of issues that those matters are at the fore and where that's not possible that obviously the use of appropriate support through appropriate lay members is fundamental to that. And, in my view, if there is going to be that interception it should focused before going straight to an adjudicatory role to a facilitation and a potential dispute resolution before adjudication because I think once you get to that adjudicatory stage I think, you know, you are at the hard end and I think if this Court is minded to say the tikanga process isn't enough, I think there's an intermediary step there, where some independent facilitation may offer a possible solution to at least the parties to move matters forward and other cases such as this that might arise so –

WILLIAM YOUNG J:

But this isn't an answer to the current situation where there's a dispute, how is it resolved because –

MR FERGUSON:

No, no, no I accept that Sir.

WILLIAM YOUNG J:

No.

MR FERGUSON:

This is the future-looking lens that we were talking about before, this morning, about what other things might be possible if one's looking at –

TIPPING J:

Well I was actually looking for something a little more concrete but I understand your difficulty Mr Ferguson.

MR FERGUSON:

Yes. Well I mean, to be honest, if I – something a little more concrete but within the purview of this Court's powers are two potentially different things. Ideally if one could get for example –

TIPPING J:

Well I was just giving you the opportunity and I think you've exhausted it.

MR FERGUSON:

Yes. I think the additional point, if one is looking at the Court as an adjudicator in cases of this matter, is to I think and again, whether this is within the inherent powers of the Court or needs to be a matter to be considered in terms of empowerment, that the range of remedies that might be contemplated by the Court, particularly beyond the stark issues that address the question of an interment, or a disinterment, would also be important and I haven't taken that thinking through to some examples but, in terms of the relationship between the parties and how there might be aspects of a remedy that might address some of that.

Again, it's not the natural role of the Court particularly when one gets into the High Court and above and in this sense but certainly some of the specialist jurisdictions

Courts have a greater freedom, if one calls it that, to facilitate both in terms of outcomes and in terms of the orders that might be made. So again, that's something in terms of just reflecting upon process.

I think if it's worth returning, if I might, just to get back to where we sit on this. Paragraph 18 of my written submission –

ELIAS CJ:

Mr Ferguson, I should have indicated earlier to counsel, that we're obliged to adjourn at 12.40 pm today for the luncheon break.

MR FERGUSON:

Thank you Ma'am for that indication. In paragraph 18, what I've focused on there is in terms of the decision of the Court of Appeal majority and the approach that they take which they start by referring to the requirements for English custom to recognised and that is the antecedent of the approach of the Courts, one would see it in the colonies and elsewhere, in terms of the recognition of indigenous custom and its intersection against a received or introduced common law and the elements of the test that were looked upon then hark back, an emphasis placed on *The Case of Tanistry* (1608) Dav Ir 28, a case I must admit that I found extraordinarily frustrating in terms of trying to reconcile the references, in most cases to the French text and then the English translations that I was able to find available –

ELIAS CJ:

Well these are cases about local custom –

MR FERGUSON:

That's right.

ELIAS CJ:

– which are different from the sort of custom which becomes part of the common law as the general law of the realm.

MR FERGUSON:

Yes, that's, that's correct Ma'am, but the Court of Appeal does start from that position and notes, the footnote in paragraph 12 from certainly the, from this John Davies translation of *The Case of Tanistry* talking about these tests that things must have

existed from time immemorial, must have continued as of right and without interruption since its original, reasonable and certain in its terms in respect of the locality which it obtains, the person it binds and it must not have been extinguished.

The Court of Appeal is still very much focused on that foundation when moving forward into the New Zealand setting and still uses those touchstones of longevity, continuity, certainly, reasonableness and extinguishment and I think certainly there is no dispute over the extinguishment point or again that's, it has been explored to some significant degree in New Zealand and more recently, obviously, in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

But the Court, I think if I was to take an issue with the approach of the Court of Appeal generically, in that regard it tends to go into those factors in isolation and then note that there is a certain New Zealand lens to be applied. And again, it's slightly a step-by-step process where I think there probably is a more fundamental issue and perhaps it's not as strongly expressed as it could have been in here but when one is looking at those tests which are for custom in England, one needs to interpret those tests and in fact form the New Zealand test by looking through the New Zealand lens and what that brings with it and I think while that might ultimately end up in the same position in terms of the factors one's looking at, I think it's quite a different approach in terms of looking at what the status quo is, that starting point again and it comes back again to the starting point being the custom as it existed prior to the adoption of English law and in relation to common law principles and its interface with custom, then the custom stands and the introduced common law only applies to the extent it's not inconsistent, and in my submission that remains the sound proposition for the approach to this case as well.

And I think that again goes to the heart of, when one is grappling with viewing the tikanga as failing, as making sure one is viewing that through the right lens not through an introduced lens of that is focused on ultimate arbiters and assuming that whenever there is not a consensual outcome that you need that independent arbiter to be in place as a matter of law.

And I traverse on paragraph, pages 8 onwards from paragraph 23, with a series of cases that look at the New Zealand situation and where there has been a recognition of this fundamental proposition, starting with *R v Symonds* (1947) NZPCC 387, *In Re the Lundon and Whitaker Claims Act, 1871* (1872) 2 NZCA 41, recognising the fact

that native custom, where in is found to exist, requires full recognition and the Crown is bound to respect it. And certainly we see cases over time that see custom certainly applying and being able to stand against the Crown in cases such as *Baldick v Jackson* (1911) GLR 398 in terms of Wales, and in relation to *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680 (HC) albeit in a slightly different statutory context in terms of fishing rights and *Ngati Apa* certainly the acknowledgement that the potential is there to advance claims that would stand against the Crown.

I think one of the interesting issues that flows out of that and it perhaps goes, some of the later consequences of this is and perhaps to the point about not the fact of opting out but the legal effect of that is that if custom is cognisable and enforceable against the Crown is there any sound reason why it shouldn't be recognisable and enforceable against the subjects and, therefore, are individuals, simply because they are not Māori, able to escape or not participate and exercise a different – initiate a different process, simply because they don't wish to be subject to the custom –

WILLIAM YOUNG J:

Who are you talking about here? Ms Clarke or –

MR FERGUSON:

Ms Clarke in that case. Particularly in circumstances I suppose for myself, if one accepts the premise for the moment that the, fundamentally the tikanga is cognoscible and therefore is common law in New Zealand, that Ms Clarke as a Pākehā is able to exercise a decision not to be subject to that process, or not to participate in it and thereby opt out in a sense.

In a situation where if the executor or partner was Māori would the same principle apply, would they be able to opt out of that tikanga? So it's not a question of, in my view, about whether one is Māori or not Māori. In that case, if one is talking about rights to opt out, they should be universal rights and they're ended up with a whole different set of circumstances and why should there be a right to opt out of a custom that's cognoscible at common law and yet not a right for an individual Pākehā to opt out –

BLANCHARD J:

It would depend upon whom the custom applied to.

MR FERGUSON:

Well it applies to the deceased. So, I mean, that's the subject of the custom –

BLANCHARD J:

Well it applies to more than the deceased. The deceased is the subject matter and certainly it would have applied to him while alive but where the widow or other close relative are not Tūhoe, then arguably the custom might not apply to them. I'm not putting that up as a proposition.

MR FERGUSON:

And I think the point I was getting to is the corollary of that, that equally someone who is Māori should have an equal ability to say well, I want to opt out of the application of the orthodox common law in relation to the powers of an executor in circumstances, you know, as a matter of an individual right. So is that the foundation for – or is that a sound foundation for engaging with the application of those or is once something is cognoscible, as a matter of law, then one falls within its influence, whether one wants to actively participate in or not might well be a matter of choice but to assess that one can avoid it entirely by that decision I think is a different matter.

ELIAS CJ:

But you've said that tikanga is a process. You said that the Courts should not be determining the content of tikanga, something I totally accept. What we are talking about here is what the common law of New Zealand is and, subject to what Mr McCoy says, presumptively I'm attracted to the view that the common law of New Zealand is adapted by the circumstances of Māori culture in the context of New Zealand history so that the whānau pani has authority to bury if there is no dispute, the executor has authority to, the person who has the custody of the body, superintendent of an institution in which the deceased at common law has authority to bury but if there is a dispute – so I don't have any problem about the common law and again, subject to what Mr McCoy has to say here, I can see that the common law may recognise the authority of all these different people, the widow, the children, as well as the wider whānau but what are you saying is incorporated into New Zealand common law? Are you saying the processes, so that in fact, the decision-making authority of the Courts in administrating New Zealand law is displaced by tikanga

because that's a pretty extreme proposition it seems. I'm very worried about the extent to which, in this case, language is being loosely used –

MR FERGUSON:

Oh, through, yes, yes –

ELIAS CJ:

– and so when you're talking about the common law of New Zealand here and you're saying that it incorporates tikanga. Well what does it incorporate, does it incorporate the process, as I think you're saying, or does it mean that the common law is modified so that there has to be recognition of the authority and standing of the whānau as well?

MR FERGUSON:

I think first and foremost Ma'am, I'm saying that the tikanga, as a matter of process, is cognoscible and therefore forms –

ELIAS CJ:

Well then it displaces the law administered by the Courts, on your submission.

MR FERGUSON:

Well I suppose – once one accepts, I think this is again, this is where that interface sits, once one accepts that it is – well, if one accepts that it is the common law then to suggest it's the common law but is incapable of judicial scrutiny in any way, shape, manner or form, I think I would have to fairly concede as going one step too far because, as a matter of tikanga, it's still does have rules and principles and like any legal right it could in circumstances be open to misuse, or misapplication, or other things and the classic example was if it was cognoscible but somebody used violence to further – as part of the process, that that would bring starkly into question the actual, whether the tikanga has been validly exercised –

ELIAS CJ:

Then you –

MR FERGUSON:

– and the Court must have –

ELIAS CJ:

– give away the gain that the Courts can't determine tikanga because as soon as you say that the Courts will have to decide there are limits to the tikanga recognised, the Court will be defining tikanga.

MR FERGUSON:

Well it's defining the limits of the cognoscibility. So if you come to the point of repugnancy, I don't think anyone is suggesting, otherwise we'd be in the situation where anything, no matter how it might clash in terms of abhorrence or repugnancy, if it hasn't been dealt with by statute, if it can be shown to be a matter of custom, then it continues and therefore you wouldn't be able to strike down and this is hypothetically speaking, slavery and other matters if they were today matters of custom or other types of act.

So I think the legal – the decision is recognised that there are limits on this, on what the common law will accept. The question is, what I'm saying is, it's at that level of margins where the intersection is, it's not opening up the entire tikanga for reinterpretation or codification but being here at all, in a sense, inevitably gives rise to issues about well, what is the tikanga which is a question of fact because one has to look at that in some sense so that it's not just an arbitrary claim that somebody is doing something as a matter of custom without any factual foundation whatsoever.

So there must be some jurisdiction in that supervisory sense around that but whether it delves right down into the heart of the tikanga and actually inserts another process in there which is an adjustment to the tikanga, it can be nothing other than a adjustment to the tikanga because the tikanga doesn't have an independent adjudicator at the end of the process if the parties get to a certain point, that's not part of the tikanga. So inserting that does change it, it changes the process.

McGRATH J:

Who is the ultimate decision maker, in your view, on whether the customary law applies to a particular Māori, where the debate is whether the person is of Tūhoe or not, who should resolve that question?

MR FERGUSON:

So there's a genuine debate as to whether they are of Tūhoe descent –

McGRATH J:

Whether their connection with Tūhoe is such that they come within the custom, the custom applies to them?

MR FERGUSON:

Oh sorry, I think there – okay, I'll be very … in my response –

McGRATH J:

Yes, well you'll probably inform me with your response.

MR FERGUSON:

Well, I've failed before but I think there are two potential aspects to that. One is, if there is a question as a matter of fact whether someone is Tūhoe and therefore the Tūhoe custom applies to them, oh yes, someone might say well, actually no, they're not, they're Pākehā or yes, they lived all their life up there but they're actually from Ngāi Tahu and if it is important for the application of that custom and that wasn't the issue in this case so we didn't – the facts don't address that, then that must be capable of determination and there should be some process –

TIPPING J:

Well by whom, is my next question?

McGRATH J:

By whom? Ultimately, should that not be by the Court, even on accepting what you say about tikanga as the ultimate authority?

MR FERGUSON:

Well I don't think, the appellant doesn't challenge the proposition that they are required to establish that (a) there is a tikanga and (2) that it applies in these circumstances –

McGRATH J:

And the case falls within its limits.

MR FERGUSON:

That's right. I mean, a classic example is – my mind's going to go completely blank. Sorry, bereaved of assistance. I don't know why my mind has gone completely blank

on it but the decision that grappled with the issue in the Court of Appeal, I think it was, or was it the High Court, *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA) and the Department of –

TIPPING J:

But what is the answer? We're hearing all about who has grappled with this but what is the answer?

MR FERGUSON:

The answer in that case was somebody –

TIPPING J:

Well what, in your submission, is the answer? Never mind other cases.

MR FERGUSON:

Well that is, it's the same proposition Sir –

TIPPING J:

Are you not prepared to accept that it is the Court that would decide that issue?

MR FERGUSON:

Yes, no, that was my –

TIPPING J:

Well spit it out because, I mean, we're causing a lot of uncertainty at the moment.

MR FERGUSON:

Well that, with respect Sir, that was the proposition I was just accepting, that the Court is able to consider –

TIPPING J:

Ah, well I didn't hear that loud and clear.

MR FERGUSON:

I apologise Sir. It's not simply a matter of somebody saying, I've done this activity –

TIPPING J:

That's all we need to know. That's the answer to my brother's question, the Court.

MR FERGUSON:

Yes, well it's not precisely Sir and I'll move onto that because I actually anticipate that we're talking about two different things in that regard. The first proposition which is what I was addressing, was where there is a matter of fact the person was Tūhoe and there might be other questions as a matter of fact, is there a custom on this?

For example, the point that I understand your Honour was in fact raising with me, was if there is an issue as to whether in the circumstances of the particular case and Mr Takamore for example, the very question that Justice Fogarty and Justice Chambers grappled with, was he had lived his life in a way that made him suitably connected with Tūhoe such as the tikanga was able to be exercised in relation to him. My answer to that proposition is quite different and it's different for the reason that, in my view, that question does not legitimately arise because it is not –

WILLIAM YOUNG J:

It's governed by tikanga.

MR FERGUSON:

It's governed by tikanga and if he –

TIPPING J:

So tikanga is the ultimate –

MR FERGUSON:

The tikanga applies to every person of Tūhoe descent. However they live their life, the tikanga that relates to the burial of that person when that person dies, is not that person's right as an individual right, the tikanga is not that person's tikanga. It's the tikanga of the whānau and hapū grouping.

TIPPING J:

But what if the executor, widow or the family member says, "Hang on a moment, I don't think you're right. I don't think my father, partner, whatever, is subject to this tikanga." Who resolves that?

MR FERGUSON:

What I'm saying is they – the only basis upon which they would not be subject to the tikanga is if they are not Tūhoe.

Now, before your Honour responds, remember I'm focusing here in that submission on the tikanga process not the outcome.

TIPPING J:

Yes I understand that.

MR FERGUSON:

Yes, so they are subject to the tikanga. Now whether as part of the – when that tikanga is exercised and that collective discussion occurs it's quite clear on the evidence of the experts that those are the very, some of the very factors that would go into there and one would be expecting that to be vehemently argued and it was articulated clearly in this case and in the discussion and there was a contrary view and the majority of the Court of Appeal finds that it wasn't clear on the evidence that he had so disconnected himself, as assuming one could, but that in a matter of fact that he – that that could occur, but that was grappling with the act of opting out. I'm saying –

TIPPING J:

But are you saying –

MR FERGUSON:

– you can't opt out but it's one of the factors that needs to be grappled with in the decision.

TIPPING J:

But who decides whether the person has successfully opted out?

MR FERGUSON:

Well you can't opt out, that's my point.

TIPPING J:

Aha.

MR FERGUSON:

It's not the issue. The –

TIPPING J:

Aha.

MR FERGUSON:

– issue isn't whether you opt out it's whether, having regard to the, and perhaps it might be useful –

TIPPING J:

Do I understand you to say that you can't opt out?

MR FERGUSON:

You can't opt – the deceased can't opt out, no.

WILLIAM YOUNG J:

And so Mr –

MR FERGUSON:

Just as I can't opt out of the common law power of the executor when I die.

McGRATH J:

Mr Ferguson, the position I think we are left with is that you're saying that in some cases where the tikanga applies the Court can resolve it such as whether it is a question of fact as you characterise as to whether a person is of Tūhoe descent or not. Yes the Court can resolve that.

MR FERGUSON:

Yes.

McGRATH J:

And I suppose it would have to if another, other elements of Māoridom claimed that person is exclusively theirs.

MR FERGUSON:

Yes.

McGRATH J:

But you're saying that if the question becomes one of the scope of tikanga and whether they are caught up in it, that's entirely for tikanga and it can't be considered, is that the – I'm trying to sort out the –

MR FERGUSON:

Yes.

McGRATH J:

– basis for your distinction.

MR FERGUSON:

And in –

McGRATH J:

Because you are obviously acknowledging –

ELIAS CJ:

Or the outcome of the process you're saying?

MR FERGUSON:

The outcome, the outcome is certainly open. The outcome is certainly open –

ELIAS CJ:

No, but is resolved only by tikanga on your submission.

MR FERGUSON:

Within the tikanga and as I – and that's indicated by the experts that, the level of connectivity, matters such as, and it is noted in both I think, Mr Kruger's and Nehu Takamore's evidence, that the fact that James was the eldest son was very important and, you know, that that was a –

TIPPING J:

I thought you'd said to me a few minutes ago the exact opposite of what you've now agreed with my brother McGrath? I'm sorry Mr Ferguson but I'm getting quite confused.

ELIAS CJ:

What did you take from it?

TIPPING J:

I took from it that you, the Court didn't have a role in deciding whether you were of Tūhoe descent that that was decided by the Tūhoe people. That's what I took out of your answer to me.

MR FERGUSON:

No, no, no, the –

TIPPING J:

It just shows how confusing this all is.

McGRATH J:

I must say, I didn't take that out of what Mr Ferguson –

ELIAS CJ:

No I didn't take it either which I find surprising.

TIPPING J:

Well I did.

MR FERGUSON:

So we're distinguishing between, and I think we need to be quite clear on this, whether one is of Tūhoe descent as a matter of fact and that is a matter of whakapapa. It's not a matter of how one lives one's life. As a matter of fact are you Tūhoe? Am I European? It's a matter of fact, it's not a question. I can't wake up tomorrow and say I'm Māori –

TIPPING J:

But is that –

MR FERGUSON:

– can't elect to be Māori.

TIPPING J:

No, but if it was a matter of fact, are you Tūhoe, I thought –

MR FERGUSON:

And I said that was able to be looked at.

McGRATH J:

Yes that what I understood at all stages to say, Mr Ferguson, yes.

TIPPING J:

No, all right, I may be –

WILLIAM YOUNG J:

I understood that too Mr Ferguson.

TIPPING J:

All right, well I must be the one – odd man out then.

WILLIAM YOUNG J:

Can I ask a question Mr –

TIPPING J:

With the emphasis on the word “odd”.

MR FERGUSON:

With all due respect it's not how it feels from this position.

ELIAS CJ:

I'm sorry but we have to take the adjournment now and resume at 2.15.

COURT ADJOURNS: 12.39 PM

COURT RESUMES: 2.19 PM

WILLIAM YOUNG J:

Mr Ferguson, before we broke I was going to ask you a question which I think I know the answer to but I just want to give you a chance to comment on it. Does it follow that, on your approach, that the deceased children themselves are subject to tikanga

and that their nearest and dearest would be effectively required to engage in this process when they die, when they are indisputably of Tūhoe descent?

MR FERGUSON:

The simple answer is yes but, upon reflecting over the luncheon adjournment, I just wondered whether there was a subtlety that tends to get missed in the way in which we talk about the tikanga and the tikanga process and the stages of that I suppose.

It seems to me that there are, as we would see, in the application of the tikanga and its exercise, there are two potential decision points that would be relevant to that case and in fact to the present case of Mr Takamore and the whānau, I think there's an initial, or one would say a preliminary decision that would be made as to whether to initiate the tikanga process, so they may simply just decide very briefly not to even start the process and go into an engagement and just leave it to the other family and illegitimate about them making that decision but if they then decide to initiate the process then there's the application and the engagement occurs there and the decision that comes out at the end of that process.

So yes, in principle they would be subject to the purview of it but again, even at the outset or, in terms of outcome, there could be a decision through the tikanga process that sees the final decision being one that the children are not buried in the Urupā Kutarere.

WILLIAM YOUNG J:

So they could avoid that process either by immigrating or their nearest and dearest not notifying their relatives of their deaths.

MR FERGUSON:

Yes –

WILLIAM YOUNG J:

It comes down to that, doesn't it?

MR FERGUSON:

Well, take one out of the jurisdiction then it makes life difficult I imagine to do these things but again, I think it comes back and without wanting to labour or overplay the point, that these are all factual elements that would go into the mix and one might say

equally, dealing with a non-Māori situation, you might properly suggest well, any executor should be properly taking all of these factors into the mix to and whatever they're grappling with. Even in a European setting, again it comes to that question about what is the law in New Zealand, absent tikanga, for ordinary executorial decisions in the relationship with the variety of factors that might be seen as potentially relevant to that and how many of those bite at law, procedurally or determinatively, is itself not the subject of a huge amount of judicial consideration in New Zealand at that broader expanse.

We are dealing mostly with – as in this case, dealing with the facts and, as I said right at the outset, I think some of the evidence and the argument has been focused on that and perhaps in some respects has been limited by that and by perceptions of what were the issues on day one, relative to what the issues might feel that they are here today. And I think we'd all say, with the degree of hindsight, if we all knew precisely what would be in the minds of not only your Honours but ourselves as counsel and we may well have taken a different view about what was the core evidence and hopefully the worst that comes out of this is that there's a clear indication of what is expected and warranted in other cases in the future. If nothing comes out of this but to be a helpful aid for future situations, even in a peripheral sense, that would be useful.

ELIAS CJ:

Mr Ferguson, on the first ground what do you want to address us on further. Is there more to be said?

MR FERGUSON:

Well I was going to, if it's helpful to anybody and therefore I'm open to be told it would be unhelpful, to further discourse in relation to the question of Mr Takamore opting out through conduct in terms of his lifestyle and whether (a) that matters a jot and if it does matter, well, whether it was open for this Court to reach a different conclusion, whether this Court should reach a different conclusion from the majority of the Court of Appeal. In other words, to favour the approach of his Honour –

TIPPING J:

I would have thought you'd be arguing as a fallback that the Court of Appeal was too absolute in its approach to the executrix's position.

MR FERGUSON:

I think that's on a –

TIPPING J:

Do you understand what I'm saying? In other words, the Court of Appeal seemed to me as I read them, to work from the premise that if under English common law the executor or executrix had some pretty near absolute right –

MR FERGUSON:

Mmm.

TIPPING J:

Well I'm not sure whether that is so and as a fallback, if you like, from your point of view or as a subsidiary proposition. You may not want to develop this until you hear what Mr McCoy says about it but I'm not at all satisfied that it is as absolute as the Court of Appeal portrayed it.

MR FERGUSON:

No and I think, and I think there's – sorry I was simply facing that first point about whether it's useful to continue to address the opt out issue and that question –

ELIAS CJ:

Well your first submission on that is that you can't.

MR FERGUSON:

You can't, yes.

ELIAS CJ:

And your second submission on that, or you would develop an argument against the factual finding made by two of the Judges.

MR FERGUSON:

That's correct.

ELIAS CJ:

The High Court Judge and Justice Chambers.

MR FERGUSON:

Yes and for the reasons that the Court of Appeal identifies, and I think the Court of Appeal rightly, in my submission, the majority identified that actually the evidence as, as I was just focusing, portrayed it wasn't as absolute when one, and this was the subject of some discourse before their Honours in the Court of Appeal, that there was contrary evidence from Mr Takamore's mother, Nehu, in relation to his association and continued association and it was an addition so that the issue wasn't clear cut on the facts and it was a disputed fact and it wasn't open for his Honour Justice Fogarty to reach that conclusion. Secondly, we also noted in that regard that the first respondent, Ms Clarke, conceded under cross-examination that the decision that she made in terms of deciding where she wanted to bury Mr Takamore wasn't based in any way on his view as she perceived it or understood it.

So when she made that decision it was her view and it wasn't informed by a view as to whether he would have wanted to have been buried in Christchurch or back home or had participated or otherwise and she accepted that at page 157 of the case at tab 10 under cross-examination that, in essence, at the time she made the decision and what she based her decision, which is a critical decision, we've got a lot of evidence post facto in relation to what he may or may not have from his work colleagues, etcetera, but none of that was available at the critical time that these decisions were being made.

ELIAS CJ:

Why does that matter –

MR FERGUSON:

Well –

ELIAS CJ:

– in terms of the questions the Court has to look at?

MR FERGUSON:

I think – well again it depends on the range of questions but if we're going to this –

ELIAS CJ:

If you're saying that the reasonableness of the whānau decision.

MR FERGUSON:

– decision as an executor –

ELIAS CJ:

Yes.

MR FERGUSON:

– she was not applying an executorial decision –

ELIAS CJ:

I see.

MR FERGUSON:

– and she was applying a personal decision.

ELIAS CJ:

I see.

MR FERGUSON:

So she wasn't – that was the point I was trying to make there. She accepted she wasn't influenced by any of these other factors which are now potentially being relied on by the Court to say, well, you could opt out and that's what we find now. At the time that this critical decision was being made, that wasn't a factor.

ELIAS CJ:

But that's really to focus on the decision being made by the executrix as if that is the focus. If you are focusing on the reasonableness of the conduct of the whānau are you saying that it hadn't been communicated to them that he had a preference to be buried in Christchurch?

MR FERGUSON:

That he had? No, no.

ELIAS CJ:

Yes.

MR FERGUSON:

In terms of –

ELIAS CJ:

Sorry. So just in terms of the information available to them, is it the case that they were confronted with the strong preference of the widow and the son that he be buried in Christchurch?

MR FERGUSON:

In Christchurch, correct. The will, which I think is in the bundle, notes that he was just to be buried but not where.

TIPPING J:

I know this may beg the question. There was an executrix appointed which in the ordinary cause of events would signal that the executrix make – the intention of the testator is that the executrix makes the decision?

MR FERGUSON:

Yes. I think that might fall shy of the assumption that we start on which is that most people don't understand – well this is –

ELIAS CJ:

But in fact, in terms of –

MR FERGUSON:

So whether that consciously goes into anyone's decision, I'm not sure.

ELIAS CJ:

In terms of the information they had, did they know that she was the executrix on that evening, was that communicated?

MR FERGUSON:

I'm not sure, to be honest Ma'am. I can seek clarification of that but I can't honestly answer off the top of my head. I certainly know that the will provided that if she pre-deceased James the executor would be James' brother.

ELIAS CJ:

And Ms Clarke's sister.

MR FERGUSON:

And Ms Clarke's sister jointly, so another interesting – yes, correct, yes.

WILLIAM YOUNG J:

Just looking at Ms Clarke's evidence, she says at 158, that she understood the decision was hers. I'm just looking at – that's just in re-examination, I haven't sort of gone –

ELIAS CJ:

But that may well be as widow rather than as –

WILLIAM YOUNG J:

Yes, yes.

