CASE NOTES

Takamore v Clarke: *A Missed Opportunity to Recognise Tikanga Māori?*

REBECCA WALSH*

I INTRODUCTION

The case of *Takamore v Clarke* concerned the sensitive issue of where and how a loved one should be buried.[1] The lack of consensus among immediate family and wider whānau and hapū meant that *Takamore* engaged several issues regarding the intersection of tikanga Māori, burial customs and the Common Law of New Zealand. The Supreme Court's decision demonstrates the challenges courts face in attempting to resolve burial disputes when one party is Māori.[2] By exploring the approaches of the Supreme Court, the Court of Appeal and the High Court, this case note focuses on the Courts' treatment of how tikanga interacts with the common law. It will also consider the implications *Takamore* may have on future judicial recognition of tikanga. The author queries whether this case represents another missed opportunity to recognise tikanga Māori at common law.

II BACKGROUND

James Takamore died in Christchurch in 2007, where he had lived with his non-Māori partner Ms Denise Clarke (who was also his executrix) and their children for 20 years.[3] Prior to his burial in Christchurch, Ms Clarke consented to him lying in state at Te Whare Roimata Marae. Members of his whānau requested that his body be returned to the family urupā (burial ground) in Kutarere. The parties were unable to agree on Takamore's place of burial. Mr Takamore's body was removed and reburied in accordance with the tikanga of his hapū and the wider Whakatohea and Tūhoe iwi without Ms Clarke's consent.[4] Ms Clarke obtained orders from the High Court to enter the urupā and retrieve the body for reburial in Christchurch.[5]

Mr Takamore's sister appealed to the Court of Appeal claiming that the burial of a deceased Māori person is governed by tikanga. She submitted

---

* BA/LLB(Hons) student. The author is particularly grateful to Dr Nin Tomas for her helpful comments and for granting access to her unpublished work.

1 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore* (SC)]

2 At [83] per Elias CJ.

3 At [13] per Elias CJ.

4 Nin Tomas "Who Decides where a Deceased Person will be Buried — *Takamore* Revisited" (2008–2009) 11/12 Yearbook of New Zealand Jurisprudence 81 at 82.

5 *Takamore* (SC), above n 1, at [21] per Elias CJ.

that because Māori customary burial practices are in existence, the Treaty of Waitangi requires that Māori burial practices be accommodated by New Zealand courts to a reasonable extent.[6] Ms Takamore maintained that she was acting in accordance with Tūhoe burial custom that allows burial decisions to be made collectively by whānau and hapū. Where conflict arises, this custom allows one whānau line, if necessary, to take the body without consultation and with force.[7] Her claim illustrates the uneasy relationship between tikanga Māori and New Zealand law.

The majority of the Court of Appeal ruled for Clarke. Their Honours considered that the Tūhoe custom, which allowed the forceful taking of tūpāpaku (the deceased's body), could not be recognised in law because it was unreasonable[8] and was inconsistent with the common law's fundamental values.[9] The Court affirmed the common law rule that the final decision regarding a deceased's burial lay with the executrix of the estate.

The Supreme Court was unanimous in dismissing Ms Takamore's appeal and granted Ms Clarke the right to take Mr Takamore's body and rebury it where she wished.[10]

III THE SUPREME COURT DECISION

The Supreme Court confirmed that the person appointed as a personal representative has the common law duty to attend to the body's disposal.[11] Tipping, McGrath and Blanchard JJ jointly held that the common law rule operates where there is no agreement or acquiescence, arrangements have broken down, or nothing is happening to the deceased's body. Any party may challenge that decision in the High Court.[12]

The majority held that whilst tikanga does not displace New Zealand's common law, where there is a dispute, personal representatives have a duty to take into account the views of those close to the deceased, including cultural and customary practices, such as burial customs.[13] This suggests that, where relevant, greater weight may be afforded to tikanga. However, the representative may exercise his or her discretion in determining what tikanga involves.[14] Regrettably, this leaves room for a personal representative to simply consider tikanga as one of many other factors, which may result in tikanga being overlooked.