MR FERGUSON:

Yes. I'm not critical of that, you know, I'm very sensitive to that dichotomy, it's a real one in fact at law but, I mean, it's very difficult for one who wears multiple hats to – and in that charged situation, I mean, I think it's one of the things that I suppose, if one was to say well, what should be the role of the executrix in those situations, particularly if we're in a situation where they have to make these calls and they are highly charged, is that a question where that really does need to be, you know, assuming we've got a limit, assuming it's not accepted for the moment that the tikanga prevails but to the extent there's some colour on the executrix's role when there is that tension, I think the real question does arise as to whether it's appropriate or safe for the widow to have to exercise that judgement as executrix when they're intimately intertwined with the fundamental conflict that sits underneath it and whether, given the types of, even on the Court of Appeal's analysis, the types of considerations and therefore a quasi, you know, legal decisions that need to be – factors need to be weighed up, whether that's an appropriate role for such a person to play, as opposed to an independent executrix, or as you say, having somebody else appointed to fulfil or facilitate that.

I think, just in terms of the final point which I think, as I say, I think it's difficult to break these points down because they are intertwined in a number of respects and I think that was clear from the exchange that we had shortly before the break about well, where does the – assuming the Court has some role, adjudicatory or supervisory

role, in relation to this interface or even the tikanga itself, what are the limits on that and where does it sit? When one starts talking about then that throws up issues about trying to ensure that one isn't (a) extorting the tikanga itself entirely but actually, you've created a new process altogether that –

ELIAS CJ:

I'm sorry, I'm getting lost as to what this submission is directed at. Is it simply repeating –

MR FERGUSON:

Oh it's –

ELIAS CJ:

– some of the matters? I thought you were addressing the questions of fact at the moment.

MR FERGUSON:

No, I'd completed that Ma'am –

ELIAS CJ:

I see.

MR FERGUSON:

– as far as I – unless your Honours have further questions in relation to that issue on the opting in and opting out.

So now I was moving on to trying to wrap up any final points that I thought still needed to be addressed in relation to the cognoscibility of the tikanga. And I was returning to some of the discussion we were having before lunch which I've reflected on a little bit further in terms of what are those points are. If the Court is going to have a role or should have a role, what is its role vis-á-vis this tikanga process? I was going to get on to addressing the issue of reasonableness as the Court of Appeal had interpreted it, which I say is at the parameters of repugnancy. What I was saying is that naturally that then flows into, well, if that's a parameter then the Court must have, reasonably have, a role to determine whether, and looking at the very least about what those parameters of the tikanga are, and I accepted that before lunch and I've reflected on that and I have to maintain that position that if someone is going to

rely on custom then one needs to be able to establish what the parameters of that custom are and also show that in fact that's what's occurred and deal with any contrary evidence that's advanced in that regard.

So, but I think that's around, as I was trying to emphasise, around the parameters of the tikanga and what it is. What I would be very firmly stepping against is any suggestion that the Court in the case where the tikanga gets part way through its process because we would say, as we do, that the tikanga is absolute and will result in an outcome albeit, it might be one that takes a number of years to come full circle and be rebalanced, that if the Court was to say the Court has a role once the parties are unable to reach agreement. So we don't have that last stage, that essentially what you're doing is you're building an adjunct onto what starts as a tikanga process and then diverts off into an adjudicatory process and therefore you've actually created something quite different and haven't … And you've essentially then got the Court almost putting itself in a position of not quite exercising the tikanga but judging its exercise in an internal way which, the point we made and, well, couldn't really take any further reasonably was, well perhaps if there was a forum that was imbued with those things that could do that that might be somewhat different but I don't think we are in a position where that can – that the Courts would want to be putting themselves into the internal workings of the tikanga but rather can look at its external aspects, its repugnancy, those things. Now, and all the evidence is focused on that because the central argument was that tikanga is not cognoscible.

So the evidence is at that broader level. The view of both experts was that the tikanga was complied with in this case, there was no contrary expert evidence on that and that is the factual position before the Court. And I, in my submission, say it's very difficult – in my submission it's difficult to go beyond that in terms of the facts of the case as we see it. in other words, I suppose in my conclusion on that point, in my view the Court doesn't have a role as an impasse breaker in the tikanga process which is where you might get to if one said, well, there's not a meeting in the minds at that point and therefore it's got to go to the Court for adjudication. I think that would effectively limit or curtail the natural completion of the tikanga process and therefore the process becomes something quite different.

I then wanted to move on briefly to what is the role of the executor then in our view, and I think in our pure view as we've indicated in the submission, we would say where the tikanga process applies and as initiated the role of the executor is to

facilitate the outcome of that or if, through that process, it's decided they don't wish to either take that tikanga process further or reach an ultimate decision to bury the deceased in a marae, to hand that back to the executor in which case the executor would have their ordinary decision to make, but that that's when that would trip in, in my submission.

The proposition that, which is in the alternative, that your Honour the Chief Justice was raising about a possibility that there are two authorities to bury, in a sense, that are parallel albeit it sourced in different –

ELIAS CJ:

Or there might be more.

MR FERGUSON:

Or more, two or more and we haven't contemplated what those others would be and how they might intercept because there are probably interfaces there as well, depending on the situation.

What then is the role of the executor in that case? I think the issue that I was cogitating on over the luncheon adjournment was, in that case would the two processes and I'm, this is thinking through it, are the two processes, the two authorities being grappled with in isolation from one another? And then there is a coming together to see whether they concur and there is no issue, or they conflict in the particular case and there is an issue for adjudication –

ELIAS CJ:

I think Mr Ferguson, you really need to make a submission to us. What is your position?

MR FERGUSON:

Well my view of it, having thought if that were the proposition, is that they need to be informed by one another and even if there are two separate authorities that they cannot operate in isolation or in vacuum from one another. The New Zealand context cannot reasonably allow this. So even if one is looking for, if one might call it a middle ground, or a new approach in relation to this issue, the fact remains first that the members of the whānau pani may include the executor and certainly the executor's family in this case. They therefore are entitled to participate in that

tikanga process and so while that tikanga process which, as I say, gives rise to some authority to bury, they can't be excluded from that just because they all –

ELIAS CJ:

I think we all understand the submission.

MR FERGUSON:

Yes and equally the executor, even if it's a separate authority to bury, would still need to be cognoscente of all of those factors as well. Now whether they come together is another matter.

ELIAS CJ:

If the executrix seeks access to the Courts to maintain her authority, even accepting for the moment that it may be a parallel to bury, on your approach the Court is to say sorry, we can't entertain this?

MR FERGUSON:

If the tikanga process is extent or has been completed – sorry, the timing of the –

ELIAS CJ:

Well there just doesn't seem to be an end to this process, on your submission. If someone who has authority, lawful authority, comes to the Court to seek vindication of it, doesn't the Court have to grapple with that, doesn't it have to entertain that application which is really what Ms Clarke has done here?

MR FERGUSON:

If the foundation of it is that, as in this case, she has the sole right and there is no other right. What I was trying to –

ELIAS CJ:

Well even if it's not the sole right, even if there may be other rights, doesn't the Court have to listen to her side and decide what should happen?

MR FERGUSON:

With respect, I think there would be an issue, I would have thought, about whether it would be legitimately open to the Court to say it's premature for us to rule on this because there's another part of this process that still needs to be worked through –

TIPPING J:

The process never ends, it goes down generations apparently.

MR FERGUSON:

But no, the ultimate rebalance does but there will still be a decision about the place of burial through that process. So that decision arises. The tikanga isn't completed by that, that process isn't completed by then. At that point there's something for the executrix or executor to grapple against, or to balance against their right –

TIPPING J:

I don't think you accept that there are competing authorities here, or competing rights. I think the fundamental problem is that your clients say there are no competing rights?

MR FERGUSON:

That's correct and that's my starting proposition and this is in the alternative if we're talking with two separate authorities –

TIPPING J:

Well if there are competing authorities, surely the Court is the place to resolve that, who else possibly could?

MR FERGUSON:

Yes, yes, if there –

TIPPING J:

Consistently with the rule of law?

MR FERGUSON:

If there are two competing authorities and they both are authorities to bury and therefore they're both cognoscible in a sense and the Court believes that – and as a matter of law the Court determines that neither one overrides the other, then there is, that is the legal position as determined by this Court, then necessarily there's an issue to be determined. My –

TIPPING J:

No. The Court would have to decide which one, which party has the better, I won't say the right, but the better solution.

MR FERGUSON:

On the facts of the case –

TIPPING J:

Yes.

MR FERGUSON:

– and therefore, my point was that it would be premature for the Court to determine that before the tikanga side of that process has made a decision about the place of burial –

ELIAS CJ:

Well then you are saying that people are to be stopped from coming to the Court because, on your submission, it's premature.

MR FERGUSON:

It's premature yes but not –

ELIAS CJ:

Mr Ferguson, just –

MR FERGUSON:

– absolutely stopped if that's the law that the –

ELIAS CJ:

No, well I'm not sure when there's an end of it –

TIPPING J:

It would be no good then because it would all be done and dusted. This is a naive proposition.

WILLIAM YOUNG J:

So you're saying effectively, Ms Clarke was entirely premature to seek an injunction because she could have gone up to the North Island and if the burial took place she could have haggled over it down the years –

MR FERGUSON:
No well, with respect Sir –

WILLIAM YOUNG J:
– and if that wasn't successful her descendants could do the same?

MR FERGUSON:
No, with respect Sir, my submission is based on the assumption that this Court rules that there are two equally valid authorities to bury, they both have legal standing and that therefore, if they don't come up with the same decision, there's a conflict that will need to be adjudicated on and that's what I'm saying. Now I accept that in that situation one would not want to – if that was the law, you would not want a situation where one party could run away and circumvent that through action and so if that was the legal position then yes, Ms Clarke could seek an injunction to stop that process and we would then allow the whānau, if they hadn't decided at that point, it may be that they had and if they had yes, the Court can adjudicate on it.

What I'm saying, if the Court is deciding between two, there needs to have been a tikanga side or else – well, you haven't necessarily got a dispute all you've got –

WILLIAM YOUNG J:
Why can't there be a non-decision on the tikanga side because there wasn't really a decision here other than by default?

MR FERGUSON:
Oh, with respect, I don't accept that Sir.

ELIAS CJ:
I wonder –

WILLIAM YOUNG J:
Well it wasn't –

ELIAS CJ:

Sorry.

WILLIAM YOUNG J:

Sorry. Well it is I think and there may be a difference of views about whether this is the right way to look at it but the findings are that there was no acquiescence in the taking of the body.

ELIAS CJ:

I think that was conceded, wasn't it?

MR FERGUSON:

Conceded that it wasn't consented.

ELIAS CJ:

Yes.

MR FERGUSON:

Yes. If one views it, as I respectfully suggest, my client would have and the broader whānau within the tikanga process, then that non-participation on that second day and not to use a legal term but essentially was a stepping back from it from their perspective. Now we concede, it's quite clear from the position of the first respondent, that's not what she intended that to be taken as but we're talking about what occurred then and the circumstances in which they then made that judgement and proceeded with the tangihanga, unaware of an injunction or any other issue of that nature because there was no service on them before the burial occurred –

ELIAS CJ:

Right, I think we need to get a little bit more focused on the structure of where you're trying to take us because I am conscious of the fact that we're taking up a lot of time really on the same point I think Mr Ferguson and that may be entirely understandable because that is the position you're advocating for. What else do you want to say to us about the first point?

MR FERGUSON:

No. I think I've concluded that Ma'am and look, my apologies. All I was trying to do in this last little piece was to address the alternative proposition to my fundamental one and where that might lead things and where the balance sits –

ELIAS CJ:

Yes. The alternative proposition at least gives your clients a right to be heard I suppose but it sounds to me as if that's not satisfactory in terms of the position you're taking, that it was premature for them to be heard in an independent forum?

MR FERGUSON:

Well no because I think we ultimately have ended up in that forum and it wasn't premature because the decisions had been made, so it wasn't premature. I mean, in terms of this proceeding which was a year after the burial, or nine months after the burial. The decisions, the decisions of both parties was there and the dispute was there to be had, what the consequent effects of that is a different matter in terms of time but I don't want to be misunderstood on that point.

ELIAS CJ:

So, I'm sorry. You were saying that as at the time that this application by Ms Clarke was entertained by the Court, you accept that the Court had jurisdiction to determine whether what was done was properly done or was lawfully done.

MR FERGUSON:

Well if we're talking about the initial application for an ex-parte interim injunction?

ELIAS CJ:

No we're not. We're talking about this, these proceedings.

MR FERGUSON:

So these proceedings, when they were commenced the following year –

ELIAS CJ:

Yes.

MR FERGUSON:

– I think, or there was a legitimate issue. We – the appellant and her broader whānau believe they are acting according to tikanga. Ms Clarke doesn't believe that that tikanga has any legal –

ELIAS CJ:

And she asserts her right as executrix to determine?

MR FERGUSON:

That's right, and it's a legitimate issue therefore for the Court to decide –

ELIAS CJ:

Thank you, yes.

MR FERGUSON:

– does tikanga exist and is it cognoscible.

ELIAS CJ:

Yes.

MR FERGUSON:

But that's a different thing from putting yourself inside the decision making process on the tikanga side which is what we were contemplating earlier so.

ELIAS CJ:

All right. So are you now going to address us on the point of –

MR FERGUSON:

Post-burial.

ELIAS CJ:

– yes, whether the proceedings are overtaken by that or whether the executrix has authority in relation to what happens now.

MR FERGUSON:

Yes and I think in this regard there are a series of interrelated issues on this but the fundamental proposition as outlined in the submission is that if one of the focus –

TIPPING J:

What paragraph Mr Ferguson?

MR FERGUSON:

Sorry.

TIPPING J:

It's where you start ground two I assume.

WILLIAM YOUNG J:

Para 80, isn't it.

MR FERGUSON:

Yes, so the fundamental proposition that's advanced by the appellant is that there is no true property in the body of a deceased and these rights that do exist are directed to that ancillary duty.

WILLIAM YOUNG J:

Can I just raise an issue with you that I think was mentioned in the pleadings. I'm not sure if it was discussed but the coffin?

ELIAS CJ:

The what?

WILLIAM YOUNG J:

The coffin. I see the statement of claim proceeds on the basis that the coffin belonged to the estate. Your pleading says, well, if it did we're prepared to pay for it which I don't think is actually an answer. Is that dealt with in the judgments? I can't remember seeing it.

MR FERGUSON:

No, I don't think it is, Sir.

WILLIAM YOUNG J:

Was it not pursued?

MR FERGUSON:

I don't think it was pursued as a matter of fundamental importance. I mean, my friend can address that if he wishes but I don't really recollect it.

TIPPING J:

It would be a fairly artificial distinction and not a very appealing one to distinguish between the body and the coffin.

WILLIAM YOUNG J:

Well yes but there would – I mean, I don't want, I mean it maybe, you know, if there's a technical argument about property and a corpse there may be a technical answer saying that it's inside a bit of property which is a coffin.

ELIAS CJ:

Sounds a bit like *Porsche.*

TIPPING J:

Porsche, yes.

WILLIAM YOUNG J:

Yes, yes.

MR FERGUSON:

And then there would be a question of, well, was the coffin paid for out of the estate or did somebody else pay for it and –

WILLIAM YOUNG J:

Why does that matter?

MR FERGUSON:

Well it depends on which –

WILLIAM YOUNG J:

Who the plaintiff should be?

MR FERGUSON:

Who the plaintiff should be.

TIPPING J:

Then it would be a straight action in conversion presumably?

MR FERGUSON:

Well presumably so Sir which –

TIPPING J:

Which this isn't.

MR FERGUSON:

– this isn't.

ELIAS CJ:

Well on the view taken by Justice Chambers.

WILLIAM YOUNG J:

– Justice Chambers.

MR FERGUSON:

Yes, yes.

TIPPING J:

Well it wasn't pleaded in that form –

MR FERGUSON:

No, no and it wasn't argued in that way either.

TIPPING J:

Yes, the pleadings are, well we won't go back there.

MR FERGUSON:

No, no.

ELIAS CJ:

All right, so on –

MR FERGUSON:

Much to be desired.

ELIAS CJ:

– on this ground your simple submission is that the executor's authority is exhausted on burial?

MR FERGUSON:

That's correct.

ELIAS CJ:

And that there is no lawful authority to seek return?

MR FERGUSON:

Once burial has occurred, and the vast majority of cases that my friend's identified and he will traverse those with your Honours, deal with cases that have come before the Courts before burial has occurred. I think there are only –

WILLIAM YOUNG J:

But I don't know that – I think there were – wasn't there one case about a burial unconsecrated?

MR FERGUSON:

The majority, yes, there were. There was one – and there was another one where somebody had secured a disinterment on false grounds.

ELIAS CJ:

Well that was *Williams v Williams* (1882) 20 Ch D 659, wasn't it?

MR FERGUSON:

Yes.

WILLIAM YOUNG J:

But can it really be the case that if a body has not be properly buried and that's a question begging –

ELIAS CJ:

That's a question –

MR FERGUSON:

Well that's the question – sorry, I should say proper burial and then the issue is what is a proper burial and if –

ELIAS CJ:

Well one has to gone back presumably, to the purpose of imposing a duty on the executor in default of someone else with the custody of the body to bury it and that purpose, as really the Burial and Cremation Act also indicates, is both a public health and a public decency –

MR FERGUSON:

Yes and those were –

ELIAS CJ:

– reason –

MR FERGUSON:

– the foundations going all the way back to the genesis of this obligation when, you know, there was money to be had in not only –

ELIAS CJ:

Ransoming a body.

MR FERGUSON:

Well not only bodies but in the accoutrements of the body in other respects and one goes back, this was – it was informed by public health and notions of public decency –

TIPPING J:

Didn't Burke and Hare steal dead bodies for the purpose of selling them to hospitals or –

ELIAS CJ:

Yes, deception –

MR FERGUSON:

Yes so it's quite lucrative –

TIPPING J:

Very lucrative, in those days –

ELIAS CJ:

So on that basis, proper burial is simply burial which, on one view, accords with the provisions for proper burial in terms of the public purposes being pursued?

MR FERGUSON:

That's right and in a lawful plot, as it were, within a lawful burial ground –

McGRATH J:

But there are cases that are put up against you in the respondents' submissions, *Dobson v North Tyneside HA* [1997] 1 WLR 596 (CA) and *R v Stewart* (1840) 12 AD & E 773 (CB), 778 per Lord Denman CJ. Do you intend to go to what those authorities or other authorities say about the concept of proper burial?

MR FERGUSON:

Well I think, if I can approach it from this premise which is, I think, the appropriate premise, there isn't –

ELIAS CJ:

Well before you restate the question, by all means do so but are you going to be taking us to those authorities or is that not something that you want to develop?

MR FERGUSON:

No because I don't think they are particularly helpful in determining what the law in New Zealand is, or should be, in relation to this issue.

McGRATH J:

So does that mean that your wish to persuade us that the concept of proper burial, as applied in England, is something that New Zealand's common law should depart from?

MR FERGUSON:

I think that the concept – well, I think there are cases that go either way in other jurisdictions as well and my friend has quite a jurisdiction – a number of overseas jurisdictions, not simply England and a range of different factors that fall into the mix on that but certainly cases like *Re Blagdon Cemetery* [2002] 3 WLR 603 (Arches Court of Canterbury) which talk about the notion of permanency of a burial and it would only be in the most extraordinary circumstances that you would disinter and again, going back to that point about –

McGRATH J:

But the question, can I just come back to my question. My question is –

MR FERGUSON:

New Zealand has a different approach –

McGRATH J:

– are you saying that the law, the common law in England is not as its represented in the submissions of the respondent, or are you saying that there are different cases, or what? If you just tell us the concept that underlies your response.

MR FERGUSON:

The concept is that there are – if you read all of the cases, there are a range of degrees to which this is expressed, from absolutely one saying there's no property at all and one shouldn't interfere, to ones that say, you know, there are issues as to what –

McGRATH J:

But there are cases that support you?

MR FERGUSON:

Yes and there are cases that support my friend –

McGRATH J:

Well are you going to take us to those –

MR FERGUSON:

No because I –

McGRATH J:

– because this could be important –

MR FERGUSON:

– don't see, with all due respect, a great deal of merit in revisiting and looking at the overseas jurisdictions on this particular point where it's quite clear what the antecedence of this duty are for the executor and one in New Zealand needs to look at how that common law should apply in New Zealand and, in the particular facts of this case because that is all we are dealing with. We have a situation where we have a tikanga process which, even if it doesn't reach the standard of being a common law process, it's certainly recognisable and accepted as these are legitimate burials where they occur in principle, they're occurring in urupā that are designated as such. That all of those things are provided for and that, through that lens in the New Zealand circumstance where one is considering the issue of proper burial in these circumstances those are relevant factors that lean in favour of this being viewed as a proper burial.

Now other factual situations may be different but I think this is very much, we need to focus, with all due respect, on these facts.

McGRATH J:

So you're putting to us a concept of proper burial within which burial according to tikanga eminently qualifies?

MR FERGUSON:

Eminently qualifies.

TIPPING J:

But what if we're against you on ground one, where does that leave us? Because if we are with you on ground one the respondents are going to be in difficulty because everything is, in effect, it happened according to law. But if we're against you on ground one then it may be said that the burial was not in accordance with the law and if that's not to be an improper burial then one would need some help as to what the concept is designed to cover.

MR FERGUSON:

Well I think there are –

TIPPING J:

If it's just purely logistical issues that may be one view of it but your argument would have to encompass the fact that it could still be proper even if it was unlawful.

MR FERGUSON:

If there was no lawful foundation at all for the burial.

TIPPING J:

Yes.

ELIAS CJ:

Well it's burial in a designated urupā. It complies, it seems, with the provisions of the Burial and Cremation Act. Doesn't your argument have to be that that is sufficient for proper burial because the obligation on executors is only to secure –

MR FERGUSON:

A proper burial.

ELIAS CJ:

Yes.

MR FERGUSON:

And at that point on a proper burial then, as I think one of the cases –

TIPPING J:

That was what I was trying to drag out of you Mr Ferguson, that you have to say that, don't you, that as long as it complies –

MR FERGUSON:

Yes.

TIPPING J:

– with the legislation then you are all right, it is a proper burial.

WILLIAM YOUNG J:

Is that consistent with the cases?

MR FERGUSON:

Well first, -

WILLIAM YOUNG J:

I mean are there cases where bodies have been buried contrary to the wishes of the executor and where the executor has been able to ensure that his or her wishes are complied with and the body is buried in accordance with the directions of the executor.

MR FERGUSON:

I'm trying to think if any of those –

WILLIAM YOUNG J:

Well to put it another way, are there any cases that go the other way that say the executor is out of luck, too late?

MR FERGUSON:

Yes there are some, certainly –

ELIAS CJ:

Mr Ferguson if you are not in a position to help us with this maybe it would be best if we hear from the respondents but –

MR FERGUSON:

Yes. Look I'm conscious of the issue, Ma'am, and I was approaching it through a different lens but, and I will perhaps –

TIPPING J:

Not a telephoto lens?

MR FERGUSON:

No, no, clearly not.

ELIAS CJ:

But I understood your argument to be that upon burial the executrix has no common law right to the body and one would have thought that you are able to substantiate

that by reference to the authorities because that's a legal submission, and for myself, although I will be interested to hear what Mr McCoy says, it does seem to me that the cases are not necessarily inconsistent with that.

MR FERGUSON:

Or, Ma'am, certainly in terms of the cases I have cited being *Williams v Williams* and *Doodeward v Spence* (1908) 6 CLR 406 which are cited in my submissions, are consistent with that approach and in that regard, in my view, acknowledging that there is no doubt at all upon the general rule that an unburied corpse is not the subject of property so that's the kind of property right approach in that regard and that in relation to the burial itself again we get down to this issue of what is a proper burial and the facts of the various cases in that regard – I'm sorry, I'm just trying to find the bundle that I've – I have this written out, Ma'am, and I'm sorry I can't locate it at the moment in my papers which is what I am struggling with at the moment.

ELIAS CJ:

Well, it is the second question we stated in the grounds on which leave was given.

TIPPING J:

Do you derive your proposition by reverse, if you like, from the dictum in *Williams v Williams* cited in your paragraph 81, where it says that, "The executors have a right to custody and possession of the body, although they may have no property in it, until it is properly buried," and is the proposition that the converse of that, that once it's property buried, they have no right to the custody and possession of the body, is that where you start your argument from, if you like? Although you don't express it in that form, it seemed to me that that might be a way of starting an argument along the lines that you're putting forward.

MR FERGUSON:

Yes, well and certainly the cases such as *Dobson v North Tyneside HA* which my friend cites, are about that, talking about that, possession of the body for the purposes of final disposal and that persons charged by the law with interring the body have a right to the custody and possession of it until it is properly buried and again, there's a sense of finality around this. Now that doesn't –

ELIAS CJ:

But you've got to give some content to what proper burial is.

ELIAS CJ:

Is the reference to "properly buried" simply a reference in *Williams v Williams* or does it have a prior or subsequent jurisprudence?

MR FERGUSON:

I think *Williams* is always cited as the –

TIPPING J:

Yes, well it's cited as the authority.

MR FERGUSON:

Yes.

TIPPING J:

But did they just put it that way in *Williams v Williams* or does it have a provenance, or does it have any elaboration beyond after 1882?

WILLIAM YOUNG J:

It goes back to *R v Sharpe* (1857) Dears & Bell 160, 169 ER 959 doesn't it, which was a desecration of a grave for a good motive?

TIPPING J:

I have to confess, I haven't followed this through in my preparation but it just struck me that, as the Chief Justice days, we need to have some fairly clear appreciation of what the cases mean by "properly buried" because it's not a reference to any statute as it appears. The context of *Williams* leads me to think "properly buried" includes in accordance with the wishes of the executors because that's the context of the passage.

ELIAS CJ:

I'll leave you to answer.

TIPPING J:

Well the Chief Justice –

ELIAS CJ:

I'm not sure.

TIPPING J:

This is just tentative because, as I say, I haven't researched it. Does it just relate to the physicalities of burials so to speak, or does it relate to matters wider, in other words, the lawfulness of the place, or the decision as to where to bury?

BLANCHARD J:

I suspect that it has to be read in context and in *Williams v Williams* the body was buried by the family with the assent of the executors. So there really couldn't be any question that it was a proper burial.

MR FERGUSON:

And in the case of *Dobson v North Tyneside HA* which is also cited, in that regard you have a situation there where before the appointment of the plaintiff as the administrix in that case, the burial occurs and so she would normally have that responsibility. She seeks to essentially, in that regard, in terms of the brain or part of the body had been removed and preserved, she sought to pursue a property right in relation to that and that was dismissed, so there was found to be no property right in relation to that.

Now the brain hadn't been buried in that case. There seemed to be no question about the legitimacy of the burial at all because it had occurred, even though it didn't occur with the consent of the person who was duly empowered to exercise that decision –

ELIAS CJ:

Isn't it –

WILLIAM YOUNG J:

Can I just –

ELIAS CJ:

Sorry, yes.

WILLIAM YOUNG J:

One of the points that is made against you is that if the executor doesn't continue to have some authority after burial, those who are opposed to the executor's wishes would just disinter the body and bury it where they jolly well want.

ELIAS CJ:

Well they can't under the Burial and Cremation Act.

WILLIAM YOUNG J:

No. Yes but having done so, it's then buried in another cemetery and is it not possible for the executor as well to get the body back?

ELIAS CJ:

Well they have to get a licence.

WILLIAM YOUNG J:

Well say they haven't, say they haven't got a licence, say they just dug the body up –

ELIAS CJ:

Well they have committed an offence.

WILLIAM YOUNG J:

Yes but the question is, what happens to the body? Can the executor get – disinter the body from what maybe an otherwise an entirely appropriate cemetery.

ELIAS CJ:

It's not.

TIPPING J:

The Act's not in the paper?

ELIAS CJ:

No I think if you –

WILLIAM YOUNG J:

This is paragraph 39 of his submissions, page 15.

MR FERGUSON:

But assume that kind of situation and assume that a dispute then breaks out over whether the body, having been recovered from an improper burial by the people who removed it from the original grave, whether it goes back to the original grave or whether it goes somewhere else. The executor must have a role then I would have thought despite the fact that there has been a burial. In other words, the executor's authority would not necessarily cease once and for all simply because there has been a burial.

MR FERGUSON:

If the circumstances gave rise to a situation –

WILLIAM YOUNG J:

Mmm.

MR FERGUSON:

– in which there was a disinterment.

WILLIAM YOUNG J:

I just don't think too much should be read into this –

MR FERGUSON:

Yes.

WILLIAM YOUNG J:

– proper burial it's a, it fitted in *Williams v Williams* but factual situations could be more various.

MR FERGUSON:

Well, I mean it's loosely used with, you know, again without great precision in terms of, you know, the parameters around that and I suppose that's why I came, and my apologies if it appears superficial in hindsight, to the point that one focuses on the particular circumstances here … the focus rather than the antecedence of that as a matter of general principle, because my reading of those, I reached the conclusion that they, there were bits here and bits there that were in our favour and against, and really the focus should be on the New Zealand situation in that regard, and what the tikanga whether recognisable absolutely or not, even if not recognisable in terms of providing the absolute authority that overrides in a particular case is nonetheless, in

my submission, a proper burial that is sufficient to satisfy that test, and that is a relevant factor that would need to be taken into account in the particular circumstances if one was grappling with the issue of that.

And perhaps in that regard I think it was beginning to, in my mind, cross over into the issue of remedies and how that was facilitated in the event that there was an issue about the legality of this in which I think not only is there the base legal proposition that I've advanced but also, which I'm conscious your Honours need a more targeted submission from me about that range of cases, but also about the issues that surround not only the act of burial but the consequent act of disinterment and where that fits appropriately and to any decision making in relation to outcome. And again, I think that goes to both the remedy issue but also overlaps into the issue of proper burial.

ELIAS CJ:

Well I wonder whether it is of significance that this right of the executor to take possession for the purposes of burial of a body is derived from a duty to bury which applies not only to executors but also to those who have the custody of a body, like the superintendent of a prison, like the superintendent of a hospital or something like that. So it is directed at decent disposal.

I can see that, and the cases are relatively consistent in saying that there is no property in a body. I can see that an executor retains standing to apply to the Court or something like that to apply for relief to obtain a body that has been wrongly taken or buried but that may not be the same thing as having an immediate right of possession because the right of possession that's been recognised by the common law is a right of possession for the purposes of burial. But that's not to say that the executor doesn't have standing after burial but it's a different sort of right, it's not an immediate right to possession because that is only for possession for burial.

MR FERGUSON:

For possession for the purpose of burial.

ELIAS CJ:

It's very difficult this area of law, it's amazingly unclear.

MR FERGUSON:

No and, I think, never a truer word was uttered, on what on its face appears relatively simple when one first glances at it –

TIPPING J:

Am I right in thinking that the executrix widow has obtained a licence under s 51(1)?

ELIAS CJ:

Well there is a licence but it's directed at a constable. I imagine she's obtained it because she has the standing to get that.

TIPPING J:

Well the minister has obviously, at least purported to give –

ELIAS CJ:

No, it's not in the minister's name –

TIPPING J:

Is it not –

ELIAS CJ:

I'm not sure whether it – it's not really clear, it's a bit unsatisfactory on its terms.

TIPPING J:

Well I was just looking at the s 51 and there's a number of points arise out of it. The standing point, vis-à-vis executors, would seem to be fairly self-evident from s 51(1) that they would be entitled to apply for the minister. I see there's absolutely no basis to read the section down because it actually talks about relatives and friends as being –

WILLIAM YOUNG J:

But that's a closed cemetery I think.

TIPPING J:

Yes, I know but there's absolutely nothing in here which suggests that the executor can't apply, so they must have standing at least to apply under the section?

MR FERGUSON:

Yes, the section is relative – doesn't talk about really the grounds upon which one could –

TIPPING J:

Well never mind the grounds but we're here saying that – you're asserting that after burial, proper burial, executor's authority ceases. Well that can't stand with 51 of the Act, I would have thought.

WILLIAM YOUNG J:

The disinterment licence is page 272. It's signed by, presumably someone with delegated authority.

ELIAS CJ:

Yes, that's what one would imagine.

WILLIAM YOUNG J:

And it's addressed to a senior sergeant.

MR FERGUSON:

And actually with – it's not actually apparent who the applicant was from that either and I'm not sure –

WILLIAM YOUNG J:

You could probably guess actually, can't you?

ELIAS CJ:

But the point that I'm asking for assistance on is whether there is a distinction between a, if one can call it a possessory right, which is what the common law recognises for the purposes of burial, and then standing to seek intervention by the Court or by the minister to secure restoration of a body that has been buried contrary to the wishes of the executrix or executor. But it may be that you can't assist us anymore with this Mr Ferguson and it may be that we should ask you to wrap up your submissions to us so that we can hear from counsel for the respondent.

MR FERGUSON:

I mean, that might be advantageous Ma'am and I'm sorry I'm unable to take that successfully further. No doubt I'll sit down and find what I've written on this and be re-enlightened, it has gone somewhat blank.

I think I can make the following observations. In relation to the disinterment licence that was granted, as I understand it, the reason these proceedings then ensued is because there were obviously difficulties perceived or actual on the part of whether – on the part of the plaintiff, the first respondent, or on behalf of the licensee in terms of effecting that and whether the – what the nature of that was I'm not sure –

ELIAS CJ:

It's curious that the evidence doesn't seem to be directed at the orders that are being sought against the appellants. There's no evidence is there of – or if there is I missed it, I mean, there's a description of what happened but there's no evidence directed at whether it's thought necessary to obtain an order that they not interfere with the disinterment.

MR FERGUSON:

Yes, no. Essentially they'll say the case took on very rapidly a different context –

ELIAS CJ:

Most unsatisfactory for cases to develop in this way, particularly in an area of such importance.

TIPPING J:

But unless you're in the position, which I don't think you are, to give any undertakings on behalf of your clients, if we are addressing this issue which we will only be doing if you fail on ground one, at least as I see it at the moment, then the remedy granted would be entirely justified.

MR FERGUSON:

In terms of non-interference.

TIPPING J:

A restraining, restraining interference because there would be no lawful basis for them to interfere.

MR FERGUSON:

Yes I think, whether it's a – as I say, your Court would want to know whether that was a necessary order to make or not but –

TIPPING J:

Well, but at the moment you're, and understandably, you may not be in a position to give any other facts.

MR FERGUSON:

No, no, and I'm not for the – for the appellant who I'm, singular, who I'm representing today so you've got to – there are a number of obvious issues that arise in relation to this and my friend touched on them –

TIPPING J:

Well the Court wouldn't actually have to accept an undertaking –

MR FERGUSON:

No.

TIPPING J:

– I'm not forecasting that would be the view but it doesn't have to. It could simply say, well, no it's better in the circumstances that the thing proceed on the terms of the order.

MR FERGUSON:

Yes, and the issue I was alluding to is that there are obviously a range of other persons who are responsible – my – the named parties in the original –

TIPPING J:

Well, look, I don't think you need to develop this. I understand exactly how you are placed.

MR FERGUSON:

Yes, I was just going to observe, Sir, that we're a – there is a subset – the parties to the proceeding are a very small subset of the broader collective that is involved in the process and also is different from those who – they aren't responsible for the urupā

or its maintenance in that respect and it was discovered in the High Court stage that the two urupā trustees that –

ELIAS CJ:

They've both died, haven't they?

MR FERGUSON:

– had originally been named have both passed away and that there are no current living trustees there.

TIPPING J:

Well an injunction to the world might be the solution then, rare as that is, but if there is no ability to identify.

MR FERGUSON:

Well, no, I'm not saying that there is no ability to identify but –

WILLIAM YOUNG J:

Well no one is putting their hand up to say we will co-operate with an order the Court makes, or we will facilitate the orderly implementation of the decision the Courts eventually reach.

MR FERGUSON:

Well I think the position I was able to state is that if the issue of remedy arises then my clients have an interest in engaging on that in the manner in which such orders might, because of the nature of the tikanga, that from their point of view is essential to any disinterment least we end up with compounded repugnancy on, that sits upon this and I think we just end up with another unsatisfactory situation which it's in nobody's interest to have as the outcome of this proceedings but I suppose one needs to exercise caution in that respect and I suppose that is why the, I think, Court of Appeal indicated that the matter of remedies should go back to the High Court because there are potentially things to be explored about what the nature of that relief should be, who are the parties that need to be and should possibly be heard on that and how one properly ensures that whatever should lawfully occur, so far as humanly possible in the Courts, and the parties can occur? And the case, again, wasn't directed to that issued at first instance because it –

ELIAS CJ:

I don't think we need any more explanations.

MR FERGUSON:

Yes. No.

ELIAS CJ:

Thank you.

MR FERGUSON:

It's unhelpful, the position, you know, one would like to be here with all of the facts covering all of the issues as they've now permeated to the surface over three hearings where, or two sets of Courts have taken quite different approaches and that's given rise to specific issues that weren't necessarily anticipated by the representative of the parties at first instance. Thank you, Ma'am.

ELIAS CJ:

Thank you, thank you Mr Ferguson.

MR McCOY:

If it pleases the Court, I would like to make some short overarching submissions before turning to the discreet issues that the appeal raises.

Firstly, the respondent would accept that as a generality tikanga is a cultural heritage and has the genuine capacity to enrich the general law of New Zealand. Secondly, any tikanga that comports with the general law will itself become cognoscible as a constituent part of the general law. Three, the potential interaction between tikanga and the general law is itself a matter for determination under the general law and this will engage a fact sensitive evaluation as to the parameters and the substantive content of the particular tikanga in issue. Four, where possible under that framework there will not be a binary situation but rather a process of mutual accommodation or conditioning between the tikanga and the general law. Five, if a –

ELIAS CJ:

Sorry. Can you just explain that a little bit more for me?

MR McCOY:

I certainly intend to your Honour.

ELIAS CJ:

I see, you're just summarising. All right, that's fine.

MR McCOY:

Indeed. I will finesse each of these points as a result of your questioning in due course. Five, if a particular tikanga on analysis is irremediably inconsistent with the general law, or if it is irreconcilably incompatible with fundamental precepts of New Zealand constitutional society, it cannot be countenance under general New Zealand law and is contrary to it.

This appeal therefore, provides in some ways a well overdue and yearning opportunity for Your Honours as the highest Court for our country, to identify the principles for the harmonisation between Māori customary law and the general law of New Zealand. The choreography of the issues to be presented by the respondent is set out in our paragraph 30 and, subject to the Court's direction, I would intend to move with some alacrity through the earlier points and I would –

ELIAS CJ:

Well we have in fact read the submissions so you can accept that.

MR McCOY:

Well, thank you. I would ask the Court, in that spirit then please, to come to paragraph 37 of our printed case. The first submission that I would make and I note it is acknowledged to be correct by the appellant, is that the executrix or executor has, under New Zealand law, the legal duty to dispose of the body. If that proposition is correct, that duty must carry with it the enforceable right to perform it and it must follow thereafter that that duty to dispose of the body therefore provides the executor with the necessary right to possession of the body for fulfilment of that duty.

TIPPING J:

On what basis are you saying that this proposition is accepted by the appellant?

MR McCOY:

The appellant accepts the concept as I see it, that the executor has the duty under orthodox common law. The appellant's case, as I understand it, is that that right is

affected by the notion of tikanga and tikanga and the common law right must somehow coexist.

TIPPING J:

Are you saying this is without bringing tikanga to that?

MR McCOY:

Oh, yes, oh yes, at this stage.

TIPPING J:

At this stage?

MR McCOY:

Yes, certainly.

TIPPING J:

I'm not sure. The duty is probably a residual one but that may not need to trouble us. In other words, it's perhaps to see that it has a proper burial.

MR McCOY:

Well I will in fact ask the Court shortly to come to the rather epigrammatic statement that there is no property in a dead person's body because in my submission that statement is as general as it is misleading. The true and sophisticated legal analysis that deals with this concept shows, on our argument, that there is in fact custody and a right of disposition which are the essential attributes of the whole notion of property.

This has been specifically and closely examined in one of the American cases, and it should be noted that the classic expression in *Williams v Williams* is taken from an oral judgment in Chancery in 1882 and presumably because the Courts often have to act under haste in view of the need for speed generally in these types of decisions. One finds that that terse statement is and has been uncritically adopted by many subsequent Courts but if I could ask the Court to come to volume 1, case 19, to find what we submit is the accurate statement which represents indeed New Zealand law.

It is a judgment of the Supreme Court of Pennsylvania in 1904, six Judges unanimously, *Pettigrew v Pettigrew* (1904) 56 A 878 (Pennsylvania SC), and if Your Honours would come to page 4 of 7, top right-hand corner being paragraph 315

of the original report. We see the opinion by Chief Justice Mitchell and this paragraph reads. "When a man dies public policy and regard for the public health as well as the universal sense of proprietary, require that his body should be decently cared for and disposed of. The duty of disposition therefore devolves upon someone and must carry with it the right to perform. It is commonly said, being repeated from the early cases in England where the whole matter of burials was under the jurisdiction of the ecclesiastical Courts, that there can be no property in a corpse, but in as much as there is a legally recognised right of custody, control and disposition, the essential attributive ownership, I apprehend that it would be more accurate to say that the law recognises property in a corpse but property, subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. Whether, however, the rights be called property or not is manifestly a question of words rather than of substance." And we submit that that is an entirely accurate conceptual analysis of the true position of the executor's duty and rights equally under New Zealand law.

Now I will not wearisomely take the Courts –

ELIAS CJ:

Sorry, my understanding, and it's partly obtained from Rohan Hardcastle, *Law and the Human Body*, I don't know whether that's included in the materials, I think it is, before the Court.

MR McCOY:

It is.

ELIAS CJ:

Is it that the American jurisdictions vary in their approach particularly in terms of this quasi-trust notion and that in recent years there's been a pulling back from that approach. Are you going to develop this at all?

MR McCOY:

I think your Honour, I will show your Honour that the position in America could perhaps been seen as uneven.

ELIAS CJ:

Yes.

MR McCOY:

It very much depends on the State Court and whether that State Court came with the common law and equity, or developed from the civil law propositions, or has developed quite independently of the original English law situation. Some of the north-eastern states, like Pennsylvania, Delaware and the like, continue to effectively apply the equivalent of English law.

For that reason, of course nothing said by the American Courts can in any sense be said to be definitive or persuasive beyond the intrinsic value of the reasoning as appears from the material but I do submit that from the smorgasbord of jurisprudence one can find in America that *Pettigrew v Pettigrew*, particularly that paragraph, is a meet encapsulation and a true understanding, in a finesse sense, of the notion of property and of the notion of trust and of the notion of the enduring fiduciary responsibility that falls upon the executor.

WILLIAM YOUNG J:

But isn't it actually authority for the proposition that the executor didn't have an interest in the body after it was properly buried and in that in this case, as it were, the priority went to the widow as next of kin?

MR McCOY:

It is to that effect. There are however, no less than eight other judgments which I can show the Court, where the Court has much more closely examined the right since 1904, whether the executor has an enduring right post-burial, where there has been a tortuous or a criminal act leading to the burial. I would mean –

TIPPING J:

Mr McCoy, before we get to the post-burial problems, does it really matter how we characterise the executrix's right? It is, at the very least, a right to possession –

ELIAS CJ:

For the purposes of burial.

TIPPING J:

– for the purposes of burial.

MR McCOY:

The reason why it is significant to characterise the right, whilst entirely accepting what Your Honour says in terms of possession, is the executor alone, unlike under tikanga, has a duty, a legal duty. Tikanga does not impose a legal duty. At most it generates a permissive interest born out of sincere cultural considerations but it does not constitute a legal duty. The executor has that responsibility.

ELIAS CJ:

But the reason it's couched as a duty, I mean, there may be a number of reasons. One is the residual approach that Justice Tipping mentioned because presumably there may be many cases where some relatives organise burial and the executor's wishes are not ascertained at all. In those circumstances, the executor isn't under a duty if the body has been buried according to the purposes for which the duty applies and *Pettigrew* I think is a useful authority because it emphasises that it's a purpose of approach. The purpose which is identified is public policy in regard for public health and that's why you have to have a residual duty. It also permits presumably, the executor to make this a charge on the estate. So it's not a matter of – that's why it's a matter of obligation.

MR McCOY:

It is a duty which in itself of course correlates with obligation because it must fall upon someone, under the law, to achieve the purpose. The executor or executrix can however devolve that right or duty by acquiescence or by consent on another. That did not happen in this case. There was an improper asportation of the body and the coffin of the late Jim Takamore.

ELIAS CJ:

But I think you will need to develop that because if the purpose is public decency and public health, and I think some of the cases say this is a public duty or words to that effect, why is it not fulfilled on burial that conforms with the objectives of public decency and public health?

MR McCOY:

That is the second question and I certainly will address it –

ELIAS CJ:

Yes.

MR McCOY:

– and if you prefer I will do it immediately.

ELIAS CJ:

No, no do it in your order, that's fine.

MR McCOY:

No I will assume the burden of answering it immediately. The answer to the second question, and I will come back to the first part of the true common law position under New Zealand law, but the answer to the second part is this.

The late Jim Takamore has never been properly buried because "properly buried" means in accordance, in accordance with the duty and decision of the executor who is the decision maker in terms of the duty imposed on him or her by law. Now if there has been, as I respectfully submit in the present case, tortious conduct or indeed even criminal conduct, then it follows that the body was taken by way of an unlawful asportation. The –

ELIAS CJ:

Are you going to take us to authority on this?

MR McCOY:

Indeed I am.

ELIAS CJ:

Yes.

MR McCOY:

And I'm very close to doing that. The executor would be entitled to a mandatory injunction for disinterment to secure proper burial and/or damages and it would be unconscionable if no remedy under the law would exist because it would otherwise only sanctify the anterior wrongdoing of the other parties.

In this case the respondent as an executrix immediately challenged the unlawful taking of her late partner and she pursued that by way of –

ELIAS CJ:

I'm sorry, the unlawful taking in your submission is simply because it was without her consent, is that right?

MR McCOY:

Correct, correct.

ELIAS CJ:

And that's based on a submission that the executrix or the executor has the exclusive power –

MR McCOY:

Decision making and power.

ELIAS CJ:

Yes, I see.

MR McCOY:

Indeed. And since the original asportation she has consistently and continuously asserted her legal right and I submit this is an unfulfilled duty and she is required to continue to pursue the fulfilment of the original duty imposed upon her.

Indeed, s 150(a) of the Crimes Act makes it a criminal offence for someone who has a duty imposed upon them in relation to dead human persons not to fulfil that duty.

BLANCHARD J:

Are you suggesting that if she changed her mind and said, "I've had enough of this, I don't propose to take this matter any further, my late husband can rest where he presently lies," that she would be in breach of duty?

MR McCOY:

No, not in that circumstance because that would have amounted to a fully informed consent or acquiescence to the position. She, as the decision maker, at that point, would have been satisfied that her duty had been fulfilled and that would be sufficient in all the circumstances. She would thereafter have no enduring right in terms of possession or the proprietary rights that exist in an executrix.

ELIAS CJ:

But this is a public duty. Where is the public policy in the course that you're advocating here that she remains under a duty unless she wills the result.

MR McCOY:

It is a private matter of trusteeship obligation imposed as a function of being an executor. That cannot be unilaterally taken away by the conduct of others. So that obligation remains unfulfilled –

ELIAS CJ:

So that's a property claim, is it?

MR McCOY:

It is a quasi-property claim as the authorities demonstrate but the function of it is an unfulfilled duty in terms of trusteeship and that's imposed by the office of executorship and that means no other person can be the ultimate decision maker in relation to the disposition, or mode in place of disposition of the body, without the consent, informed consent or agreement of the executrix.

WILLIAM YOUNG J:

Your position, I suppose, it doesn't have to be super broad, she was in possession of the body and she had put in train events that were going to lead to the burial of the body in the Ruru Lawn Cemetery. So it's not a case of there's a body lying in a house and nobody knows what to do with it, or anything of that sort and your contention is that it was wrong, whether criminal – you'd say criminal, to interfere with her execution of that duty?

MR McCOY:

Exactly.

WILLIAM YOUNG J:

All right.

TIPPING J:

Is it inherent in your proposition that no one can go to Court to review her decision?

MR McCOY:

No. I do not suggest it is non-judiciable because, as it is a trusteeship obligation it would, on my own argument, be subject to the usual oversight of the Courts in relation to the rights of trusteeship, therefore if the decision of the executrix was illegal, was capricious, or patently unreasonable and I'll show you examples of each of that, in relation to carrying out the executrixship decision maker, it is reviewable by the Courts. But what would have to be established would be a trusteeship breach, a fiduciary breach would have to be established and it's plain and obvious and we would submit entirely intuitive, that there must be a very significant latitude available for an executor in terms of the relative decision making.

In due course, when I come to address the difficulties, I think my learned friend used the word the "imponderables", one will have to confront how the two potential sources – sorry, tikanga as a potential source of law and its confluence with the general law of New Zealand and I will specifically address that issue but –

TIPPING J:

You would accept though, as you have, that the decision of the executor is amenable to judicial oversight but on fairly limited grounds, as are consistent with reviewing a trustee's decision in the ordinary course of events?

MR McCOY:

Exactly, that has always been our case. Yes, we did not advance a totalitarian absolute position but a modified absolute one that there is the right to challenge the decision of an executor, as much as you can challenge the right of any trustee but you will only succeed in challenging such a person and the Court will only interfere with the discretion making decision of an executor if it's been exercised improperly, capriciously or wholly unreasonably and I'm referring now to paragraph 46 of our printed case, where the authorities are set out to the effect. In particular –

ELIAS CJ:

Just before going to those authorities, thinking back about your submission that the executrix is required to continue to fulfil the original duty –

MR McCOY:

Yes.

ELIAS CJ:

– imposed on her but can acquiesce in what has happened, and thinking more generally than this case because these sort of issues can arise without any of the background that we have here, if an executor is not consulted about a burial because the family achieves it and the executor later doesn't approve, are you saying that the executor is entitled to possession of the body?

MR McCOY:

Yes, and in fact the case law is to that effect and I will take you to those authorities –

ELIAS CJ:

Yes.

MR McCOY:

– because I am conscious that the Court is seeking assistance in relation to what is a somewhat arcane point.

TIPPING J:

So your approach would involve, and I'm not expressing an implicit view one way or the other, Mr McCoy, your case would involve giving a far degree of priority to the decision of the executrix subject to some overriding control in extreme circumstances?

MR McCOY:

Exactly.

TIPPING J:

Yes, whereas the idea floating earlier was that the Court should, as it were, make a decision on the merits with the executor's position just being one, and an important one, of the factors to be taken into account along with factors on the other side.

MR McCOY:

I will address the Court about the invidious position should you ever had to get into a merits-based analysis because with all respect my submission is, the Court is ill-equipped, in fact, not equipped to weigh up what are effectively incommensurables.

How much one person's love of a particular tikanga should be – can it really be weighed up against another person's love of some religious observance. How do

you measure the value of the children's wishes? These matters are, in my respectful submission, matters that are non-justiciable because the Court simply is incapable of evaluating them.

In fact, there can be as Baroness Halessaid in this regard, "No hierarchy of value's established," for that very reason. Therefore, to fall back on something as amorphous as moral authority is far too transcendental a notion to have any value in a legal system in relation to this type of issue. Incommensurables would be evaluated.

What can and may well prove after this case to be the law of New Zealand is a more nuanced situation in which, whilst the executor or executrix still retains the final decision-making power (subject to review on the limited basis I've already adumbrated). the executor should take into account the rights of other stakeholders which would embrace tikanga. However, -

TIPPING J:
Is that an acceptance by you or just a forecast of where we might be going?

MR McCOY:
It is both.

TIPPING J:
But – right.

MR McCOY:
It is both. It is both, because that would give informed normative value to tikanga because if under New Zealand law we are to treat it as a prospective component of our general law, it must carry its own weight, but that weight will be fact sensitive and would require an evaluation.

The difficulty when one brings the two together and although as the Chief Justice this morning correctly referred to the judgment of *Dodds* in South Australia, the judgment there when I take you to it, proves on analysis to be aspirational because whilst it says take into account it never and how could it, it never identifies how you take that into account, how do you adjudge and evaluate it in the circumstances –

ELIAS CJ:

But hang on, you just said that the executor must take it into account because it's one of the factors, so how does the executor take it into account and how does the fact that the executor has taken it into account, how is that demonstrated, are we going to require executors to give reasons?

MR McCOY:

How it is taken into account is entirely a matter for the executor. As we know, even in public law and this is not a public law issue but a private law matter, in a public law issue, take it into account does not require that any individual component of the decision making be ascribed a particular value. It requires simply that it be put into the calculus of the decision making –

ELIAS CJ:

But how is that to be, how is that fact, whether it has been put into the calculus of the decision making, to be ascertained?

MR McCOY:

Well, if someone is confronted with the fact or a claim under tikanga, then if you do not approbate, if you do not accept what is being advanced, you have evaluated it in the circumstances of the particular matter, as carrying no weight other than that that you give it. There will be, of course, perhaps in other factual circumstances but not this one, in this case, where someone will give it significant weight. It will entirely depend on the decision maker but the decision maker has to be, on our argument, the person on whom the duty is devolved and what is unacceptable and inappropriate and inexpedient, in terms of a contextualised issue where there is matters of grief and vulnerability predominating, is for there to be the imposition against an unwilling executor of a claim to tikanga.

TIPPING J:

If you were to have a corporate executor, as may be the case – well, a lot of people appoint trustee companies as executor. What would be the procedure then Mr McCoy, would they have to sort of have a bit of a hearing?

MR McCOY:

No, it's not an – it's not such a situation –

TIPPING J:

Well they've got to take it into account –

MR McCOY:

That's right.

TIPPING J:

– and –

MR McCOY:

It would depend your Honour –

TIPPING J:

– the claim would have to be made to them, wouldn't it?

MR McCOY:

Correct.

TIPPING J:

That would be the first step.

MR McCOY:

Exactly. There has to be an assertion or a claim, then it has to be evaluated which could be instantaneous and it might and should be very quick because of the subject matter and of the issues of decency and respect that pertain to the very fact that a human has moved on –

TIPPING J:

Would we be setting up arguments for you didn't hear us or, you know, I'm trying to be practical about this. I mean, I'm not out of sympathy – well maybe we're reaching the –

ELIAS CJ:

No, no. Well would we be setting up arguments where a wife and children with a corporate executor don't have their wishes fulfilled and, on your submission, well it's the executor's call?

MR McCOY:

That's right. The executor – someone must, unless the law is to turn to a very awkward posture, have the right to make a time efficient decision in relation to the disposal of mortal remains. It can –

WILLIAM YOUNG J:

But if the executor was a trustee company – well, let's say that the executor, we can leave the trustee company out of it, the executor made a decision as to burial which was flatly opposed by all members of the deceased's family, well that would be the capricious, unreasonable sort of decision which one would expect to be quickly reviewed.

MR McCOY:

Exactly, and I countenance that very scenario within our submission. Where there was, say, unanimity but an obstreperous trustee or executor then the Courts would be utterly entitled in those circumstances. But it can never, and I of course will come to this in due course, it can never come to a notion of might is right. It can never come to a force majeure situation or a situation, I'm afraid borrow more French, where it's fait accompli and you say, well, we've got it now you have to go off to Court and try and stop us. The decision making cannot simply ever engage those notions, we say, with respect.

Now the –

TIPPING J:

It is at the heart of your argument that there really has to be someone before the Court –

MR McCOY:

Oh yes.

TIPPING J:

– who has vested in them the power of decision, subject only to the control of the Court in, what I'll call extreme circumstances.

MR McCOY:

Of course, with respect, of course. I mean, this is no recently discovered God particle of the common law, that's why executors have duties because it must fall on someone who can very quickly make the decision. So the chain of decision making has to be the executor if there is a contest, which there should not be except in the most exceptional case, then it has to come to the Court, the Court decides it under the inherent jurisdiction as reflected by section 16 of the Judicature Act 1908. It's a justiciable issue because you are dealing with trusteeship and you're dealing with rights of property as I've described them through the *Pettigrew v Pettigrew* analysis.

McGRATH J:

Characterising it as trusteeship, is there – you've indicated there's a range of American authorities, is there anywhere outside of the United States that, particularly in England or Australia, that has picked up this trustee concept?

MR McCOY:

Certainly I can, I'd show the Court where the expression "fiduciary responsibility" has been equiparated with the duty on an executor. As for immediately identifying the phrase "trusteeship" from the other authorities, I will have to content myself by looking through the cases again but I will certainly be able to assist the Court in relation to this question promptly tomorrow morning.

ELIAS CJ:

All right. Is that a convenient point to take the adjournment, Mr McCoy?

MR McCOY:

Certainly.

ELIAS CJ:

Are you sure Mr McCoy, did you want to finish something?

MR McCOY:

I'm afraid I've just started so I'll never finish.

ELIAS CJ:

Right, we will take the adjournment and resume at 10.00 am tomorrow.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON WEDNESDAY 18 JULY 2012 AT 10.03 AM

MR McCOY:

If it pleases the Court, your Honours, might I invite your attention initially this morning to volume 2 of the authorities and I shall try and stay in this volume to avoid occupational overuse syndrome. If we come initially to case 38 in volume 2. It's a case decided in the equitable jurisdiction of the Supreme Court of Rhode Island in 1872. It's been applied by Justice Heath in New Zealand and has been widely regarded as a true exemplar of the correct approach to equity in the type of issues that we've involved with in this appeal.

The heir at law, the executor, agreed to have her late father buried. Some 13 years later her mother moved the body, had it disinterred surreptitiously. The executor now brought proceedings. If one comes please to page 7, top right-hand corner of 11, in the judgment of Justice Potter. So the case is *Pierce v Proprietors of Swan Point Cemetery* (1872) 14 Am Rep 667 (SC) and we're at page 7 of 11, top right-hand corner, in the first full paragraph, omitting the first sentence, "That there is no right of property in the dead. Using the word in its ordinary sense may well be omitted. If the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property, there is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead. A duty and we may also say a right, to protect from violation and a duty on the part of others to abstain from violation. It may therefore be considered as a sort of quasi property and it would be discreditable to any system of law not to provide a remedy in such a case." That is, to a wronged executor.

This judgment is further, the next page, page 8, the last full paragraph, the sees the analysis beside square bracket 240, "It has been the boast of many of the sages of the law that there is no wrong without a remedy," and applying that principle through equity, coming to page 10 of 11 of this judgment, the Court concludes, in the middle paragraph, say 52 percent down the page, page 10, "That the executor holds on a sacred trust." The paragraph beneath, "That the –

WILLIAM YOUNG J:

I haven't got that, I'm sorry.

BLANCHARD J:

I'm getting completely lost.

MR McCOY:

I'm sorry, if I'm moving too fast forgive me, I'll rewind. Page 10 of 11 –

McGRATH J:

Just identify the paragraph precisely you're in, that would help.

MR McCOY:

I see. Commencing, "Although, as we have said," halfway down. "The body is not property in the usually recognised sense of the word, yet we may consider it a sort of quasi property to which certain persons may have rights as they have duties to perform towards it arising out of our common humanity but the person having charge of it cannot be considered as the owner of it in any sense whatever, he holds it only as a sacred trust for the benefit of all who may, from family or friendship, have an interest in it. We think that a Court of equity may well regulate it as such and change the custody if improperly managed. So in the case of children, certain persons are prima facie entitled to their custody, yet the Court will interfere and regulate it. We think these analogies furnish a rule for such a case and one which will probably do most complete justice as the Court could always interfere in cases of improper conduct. The following paragraph, the Court will see that having been properly buried, the body had been surreptitiously disinterred because the wife wished to have the body buried somewhere else."

The Court, in the last paragraph, commencing with the expression, "Consent of course cannot give jurisdiction," and the following few lines and the few over the page concludes that, "The legal right is a right remaining and that they are in fact trustees for certain purposes and when the trust is not properly executed this Court has the same jurisdiction to compel its execution as in any case, case of any other trust."

ELIAS CJ:

I'm sorry. This case recognises the authority of the person who has charge of the body, is that right?

MR McCOY:

It recognises the authority of the executor being the heir at law to have an enduring right to prevent the surreptitious disinterment by the wife of the deceased.

ELIAS CJ:

Why do they refer to the person having charge of the body?

MR McCOY:

I'm sorry your Honour, may I ask which paragraph?

ELIAS CJ:

Well that paragraph you took us to, "Although as we have said." I'm just interested in that terminology because the Burial and Cremation Act and I am slightly surprised there hasn't been more reference to the New Zealand statutory scheme, such as it is, it probably doesn't take us very far, it has the same sort of concept, the person having charge of a body and s 46E of that Act which is the duty to dispose of a body, is concerned with the person having charge of a body.

MR McCOY:

And that presupposes having lawful possession to carry out that function. That is why when I come to dealing with the Burial and Cremation Act I will submit it presupposes or was predicated upon the fact that there is a lawful status that the duty which exists at law has not been one improperly interfered with by someone else. The Act deals with the functionalities and the mechanics of final disposal but it does not, on proper interpretation, exclude the executor from having the right to ensure that the possession is in accordance with the wish of the executor and if that wish is broken by some overborne performance or by coercion then the status of the deceased is not a person who rests in peace in accordance with the law of possession and the subsequent Act –

ELIAS CJ:

Well this is a very long speech but I'm trying to get an answer to a specific question because you talked about what is – you talked about the wrong here and I'm trying to ascertain exactly what the wrong you say is. It's that I'm taking from what you're saying that it's solely the right of the executor to dispose of the body?

MR McCOY:

Yes.

ELIAS CJ:

Now where do you get that from in this case?

MR McCOY:

I'm not suggesting that that, this case is –

ELIAS CJ:

I see, I'm sorry.

MR McCOY:

– the authority which shows that proposition but this case –

WILLIAM YOUNG J:

It is actually stated towards the bottom of page 7 but I mean I suspect this, from reading the thing generally, the states – the laws of all the states are not exactly identical but it does say, "With us the executor or proposed administrator generally superintends the burial."

TIPPING J:

Isn't the significance of this case its post-burial dimension?

MR McCOY:

Exactly and it shows that the executor had still the right and in fact I intend, with respect, to show the Court clearer examples of the post-burial scenario where Canadian Courts rather recently have held that the executor still retains the authority otherwise it would be a completely hollow right and would we not be in some form of grotesque game if you could be lawfully buried one day in accordance with the rights of the executor yet the next day somebody could disinter you and there would be simply no rights in relation to that scenario.

ELIAS CJ:

But that can't happen in New Zealand because of the Burial and Cremation Act. You cannot be disinterred without a licence from the minister.

WILLIAM YOUNG J:

But you might be though.

MR McCOY:
But if you are –

WILLIAM YOUNG J:
You might be though, it's just unlawful.

MR McCOY:
– that is my problem. That is the reality. If you are, I fully accept your Honour the Chief Justice's analysis of the strict law but we are dealing with situations that may not or could not –

ELIAS CJ:
Well we're not dealing with that situation here.

MR McCOY:
Not yet.

ELIAS CJ:
We're – no.

MR McCOY:
Not yet. That is an unfortunate prospect which we look forward to with dismay, yes.

ELIAS CJ:
Well I don't know that there is any basis for looking forward to it at all. There's no evidence to suggest that if the outcome is that there is a reburial that the body would be disinterred again unlawfully.

McGRATH J:
That is a matter if necessary I accept.

ELIAS CJ:
Yes.

MR McCOY:

For a downstream conclusion to be reached. One hopes that none of these scenarios will have to actually occur.

ELIAS CJ:

But you're saying that the authority of the executor, such as it is, continues after a burial where necessary?

MR McCOY:

Indeed, and I will now, if I might, show Your Honours some more recent authorities.

Staying in the same volume if you come to page 34. This is *Waldman v Melville* (1990) 65 DLR (4th) 154 in 1991. The deceased died in 1985, so five years later and was buried by his common law wife who was the executrix. So a perfectly lawful burial arrangement.

The applicant was the deceased's sister. She obtained a permit under subsidiary or primary law permitting disinterment of the remains and reburial. She wished for the burial to take place, or the reburial, in a Jewish cemetery. She applied for an order enforcing the permit.

The application was dismissed and if one comes please to page 156. After traversing from the top *Williams v Williams* with the notion of proper burial, the extract from *Pettigrew v Pettigrew* which I commended to the Court yesterday which has been adopted in *Miner v Canadian Pacific Railway* (1911) 3 Alta LR 408, (ABSC) and the last three or four lines. "The right of the executor continues after the burial of the body otherwise it would be an empty right and subject to the regulations. Those who oppose the executor could disinter the body as soon as it was buried. The executor's right may be reduced or eliminated by provincial legislation but the legislation must unambiguously show that to be its intention.

And there is subsequent Canadian authority following this judgment also a judgment of only a single Judge but this time a Judge from Ontario.

WILLIAM YOUNG J:

It says, sorry, yes, sorry I misread it.

MR McCOY:

Yes it's *Sopinka v Sopinka* [2001] 55 OR (3d) 529 (Ont Superior Court of Justice) in volume 1, case 24. I don't ask you to turn it up because it's just to the same effect. *Sopinka v Sopinka.*

There is also a decision of the New South Wales Supreme Court in equity in relation to the rights of an executor where the body has been cremated and in the case of *Robinson v Pinegrove Memorial Park Limited & Swann* (1986) 7 BPR 15 (NSWSC) which is, I fear, in volume 1 at tab 25. The judgment of Chief Judge Waddell in equity in 1986 who held, "That an executor has a right to possession of the ashes of the deceased who has been cremated and to direct their final disposition, particularly where the executor wishes to carry out the wishes of the deceased."

Now his Honour said there was no prior authority discoverable in relation to that particular issue and it is at page 15, 098, the second page of the short report. The ultimate paragraph commencing with the expression "giving the matter the best consideration I can" and in those following lines His Honour concludes that the executor has the right to direct how the ashes shall finally be disposed of.

ELIAS CJ:

Particularly where the executor intends to act in accordance with the wishes of the deceased is an indication that it is not an absolute right by the executor, does it not?

MR McCOY:

Indeed, and your Honour, I do not contend that the executor's right is absolute –

ELIAS CJ:

No, I understand that.

MR McCOY:

I fully submit –

ELIAS CJ:

Yes.

MR McCOY:

– that it is a strong prima facie entitlement –

ELIAS CJ:

Yes.

MR McCOY:

– that can be displaced if there is appropriate countervailing considerations. When it comes to consideration, for example, of the South Australian case of *Dodds* I will suggest by way of respectful submission, examples where tikanga could trump the situation. Not this case because in my submission, which I have not yet come to, the tikanga itself is unreasonable, uncertain and indeed violative of statutory law in New Zealand but other tikanga, or a modified version of it on a consensual model, plainly has got significant potential value.

Yesterday when I referred the Court to *Pettigrew v Pettigrew*, that more sophisticated analysis of the notion of property, Justice Young taxed me with the observation that in that particular case the executor's right was held to come to an end, to be as it were, coterminous with the right of burial but in that case it was done with consent of the executor and that is a distinguishable situation.

If the executor consents to the initial burial it may well be, even on *Pettigrew v Pettigrew*, which would be distinguishable from the present case. It may well be that that brings to an end or exhausts the duty of the executor but where there has never been an initial proper or lawful burial, in accordance with the wish and the duty of the executor, our situation, on our argument, the executor's duty remains unexhausted. It's for this reason I respectfully commend that equity comes to hand and I would like to take you to another judgment if I might, from the New South Wales Supreme Court.

It is in volume 1 and it's the last case, *Smith v Tamworth City Council* (1997) 41 NSWLR 680 in 1997 where Mr Justice Young of the New South Wales equity division, in an extended judgment, considered many of the authorities. If your Honours would come please with me to, first of all, 690 of the judgment at (f), simply to note that this learned Judge is himself considering the Rhode Island case of *Pierce v Proprietors of Swan Point* that I've previously taken you to.

Turning to 691, we then find at (d) the following, "There are other passages in the authorities to similar effect." I will quote only one more from the judgment of a Missouri Court, the Court of Appeal in *Polhemus v Daly* 296 SW 442 (1927), based

on the corpus juris, "While there is no right of private property in a dead body in the ordinary sense of the word, it is regarded as property so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial." A fortiori, the executor who has the legal duty and I read on.

This states the law in New South Wales, "Although the common law would not give a remedy, *Bone v Clancy* (1881) 2 LR (NSW) (L) 176, equity would grant an injunction to protect the irrevocable licence involved in burying a body." To complete the extracts from this judgment, his Honour tabulates at the end of 693(g), throughout to 694(e), a series of propositions. The one that I commend the Court to is proposition three at 694(a) to (b). "A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders," that would include the whānau pani, "but is not legally bound to do so."

It's an expectation, it's not an enforceable one but there will be appropriate circumstances and I will commend these to the Court shortly, when the rights of the whānau pani may displace the obdurate decision-making of an executor or executrix in particular circumstances because the infusion of cultural considerations might be seen by the High Court which must have jurisdiction in relation to this issue, the High Court might conclude on the analysis I propounded yesterday, that the decision of a particular executor in a set of circumstances was patently unreasonable and, therefore, the High Court would interfere equally if it was improper.

McGRATH J:

Does that suggest that while there is no duty to consult there may be a duty to consider the particular circumstances and if we speak in the language of administrative law, a relevant consideration, mandatory relevant consideration in certain circumstances, but no duty to go out and inform yourself by consulting?

MR McCOY:

I'm not, on my submission, with respect, wishing to elevate it to a mandatory consideration. I say it's a potential factor which may, in some cases, carry significant weight and in many others it may carry none. But the Court could only, in relation to this duty which if it's not a classic trusteeship duty, if it's not a classic trusteeship duty in the executor, it is in any view a fiduciary duty. Therefore, the access point for the Court to interfere with that decision of the executor could only be activated on our argument, if it's patently unreasonable, capricious or improper. Subject to reaching

that demanding standard, the executor is able to give no weight or such weight as they wish.

And perhaps I –

ELIAS CJ:

In the circumstances of New Zealand –

MR McCOY:

Yes.

ELIAS CJ:

– and the law applicable in New Zealand, would it not be capricious, what were the other epithets you used? Unreasonable, patently unreasonable, not to consider the whānau pani?

MR McCOY:

If one takes, as I fully understand one could or should, a wide inclusive definition of who constitutes family being an aspect immanent under the laws of New Zealand if not precisely articulated through, say, the New Zealand Bill of Rights. If one takes that wider panoramic view then clearly the whānau pani constitute family members and it would be wrong to say otherwise.

However, once one makes that initial step the next step is the critical one which, on my respectful argument, the Court is simply not ill equipped but not equipped to deal with, namely, how as a generality to evaluate the weight to be attached to those discretionary factors. So that is why on our argument the law identifies a person, the executor, who has that right.

The overview of considerations will vary and in some cases, and I will posit an example if I might where I would acknowledge, by way of submission, that the role of the whānau pani could be almost decisive or determinative.

But take the position of someone who had actively lived a life in an accord with Tūhoe customary law. They enter a relationship with a person. They buy a cheap flat and the local suburban lawyer says I will throw in a will when I do the conveyance and the partner becomes the executor of, I will make it, the male Tūhoe person.

There is a very short term relationship. It's bitter. It's acrimonious. In those circumstances although that executrix has the legal duty by virtue of the instrument of the will, it would be my submission that that may be the type of situation where the person, the deceased, had an active Tūhoe relationship where the Court might, applying the *Jones v Dodd* approach, reach the view that it would be actually unconscionable or wholly improper for the executrix who was in an utterly acrimonious relationship and who was perhaps motivated by a desire to inflict greater grievance on her late partner. One could see in that type of situation that the claim of culture, which normally cannot be assayed, weighed up or evaluated, may prove to have real thrust in that decision making process. And I will, when I come to look at the South Australian case, make further submissions in that regard.

McGRATH J:

Essentially, though, you're saying that this case from New South Wales of Justice Young's is a case turning on equitable principles just as *Pettigrew v Pettigrew* was?

MR McCOY:

I absolutely submit that, yes.

McGRATH J:

Yes.

MR McCOY:

And the argument in terms of equity is, there was an incomplete duty, an unfulfilled duty. The duty has been fractured by the unlawful asportation of the deceased, taken away in breach of the duty, the duty generated the right to possession, the executrix was unlawfully dispossessed, therefore, equity will provide a remedy.

ELIAS CJ:

If the deceased is buried as is envisaged in this judgment of Justice Young's not by the executor because of the circumstances but because some competent person has been willing to bury the deceased. Do you say that that body is not properly buried?

MR McCOY:

I do. And I submit the reason for this is, the duty is cast on the executrix. That duty necessarily generates lawful possession to fulfil that duty. If that duty is interrupted

by others without the sanction, concurrence or acquiescence of the executor it means that the executor's right was destroyed.

The executor has an ambulatory right in equity, in my submission, to pursue the possession for recaption in terms, if it were a chattel, to obtain it back, and the relevance of this is –

ELIAS CJ:

Surely that this indicates that people can be properly buried by others. That's not to say that the executor doesn't have standing to go to the Court and say, look, I wasn't around and there are preferences here, but then surely it's a matter for the Court to assess whether to accede to that, the body having been properly buried.

MR McCOY:

May I answer it from this perspective. I, too, submit that the executrix plainly has standing in terms of commencing the application –

ELIAS CJ:

Yes.

MR McCOY:

– because, if your Honours are with me that we are in the realm of equity, ultimately it is a matter of discretion.

ELIAS CJ:

Yes.

MR McCOY:

One would have to separate the remedy from the claim but in this case on the facts the executrix, the wronged executrix has immediately maintained her claim. In fact she made it to the High Court while the body was in slow motion been driven in the unrefrigerated van from Christchurch to the Bay of Plenty. She has instantly asserted her rights and steadfastly maintains them.

So there is no question of delay in this situation. In fact the delay has never been engendered by her. She has on our argument plain standing to secure restoration of

the body because the body was never lawfully buried in accordance with her decision.

ELIAS CJ:

Sorry, I'm trying to understand the legal concepts –

MR McCOY:

Yes.

ELIAS CJ:

– that you're speaking of. She has plain standing to apply to the Court which in its discretion and as you say, the case is a powerful one because she moved –

MR McCOY:

Yes.

ELIAS CJ:

– directly, may well accede to her request but it's not a right to obtain the body?

MR McCOY:

It is, with respect, on my argument because you have an unfulfilled duty in which the duty was interfered with, it is an incomplete duty and equity will complete that duty in her favour subject only, on my argument, to an ultimate discretionary analysis based on delay and the general issues that factor into final decision making.

TIPPING J:

And subject to her not acting capriciously or unreasonably?

MR McCOY:

Correct. Correct.

ELIAS CJ:

So does that mean you do draw a distinction, and I want to know what the distinction is, between the householder, say, who has no option but to obtain burial of the body. Does that – when the executor comes along in those circumstances does the executor have a lesser right than the one you're contending for in the circumstances of this case?

MR McCOY:

No, the executor's right is –

ELIAS CJ:

It's still an incomplete duty you would say, is it?

MR McCOY:

It is an incomplete duty but where, and I acknowledge this, this is exactly my case, where, as a matter of the ordinary practicality of the situation that no doubt attends in the great majority of circumstances, where the executor goes with the flow, concurs in the decision of the family where the family is not themselves the executor. When the executor's assent to the arrangement that acquiescence of course removes thereafter the right of the executor to complain because the duty in that situation is a voluntary completed one. But in our case the poignant facts show that it's an incomplete one where the executor remains anxious to have the body of her late partner taken back.

ELIAS CJ:

Well, I am still trying to understand this. Are you saying that the executor always has the right which can be supervised only for unreasonableness or arbitrariness unless the executor acquiesces?

MR McCOY:

That is exactly my case.

ELIAS CJ:

Thank you.

MR McCOY:

Thank you, your Honour.

TIPPING J:

And Mr McCoy, just for completeness, if there is no executor you would substitute the person entitled to administration presumably?

MR McCOY:

And then you would have a statutory appointment which equally cannot be interfered with.

TIPPING J:

Yes I just wanted to –

MR McCOY:

Most certainly your Honour, I go that far –

TIPPING J:

Because often they won't be, well, it's not uncommon for there to be no will.

MR McCOY:

Not uncommon, exactly. And the law even identifies that the right of the executor is a transmissible one. The executor's executor under s 13 of the Administration Act has that continuing or ambulatory right and duty.

WILLIAM YOUNG J:

I think my Australian namesake seems to have proceeded on the basis that where there wasn't a will it would be dealt, and there wasn't an administrator, you'd just look at the order of the hierarchy provided for in the Administration Act?

MR MCCOY:

Yes and the, and Denise Clarke would trump straight away and then her children.

McGRATH J:

But that's been doubted, that's been subsequently doubted hasn't it, that the, I think the South Australian case, *Jones v Dodd* was not prepared to look at the matter so absolutely.

MR McCOY:

That's right and that is why I brought that case to the attention of the Court although it appears to be the strongest one against me. Because in that case the South Australian full Court did identify that it would not accept, as the Chief Justice has caused me to accept as well in submission, that it's an absolute position of the executor. I submit its strong prima facie rights and duties on the executor t can be

displaced but only under a very limited entry point and then at a standard of proof which would be commensurate with that required to show a breach of fiduciary duties.

If you have lawful possession that must connote a right in the law to go to the law for its protection; and that is what Denise Clarke as the respondent does in this case. The incomplete performance and the breach of duty is something that equity will give her a remedy for.

If I might, very quickly, deal with one aspect of the Burial and Cremation Act. I submit it is not a code regulating all matters relating to interment or cremation. What it does is it deals with the functionalities and the mechanics in relation to the final disposition but the Act presupposes that the body entrusted for disposal is in the peaceable possession of the person to carry that out and that is not the case here. There was no peaceable possession because the custody had been improperly obtained and there –

ELIAS CJ:

Where do you get that concept of "peaceable possession", that's just a submission, is it?

MR McCOY:

Indeed Your Honour and –

ELIAS CJ:

Yes, that's all right.

MR McCOY:

May I add, there is nothing in the Act that excludes the right of a wronged executor to come to the law in equity. The Act does not preclude that and I also ask the Court to bear in mind, as I did yesterday, that s 150(a) of the Crimes Act creates a duty in relation to the disposal. So it is a duty understood by the law not merely a right.

ELIAS CJ:

Well s 46E of the Burial and Cremation Act imposes the duty. A person having charge of a body must, within a reasonable time of taking charge of it, dispose of it or cause it to be disposed et cetera, or transfer it.

MR McCOY:

And the executor is the person who causes and that causation must be voluntary. That is why the tikanga will fail because it's usurpation and not voluntary conduct.

ELIAS CJ:

But it – all right.

MR McCOY:

If I could ask you, just in relation to this issue, to look at one last case and if I may be excused, it's from the High Court of Australia, volume 1 if you would. It's 17, it's *Doodeward v Spence* (1908) 6 CLR 406 and it's simply the approach of Chief Justice Griffith and if you come to page 412 please. This has a curious facility for the wider argument I seek to propound because at the bottom of the page there is a triplet but above that, four or five lines, "The very term lawful possession connotes a right to invoke the law for its protection." That's the claim inequity. "A lawful possession which does not involve any right cognoscible by law is a contradiction in terms. Otherwise there would be a field of English law or New Zealand law where still prevails 'the good old rule, the simple plan, that he should take who has the power and he should keep who can'." That is the tikanga as identified in poetry in this particular case.

TIPPING J:

The learned Judge doesn't identify the source of his –

MR McCOY:

He does not and I haven't sought to Google it for its provenance. Now your Honours if I could just, without asking you to individually turn up cases, just note if you would, that there is a cause of action held by the authorities in the executor has a right to a cause of action for conversion, détenu and intentional infliction –

ELIAS CJ:

I'm sorry. You're not going to take us to *Doodeward* for anything else?

MR McCOY:

Nothing else. I do apologise.

ELIAS CJ:

No, that's all right, I was just reading it.

MR McCOY:

So a cause of action exists. Now yesterday, at the commencement of the appeal, your Honours remarked at the state of the pleadings and of course that's the predecessor in title counsel, and it's never been amended on perhaps the hope that it would never be necessary to do so and the current statement of claim is rightly described as exiguous but if it has to advance beyond the present state then torts of conversion and détenu and the intentional infliction of emotional harm would all be available.

I won't ask you to turn the cases up but for example, *Edmonds v Armstrong Funeral Home Ltd* [1931] 1 DLR 676, 679, 681 (ABSC) which is volume 2, case 41. *Edmonds v Armstrong* and indeed the case before it, *O'Connor v City of Victoria* (1913) 11 DLR 577 (BCSC) are all authorities to that effect. So there is a right of action in the executor even after the burial or after the death. *Edmonds, O'Connor v City of Victoria* is where buried individuals were displaced by the City of Victoria and there was a right of action.

I now turn to –

ELIAS CJ:

Do you say that that is an exclusive right of action. You say no one else has a right of action?

MR McCOY:

The executor will have a right of action –

ELIAS CJ:

Yes.

MR McCOY:

– but there may be, there may be a right of action concurrently available in others.

ELIAS CJ:

Yes.

MR McCOY:

Yes I can acknowledge that your Honour, yes I can.

ELIAS CJ:

Yes.

MR McCOY:

If I might now turn to the issue that was raised towards the end of play yesterday, namely –

ELIAS CJ:

Are you finishing on those cases because I have –

MR McCOY:

Yes I am.

ELIAS CJ:

– a few other cases I wondered if you would comment on.

MR McCOY:

Of course.

ELIAS CJ:

Are you going to refer to the *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) case?

MR McCOY:

I can.

ELIAS CJ:

It's just that in that case my understanding is it was that it was held that the executor's right, although I think there was some doubt about the legitimacy of them, but the executor's rights yielded to the rights of the party who had possession of the body.

MR McCOY:

I'll turn it up but my recollection is the argument was where the executor claims the body but another party claimed that the executor was not entitled to the executorship –

ELIAS CJ:

Yes.

MR McCOY:

– because the will had been procured –

ELIAS CJ:

Yes.

MR McCOY:

– the Judge then had to decide who held the place and the Judge said, "The person appearing to be the executor had the right." That's my understanding of it.

ELIAS CJ:

Right.

MR McCOY:

I think it's the judgment of Justice Hart in the Chancery Division. So a curious situation.

TIPPING J:

This is quite a recent case as I recall it.

MR McCOY:

Yes it's about 2006 from memory. I can turn it up.

ELIAS CJ:

It's 7 in the bundle.

MR McCOY:

Thank you, tab 7.

TIPPING J:

Tab 7.

MR McCOY:

Yes, the point is found at paragraph 15. "The essential question, therefore, is how that duty should be discharged in circumstances where there is a bona fide dispute as to whether the person claiming to be executor has a valid claim to act as such because of a dispute over the validity of the will appointing him to be executor which dispute in the nature or things is highly unlikely to be resolved in the period of time…" The Judge says there is no authority on this and the Judge, at 17, "In the present case –

ELIAS CJ:

But at 16 there is an indication that there is a high priority for the executor where there is no dispute but, and that the executor – I suppose you would say that in circumstances where no dispute at all exists –

MR McCOY:

Correct.

ELIAS CJ:

– is a reference to dispute about the executorship?

MR McCOY:

That's correct.

ELIAS CJ:

Yes.

MR McCOY:

Yes. And your Honour, the case that's called *Grandison v Nembhard* (1989) 4 BMLR 140 (Ch) is in fact *Nembhard v Grandison* in our list of authorities before this Court. It is the judgment of Justice Vinelott and I think it is case number – I will cause that reference to be identified momentarily.

ELIAS CJ:

Yes.

MR McCOY:

Fifty-one, 51. *Grandison v Nembhard* is in volume 2, case 51 is the case called *Re Grandison* in paragraph 16.

ELIAS CJ:

Sorry where is it?

MR McCOY:

Yes. Sorry. The case in para 16 intituled *Re Grandison* in the *Times* is in the bundle of authorities before the Court, volume 2, case 51 and I would entreat the Court to consider that judgment because it deals with a graphic situation, *Grandison v Nembhard* in *Butterworths Medico-Legal Reports,* the head note shows that the deceased, who was Jamaican, had passed away. The executor appointed wished the body to be buried in Jamaica. The daughter claimed that the body should be buried in the United Kingdom.

Now if one comes to the judgment, at page 143 please and the paragraph, 68 per cent down the page, "I do not find it necessary to consider how far, to my mind, the rather extravagant language of this passage represents English law, or whether or in what circumstances a near relative has a right to apply to the Court for directions overriding or supplanting a decision of an executor as to the place or mode of burial, or if an executor neglects his duty. It would be surprising to find that the Court had no power in any circumstances to interfere, save only where questions of expense are involved and where the relative has an interest in the estate but, as I say, I do not find it necessary to decide the point. To my mind, it is plain that even if the performance of the executor's duty is capable of being controlled at the suit of relative, the executor must have a discretion as to the mode and place for the disposal of the corpse of the deceased and that on ordinary principles the Court will not interfere with the exercise of that discretion, unless it is exercised in the way which shows that he has not properly weighed the factors which ought to have been taken into account in that it is wholly unreasonable."

This would comport with the case, two cases earlier, *Tempest v Lord Camoys* (1882) LR 21 Ch D 571 (CA), the judgment of the English Court of Appeal in 1882, so that is tab 48 and if your Honours would come to page 578, the judgment of Sir George Jessel, Master of the Rolls. It's the first six or seven lines I claim, "It is very important that the law of the Court on this subject should be understood. It is settled law that

when a testator has given a pure discretion to trustees, as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees but it does prevent them from exercising it improperly."

To similar effect, is the judgment of Lord Justice Cotton in the sixth or seventh last line of the judgment at 580, "No doubt it will prevent trustees from exercising their discretion in any way which is wrong or unreasonable but that is very different from putting a control upon the exercise of the discretion which the testator has left to them."

ELIAS CJ:
Sorry, I'm behind in terms of looking at the context of this but this was a specific –

TIPPING J:
Investment of money.

ELIAS CJ:
Oh, right.

MR McCOY:
It's a trusteeship, it is a classic trusteeship position. My argument is that the position of the executor is a fiduciary and is not indistinguishable conceptually in terms of the decision making that the executor has carrying out a quasi trusteeship or fiduciary obligation. Plainly, it must be exercised in good faith and not improperly.

Now your Honours if I might now, at this junction, move to the approach of the Courts to the plainly sensitive analysis that is required in deciding how competing cultural values are to be measured, if at all, with religious beliefs and are to be measured, if at all, against say family sentiment. The authorities have as a generality, I will submit, shown that this is simply an area into which the Courts cannot and should not trespass unless there is some outstanding feature which means it can be classified as a patently unreasonable decision by the executor.

If you would come please to volume 1, case 2. *Calma v Sesar* (1992) 106 FLR 446 (NTSC) a judgment of Justice Martin in the Supreme Court of the Northern Territory, because the Australian Courts have had to consider the issues that arise with the

indigenous people of that country, and if one, please, enters the judgment at 452, the last page.

The learned Judge says, "The right to possession of a dead body runs with the duty to dispose of it. Each parent in this case had that duty or at least accepted it and attempted to carry into effect thus claiming that right. Their respective legal claims were subsumed by deep emotion emanating from and perfecting not only them but other members of the deceased's extended family as well. Questions relating to cultural values and customs interceded. To state that the Court was asked to make a decision taking into account matters relating to burial in a home land and the profession of the Roman Catholic faith demonstrates just some of the imponderables. Further issues such as these could take a long time to resolve if they were to be properly tested by evidence in an adversary situation. A legal solution must be found, not one based on competing emotions and the wishes of the living except insofar as they reflected a legal duty or right. That solution will not embrace the resolution of possibly competing spiritual or cultural values. The conscience of the community would regard fights over the disposal of human remains such as these as unseemly, requires that the Court resolve the arguments in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay but with all proper respect and decency."

Now having identified for the Court that his Honour indicates there that the solution will not embrace the resolution of possibly competing spiritually or cultural values. You will soon see that that line was weakened by the judgment of the full Court in South Australia.

If I could ask you to come to case 52 in volume 2. *Meier v Bell* [1997] VicSC 53 from the state of Victoria, Justice Ashley, and without in each case taking you to the factual substratum, they tend to involve intra-family claims based on assertions and moral obligations as to where the deceased should be buried because of Aboriginality.

And at page 8, if you would, of the judgment. The Judge again in identifying the problem for the Court at the first full paragraph. "I consider it to be entirely understandable and appropriate that a Court should approach a matter such as the present by seeking to identify a person with the best claim in law to the responsibility of making burial arrangements. Such identification might not always be straight

forward but it is likely to be very much easier than attempting to resolve what I've called "the merits". The matter before me illustrates the complex factual issues that could arise for determination." And then his Honour sets out the extract I just took you to from *Calma v Sesar* and if you would kindly turn the page to 9, your Honours. His Honour says at the top of the page, "In my respectful opinion, His Honour, Mr Justice Martin's observations, were correct in law, humane and entirely sensible in their practical effect," and in the paragraph beneath commencing with, "It follows from what I have said, I should make it clear that the manner of resolution of a problem such as the present must be consistent. The body of principle to which I have referred requires it. There cannot be departure from principle in order to accommodate particular factual disputation, whether it be founded on matters religious, cultural or of some other description."

Now it will be evident from my argument that whilst I bring this to your attention, I do not commend it for its absolutist terms. It identifies on our submission correctly the difficulties and imponderables implicit or inherent in the situation but there is much merit in the judgment of *Jones v Dodd* and I would now ask you to turn to that judgment of the full Court of South Australia. That is case 54 in bundle 3.

You will find your Honours, in bundle 4, three cases with very similar names. Case 53 is the judgment of the Court below that was affirmed by the full Court. The full Court dismissed the appeal from the judgment of Justice Debelle which is case 53 and I have referred to dicta from that in the footnotes to our written printed case before the Court. In the interests of time, you will note perhaps if you would, in case 53, page 5, the paragraph commencing, "Equally," and this was, I hope I'm not insensitive by saying, as it were, a tug of war between which place someone should be buried.

"Equally, there are strong desires amongst other members of the family that the deceased should be buried at Oodnadatta. In emotional terms, the conflict is incapable of resolution. It is unfortunately necessary to resort to legal principle to resolve an issue which the parties themselves cannot resolve." It's this case which becomes case 54 *Jones v Dodd*. So the appeal –

ELIAS CJ:

Just pause there for a moment because –

MR McCOY:

Sorry, if I move too fast –

ELIAS CJ:

No, no. Justice Debelle says that he's resolving the dispute not only by the rules of common law but also by the rules of Aboriginal customary law.

MR McCOY:

They co-existed in that particular case because the claim of the father was determinative and the executor agreed. So in that particular case, we had that happy harmonisation between the common law and that particular Aboriginal position.

TIPPING J:

But he had to deal with a case where another party or parties wanted it to be resolved by some means other than those two.

MR McCOY:

Yes, correct. Yes, I understand that.

TIPPING J:

I'm sure you do Mr McCoy but I'm just saying it may be helpful in general terms but it doesn't quite get us onto our facts.

MR McCOY:

And now, I fully – if I can move with that spirit to case 54 which is *Jones v Dodd* and your Honours have indicated you have read it in advance, so I won't go through this but may I just ask you to note that at page 329 the Court instantaneously dismissed the appeal from Justice Debelle. I note *Murdoch v Rhind and Murdoch* [1945] NZLR 425 (SC) in the New Zealand Supreme Court (as it then was) was cited. So paragraph 1 of Justice Millhouse, the presiding Judge, they dismissed it on the spot. They then took seven or eight months to come up with their reasons but when you enter the reasons, please come to page 333, paragraph 33.

Interesting though the old cases are, those to which I have referred so far do not shed any direct light on the question in this case. The issue here is: upon what principles does the Court determine, as between competing claims by family members none of whom is the surviving spouse of the deceased, who has the right

to possession of the body for the purpose of burial, the deceased having died intestate? It is not our case but the factual introduction.

If one then turns to 334 your Honours will find that the extract from *Meier v Bell* at paragraph 38 is referred to. The Court took the view, with respect, at 40, that that judgment, *Meier v Bell*, was too prescriptive in eliminating the capacity for cultural and other considerations, and I'm entirely content with the full Court's position.

But if one then comes to para 40. In the first place, with great respect to Justice Ashley, in my view the authorities do no more than support the view that in some cases such an approach may be appropriate but that there is no principle of universal application which compels such an approach in all cases.

Furthermore, again with great respect, I cannot accept that it's right to reject considerations of emotional, spiritual and cultural factors when they are present however inconvenient it may be to do so in the short time which is commonly available to decide these cases.

Then the judgment tracks through *Smith v Tamworth City Council* and others, *Calma v Sesar* and if you come please to page 337. The Court will see how, having considered those other authorities from Australia, the Court evaluated the position, 337, para 53. "In my opinion proper respect and decency compel the Courts to have some regard to what Justice Martin there refers to as spiritual or cultural values even if the evidence as to the relevance of such considerations in a particular case maybe conflicting. That is not to say that the Court should have regard to expressions of pure emotion or arbitrary expressions of preference. At the end of the day, pragmatic features of the case such as those… the Court must nonetheless proceed as best it can to pay due regard to whatever cultural or spiritual factors arise."

And your Honours, can I say equally in para 60, six, zero, at page 338 you find yet a further iteration of the same reasoning where here, at para 16, the learned Judge says, "But it seems to me that common considerations of decency and respect for human dignity should lead those responsible for the burial of a corpse to recognise and where possible give effect to the cultural, spiritual and religious beliefs, practises and traditions of the deceased," and there is a claim for sensitivity.

So at the end of the day, what you find exemplified at paras 68 and 69 on page 339 is it's a consideration and it should be given appropriate weight. However, the judgment never indicates how you weigh these matters up. And in my respect submission, whilst it's right that they should be taken into account, what could not be correct is a matter of New Zealand law, would be to impose some rigid or formulaic obligation on an executor to methodically in each case evaluate these matters. This can be done as a matter of instantaneous decision making because there is plainly in this regard a need for speed. Protracted disputes over burial such as this case, only identify why the law, as a function of pragmatism, consistent with principle and policy, will divine an approach that means the executor is not subjected to some rigid requirements to take into account and evaluate issues such as this. These issues are beyond the competence of the law to weigh up.

TIPPING J:

Is it your – there are two choices perhaps here, well at least two. One is that the Court makes the decision. The other is that the Court controls an external decision maker.

MR McCOY:

Yes.

TIPPING J:

You prefer, or your preference or your submission is directed to the latter –

MR McCOY:

Yes.

TIPPING J:

– and the control is the traditional equitable control?

MR McCOY:

Yes, exactly and it would be, well frankly, inexpedient and counterintuitive that in every situation you had to come to Court for a ruling. I mean, the expense and –

TIPPING J:

Well in every situation of lack of agreement.

MR McCOY:

Correct, correct.

McGRATH J:

In *Jones v Dodd* there was no such person –

MR McCOY:

No, there was, that's right.

McGRATH J:

– because there was no will –

MR McCOY:

Yes.

McGRATH J:

– and the surviving partner wasn't in a position to apply, as of right, for letters of administration.

MR McCOY:

Correct your Honour, correct.

TIPPING J:

There may be rare cases where, if there is no will, the presumptive administrator is so hard to determine that the Court has to get involved in the first instance.

MR McCOY:

That was really the *Lewisham* case, Justice –

TIPPING J:

Yes.

MR McCOY:

– I can understand that and that engages much more orthodox considerations of the title which the executor derives from the will. I fully understand that and you're much more in the realm there of probate rather than executorship. Might I assist the Court

please, if I ask you just to turn to the next case which is from South Australia and this is post *Jones v Dodd* and this is the judgment of Chief Justice Doyle.

Now the names suggest it's in fact the same case, it's not. Unfortunately there appeared to have been yet another untoward death in the family because if you come to page 2, top right-hand corner of the unreported judgment of Chief Justice Doyle, at paragraph 5 you will see that this is a fresh deceased, passed away only 13 days earlier –

BLANCHARD J:
It's the same –

MR McCOY:
Yes.

BLANCHARD J:
– woman involved.

MR McCOY:
It is, it is –

BLANCHARD J:
It looks as though she might have had de facto relationships successively with two brothers.

MR McCOY:
I think, with respect, that's exactly – I was reluctant to say it myself but the facts do suggest that there may have been even some polyandry at one stage I think but never mind, that's just an exotica that we can put to one side –

McGRATH J:
But the Judge did apply Justice Perry's principles.

MR McCOY:
He had to.

TIPPING J:

He applied the law of polyandry.

MR McCOY:

He had to apply because he was bound by the full Court but there are extracts from here which may assist this Court in developing and identifying the law for New Zealand. If you come – because this is no doubt what my learned friend Mr Jamie Ferguson and his colleagues would be saying. If you come to paragraph 18 please.

"In short, from the defendant's point of view, it's of great importance for cultural and religious reasons that the deceased be buried at Oodnadatta with his other family members. Mr Roader rightly pointed out that the claim which the defendant makes is not one based simply on emotion, or simply on family wishes. It's a claim derived from an organised system of beliefs and cultural practices and a system which the law and our society should respect as far as possible." I think I said nothing dissimilar when I commenced this appeal yesterday. Then Chief Justice –

ELIAS CJ:

And you accept that a claim derived from tikanga is equally a claim from an organised system of beliefs and cultural practices?

MR McCOY:

I have pleasure in saying that.

ELIAS CJ:

Yes, thank you.

MR McCOY:

Twenty –

TIPPING J:

What organised system was it, if it wasn't Aboriginal –

MR McCOY:

It was Aboriginal custom.

TIPPING J:

But I thought custom – oh custom, that was in the other case?

MR McCOY:
It's also this case.

WILLIAM YOUNG J:
Same customs.

TIPPING J:
Yes, same customs –

WILLIAM YOUNG J:
Different outcome.

TIPPING J:
– but apparently they worked in parallel with the common law.

WILLIAM YOUNG J:
Different administrator.

TIPPING J:
Different administrator.

MR McCOY:
If I spent time looking at the facts of each for you we would need, I think, yet another day because there are complications but the interesting aspect, may I submit, is the result in this case because they in fact, in this case, Chief Justice Doyle held that the cultural rights succeeded in this case in displacing the position being advanced by the plaintiff who was the de facto wife of the deceased. This is, I would have thought, the case my learned friend –

WILLIAM YOUNG J:
I thought it was the other way round.

MR McCOY:
No, is it? Have I got it back to front now?

WILLIAM YOUNG J:

I think you have actually. If you looked at the orders, "The plaintiff is entitled as against the defendant to have the body of the deceased delivered to her for the purpose of making burial arrangements."

MR McCOY:

Yes, correct, so sorry. This at least tracks the process that the executor and thereafter the Court may have to go through. You will see that in paragraph 36 the problem is insoluble in one sense. It's impossible in any realistic sense to weigh the competing claims and arrive at one would truly call a legal judgment. I understand and respect the wishes and beliefs of the plaintiff and of the defendant, there is no solution or compromise available to me that will satisfy each side and the Judge was conscious of the fact that the outcome would necessarily cause pain to the unsuccessful party.

And the 37, the resolution was, consider the plaintiff's claim should prevail. First of all common law principles appear to give her the stronger claim and those principles are relevant although not decisive. Secondly, the claim of a de facto spouse of nine years standing who has two children by the deceased is a strong one on any view of the practices and attitudes that prevail in our society and perhaps I should only ask you to note that at paras 29 and 32 the Chief Justice of South Australia states that in his view that the community of Australian society would respect and endorse the right of the partner to have the primary privilege of burying the body. This being widely shared view in contemporary Australian society –

McGRATH J:

This being the particular, was it para 40, the fact that the deceased had left his family and gone to make his life and home with the plaintiff in Port Augusta. That was, seemed to be in the end the factor that tipped the balance for Chief Justice Doyle.

MR McCOY:

Yes and it has a real resonance in this case.

WILLIAM YOUNG J:

For present purposes.

TIPPING J:

But was the claim of the father the one that would be preferred by Aboriginal customary law?

MR McCOY:

Yes it would have been, it would have been. They coincided, as Justice Young rightly corrected me in the first case –

TIPPING J:

Yes first case but not in the second.

McGRATH J:

– but there was a dissonance in the second case.

TIPPING J:

Yes that was the point I –

MR McCOY:

But it's fact specific.

TIPPING J:

Yes.

MR McCOY:

Just if I could in the same spirit move to one more Australian case and then look at what Baroness Hale has said please.

ELIAS CJ:

I'm sorry, but this case is not authority for saying that the wishes of the spouse would inevitably prevail, it was the circumstances in which they were living that tipped the balance as Justice McGrath put to you?

MR McCOY:

Yes, if your Honour deleted the adverb “inevitably” I would agree. It's taking away the inevitability factor. Yes, it was as these cases, even on my own argument, will so often be. They are going to be fact-sensitive analysis and because New Zealand is a polycentric and multiracial society, your Honours, in deciding the law for New Zealand in this case, will be attributing to that law a texture that recognises all of

those matters each of which in terms of the framework of equality under the law, needs to be carefully weighed up.

In the next case we get, 56, it's convenient to turn to it, *Buchanan v Milton* [1999] 2 FLR 844 (Family Div). This is a judgment of Baroness Hale, as she now is, in 1999 and it involved the stolen generation because a young Australian had been happily adopted by an English family from Queensland that then migrated back to England. He unfortunately was killed in a car accident. He had a partner and a child and his biological Aboriginal mother claimed before the English Courts the right for the body to be brought back to Australia for burial and the same difficult issues came before the Court.

We submit there is much to be said for Baroness Hale's approach at page 855(d). "I understand and accept that from the applicant birth mother's point of view it is necessary because of her particular cultural imperatives [for the body to come home]. I also accept that she can articulate a spiritual belief which lends force to this imperative. Others who feel just as strongly, as many of us do, that their deceased relatives must come home to be buried might not be able to relate that as clearly to any particular religious belief in the way that the applicant and her family can do but that does mean that the feeling is any less worthy of respect. The law cannot establish a hierarchy in which one sort of feeling is accorded more respect than other equally deep and sincere feelings. Nor is the applicant's point of view the only one which is deserving of respect. There are others whose views are at least equally deserving and who feel quite differently."

Now that, as a principled approach, identifies that it should only be an extraordinary, or an extreme case, where you can show patent unreasonableness that the decision of the executor could ever been displaced by the super abundance of particular factors that simply displace the strong prima facie right of the executor.

TIPPING J:

Mr McCoy, when the Judge goes on at letter (f) to say, "Is it then 'expedient' to displace the otherwise normal course of events," she's obviously referring back to a previous discussion and presumably she has adopted the test of expediency?

WILLIAM YOUNG J:

I think it's from the statute.

MR McCOY:

Exactly.

TIPPING J:

Is it from a – it's from a statute, is it?

MR McCOY:

It is a situation under the administration equivalent provision in England where the language allows the Court to do what inter alia is expedient and that was the framework for the learned Judge's decision.

TIPPING J:

And the ordinary course or otherwise normal course of events would be burial in England according to the wishes of the people in England?

MR McCOY:

Correct.

McGRATH J:

It was really about displacing the statutory prima facie order as to, in effect, the rights of burial, wasn't it?

MR McCOY:

Exactly.

McGRATH J:

And special circumstances that statutory priority could be displaced and that's what she's talking about.

MR McCOY:

Yes, yes.

ELIAS CJ:

What was the statute, what priority –

MR McCOY:

The statute –

BLANCHARD J:

It's actually on page 846 and it's dealing with the appointment of the administrator.

ELIAS CJ:

I see.

TIPPING J:

It's really presupposing that once an administrator is appointed, that administrator will take the decision. It's in order pre-empt that position that the law in England allows the Court to look at the question of whether not to appoint that administrator, presumably?

MR McCOY:

That is right, that is quite right –

TIPPING J:

Yes. I'm just guessing because I haven't read the case –

MR McCOY:

– and you can actually feel a rather broad textured discretion there which would allow cultural and spiritual values where possible to be relevant factors in the Court's original decision making because in the administration situation it's not a review of the executor under fiduciary law but an originating decision of the High Court in its own first instance jurisdiction.

TIPPING J:

Do they have in England an ability to displace an executor or is –

MR McCOY:

Yes.

TIPPING J:

– only an administrator?

MR McCOY:

Oh no, an executor can be displaced. Oh yes, if the executor, I mean, there's a classic situation and it's referred to by Justice Heath in the New Zealand case, where he notes a Northern Ireland High Court judgment *Re LL* [2005] NIQB 83 where the person who was the executor was in prison and had been responsible for inflicting serious wounding on the young child. The young child later happened to die and the Court said it unconscionable for that person to be the executor so the Court has that opportunity to intercede.

TIPPING J:

But had the young person appointed a person as executor?

MR McCOY:

There was some combination of events where he fell to have that right, maybe it was as an administrator.

TIPPING J:

No I think it would be more likely as administrator.

MR McCOY:

It's most improbable that there would be an estate and executor but if it was even an adult of course that would be the same point.

TIPPING J:

Yes, quite.

MR McCOY:

It would be the same point.

Now the last case I would turn to on this issue, with the Court's leave, is found in volume 1 at page 5 because it's the last of the Australian cases so it's the most recent and in a sense it looks backwards.

ELIAS CJ:

I'm sorry, I'm just thinking of this provision in the UK, because I haven't done an extensive review of the statutes and it didn't occur to me to look at the Judicature Act but I take it there's nothing in the Judicature Act which bears on this?

MR McCOY:

Only s 16 through the inherent jurisdiction.

ELIAS CJ:

Yes.

MR McCOY:

As far as I know but I will cause that to be cross-checked –

ELIAS CJ:

It's all right.

MR McCOY:

– for frailty of recollection.

Your Honours, if you would come to case number 5 in volume 1, *Keller v Keller* [2007] VSC 118, (2007) 15 VR 667. This is the last of the Australian cases that looks at the issue of how one factors in the cultural or religious or indeed family considerations into the executor's decision making. *Keller v Keller*, case number 5, volume 1. And you will actually find in this case that whereas the South Australian Court had said that the prescriptive approach in cases such as *Meier v Bell* should not be adopted, the Victorian single Judge found that the earlier Victorian approach was still true notwithstanding the approach of South Australia.

BLANCHARD J:

Well is the South Australian approach referred to?

MR McCOY:

You will see – well when you find *Meier v Bell* – I must answer you. I don't believe it is but when you find *Meier v Bell* and, your Honour, if you come into the judgment you will find at para 14 you do find the Australian, South Australian case referred to not, you find it referred to in the extract because at para 14 there is the judgment of Justice Perry and referred to as an extract because another Judge, Justice Cummins in the case of *Dow v Hoskins* [2003] VSC 206 had approved the South Australian approach.

If one comes to 15 –

McGRATH J:

Yes but he's preferring Victorian Judges.

MR McCOY:

Yes I fully understand the incestuous commendations, perhaps I've been unfair by that but, yes, there may be a natural temptation to find accuracy in your brother Judges.

McGRATH J:

He's discussing the Victorian case and deciding it through them really, isn't he?

MR McCOY:

Yes, I think that's entirely correct.

So, and to the extent Your Honours think you will be assisted at all by yet another Victorian Judge, if you look at paragraph 15 you find the approach of Justice Byrne in *Leeburn v Derndorfer* [2004] VSC 172, volume 14, Victorian reports. And if I could be permitted just to read this extract.

"It is a difficult case too as a matter of law for it raises and touches upon issues upon which there is surprisingly little judicial guidance. Moreover, such authority as I have been referred to appears to be based upon practicalities as much as upon principle. This maybe because the questions which come before the Courts as to the right to direct the disposition of a dead body or parts of it, must be determined quickly without the luxury of a full investigation of the facts in law. It may be too that it is because cases such as the present stand at the intersection of a number of competing principles. These may be competing prescriptions and proscriptions of a cultural, social or a religious nature, personal taboos, wider concerns as to public health and decency, the attitudes of the grieving family and friends and the wishes of the deceased. Moreover, these competing pressures may be difficult to resolve especially when they are based on feelings which are strongly held at a time of great emotional stress and which are difficult to justify or even explain in any rational way. This makes decisional compromise difficult. It's an area of the law, where one can read in the reported decisions, an anguish in the Judges seeking to accommodate the concerns of those interested and their embarrassment at having to deal, often in some haste, with bitter complex within families over the remains of a recently

deceased relative or friend which conflicts, although arising out of genuinely held feelings, are perceived as being unseemly."

The Court, in this case, took the view that you actually have to resort to a principled outcome. The only safe way and I commend this to this Court, the only safe way out of what is otherwise an unworkable imbroglio, is to have a principled legal approach, influenced where there are overwhelming features of cultural heritage, where it's possible to accommodate them but the executor ought, as a matter of New Zealand law, be given a very large latitude in the decision making and it would only be something approaching *Wednesbury* or *Thursbury* unreasonableness that the Court in a non-public law issue such as this would seek to interfere as Sir George Jessel indicated, where you're dealing with fiduciary of quasi trustee discretions given by the testator to the executor.

TIPPING J:

If one talks in terms of fiduciary duty Mr McCoy, to whom is the duty owed?

MR McCOY:

The executor owes the duty in furtherance of the wishes of the testator. So the testator creates the duty by the instrument of appointment to the will. The executor, by accepting the appointment and that appointment arises instantaneously upon the death, there is no waiting period, thereupon the death, the executor has a duty to fulfil the directions in the will. He may not and I could come to this, be bound by the hope expressed in the will as to the disposal of the body. European jurisprudence suggests that that position may now actually have changed, or should change but the duty is in fulfilment of that fiduciary obligation, accepted while he was alive –

TIPPING J:

A shorter and simpler answer to my question is, to the deceased?

MR McCOY:

To the deceased and – yes, to the deceased.

WILLIAM YOUNG J:

Well isn't the – language is probably elusive, isn't it, rather than descriptive? It's not really a fiduciary duty in the orthodox sense. It's the exercise of a power which is capable of being reviewed by those who have an interest in the matter.

MR McCOY:

I would submit that the executor is in some sense an officer of the Court and is accountable to the High Court under the inherent jurisdiction. The executor plainly, when it comes to issues such as the expenses of the estate, matters of that nature, could never act of course in such a way as to defraud creditors of the estate. So if the executor suddenly had the potty notion that having once been delighted by the alpine scenery of Liechtenstein that the body should be buried in Liechtenstein, Courts would immediately intervene on the grounds that this was patently unreasonable but in the absence of a matter that is demonstrable unreasonable, the Courts should, as a matter of practicality and consistent for the need for speed, entertain a hands off jurisdiction –

McGRATH J:

I understand your view about the wide margin appreciation but a duty to the Court sounds like a public duty and suggests a public par and the judicial review context?

MR McCOY:

I will not submit that it falls under the Judicature Amendment Act 1972. I submit it is and I take the position of Justice Young, we may not, in the classical conceptual terms, be in a true trusteeship position and it may not be an espresso version of fiduciary relationships either and it may be a very sui generis situation but the accountability of the executor is to the Court and not in the realms of public law but in the realms of private law. This would be entirely compatible, in my argument, with the function of executorship which arises out of the imposition of that duty by the testator and almost always with the consent during the lifetime of both of them.

ELIAS CJ:

Is that a convenient to take –

MR McCOY:

That would be convenient. Now your Honour, would it be more convenient if I indicated to you that after the adjournment I would move to the issue as to the unreasonableness and uncertainty of the tikanga?

ELIAS CJ:

All right, thank you.

COURT ADJOURNS:11.36 AM

COURT RESUMES: 11.57 AM

MR McCOY:

May it please the Court. My answer to Justice McGrath, on further reflection, is inadequate when I indicated that the duty of the executor is to the deceased. That's but an aspect of it.

The better analysis is it includes a duty to the deceased, the body of the deceased and of course the monuments to the deceased and that is of that nature but the role of executorship is also a duty for the living. It is a duty in relation to the family and those who are properly interested in the estate of the deceased including the corpse of the deceased properly buried.

This notion gained some support from perhaps one other judgment that I should take you to and this engages an English judgment where there is a balancing of competing family interests in terms of the right to burial, and I regret I hadn't earlier assisted you with this case.

If you would come to bundle 2, case 47 please. *Burrows v HM Coroner for Preston* [2008] EWHC 1387 (Admin), [2008] 2 FLR 1225. Now I trust you've been favoured with a reported version. Originally I think only an unreported version –

ELIAS CJ:

No, we've got the unreported version.

WILLIAM YOUNG J:

Is that in the supplementary –

MR McCOY:

Yes, then it will be in the supplementary.

WILLIAM YOUNG J:

The true bundle.

MR McCOY:

Thank you your Honour. It's in the supplementary, forgive me, I had hoped it might have been bodily incorporated into your bundle. So *Burrows* 2008, volume 2, Family Law Reports 1225.

ELIAS CJ:

It's a bit curious because in the unreported *Burrows* is *Borrows.*

MR McCOY:

In fact I found the New Zealand Law Reports have used *Borrows* and it's *Burrows*.

ELIAS CJ:

I see.

MR McCOY:

So if one – the facts can be distilled to this. A youth committed suicide unfortunately in prison and the, I'm afraid the contest in relation to whom the coroner should release the body was between his genetic parents and his adopted parents. I think that suffices by way of introduction and it is an administration case not an executorship case, he had no estate in view of his age.

But if you come to paragraph 18 please. We find a crossheading, Human Rights Act 1998. Justice Cranston says, "Not considered by the domestic authorities, the English case law so far is the impact of the European Convention, conceivably art 9, in particular the right to religion may enter but the main aspect is art 8, the right to respectful private and family life," and having reviewed through 18 and 19 the jurisprudence and its jurisprudence to date, I would ask the Court to come to 20, because his Lordship says this. "One thing is clear that in as much as it is said that under domestic law the views of a deceased person can be ignored that is not good law. That rule is sometimes traced back to *Williams v Williams* where it was said that directions given by a deceased as to the disposal of his body were not enforceable as a matter of law. It is quite clear from the jurisprudence of the European Court of Human Rights that the views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account. However, this aspect of Strasbourg jurisprudence is easily accommodated within domestic law."

And if you just move onto 21 I trust we will find something that will assist the Court. In some cases of art 8, the right to family life is engaged, it may be that apart from the deceased's wishes there are other claims to the exercise of that right. There may be, for example, as there was in this case, the family life that the late Liam enjoyed with the Burrows family on the one hand and his family life with his mother, Mrs McManus on the other.

Then if you turn over, and I'm doing my best not to take longer on this than needed. If you come to the five or six last lines of paragraph 21. Whereas here there is a conflict in terms of the engagement of family life under art 8.1, the Court is required to focus intensely on the comparative importance of the different rights being claimed and to balance those competing rights so as to minimise the interference with each to the least possible extent. This becomes relevant to the order to be made in this case which it seeks to accommodate.

WILLIAM YOUNG J:
But we don't have art 8.

MR McCOY:
We don't have art 8 but we do have here s 27 of the New Zealand Bill of Rights, a clear articulation that any right which is not itself specifically set out in the Bill of Rights does not mean that that right does not exist. It would be a curiosity –

WILLIAM YOUNG J:
Is there something equivalent to art 8 in the ICCPR?

MR McCOY:
ICCPR, yes there is.

WILLIAM YOUNG J:
And that didn't find its way into the Bill of Rights.

MR McCOY:
Not expressly and of course the cultural rights also do come through ICCPR but –

ELIAS CJ:

And ICCPR is relevant to the interpretation and development of New Zealand common law I suppose, yes.

MR McCOY:

I would submit it infuses it.

ELIAS CJ:

Yes –

TIPPING J:

Well even without human rights jurisprudence I wouldn't require much persuasion that the rights of the deceased should be taken into account.

ELIAS CJ:

And the family.

MR McCOY:

Well I go – and the family on my own submission, includes the whānau pani. I have no difficulty with that and respect that entirely. What you then have and what might be distilled from this judgment is to balance and evaluate those rights so the Judge has posited a test but to actually identify with exactitude how you do rub those rights off and you are rubbing the rights off against a duty.

Now the duty on the executor should always trump unless displaced and it would be capable of being displaced if there was an overwhelming factual issue that showed that the balance would skewed inconsistently with the ethos of New Zealand law on the facts, that would be a situation where the executor's rights could be trumped and the High Court would have pleasure in saying that in the right case but –

ELIAS CJ:

Can you, because of your reference to the ICCPR –

MR McCOY:

Yes.

ELIAS CJ:

– is there anything bearing on this in the Human Rights Act and also, are you going to refer us to the Declaration on the Rights of Indigenous Peoples which was referred to in the English case you took – no, the Australian case?

MR McCOY:

Yes, no, I do not myself intend to do that but I fully accept that the rights of indigenous people is not an abstract notion but a concept that falls attractively over our laws and, where possible, compatibly with international conventions and fundamentals or grundnorm of our society should be part of it, I accept that.

ELIAS CJ:

Because it does emphasise the importance of burial and the role of the remains of people who have deceased –

MR McCOY:

Yes and –

ELIAS CJ:

– it's a significant part –

MR McCOY:

– Irish people no doubt have the same view of life and every society has its own culture. It should, of course, prove to be very difficult then when you get to the complicated fact pattern of someone who is part Tūhoe and say part Ngai Tūhoe, from the great South Island tribe, who have contrary burial practices. How is that to be determined and throw in the complication if they happen to be part Cook Island or part Chinese, then overlay it with religious claims and it becomes unworkable and that is why no executor should be taxed with these imponderables, unless it's simply an overwhelming position that can be genuinely described as patently unreasonable.

What I do as your Honours to note, is that to date there is no New Zealand law, no case law, that actually requires the wishes of the testator to be ignored. This Court is not bound by any such judgment. Why is it, under New Zealand law, that you can leave your future and your estate but you cannot actually enforce that upon your executor. It would be a welcome move, in my submission, entirely consistent with the law if that was an enforceable right on the executor. The reason being this, the reason why the English Courts have said it can't be done is because of that dictum of

Justice Kay on a warm day in England in 1882, that if there is no property in a corpse, therefore you can't dispose of your body but as, on my argument, the notion of no property in a corpse is actually incorrect by its generality, you ought to be able to impose an enforceable obligation on an executor who accepts that obligation during your lifetime and his lifetime.

That, of course, reflects the position of Jim Takamore in this case who, as a finding of fact, wished to be buried in Christchurch near his partner and children. So there is nothing prohibiting New Zealand law making that development. The fracture in the logic is, if the premise is faulty, there's no property, then of course you can't dispose but as there is property in the attenuated way that I've described through the *Pettigrew v Pettigrew* analysis, then you do have a dispositive right which should be enforceable under quasi trusteeship or fiduciary obligations –

TIPPING J:

Mr McCoy, is it wise to make it binding, or is it better to make it, to use the language of the Courts, persuasive?

MR McCOY:

Yes, a persuasive right can just be happily ignored, that's the problem, it defeats the purpose. If I can convince my trustees what they have to do about (a), (b) and (c), why can't I convince them about (d), death, disposal but I understand your Honour's point.

TIPPING J:

Well I understand your point too but it's just, I wonder whether it creates more problems than it solves. I mean, would it be binding on the Court?

MR McCOY:

Well I would submit it should be that a person in their lifetime, compos mentis, makes a decision that they wish to have their body disposed of by the following means and place, that should be cherished under the right to family life, under the right culture, under the right to whatever other overarching concept you want to relate to –

BLANCHARD J:

But wills get out of date.

MR McCOY:

Sorry?

BLANCHARD J:

Wills get out of date. A direction of that kind can get out of date. I think there's probably good sense in the English position that it's not binding but it certainly would be a factor.

MR McCOY:

Well I need not press this to the extreme –

TIPPING J:

No, you don't need this.

MR McCOY:

I don't need it but I would like it.

TIPPING J:

Well you might not get it.

MR McCOY:

Then if I could move on, I now turn to the other phase of the case. This commences in our written case from page 20 and this now deals with the issue of tikanga as to whether it is this particular tikanga, I'm not talking as a generality of course, whether it is unreasonable, or whether it is uncertain and whether it's repugnant to statutory or other law of New Zealand –

TIPPING J:

Do we have to use the concept of repugnancy, would not inconsistency be less pejorative and equally efficacious?

MR McCOY:

I'm content to adopt that.

ELIAS CJ:

Well I suppose repugnancy is a very high standard, so it may be more tikanga friendly to use repugnancy and indeed, there is some authentic New Zealand

provenance because the letters of instructions in 1840 did indicate the repugnancy to the laws of humanity were not –

TIPPING J:

I withdraw, in the light of that. I was just trying to avoid expressions that might inflame rather than –

MR McCOY:

I don't advance it as a pejorative word, I advance it as a word with a legal lineage. Indeed, it's reflected in the Bylaws Act which uses the same word for striking down a bylaw. It is but an example, is it not, ultimately of unreasonableness because as a matter of law it can't exist within its own self, it dies of its own inanition as a matter of law –

ELIAS CJ:

Mr McCoy, is this submission directed at supporting the Court of Appeal conclusion because I do have a query as to whether it is necessary to go there? I mean, I fully accept that you probably do want to support the Court of Appeal conclusion but I wondered whether events had not slightly moved on in terms of the focus of this decision because your principal submission is that it's for the executrix to make the call subject to unreasonableness and this is, as I understand it, a fallback position. I may be wrong in that so please, put me right.

MR McCOY:

My fundamental submission, although I have ordered it as the second part of the printed case, is that, with respect, that this particular tikanga is and cannot be part of the law of New Zealand, it cannot bind the executor –

ELIAS CJ:

Can you encapsulate, very briefly, what you say the tikanga is that you say is repugnant because the evidence indicates that tikanga does not require any particular outcome, it's a process?

MR McCOY:

But that process which is a continuum by definition, employs means and it's the means which are structural to this particular tikanga –

ELIAS CJ:

Okay, well then can you just –

MR McCOY:

Yes.

ELIAS CJ:

– say very briefly what is the tikanga you say is not able to be recognised by New Zealand law?

MR McCOY:

Yes. For your convenience, you will find it on page 29 of our written case. The asserted tikanga is this, page 29, second line. "By any means and under every circumstance the mortal remains of any person from any part of New Zealand whom Tūhoe considers important to Tūhoe irrespective of the fact that the deceased had renounced any Tūhoe connections, irrespective of the wishes of the deceased, his spouse and children, and irrespective of the rights and duties of the executor or administration of the deceased."

ELIAS CJ:

Where is that derived from as a statement?

MR McCOY:

That is – that statement is the compression of all of the circumstances. That is the way the matter has been put when you look at it. Unless, those are the terms and parameters of the particular tikanga. The reason why, with all respect to those who can have this and see a belief about it which, of course, is something we all can understand, the reason why it fails as a matter of law is, it is unreasonable because the essence of it is usurpation, the essence of it is not consent but overbearance and the essence of it is it interferes with possessory rights and duties and that's strikes at the fundament root of our legal system.

So it's not sustainable because it is unreasonable as a matter of law. Anything that is an imposition, a unilateral imposition cannot amount to being a lawful constituent aspect of our common law because it is inconsistent with the constitutional precepts of a society under law which means according to law.

So in our case –

ELIAS CJ:

I'm sorry. I'm just trying to unpackage this because I think it is –

MR McCOY:

Yes.

ELIAS CJ:

– it is quite important and is it – the tikanga you are saying cannot be recognised is tikanga which requires any person of Tūhoe or Whakatohea in this case perhaps descent to be buried other than in conformity with the wishes of the hapū concerned or in some cases it might be a wider –

MR McCOY:

Yes.

ELIAS CJ:

– body, according to tikanga?

MR McCOY:

Yes.

ELIAS CJ:

Okay, yes, thank you.

MR McCOY:

I don't want to be disrespectful because of course we fully accept that persons who voluntarily conform to these norms, and I'm willing to accept that tikanga has its own normative value, but people who voluntarily conform to it of course may guide their lives by it accordingly. But it is the unilateral imposition of it over someone who does not accept that that is the difficulty. It has elements of coercion and oppression.

There is no doubt, and it's the evidence that when Tūhoe came from the Bay of Plenty all the way down to Christchurch they came with one insuperable objective and that was to take the body by hook or by crook. They were intentionally

indefatigable, they were not going to give up and that was their own evidence. Now that is simply insusceptible of being consistent with other rights and duties.

Where the tikanga equally fails is the lack of any dispute resolution mechanism. It fails for uncertainty because the moment there is stalemate or impasse then it moves into a might is right situation. When the affected party, the person with the interest, the widow, is peculiarly vulnerable and under grief and in that contextualised system a might is right situation will not generate anything that accords with the notions of fairness that we would expect inherent and immanent under all of our legal system. I've set this out at length. I also respectfully submit that this tikanga has the real capacity to engender breaches of the peace, likely breaches of the peace and that is why it's violative of our legal system –

ELIAS CJ:

I wonder whether, I'm really hoping that we might not need to be as, perhaps as hurtful as some of this leads us to, well suggests. Whether it's not the prior question because I'm not sure that I can accept and you might need to expand on it, that tikanga is might is right. Really, it's a question though of the imposition of tikanga. It's a conflict of laws type situation really, whether tikanga should have been applied in these circumstances, rather than whether the tikanga as practised by those who live within it amounts to an assertion of right. So it's the unilateral imposition of tikanga processes upon someone who doesn't live by it that seems to me to be the gravamen of what is complained about.

MR McCOY:

Well it's the interference with free will, the autonomy and dignity of the individual to wit the partner, the executrix and the children. There was no option, it's not a question of opting out of Tūhoe, tikanga, it's a question of opting in. We never opted in at any stage in the lives of the respondent –

ELIAS CJ:

Well I think what you're saying is that you're agreeing with me, that it's an application question that you're talking about?

MR McCOY:

If your Honour means the facts as portrayed in this case, yes. We say they're objectionable – may I and I'm seeking to present this in an equity and good

conscience way rather than a hard, iconoclastic legal terms but, as you rightly state, you do have a potential source of the law because if it comports with the law it should be part of the common law, the potential source of the law, namely tikanga. It comes towards the pre-existing general corpus of New Zealand law.

If there can be accord and satisfaction between the two and if there is no violation of something that is a norm of New Zealand general law, then that accommodation can succeed but if it engages or involves aspects that are incompatible with those fundamental norms, at least to that extent, that process would not be cognoscible as a matter of general law whilst still remaining a matter for individual conforming choice by those who wish to use it. It simply cannot however, been imposed on others who do not recognise it.

The important aspects of this particular tikanga are that the resort and the capacity to go to matters beyond consensus and agreement are an integral part of the tikanga. Where there is congenial outcomes then the tikanga and the common law are at one but the moment it goes beyond and entente cordiale, there has to be a dispute resolution mechanism. The tikanga has no dispute resolution mechanism other than the assertion of its own paramountcy which is indefeasible. That means if necessary (and has happened on the facts of this case) that there will be resort to intimidation, stealth, violence or tricky and furtherance of the objective.

Now if one stands back, as I respectfully do and not wishing to, in any sense, be hurtful of the cultural heritage issue that is plainly engaged by this case. I've got no right to do that. What the Court may conclude is that there is a generative and transformational capacity within tikanga such that it can exist and comport with the law up until the point that it exceeds the breaking point of the common law. The strict common law position, as identified under English law, was that if any part of a custom was unlawful the entity failed. That's identified from 1616 onwards as being English law. It's within the –

ELIAS CJ:

That's local custom.

MR McCOY:

Yes, Your Honour made that point yesterday and I was, in my own way, about to come to the rescue because it must be within the plenitude of the powers of this

Court and the general fecundity of New Zealand general law to say that where you have tikanga there is this capacity for it to be reshaped or modified, if that's not too harsh a word but it can be redefined, such that – up until the point that it exceeds any norm at the fundamental of our legal system –

ELIAS CJ:

Well would you apply that also to intracultural dispute resolution because if so you're transforming tikanga?

MR McCOY:

Yes.

ELIAS CJ:

Well, that's a –

MR McCOY:

I don't need this argument. I float it –

BLANCHARD J:

Could I –

MR McCOY:

– for your wider consideration in view of the –

ELIAS CJ:

Yes.

MR McCOY:

– implications of your judgment, whatever they may be –

BLANCHARD J:

Could I suggest that it's not a matter of reshaping tikanga which the Court wouldn't do and couldn't do, it's more a matter of what the Court will recognise and say well, that has the force of law which the Court can enforce if need be and it could be that in a particular situation the Court will recognise a part, perhaps a large part of tikanga but say, we're not going to recognise things that go beyond where we think the Court would be prepared to enforce.

MR McCOY:

No, I do accept that and perhaps I have embarrassed by the crudity of that presentation slightly earlier. I don't suggest that the Court has got, as a judiciable issue, the extent and parameters of tikanga, must be entirely a matter for Māoridom but, as with the conflict of laws, the recognition of another law is a matter for the Court and the Court would be able to identify the parameters of the tikanga, notwithstanding that it surpassed those parameters for those who wish to conform and abide by it but would recognise the parameters that comport with New Zealand general law.

McGRATH J:

Can I just take that back to something Mr Ferguson was saying yesterday. Is it the case then that you could recognise that tikanga is a matter of fact entirely, it's proven by evidence entirely but the scope of tikanga is part of New Zealand's common law and doesn't force by the Courts, is a question for the Courts because it's a question of law on which the Courts in our system must in the end make the definitional decisions as to the scope of the law?

MR McCOY:

Yes I entirely support that analysis. The content must be a matter of fact to be proved by expert evidence where needed and –

ELIAS CJ:

And our successive Evidence Acts have always made that provision in terms of Māori custom.

MR McCOY:

And I believe that the Māori Appellate Court actually has a role under the Te Ture Whenua Act to –

ELIAS CJ:

Yes.

MR McCOY:

– declare custom.

ELIAS CJ:

Yes, and earlier under the earlier Land Acts.

MR McCOY:

Under the Native Land Court Acts. So that has always existed –

ELIAS CJ:

Actually I think also under the Judicature Act.

TIPPING J:

There are two questions. One, what is the custom? Two, how much of it, if any, will be enforced as a matter of New Zealand law?

MR McCOY:

Cognoscible or enforced. Yes, I would submit that that is an appropriate approach whereas those who wish to live in conformity beyond what the law, the general law recognises is a matter of free will, a matter of free choice and if it enlivens your cultural heritage so be it.

TIPPING J:

There's a lot of material in your submission about the alleged unreasonable of it –

MR McCOY:

Yes.

TIPPING J:

– and the alleged uncertainty of it –

MR McCOY:

Yes.

TIPPING J:

– which, speaking for myself, I have carefully read.

MR McCOY:

All right.

TIPPING J:

Is there anything in here that requires particular emphasis or –

MR McCOY:

Well all of it actually.

TIPPING J:

– beyond what – well all of it.

MR McCOY:

But I take the point.

TIPPING J:

Will I suppose I asked for that Mr McCoy but I did use the word “particular”.

MR McCOY:

Yes I – but I'm unable to –

ELIAS CJ:

We have read it.

MR McCOY:

– differentiate between the best point and the best point in this particular case.

ELIAS CJ:

But what do you need to elaborate on because we have read it.

MR McCOY:

I'm conscious of what the Court is saying and I don't wish to prolong unnecessarily. Perhaps I would –

TIPPING J:

Can I just help. I say it seems to me, subject to further discussion and thought, that one issue is truly problematic, whether we take it under reasonableness or certainty, but it's not a criticism of the tikanga but it just simply doesn't reach the point of providing a solution for a dispute as it seems to me and now, therefore, there is no decisional aspect of the tikanga that can sensibly be taken into New Zealand law

because there is none. That's the proposition that I understand. I am trying to articulate in very short terms one of what I see as your significant propositions Mr McCoy. Now have I got that right?

MR McCOY:

Yes, there is no dispute resolution mechanism within the tikanga other than force majeure, superior force.

TIPPING J:

Well external dispute resolution mechanism shall we say.

MR McCOY:

Indeed, indeed.

TIPPING J:

All right, well that's fine. I've clearly understood that proposition and it seems to me, subject to what may be able to be said against you, that that's a point of some force.

MR McCOY:

Well in view then of the Court's indication, I mean I –

TIPPING J:

It's only my indication.

MR McCOY:

No –

TIPPING J:

But, I mean I'm not trying to stop you from elaborating but I'm just explaining how I see it in the sense of being, trying to be helpful.

MR McCOY:

I wish to be productive, the whole virtue of a written submission is the Court has the chance to be inculcated with counsel's attempts at persuasion. I can take you to each of those authorities. This may not –

TIPPING J:

Speaking for myself I wouldn't require that because I've read them.

MR McCOY:

Yes.

TIPPING J:

But if there is anything in particular you think is a – then you should do it but personally I don't think there is.

MR McCOY:

Well I will only ask the Court to note our principle submission in this regard. That there is an inescapable dualism between the unreasonableness and the uncertainty. I've set that out and the lack of a mechanism that works, and I've gone to the fundamental precepts.

I will take it without replicating this orally I will I think move much further through the document. I only have then perhaps one last point to make beyond the way it's presented.

ELIAS CJ:

I'm sorry, on this question of what the Courts will do in terms of recognition of tikanga, surely here it's quite a simple case. It does not require the Courts, and I find it hard to believe the Courts would ever really get involved in explaining what is tikanga or what aspects of tikanga are to be enforced once its application is accepted. Isn't the real contest here between the right of the hapū to determine where a child of the hapū is to be buried, or the right of the executrix to determine where this man is buried? I mean, isn't that the issue and the issue for the Court is – it's not about how he's taken home, if he's to be taken home, it's about whether that mechanism for deciding is to be adopted in this case.

MR McCOY:

The Court is able to determine this appeal along the lines you have suggested Chief Justice, without therefore necessarily having to resort to determining whether the position of the Judges, or any of them in the Courts below, were fully accurate and reliable in their intendment. I understand that. There is, plainly in this case, a tragic polarisation of views and it's not a case, I do not present this as a confrontation between a traffic warden from Christchurch against the mighty warriors of Tūhoe

because what stands beneath this case are much more important and affirmative issues which will ultimately enrich our legal system as a result of whatever judgment you ultimately determine.

I would not however, be acting fearlessly yet sensitively, if I did not make the submission set out in my paras 94 and 95 because I have to submit that, with all respect to those who think otherwise, that the practice of the tikanga violates s 150(b) of the –

ELIAS CJ:

Well if that's so and if you're talking about going to make a demand for the body, that would also apply in intracultural disputes as well.

MR McCOY:

Depending on how it is achieved. It could simply be the modality of transportation. I could be any of these issues but I'm bound to submit –

ELIAS CJ:

But the Courts below didn't rely on these factors, did they?

MR McCOY:

They did not.

ELIAS CJ:

Was the submission made there?

MR McCOY:

I was not in the High Court and the Court of Appeal, the case morphed in view of its novelty and all sorts of directions beyond the pleadings because each party was interested in getting –

ELIAS CJ:

Because the pleadings are really only about the claim.

MR McCOY:

So far if necessary –

ELIAS CJ:

Yes.

MR McCOY:

– they are limited effectively to an equitable claim by an executor. You're absolutely right.

ELIAS CJ:

And the counter to that being the claim by the hapū?

MR McCOY:

That's right.

ELIAS CJ:

Yes.

MR McCOY:

On that basis and that's the point you put to me earlier. Stripped of the elaboration and jurisprudence it comes to a claim between the tikanga right but right against the duty of the executor and the executor unless – because her right exists as a matter of law I do not, with respect, do not accept that this tikanga as practised could constitute a matter of law compatible with our fundamental precepts. That's why it failed. An abbreviated –

ELIAS CJ:

Well that would apply, that would apply to the many cases that most of us are aware of where demand has been made in wholly culturally appropriate terms for a deceased to be taken somewhere else.

MR McCOY:

In an intra-cultural situation where the ritualised position maybe fully comprehended it may not amount to an anticipated breach of the peace amongst the participants but outside that it has that capacity, I have to make that point.

ELIAS CJ:

Yes but you're reliance on s 150 and so on applies to everybody –

MR McCOY:
Yes.

ELIAS CJ:
– and you're making that submission in all circumstances, not just the circumstances of this case.

WILLIAM YOUNG J:
Well is your position that to take a body against the wishes of the person with, what one might say, the starting point entitlement to determine place of burial is improper?

MR McCOY:
And when taken for 15 hours in –

WILLIAM YOUNG J:
Well, did that mean in a way –

MR McCOY:
I have to make that point.

WILLIAM YOUNG J:
I know you are making a point but, I mean, the point is actually the taking though isn't it?

MR McCOY:
It's the taking and the thereafter.

WILLIAM YOUNG J:
It's not proper because it's not, for the least – for one reason that it's contrary to the wishes and will of the, in this case, executor.

MR McCOY:
Indeed.

WILLIAM YOUNG J:
Now conceivably that could happen intra-culturally where the executor or one group of the, those in dispute say no.

MR McCOY:

Then it would happen as well. Then it would happen.

WILLIAM YOUNG J:

That, however, is not this case.

MR McCOY:

No.

ELIAS CJ:

Well I think we should decide this case and not go beyond what is necessary to decide it.

MR McCOY:

Well I don't contest the wisdom of that observation for self-evident reasons.

Well then, your Honours, we have set out our written argument, I don't think it's going to advance matters in the Courts interest beyond what I've already said. I would, however, ask that Mr Starling very briefly follow on one or two matters of fact that may prove to be significant in view of the questions earlier asked by the Court. I think he will only be a matter of a minute or two with the Court.

McGRATH J:

Mr McCoy, what are the orders that you are asking us to make if you are successful in the appeal?

MR McCOY:

Well, ask for the appeal as set out, the disposition sought is set out, ask for the appeal to be dismissed. In the optimum I would be asking for a mandatory order for the disinterment of Jim Takamore and this was actually briefly explored in the Court of Appeal. Justice Glazebrook for some time seemed interested in this and I commended to short circuit what otherwise may prove to be just greater angst and trouble and further unnecessary and complicated Court proceedings, an order of finality for the disinterment of Jim Takamore.

ELIAS CJ:

Do you need that if you've got the Burial Act licence?

BLANCHARD J:

There's no cross-appeal on orders.

MR McCOY:

No there is no cross-appeal. There is no cross-appeal by the other side.

BLANCHARD J:

The Court of Appeal simply dismissed the appeal and returned the matter to the High Court. If we're going to dismiss the appeal it would simply be on that basis I would have thought.

MR McCOY:

Well then the matter will have to return for a remedies hearing.

BLANCHARD J:

Yes.

TIPPING J:

Well that remedies hearing might be briefer than it would otherwise be in the light of the approach of this Court.

MR McCOY:

There's been conscientious attempt not to heighten the forensic tensions by seeking to amend statements of claim or contemplate summary judgment but all of these options remain open in the absence of any possibility.

TIPPING J:

Is it not in everybody's interests if we properly can to limit to the extent possible any further litigation?

MR McCOY:

Yes, that would be the dream of the dispossessed.

TIPPING J:

Well it must be –

MR McCOY:

– executrix –

TIPPING J:

– advantageous to all concerned because this must be very expensive and very unpleasant for everybody.

MR McCOY:

A judgment of this Court will heal that process I hope. Those are my submissions. Mr Starling would be –

ELIAS CJ:

Yes, thank you. Just before you sit down, you did indicate that you were going to refer to the Burial and Cremation Act, I don't think you did. Was there anything you wanted to say about it?

MR McCOY:

I may have only referred to it tangentially –

ELIAS CJ:

No, I think you did. I'm so sorry, you did. You said that it wasn't a source of power –

MR McCOY:

It's the mechanics and functionality –

TIPPING J:

You said it wasn't a code and it ran only so far as –

MR McCOY:

Not a code and it presupposes the lawful status of the deceased for the purposes of burial which is not our situation. Yes, thank you your Honours.

MR STARLING:

All I want to do is briefly address the Court in relation to the might is right argument as it was presented in my submissions by the appellants in the High Court and there are three particular bits from the notes of evidence that I'd like to refer the Court to.

The first section I'd like the Court to have a look at is on page 157 and that was from the evidence of Mr Kruger.

WILLIAM YOUNG J:

Sorry, what page?

MR STARLING:

Page 157 and it's part of his affidavit.

BLANCHARD J:

No, it's not.

WILLIAM YOUNG J:

This is Ms Clarke's evidence, tab 10.

MR STARLING:

The copy –

ELIAS CJ:

You're not working from the case on appeal?

MR STARLING:

I've got the version which is the Court of Appeal case on appeal so I'm –

ELIAS CJ:

What are you taking us to, are you taking us to the affidavit of Mr Kruger?

MR STARLING:

To the affidavit of Mr Kruger, page 12 of his affidavit, para 65.

ELIAS CJ:

Let's just identify it.

BLANCHARD J:

This is the Prince Tui Teka, page 232.

MR STARLING:

So the three examples I want to refer the Court to briefly were examples that were put before the High Court in relation –

BLANCHARD J:

That's all in your written submissions, isn't it, it's in a footnote –

ELIAS CJ:

And I've certainly read this but what's the point you want to make from the evidence?

MR STARLING:

The point is, that in terms of how the appellants have presented the case, the case here yesterday and in the High Court, it is the uncertainty of what the tikanga is. Now my learned friend Mr Ferguson, yesterday spoke about the process. Now, in my submissions, the process presented in regard to the tikanga effectively and looking at the examples that were given, is a process that is in two parts.

So part one of the tikanga, as presented, is that effectively competing interest groups, usually whānau groups compete to determine who has an interest in the disposal of the body. The examples given in the High Court and of which there were three of them, there was one given of the Prince Tui Teka case and there were the two examples given by Professor Temara. The two examples he gave involved one group having the body and another group trying to get the body.

So, in my submissions, the tikanga process is in two parts. The first part is interest groups compete for the body. The group that has it tries to stop the group that wants it from taking it away and Professor Temara's example, the first one he gave, the body was taken away, in the second example he gave the body was not taken away. So he gave two very interesting, contrasting examples of this tikanga in practice.

So my submission is the – that's where part one ends. One group obtains the body from the other group or one body retains – one group retains the body and then part two of the tikanga comes into play which is, the resolutions, the resolution of the –

ELIAS CJ:

Grievance.

MR STARLING:

- the grievance between the two interest groups.

ELIAS CJ:

But these are not inevitable outcomes, these are not – these are examples of tikanga in operation. Sorry, I'm just trying to think, what's the point you are making arising out of it?

MR STARLING:

The point is that the actual – what's been described in this Court, what's been referred to as a tikanga is in fact rather than being a defined custom where you could clearly say, this is what should happen in relation to the burial of the body of a Tūhoe descendant. In fact the tikanga is a process by which intra-tribal, intra-family groups compete for the body –

ELIAS CJ:

Or decide.

MR STARLING:

– or decide between them.

ELIAS CJ:

What's the problem with that?

MR STARLING:

The problem is that in fact there is no certainty in terms of – there's certainly some of the things that were raised of where should a body be buried.

TIPPING J:

You're saying it provides a process but not an outcome?

MR STARLING:

That's correct.

TIPPING J:

I think that's what –

ELIAS CJ:

I think everyone would accept that.

MR STARLING:

And there are no rules that –

McGRATH J:

There's no principle, you're saying, being applied?

MR STARLING:

Yes, so certainly the things that people think might be the principles such as you are buried where you are born –

McGRATH J:

Yes.

MR STARLING:

– now that didn't come out of the evidence because there are a number of cases where that doesn't occur. So there is uncertainty about the rigid structure of the custom. So all the custom becomes is this two-step process by which a grievance happens maybe and then it's resolved somehow by way of, often by restitution by way of a group's discussing issues. But often, as was given in evidence in the High Court, these grievances can last for generations.

So, in my submission, that – it would be unreasonable for this Court to try and impose that process or allow that process to somehow be a de facto way of resolving disputes over disposal or burial of a body when there are competing interests that are not intra-family.

Now certainly Mr McCoy discussed the Crimes Act matters and the Chief Justice said, "Well what about when it is intra-family dispute, does it still apply?" Well, I think as he touched on it, it does apply but no one does anything about it because there is a dispute resolution process which may take generations. But certainly in this case where there could be no expectation on the part of Denise Clarke in terms of what would happen or how it would happen or what the process was or how the process would involve her. I mean certainly there was no attempt to involve her in a tikanga process. The decision was made before the Tūhoe group came to Christchurch to

take the body. So the tikanga never involved her at all and was never going to involve her.

McGRATH J:

But she was present at the first, on the first day?

MR STARLING:

That's correct. But the decision was made –

WILLIAM YOUNG J:

Your argument is that because those who came down came with a settled purpose and intention of taking the body back it wasn't a discussion that could reach, as it were, another outcome?

MR STARLING:

Yes that's my position.

TIPPING J:

It was predetermined.

ELIAS CJ:

That will always be the case where someone goes to claim. They will go with that determination. It may alter as matters are discussed.

MR STARLING:

But the only – well as –

ELIAS CJ:

I'm not disagreeing or seeking to challenge the submission you make which is that this is not a process to be imposed on someone but –

MR STARLING:

Well Denise Clarke had to have known that effectively as far as the tikanga was going to be carried out the only thing she could do to prevent Jim Takamore's body being taken away was to effectively not – by force of will or by actual force. She had to physically prevent the removal of the body and she didn't know or had no way of possibly knowing that that was in fact, as part of the tikanga process, her only option.

ELIAS CJ:

Well I don't know that it's right to say from what Mr Kruger says and from what is generally known and one would think we can take judicial notice of it, that physical resistance is the only outcome.

There is a great deal of talking past each other as I think one of the other witnesses says in what happened and that's not at all a criticism of Ms Clarke or the family. She wasn't prepared for it but the – Mr Takamore was left there and what perhaps should have been explained to her was that that was real vulnerability. But I'm not sure where this submission is going.

TIPPING J:

In addition to what we've heard already.

ELIAS CJ:

Yes.

MR STARLING:

Well certainly I'm taking further Mr McCoy's submissions that the tikanga is both uncertain and unreasonable.

ELIAS CJ:

We understand that submission. Is there any more material you want to draw our attention to.

MR STARLING:

No I have nothing to add, thank you.

ELIAS CJ:

All right, thank you Mr Starling. All right, we'll take the lunch adjournment now and we will hear from Mr Ferguson after lunch, thank you.

COURT ADJOURNS: 12:58 PM

COURT RESUMES: 2.19 PM

MR FERGUSON:

Thank you Ma'am, your Honours. There are a number of points that I want to cover off by way of reply to my friend and I apologise in advance that they aren't necessarily in a perfect order in terms of addressing them but as matters evolve yet again and I think one is faced with a series of propositions which almost amount to layers of possibilities in terms of where rights and obligations lie and how they might be given effect to depending on where the Court might ultimately rest on certain of the legal issues before it and I think, with respect to my friend, those layers were evidence in terms of the various propositions which I've taken in some cases were advanced in the alternative, particularly in around what, not so much the duty of the executor might be but more particularly how that duty is performed and against what standard and, in turn, the degree of justiciability in relation to that decision as a matter first of pure introduced common law and, secondly, in the event that that is modified in some degree by tikanga and its existence and/or legal recognition. So I will try to cover off those points but necessarily they maybe a little bit disjunctive and I apologise in advance for that.

I think, just in terms of the final, some of the final comments that were made before we adjourned for lunch. The appellant firmly endorses the observation by the Chief Justice that this is a case that really needs to be limited to the facts before the Court and there are enormous perils in terms of the broader extension of some of the principles beyond the particular context here and while there may be aspects in terms of the New Zealand context which are important in other cases and in future cases, this is a case that, in my view, deals with I suppose three parameters that I think are important to bear in mind in that regard.

So, as I see them, first we are dealing with an intercultural situation and that is to distinguish it from, for example, my friend referred to as a Ngāi Tahu/Tūhoe intersection. That simply is not the factual situation before the Court and it would be unreasonable to speculate about the propriety or otherwise of whether there would be a conflict there or not.

Secondly, this is a situation where, and I suppose it's – what the right word to use but essentially there is not consensus I think is the safe way to describe it. So we are in a dispute situation in terms of the place of burial.

And thirdly, and importantly, we are in a post-burial situation and I think that latter point is fundamentally important when one looks at the approaches and the variety of approaches when one goes through those many cases, and my friend took you to a number of them.

There is, as my friend put it, a need for speed in those cases which is quite clear that the Courts have grappled with that in different ways depending on exigencies, practicalities and the evidence and time available to grapple with them but I would – and that's clear from the two decisions that appear on their face to, well they do come to contrary outcomes in the two *Jones v Dodd* decisions involving what I also agree are clearly two brothers who are deceased and the Court said that depended on the particular circumstances before it.

In that case the Court clearly felt that it had to go simply beyond what one might say is a plain assessment of things at the highest level as my friend my put it, in terms of looking at a point of pure legal principle, and the Court in that case and in others has clearly felt itself able to an extent at least depending on the circumstances, to grapple with the merits.

Now in those cases it is quite clear that the Court is constrained in the amount of evidence it has on those matters and other exigencies. Those exigencies aren't present here in terms of the reality that Mr Takamore has been buried so this Court isn't trammelled in that way. There is, I would respectfully submit, a much greater wealth of evidence in relation to the tikanga and its underlying principles and its exercise and application here and would appear, at least on the face of those Australian decisions that involve Aboriginal rights and interests which in some cases are referred to as spiritual values, cultural values or religious values and there tends to be a number of labels that are used and I think we need to also be careful, in my submission, to ensure that we are simply, we don't with due respect to the Court, that there isn't an illision between what we are talking about here is the fundamental tikanga – as was noted as a tikanga process and what one might describe are the values that sit behind that process and more broadly behind the notion of tangihanga.

This isn't simply a question of cultural values or customary values per se that sit there on a page and one can look at them and say, well, I'm cognisant of that and I can now proceed to do that. It is a process, it's an active engagement and fundamentally sitting behind that is this notion that what is being strived for is an outcome and a

reconciliation and a balance, albeit as your Honours have put, that's not consensual in the sense that one looking through a purely European lens would say that's a consensual process or that it has the type of ultimate decision maker that one would normally expect to see if one is looking at a European-type process.

But that's fundamentally important in my submission, at a number of levels of this case because at each instant where my friend begins, and I will say he goes much further than begins, where he acknowledges to give him very fair credit, acknowledges the importance of tikanga in New Zealand and in New Zealand society, acknowledges that at the very least it's a relevant factor. The difficulty in my submission in that regard is where that then ends because it seems with one breath there seems to be this tangible and material and substantive acknowledgement of this and its place but in the other, when one then looks to the next layer of my friend's argument it quickly, very quickly that water which has crept up the beach quickly evaporates again when one looks at my friend's propositions which are, first and foremost, that it is simply one of a whole range of factors that falls to be taken into consideration. Secondly, that ultimately the executor merely has to take those into account and can do so in a very, almost an immediate way and that it doesn't require any substantive engagement or discussion around that.

ELIAS CJ:

Mr Ferguson, I'm reluctant to intervene but what's the submission that you are making on this? That this is all contextual or –

MR FERGUSON:

The submission, Ma'am, and this goes to the – sorry, brought into the picture in terms of the what is the role of the executor assuming or in the alternative situation as to assessing well, if the executor has a duty here what is the performance of that? Which my friend's proposition, and I was just trying to unpick his proposition to get to the, what my countervailing point on that is, and perhaps if I just go straight to my point, it will become evident –

ELIAS CJ:

Yes, make you point I think.

MR FERGUSON:

Okay, Ma'am, my view is if we are in a situation where your Honours find contrary to my fundamental primary submission that tikanga is not cognoscible in an absolute way and therefore does not, is not the ultimate decision-making process in this and that instead the executor has a role and has a duty that needs to be performed in relation to the place of burial. And I'm putting to one side the issue of what the post-burial manifestation of that, but at the time that this issue arises and the executor becomes aware that there is a claim then in my view, that triggers a substantive obligation.

And this goes back to the very heart – I don't disagree with my friend –

ELIAS CJ:

Sorry, a substantive obligation –

MR FERGUSON:

Obligation –

ELIAS CJ:

– on the executor –

MR FERGUSON:

On the executor to –

ELIAS CJ:

– to?

MR FERGUSON:

– in that event to engage to allow that process to occur within the whānau pani to then consider that against other views in the event that there is this view because it may well be consensual, of course, and this should only arise in the event where there's no consent or no consensual outcome and that must be a material engagement with that and in my view, in the New Zealand context that tikanga process and those tikanga values need to be given primacy. That is not to say they will override in every circumstance but the reason I say they should be given primacy is because, with due respect to my friend, all of the factors he points to that are so fundamental in terms of what is driving this duty. Who is the duty owed to when he accepts in one part it's a kind of a public duty to the Court but in a private sense he

talked about the interests of the deceased and what he may have wanted to do, the interests of the family, as he put it, the interests of the wife and child and other factors. All of those matters, all on the evidence before this Court are all relevant factors to the exercise, to the tikanga process.

And it's quite clear contrary to the compression of the tikanga that my friend pointed to in a paragraph of his submissions, it's quite clear when one looks at the full discussion of the evidence which is set out at length in His Honour Justice Fogarty's judgment at para 47 onwards and then summarised again by the Court of Appeal at paras 92 to 94 as a consequence of reflecting a whole lengthier discourse through the evidence of Mr Kruger and Profession Temara, that's it's quite clear that all of those matters in relation to the views of family members, the way the deceased lived his life, his desires, and those things as well as his status –

ELIAS CJ:

They all come into tikanga.

MR FERGUSON:

All come into that mix.

ELIAS CJ:

Now I understand that because that's what you developed in your opening submissions so what's your point in reply?

MR FERGUSON:

So my point in reply Ma'am, is that that – in the event that that's not cognoscible in a pure sense –

ELIAS CJ:

Yes.

MR FERGUSON:

– the executor must give primacy to the outcome of that process.

TIPPING J:

What does that mean?

MR FERGUSON:

That – then it's more than take into account. In my view then –

ELIAS CJ:

Defer to it, is that what you mean?

MR FERGUSON:

They must defer to it except in extraordinary circumstances where there are clearly matters that –

TIPPING J:

Are you saying it's a bit like it is the first and paramount consideration?

MR FERGUSON:

Yes.

TIPPING J:

To borrow an expression from another field.

MR FERGUSON:

In the New Zealand context in my submission, that is the appropriate approach.

WILLIAM YOUNG J:

But – sorry. Do you mean that's where there's been an outcome? The executor has to defer or should defer to it in normal circumstances or do you mean that the executor must decide the case in accordance with the tikanga process?

ELIAS CJ:

Or are you meaning that the executor must defer to the tikanga processes and accept whatever results from those processes?

TIPPING J:

See if there was agreement in the tikanga process it would be very odd for the executor not to follow that agreement but we're not really talking about that sort of case at all.

MR FERGUSON:

Well, in my friend's submission I think he has because –

TIPPING J:

But he's not.

MR FERGUSON:

Well I took that from his submission yesterday when the proposition was put –

TIPPING J:

Well he –

MR FERGUSON:

– that if it was a trustee co-operation –

TIPPING J:

Well they'd be crazy if they simply decided – that was his Liechtenstein example, not perhaps directly applied but Mr McCoy's not arguing that an executor can simply ignore a consensus reaching from the tikanga process. He's concerned with a case where no consensus emerges.

MR FERGUSON:

Well in that circumstance then there will still be – tikanga-based process does not require unanimity or consensus but there will be a view that will come out of that. The whānau pani will include in this case the widow and the son. There isn't agreement so the fact that they disagree has a relevant factor for the executor to weigh up but the fact that the – it's an extension of my friend saying the interests, the views of the family need to be taken into account. The family is the whānau, it is that broader collective grouping and if we're talking – it's not a numbers game but if one looks at some of those cases and say, well, there was only two members of the family that disagree.

This is the kind of situation we have here with respect, albeit that it comes out of that tikanga process. So I don't want to get into, it's a numbers game but I'm saying there needs to be a recognition and primacy placed onto that because it is designed –

TIPPING J:

I still don't understand what it is to which the executor must give primacy? If it's a consensus I'm inclined to agree with you but if it's not what does she get primacy too that –

MR FERGUSON:

Well if it's a –

TIPPING J:

– taking the body back to the marae? That's I think what you're trying to say but in guarded words.

MR FERGUSON:

Well if I can – in this case, from the view of the tikanga process, there was an outcome.

WILLIAM YOUNG J:

You say that the deceased was, body was removed and later buried in a way that was entirely in accordance with tikanga –

MR FERGUSON:

Yes.

WILLIAM YOUNG J:

– that it's a proper burial and Ms Clarke should accept that and get on with it? That she's got no grounds for saying that anything that happened was contrary to law or interfered with any rights that she has because those rights were trumped by the tikanga process?

MR FERGUSON:

If the, if the tikanga is cognoscible at law, yes. If it is a factor to be taken into account by the executor, so if that is not the absolute solution that the Court accepts and says that, no, where there is still a dispute then that can't automatically, regardless of any other factors, trump as it were, then I'm saying that that outcome still, which is an outcome in this case, I'm not talking about other cases, needs to be given a greater weighing than simply a matter to be taken into account.

And if I can add further to that. In relation to this, the language that my friend uses which is describing the executor's role as a duty and I will get to the purpose of that, to the – we don't disagree, the appellant doesn't disagree with the notion of it being a duty in the sense that it gives rise to notions of fiduciary obligation and trust but as such and given the importance of that in a dispute situation, if one gets to the situation where the tikanga – where the executor is to have that say then the executor must perform as a fiduciary, as a trustee and that requires a much higher degree of obligation than what my friend says it does. That it can be essentially an instant type of decision particularly in these fraught circumstances where there are those tensions.

And in my view, this is not a case where there should be wide latitude given in that regard to that decision particularly in the present case where I think there is a fundamental conflict, in my submission, where the executor has that role and is also one of the disputant parties in the underlying disagreement that leads to it.

Essentially if that is the case, if that – if Ms Clarke is able to be the executor and exercise that ultimate power of decision as my friend says she can, and be the determinator of the dispute when she is already a disputant party, well then the whole process of engagement essentially is skewed from the start because essentially she goes into a process of any engagement weighing up knowing that she holds that trump card and she has an interest. And an executor, in my submission, can't, as my friend said, do something fraudulent, can't favour oneself in terms of the distribution of the assets of the estate in an unreasonable way over other parties and, in my submission, that therefore means that there is a higher standard on an –

ELIAS CJ:

Are you saying she had a conflict of interest?

MR FERGUSON:

Yes she had a conflict of interest in this case and –

TIPPING J:

Well ironically, equally did your clients.

MR FERGUSON:

If –

TIPPING J:

If one side has a conflict of interest so has the other.

MR FERGUSON:

Well, no, with respect Sir. I'm dealing firstly in the situation where the executor has the final say. In the other case it's not as simple as that because of the nature of the process and the fact that they are participants in that process as well so my clients are –

TIPPING J:

I still don't understand how this process comes to a solution where the parties disagree and there is an impasse?

WILLIAM YOUNG J:

You would say that there was a solution –

MR FERGUSON:

Yes.

WILLIAM YOUNG J:

– that as it were Ms Clarke withdrew from the fray leaving a de facto situation where –

TIPPING J:

I understand that on the facts of this case but I'm thinking in more abstract terms for the future, for giving guidance for future cases. It may well be that that's the right analysis for this case, I don't know, I'm not expressing a view but it's important for the parties but it's also important for the future. I don't understand, can you say in a sentence or two, and I mean that literally, how the tikanga resolves a dispute if it, and I understand you to say it's not really designed to?

MR FERGUSON:

Yes, it's not designed to resolve a dispute in the sense that you perceive it to be, yes.

TIPPING J:

Yes exactly, that is the fundamental problem, isn't it, that there's a disjunct between, if you like, the European view of resolution of disputes and your client's view and somehow we've got to reconcile that disjunct?

MR FERGUSON:

In this case, yes.

TIPPING J:

Both in this case and generally, according to the submissions on both sides. I mean, you're most interested and so is Mr McCoy immediately, in the outcome of this case but we can't avoid the consequence that what we say in this case will be guidance for the future.

MR FERGUSON:

And that's the reason I have such hesitancy about stepping back from that proposition because of the particular – this is the first and only case that has come before the Courts on this issue and, as I said in my principal submissions, that in itself is indicative of the fact that this process does work and it does work obviously in an intercultural setting as well. So I'm very conscious of dealing with the particular circumstances here and what they give rise to.

What I was trying to emphasise in terms of the role of executor and the conflict of interest point, was in the event that that's not accepted by Court and we're dealing with the situation where executor has this dispute resolving responsibility whether – if that process gets to the point where there is an intractable dispute, as you would put it your Honour and I'm not trying to be pejorative in that sense, as you would put it, you would – one option, as your Honour has put it, is there needs to be an impasse breaker, as it were and that could be the executor or it could be –

TIPPING J:

Subject to the supervision of the Court –

MR FERGUSON:

– the Court directly –

TIPPING J:

Well –

MR FERGUSON:

I'm saying the difficulty with the executor in this case is that the executor has a fundamental conflict of interest and the standard that my friend advances for the executor's decision making process is simply inadequate, having regard to the fundamental importance of the tikanga that has now been adapted or modified, as my friend put it, to insert this decision making outcome –

TIPPING J:

What's wrong with a solution that says that the executor makes the first decision, after having considered all the relevant factors including the tikanga dimension and even participating if that was appropriate but as the responsibility of the first decision, subject to the decision of the Court if someone challenges it and, on a test, it's broadly equivalent with administrative law considerations, what's wrong with that? I take it, it is that it doesn't give enough weight to the tikanga premise?

MR FERGUSON:

It doesn't allow the tikanga to occur in that setting.

WILLIAM YOUNG J:

It doesn't allow the tikanga process to reach a conclusion that is effectively constrained by the requirement for a quick decision and the requirement for a decision to come out of the process within that timeframe.

MR FERGUSON:

I mean, one – look, I would accept that one could construct a process that wouldn't be the tikanga process that one could codify that would see the parties obliged to come together and engage in a process but we end up with a very different thing in that regard and that may be where your Honours feel is the appropriate solution to this case and what I'm trying to do is to deal with that and how, in that event, what is reasonable. If it was, as Your Honour put it to me, an administrative law type or –

TIPPING J:

Well broadly speaking.

MR FERGUSON:

– broadly speaking, then that heightens my fundamental point about the person who is fulfilling that role and that's why I think the executor is almost a bit of a distraction in that event because it's by chance, well not by chance but there are a whole lot circumstances that lead to people being the executor. The executor in this case may have been Māori, could have been Māori in another case, might be somebody completely independent. In this case the executor obviously has a fundamental interest in the matter and to the extent anyone is suggesting that the appellants had a predetermined – had a determination or a predetermination, equally there was a determination on her side.

So we need to ensure, even at that first stage if that is – if there is a person to fulfil that role, that there is sufficient independence and ability to truly make that principled and merits based assessment, having regard to the facts of the situation because – and if the Court is then to have as supervisory jurisdiction in relation to that, then there are automatically some clear standards against which that occurs –

McGRATH J:
But the executor was chosen by the testator. Isn't that a factor that comes into this?

MR FERGUSON:
I think we're – in that ironic situation, I suppose Sir, where we're contemplating a – making a ruling as to what the legal position and then retro applying that and saying well, that somehow that appointment was – in the knowledge that that would be the role and responsibility at that time and I'm not sure we can necessarily draw those two things automatically together.

Certainly going forward, if there is clarity around these issues, then people will be under no illusion as to what the importance of the appointment of an executor will be –

McGRATH J:
I'm just suggesting, I mean, what I'm saying is that your notion that the executor is the position totally independent in relation to matters would really –

MR FERGUSON:
Well that's why –

McGRATH J:

– to my mind, isn't really consistent with the general law that the executor is appointed by will by the testator and that, nevertheless, the concerns you have may well be relevant factors in any particular decision. That I can accept but I don't think that you can expect a totally independent decision –

MR FERGUSON:

No and that's why –

McGRATH J:

– in the sense that you're advancing it. We can't –

MR FERGUSON:

That's why I'm –

McGRATH J:

– you can't every executor appointed as an independent arbitrator, as it were –

MR FERGUSON:

No and it only arises in the situation where there's a conflict and if there's not the conflict, if the executor agrees or there's consensus with the executor, this doesn't become an issue. In the event that there's a conflict and the executor happens to be one of the disputants, then in my view the executor needs to step aside and allow someone else to – in that event and for that purpose because we're talking about all the purposes of the executor, we're talking about the –

TIPPING J:

Isn't the control of the Court –

MR FERGUSON:

– ancillary purpose associated with burial.

TIPPING J:

Isn't that part of what the residual role of the Court is decision to achieved, that you don't arbitrary and wholly unreasonable decisions which may be the product of the executor's so-called conflict of interest?

MR FERGUSON:

Well on my friend's submission, one wouldn't even get into the situation of having – an executor at first instance wouldn't be doing the task that even the Courts in *Jones v Dodd* grappled with in Australia in terms of that and a written decision that articulates all of that. It can essentially be quite an immediate decision –

TIPPING J:

Would you rather have it go straight to the Court, I have to say, a proposition with which I'm not initially attracted but would you rather have it go straight to the Court? In other words, there is no decision making, prima facie decision making role. This is on the hypothesis that we're not with you on your first point that you've emphasised.

MR FERGUSON:

If the process – if the obligations on the executor, in terms of the decision-making process and the standard that the executor has to discharge and the breadth of the discretion as such, then yes, my submission would be the Court is a preferable and safer environment for that to occur and in terms of the balancing –

TIPPING J:

But the practicalities of that are, I have to say, seem to me to be extremely difficult because that would mean that well, every time there was some sort of, even remote issue about it, the matter would have to go to Court.

MR FERGUSON:

Well I think, the fact of the matter is I think, it's a kind of floodgates type issue is a difficulty in general terms but again, I come back to the fact that this is the only case that has got to this point. If by confirming that there is a supervisory role of a Court immediately above that type of process, it's going to mean that everyone is going to be running off to the Court, I think as soon as one starts dealing with this area and starts to confirm what the law and I think whichever way we are, we agree as appellants that, as a matter of fact, the existence of the tikanga, its implementation and its parameters are judiciable and therefore there is an ability to challenge that in terms of its exercise, as indicated in the written submissions for the appellant.

If tikanga has been exercised in a way that does offend against those fundamental principles that we concede, violence and those similar acts would render the exercise, then those things are judiciable. So we are already going to be in a

situation where necessarily there is going to be a clarity that will see a path to a further set of contests and potentially further arguments before the Court but, with respect, I don't think that is a reason for not engaging with those. If that was the motivation then I would say that in fact the tikanga is showing by conduct, notwithstanding this case, that by and large it works and we don't have hundreds, dozens of cases before the Court on these very issues.

In fact, the majority of the cases in the overseas jurisdictions aren't intercultural type cases at all they are your standard family disputes which exist in a whole range of ways and they are very emotional and conflicted in terms of custody and testamentary promises and family protection, et cetera, and there is a lot of litigation around those things. That doesn't make them offensive or make the processes to be avoided or not entertained or to say the Court shouldn't have an important role in that. I agree with the need to be very cautious about how one grapples with this and the consequences but I'm – my forceful submission is that I think, first and foremost, this needs to be a decision, if there has to be a decision maker, then one needs to look at what that decision involves and the purposes of it so we don't end up with, in my respect, the types of things that my friend says are possible outcomes in terms of improper purposes and capriciousness and all those types of things. We need to remove all that from the possible equation.

And we still need to, with respect, try and embrace, so far as possible, what the tikanga represents, which is trying to bring a long conclusion to these matters and a rebalancing and if we are into very arbitrary decision making at the first level that's then not, while capable of review, there are significant limits to the ability to go to that particularly to a merits-based consideration if we are talking about a type of review, we're not talking about essentially an appeal on the merits, then we do have major constraints in that regard.

If I can just touch on the duty itself, and I think this is confidently dealt with in the Hardcastle article that my friend referred to and which itself summarises the background to this. There clearly is a slightly different approach in the United States and it does, driven by different issues but certainly the antecedence and the context of this executor's duty as my friend put to it, or the role, is it's a public duty and it's motivated by notions health and decency and to an extent, issues of practicality that need to be in there.

In that context it was never seen in its foundation, in terms of the decision maker, as being a merits-based arbiter type appointment and if my friend says the Court is ill equipped to grapple with that I go back to that position I think the executor's is equally ill equipped if one takes that as the proposition.

In the present case our submission is that that obligation, that duty is to ensure a proper burial. The natural corollary of my friend's submission in my view is that in his submission it's not to ensure a proper burial it's to ensure that the executor either makes that decision or consents to that decision and anything other than that is an improper burial. And if one looks at that then one is looking at, well is that really the role of the executor in relation to place of burial. Is the ability of the executor to consent or make the decision – is that the fundamental premise that this public duty exists for? In my submission, no it's not. It's to ensure that there is a proper burial to facilitate that not necessarily to be the decision maker on it in those circumstances.

And I think when my friend says well there needs – it is beyond that because clearly and it needs to extend beyond burial. In my view, the issues that arrive beyond burial in terms of protecting, well those cases where one has looked at, there needs to be an ability standing to stop a disinterment.

TIPPING J:

In the light of the cases to which our attention has been drawn, do you maintain the submission that the executor/administrator has no powers, jurisdiction, etcetera, post-burial?

MR FERGUSON:

No but I want to be quite clear about what I do say in relation to that. In relation to that, the obligations once there has been a burial change. It is not a continuation of the same duty that existed to ensure a proper burial in my submission. It's not a continuation of that what I think is more properly described and certainly Hardcastle says this, as a right of custody. Because it's a purposive right that and the purpose is burial.

TIPPING J:

But surely ex hypothesi there hasn't been a proper burial so the duty, surely, is still to ensure a proper burial?

MR FERGUSON:

Well I disagree with – my submission is that there has been a proper burial.

TIPPING J:

You disagree with the premise?

MR FERGUSON:

Yes I – but assuming – if there has been an improper burial, for example, if he was buried, Mr Takamore had been buried in a field somewhere that isn't a cemetery or an urupā and therefore it's not appropriate, then I would not –

TIPPING J:

You're mixing this case with general propositions. Take it that I'm talking generally –

MR FERGUSON:

Yes.

TIPPING J:

– unless I expressly say otherwise.

MR FERGUSON:

Yes, generally, I'm sorry I was intending to – I shouldn't have used Mr Takamore's name, I'm talking generally. If there was an improper burial whatever gives rise to their being an improper burial –

ELIAS CJ:

Well you say what gives rise to there being improper burial is burial that's not in accordance with the purposes of disposing of a deceased's body with dignity and according to law. So you have a limited view of what is improper. Against that it's being argued that improper means not in accordance with the wishes of the executor.

MR FERGUSON:

That's correct, Ma'am. That's correct, Ma'am. But in relation to an improper burial or another issue where, for example, somebody has gone and disinterred someone who has been properly buried without dispute, in my view the entitlement to protect the integrity of a proper burial, the entitlement to protect the integrity, the executor, given their prior responsibility and duty would have standing to take steps but equally I

would say that anybody who has an interest in that proper burial also has standing. In other words, I do not see this as, that this is essential that this duty of the executor continues because otherwise we're going to have, based on the kind of *Pierce* approach or there's threats of disinterments all over the place. We've got a process which, by which proper disinterments can occur. We've got a – and we've got an ability in my view to take action to prevent other improper actions in that regard but that shouldn't be limited to the executor to be able to protect the integrity of a burial once it's occurred.

So if someone is going to go and interfere unlawfully with a gravesite then I think there are a range of people with interests in that that should have standing to be able to take appropriate action.

TIPPING J:

But hypothesise whatever this, whatever the phrase means that there has been an improper barrier –

MR FERGUSON:

Yes.

TIPPING J:

– as a hypothesis.

MR FERGUSON:

As a hypothesis.

TIPPING J:

Do you accept or not that the executor can take proper step, can take steps to ensure that there is a proper burial? Because the cases cited seem to suggest as much by implication and there doesn't seem to be anything of any consequence that suggests the contrary.

ELIAS CJ:

Indeed, you've just said that the executor and anyone else who has a connection –

MR FERGUSON:

That's right.

ELIAS CJ:

– has standing so surely we've got to that point.

MR FERGUSON:

I think – no one denying that there's ability for them to do that –

TIPPING J:

But you were originally. As I understand you yesterday you were saying that once there's been a burial, proper or not, the executor is off the map.

MR FERGUSON:

I think we were dealing with a situation as to, perhaps if I can rephrase –

ELIAS CJ:

Well you were dealing with a situation where it was said that the executor has a right to possession of the body and you say after burial, no, but you don't deny that the executor has standing to seek reburial.

MR FERGUSON:

Yes Ma'am, that's correct. And that would then be a matter that will be dealt with on the merits –

ELIAS CJ:

By the Courts.

MR FERGUSON:

Yes by the Courts.

ELIAS CJ:

Yes. Sorry, now what submission do you want to take us to?

MR FERGUSON:

I did want to make the observation, just in relation to my friend's emphasis and it's a slightly related point to the fact that a lot of these factors that would be before an executor, in his view when that's the decision maker, describes as he puts them, as

"incommensurables" and that that's not a place that the executor should be having to grapple with, nor a Court and the Court are ill-equipped for that.

My submission is that I don't accept that as a general proposition. If the information is available and there are a number of other areas where things that one might describe, at first blush, might be viewed incommensurables are grappled with by decision makers and by the Courts and I – including cultural matters and a classic example would be the Resource Management Act where the –

ELIAS CJ:

Well and human rights when in conflict and things like that. The Courts do have to deal unfortunately, with incommensurables quite often.

MR FERGUSON:

If I could move to the issue of – I'll just make sure that in our previous exchange I've covered off most of these points, so just bear with me. There was a factual point I just wanted to deal with. My friend said towards the end of his submissions that we were faced with a situation where there was a finding of fact that the deceased wished to be buried in Christchurch and I firmly reject that there is any such finding of fact. That matter was disputed and that is reflected in the Court of Appeal's judgment at para 52 and again at para 156, where it certainly noted there was a right of burial. It talks about the views expressed by some of Mr Takamore's friends that came to light post these events but were before the Court but the Court of Appeal majority clearly found that, with the evidence of the mother Nehu Takamore, was in conflict with that and there was not a clear finding of fact on that matter and I think it's important just to clarify –

WILLIAM YOUNG J:

Did Justice Fogarty not make a finding of fact on this issue?

MR FERGUSON:

The Court of Appeal – he made a finding of fact on the opting out issue, that he had opted out and I think that kind of essentially overrode that matter but the Court of Appeal was quite clear in terms of its majority finding on the facts that that was not the case.

TIPPING J:

Did the Court of Appeal expressly reverse Justice Fogarty's finding –

MR FERGUSON:

Yes, on that broader point.

TIPPING J:

Yes, on the broader point but on the point about – the Judge inferred, from all the evidence, that the deceased wished to be buried in Christchurch, as I recall, the High Court Judge.

MR FERGUSON:

Yes.

TIPPING J:

Is that right so far?

MR FERGUSON:

That –

TIPPING J:

Now did the Court of Appeal expressly reverse that finding, or only the finding in relation to his disassociation from the Tūhoe connection?

MR FERGUSON:

I'll find the relevant passage –

WILLIAM YOUNG J:

In 56 and 57, the Court of Appeal notes there was no cross-examination on the competing evidence but do they actually come back –

MR FERGUSON:

Yes, para 162 Sir, "In view of the conflicting reports given by Mr Takamore's work colleagues and his mother and the absence of any instructions as to place of burial to Ms Clarke, it cannot be said that Mr Takamore had expressed a single clear view as to the location of his burial. Our view on this is to be contrasted with Justice Fogarty's finding that Mr Takamore wished to be buried in Christchurch."

TIPPING J:

So it's 157, the Court of Appeal –

MR FERGUSON:

It's 162 on page 88 of the case.

TIPPING J:

But Justice Chambers was of a different mind?

MR FERGUSON:

On the broader issue, I couldn't tell you off the top of my head whether he focused in on that particular finding of fact –

TIPPING J:

I think it – well he discussed the evidence of the workmates and friends and I understood him to –

MR FERGUSON:

Yes, I would say it wouldn't surprise me Sir but I'd defer to what he actually says.

TIPPING J:

Of course.

ELIAS CJ:

Well I think he said he wouldn't differ from the findings of fact made by the trial Judge so presumably that meant that –

WILLIAM-YOUNG J:

At page, para 322 is Justice Chambers' summary position.

ELIAS CJ:

What, can you read it out?

WILLIAM-YOUNG J:

"In summary therefore, I would find as follows. That all the evidence is clear to me as it was to Justice Fogarty that Mr Takamore had chosen to live outside tribal life, the customs of his tribe. He had made a will, he had appointed his Pakeha partner as

his executor. He had expressed a clear view he no longer considered himself Tūhoe bound by its customs. He had expressed a clear view that when his time came, he did not want to be buried at Taneatua, but rather wanted, expressly to be close to Christchurch" etcetera.

MR FERGUSON:

The other comment, submission, I would like to make in relation to people's balancing what he said was a tikanga right or tikanga interest, compared to a duty of the executor and with respect, it is quite clear in my submission from the expert evidence, that we are not simply talking about here as a tikanga right per se. We are talking about a process and it is quite clear that is founded in a genuine sense of obligation and duty. In fact, that is the language that is used consistently, when one is talking about customary rights in a general sense, and has before the Court, that these are rights and corresponding obligations go hand in hand and as a matter or tikanga.

ELIAS CJ:

It is not a matter of will, it is a matter of obligation.

MR FERGUSON:

Obligation – and you know this whole nation. I come back to the importance again of not only tikanga generally, but in particular, the tikanga associated with tangihanga of which this forms a part, is so fundamentally bound into the nature of Māori society in that sense and that it is right at the essence of that. So you have, that is the reason that the fundamental words in Māori are inter-related to death and life. So, and iwi is bone. Hapū is pregnancy. Whenua is placenta. Whānau is to give birth. Wai; waters. When one asked "Where are you from?" Ko wai o "Whose waters are you from" These things are all fundamentally intertwined with the environment. And that is why we have the other thing that is taking up a lot of the media about these rights in some water which are under pinned by these same fundamental, irreversible, obligations, rights and reciprocal obligations and duties that iwi feel and Māori feel so strongly about. This is part and parcel of that broader fabric.

If I could then just turn – I think it is not helpful to go further into that. I just want to focus on the issue of the disinterment and the role of the executor because I think my friend's position is firmly and he can correct me if I am wrong, that the first respondent, as the plaintiff in this case, is standing and continues to stand, seeking

that these remedies and reliance on and into the role of executive, my friend acknowledges that.

As such, this role is directed to those public duties and those public responsibilities, which one understands and understands the genesis of those and understands the exigencies of a situation which I say aren't here now. When these Court turns to look at this particular case, what then is the purpose, and perhaps I should just briefly note the point at which I agreed with everyone of the Chief Justice just a moment ago, but in our submission, this is a proper burial. There is no basis for suggesting it is not, for that Takamore whanau and the relations to this, have shown anything other than the utmost decency in respect for Mr Takamore, have accorded all due care in terms of properly burying him, after a tangi hanga over several days in Kutarere in a lawful Urupa. They had not been capricious, and proper, unreasonable, they had fulfilled a purpose of any duty to provide him with a proper burial

The notion of an improper burial, in my friend's submission, relates to the fact that in this case the executor did neither consented to nor made that decision and that is the absolute nature of my friend's position.

In relation to then, the issue of disinterment if we are ultimately faced with that question in this case. What would then be the purpose or premise of disinterring Mr Takamore? Is it to recognise the absolute power of the executor over all others, in other words, a respect for the law? Is it to appease the heartfelt feelings and desires of Ms Clarke as the widow? Is it to ensure that Mr Takamore is properly buried as a matter of law? Is it to accord decency to Mr Takamore? Those are all things that obviously need to be grappled with in terms of the purpose of making that order, if it's made here, or made in the High Court on the basis of matters being referred back. It's fundamentally important when one comes to considering that.

TIPPING J:

At the moment there is no order for disinterment, is there, there's simply a minister's licence and –

MR FERGUSON:

There's a licence and that licence on its terms says it's subject to orders of the High Court.

TIPPING J:

And the order is that the certain parties do not interfere with or try and frustrate the disinterment. Is that the technical position as things stand at the moment?

ELIAS CJ:

No orders have been made, have they?

TIPPING J:

I think there is an injunction, isn't there?

ELIAS CJ:

Well an injunction was asked for but I'm not sure –

TIPPING J:

Was it granted?

WILLIAM YOUNG J:

It was granted.

ELIAS CJ:

That was granted, was it?

McGRATH J:

Couldn't be served.

MR FERGUSON:

The point that I touched on –

WILLIAM YOUNG J:

It was not served.

MR FERGUSON:

No, it wasn't served –

ELIAS CJ:

No, the injunction was granted but then these proceedings followed the injunction application –

TIPPING J:

No, that was the interim injunction –

MR FERGUSON:

Yes, so there was an interim injunction which didn't have a statement of claim so it must have been an originating application. It was then superseded by –

ELIAS CJ:

But in these proceedings –

MR FERGUSON:

Yes.

ELIAS CJ:

I must have got it wrong, I should look at Justice Fogarty's judgment but I thought that there hadn't been orders made.

TIPPING J:

Yesterday we looked at something which appeared to me to be an order restraining certain parties from frustrating or interfering with the execution of the minister's licence.

McGRATH J:

That was the statement of claim –

MR FERGUSON:

That's the statement of claim, an order restraining –

TIPPING J:

So no order has actually been made in that sense?

MR FERGUSON:

No.

WILLIAM YOUNG J:

Can I just put a hypothesis to you?

MR FERGUSON:

I'm just checking, sorry, for the moment, yes, no and that's directed to the first defendants being Nehu Takamore, the first defendants in the case, Nehu Takamore being the mother, Donald Takamore being the brother and Josephine being the appellant here –

TIPPING J:

We had a discussion about whether such an order would be necessary in undertakings and so on that I didn't want to pursue any further –

MR FERGUSON:

Yes and his Honour Justice Fogarty reserved the issue of remedies as well.

WILLIAM YOUNG J:

Can I just put this, what may be too simpler a way through. The statute permits disinterment of a body whether properly buried or not?

MR FERGUSON:

Yes.

WILLIAM YOUNG J:

It must be within the scope of an executor, or a widow, or children to seek the disinterment of a body?

MR FERGUSON:

Yes, whether – where the merit is in that is another matter, yes.

WILLIAM YOUNG J:

Yes, whether properly buried or not and in most circumstances –

MR FERGUSON:

A whole range of people, I could imagine, could seek one even for example, in a case where, I'm thinking hypothetical, where for some environmental reason it's necessary to move graves. So it could be an independent third party that would have the ability to seek that –

WILLIAM YOUNG J:

In substance, the executor has decided that she wishes to disinter the body and she has obtained a licence to do so which is to be exercised subject to any directions of the Court, your clients are entitled, I think, to challenge that decision which in substance they've done, although not in form. If the Court were of the view that she was entitled, that her decision to seek disinterment should not be challenged or should be upheld, doesn't that resolve the case without a lot of argy bargy about whether there was a wrongful removal of the body or not and a whole series of other issues that would just fall away, wouldn't they?

MR FERGUSON:

With respect Sir, no I don't think they would.

WILLIAM YOUNG J:

What's wrong with the analysis?

MR FERGUSON:

Because fundamentally, in the context of this present situation, there is obvious an enormous issue around the manner in which any disinterment should occur.

WILLIAM YOUNG J:

Well I'm not suggesting that there shouldn't be discussion about the manner in which the disinterment occurs but if the Court were to say we're going to treat this as a current issue, that is whether the executrix should disinter the body, she having licence to do so, her, the wisdom and appropriateness of her course having been challenged by your clients. If that challenge is dismissed then she's entitled to go ahead with it. Obviously it would be appropriate for that to be on a basis that accords with custom and is as non-challenging to the understandable feelings of your clients and others as possible. But, leaving aside the details of how it's done, is there a problem with my analysis of what should happen?

MR FERGUSON:

Ah –

WILLIAM YOUNG J:

Because if I'm right, it that's right we don't need to worry about whether the body was wrongly taken? It's just back story.

MR FERGUSON:

Well not if it goes to the fundamental issue as to whether there's been an improper burial.

WILLIAM YOUNG J:

No but I – it doesn't have to be an improper burial for there to be a disinterment. There is nothing in the Burial and Cremation Act saying that a disinterment is only possible if there has been an improper burial.

MR FERGUSON:

I think we – yes, we would probably be having a very different argument before the Court, I imagine.

WILLIAM YOUNG J:

But it would be really just the same as the argument –

MR FERGUSON:

Well, no, with respect it wouldn't Sir because we wouldn't, as you say, there would be a different focus. It would matter whether it was a proper burial or an improper burial because I think it is a different statutory power and you would be having a substantive engagement around that. Because it's quite clear –

TIPPING J:

Sorry, this is quite important. For my purposes you are going to have to be a lot more precise than that.

ELIAS CJ:

Well I've always wondered what you were seeking from the Court given the fact that there was a licence to disinter which is why I raise the Burial and Cremation Act and the licence at the beginning of the case.

I suppose the – yes.

McGRATH J:

I think in fairness to Mr Ferguson, as I understand his point, it's Justice Young's second premise you do take issue with which is you would take issue with whether

the executor can seek an order permitting disinterment because on your argument, as I understand it, the role of the executor is spent?

MR FERGUSON:

In that sense, yes Sir and this isn't –

McGRATH J:

That's what I understand –

ELIAS CJ:

But you haven't challenged the licence?

MR FERGUSON:

Well I think this case, with all respect to where it's been, the licence has never been the focus of the proceeding because I think, well, in my view, Ma'am, the licence was accepted at the time, that it was unable to be given effect to and that these issues all needed to be addressed.

ELIAS CJ:

Well it was subject to the order of the Court so –

WILLIAM YOUNG J:

Subject to any direction of the Court.

ELIAS CJ:

Any direction of the Court.

MR FERGUSON:

Any direction of the Court.

ELIAS CJ:

But was clearly granted in the shadow of this foreshadowed claim, perhaps.

MR FERGUSON:

No I'm not –

ELIAS CJ:

Well what I'm –

MR FERGUSON:

I'm not sure. I actually don't know on what terms it was granted or what the application says I don't think.

WILLIAM YOUNG J:

But can I –

MR FERGUSON:

We only have in evidence the – and I have never, ever seen the licence.

ELIAS CJ:

But why is this matter to go back if we're not with you, why is it to go –

MR FERGUSON:

Ma'am I –

ELIAS CJ:

– to the High Court?

MR FERGUSON:

No I'm not suggesting that it's not – that it needs to go back. I'm saying that is where it was anticipated from the previous decisions that it needs to go back but if this Court is going to do it then one needs to grapple with all of those types of things that go into that mix.

TIPPING J:

But should it not go back on the hypothesis we are discussing?

MR FERGUSON:

It could go back on that. On the hypothesis we are discussing –

TIPPING J:

Simply on the premise that the Judge giving such direction as to the methods and procedures, if you like, surrounding the execution of the licence.

MR FERGUSON:

In the event that the Court comes to that position in relation to the broader context –

TIPPING J:

Yes.

MR FERGUSON:

– and the issue is, how is this going to be done, are we going to order it? Then that's a matter that could be worked through and I don't have instructions on the point but it will need to be a matter of here are the ways in which it could be done or we'll step back and you do what you wish to do.

TIPPING J:

Well clearly you'd have a right to be heard before the High Court as to the means of execution of the licence.

MR FERGUSON:

That's right –

TIPPING J:

But the premise would be that the licence is to be executed assuming the hypothesis we're discussing it on. Now I'm looking, as for my brother William-Young obviously is and we all are, for the least possible further room for anguish depending on the view of the Court as to what you might call the broad merits.

MR FERGUSON:

Depending on the outcome, yes.

TIPPING J:

Yes.

MR FERGUSON:

I don't think grappling with the licence in abstract, avoids dealing with this set of issues for example. But I think it was certainly apprehended that there were issues around that, seen by my friends. I mentioned yesterday that the application had been filed and I have checked and it is in these proceedings, for further orders, that relate to the trusteeship of urupa, which doesn't come, have trustees, in order to

cover off that issue and if – I have copies of that, if it is useful, for the Court to be aware of the nature of that application. It is currently before the –

ELIAS CJ:

I think we should have that. Mr McCoy you don't have a copy of it?

MR McCOY:

I don't have it. I am sorry, I have very incomplete papers and I was only instructed a handful of days before the Court of Appeal.

ELIAS CJ:

Yes.

MR McCOY:

So I came to it very late.

ELIAS CJ:

Is this an application in these proceedings?

MR FERGUSON:

That is an application in these proceedings by reference to the CIB.

TIPPING J:

This is the – what we used to call ex parte but we now call without notice.

MR FERGUSON:

Yes. And lo and behold, one receives a copy, so it's a misnomer.

TIPPING J:

Never mind the procedures about all this.

MR FERGUSON:

No, no of course.

TIPPING J:

But do you accept or not? That if we are against you, on what I will call the substance of the matter. All that needs to go back to the High Court is the manner in which –

MR FERGUSON:

The mechanism, which will include dealing with any of these proprietary issues, that needs to be dealt with. The only point I was going to make to avoid, and for my friend's information too, because we have checked with the High Court in Christchurch and essentially, to put a finer point on it, they are sitting on this, pending where matters are. I would note that this is directed to –

TIPPING J:

Well of course they are sitting on it, because they don't know what we are going to do.

MR FERGUSON:

It is not automatically a stay but the registry has treated it as such, although the rules do not automatically provide for that, so in any event, that is where it is at. These appear on their face, and again I am not commenting on the form as they are the solicitor's on the other side's document, but it appears that they are designed to unlock the perceived problem around the original second defendants being the deceased trustees of the urupa. I just want to – ensure given now that your Honours happy with that application, just to note that there is a difficulty with it, just as a matter of fact.

TIPPING J:

But this simply asks for substituted defendants. You would also need to join issue, if you can't agree on what you say is the correct methodology.

MR FERGUSON:

Yes I agree. No there is no –

TIPPING J:

This is just a very pro-forma application.

MR FERGUSON:

It is but I just wanted to note in case your Honours did wish to comment on it in any incidental way.

TIPPING J:

Well I can't see why we would.

MR FERGUSON:

That in any incidental way, that it appears in the affidavit of Ms Clarke attached to it, appears to be focussed on amending the names of the second defendant who are the two urupa trustees, to being –

TIPPING J:

It is not so amending their names, it is substituting someone for people who are dead.

MR FERGUSON:

Yes that's right and represented. What I am indicating though Sir, and sorry I will get quite to the point. The property that is annexed to the back of the affidavit, which is lot 8 of the parish of Whakatohea, is the block and the names on the block as owners, relate to the marae block which is a separate block of land from urupa and there are separate Maori reservations in relation to the marae and the urupa and, therefore, I think they are dealing with the wrong block, in relation to that. I just want to avoid any confusion in that regard and in fact in the case on appeal – I will try and find the – I was going to indicate the document in the case on appeal that – apologies to your Honours, the relevant document is document 23 in volume 2 on the case on appeal. That is the document that refers to the appropriate urupa block which is established and then tab 25 – that's the order of the Court and then tab 25, is the computer freehold register of that block. This is the block that the urupā is on and I'm just noting that the wrong block is referenced in the application that's – to stand before the High Court and the affidavit to which those two exhibits are related to is the affidavit that's found at tab 9 which is the Sandra Blackwell affidavit. It's just a factual matter I just wanted to clarify in that regard.

Unless I can help your Honours, I mean, there is a little more to be said, to reiterate, that obviously the fundamental position of the appellants and knowing the difficulty of the issues before the Court and what is required is that, needless to say, in their eyes there's no greater decency could be served in terms of Mr Takamore than him being

able to continue to rest in peace at Kutarere Marae Urupa, as he has for the last five years but the appellant acknowledges that these are very complicated issues before this Court, both factually and legally and certainly wanted me to indicate that they appreciate very much the manner in which this hearing has been adjudicated on and they are greatly appreciative of that and the behaviour and a manner in which everyone has addressed this matter over the last two days. Thank you your Honours.

ELIAS CJ:

Thank you Mr Ferguson, thank you. For our part, we appreciate very much the care with which counsel have addressed this very difficult matter and the attention which has been paid by everyone who has travelled to be here. Thank you. We'll adjourn.

COURT ADJOURNS: 3.27 PM