The Supreme Court emphasised that a court will only intervene if,

6 Tom Bennion "Takamore v Clarke" *Te Karaka* (online ed, Christchurch, 15 December 2011).
7 Bennion, above n 6.
8 *Takamore v Clark* [2011] NZCA 587, [2012] 1 NZLR 573 at [27] [*Takamore* (CA)].
9 At [33].
10 *Takamore* (SC), above n 1, at [108], [170] and [214].
11 At [154].
12 At [7].
13 At [164] per Tipping, McGrath and Blanchard JJ.
14 At [156].

after assessing all the circumstances, the court considers the decision of the personal representative to be inappropriate.[15] Despite the common law requiring tikanga to be considered, the court will not enforce this upon a personal representative. Evidently, the court gives credence to the decision-maker to balance all relevant values without imposing on that person a duty to be bound by or to uphold tikanga. Interestingly, Elias CJ stated that claims based on the tikanga and whakapapa of a deceased's hapū have great weight in New Zealand law and may prevail in certain cases.[16] Her Honour did not explain in which cases this would occur. The Court did not indicate how it weighed Tūhoe tikanga or how such customs would be dealt with in future cases.[17] The question remains: in what circumstances will tikanga qualify as a paramount consideration?

IV DIFFERING APPROACHES TO RECOGNITION OF TIKANGA MĀORI

The Takamore whānau made significant claims based on tikanga, which illustrated the significance of death and burial in Māori culture.[18] Customs such as tangihanga (Māori funeral) form an integral part of Māori society and have remained relatively stable despite the forces of colonisation.[19] Nin Tomas asserts that the Supreme Court, in entrenching the historical English common law position, failed to give due regard to Māori cultural property rights and the collective decision-making upon which the Takamore whānau based their claim. In Māori society, individuals are born into a collective, linked through whakapapa (genealogical connections to relatives and land). The individual's connection with the land is strengthened by the burial of his or her whenua (placenta), symbolising the irrevocable links to whānau and hapū. Tūhoe descendants return to the territory from which they originate when they pass away.[20] Mr Takamore was not an individual in his whānau and hapū but part of something much greater — the collective. In claiming his body by tono (asking for its return), Mr Takamore's whānau reinforced this collective identity.

Future courts will, no doubt continue to grapple with the dichotomy between tikanga and New Zealand's common law. In the High Court, Fogarty J found that he did not need to decide the content of the Tūhoe custom or whether it was part of New Zealand's common law as Mr Takamore had disassociated himself from his tribal customs. It would be incompatible with the common law's presumption of individual autonomy to recognise

15 At [164].

16 At [9].

17 Natalie Coates "What does Takamore mean for tikanga?" (2013) February Māori LR 14 at 18.

18 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [374].

19 Nin Tomas "Recognising Collective Cultural Property Rights In A Deceased — *Clarke v Takamore*" (University of Auckland, 2013) (forthcoming).

20 Tomas, above n 19.

customs based on collective decision-making.[21] His Honour considered the application of Tūhoe tikanga was not reasonable because it was inconsistent with common law principles.[22] The Court of Appeal agreed, on the ground that taking a body by force was inconsistent with the legal position of "right not might" and the rule of law.[23]

The Court of Appeal did not accept that Mr Takamore had rejected his Tūhoe heritage, clarifying that living away from one's tribal area does not equate to severing cultural connections.[24] Mr Takamore had no clear view as to where he wanted to be buried. According to tikanga, his links to Tūhoe continued through whakapapa regardless of whether he had moved away from his whānau. Descendants who live outside the tribal area can be repatriated. The actions of the whānau were therefore justified according to tikanga, as not laying claim to his body would be to neglect his identity. The onus lay on the whānau, as a collective, to decide on his burial; the decision was not exclusively that of the executrix. Where disputes occur, tikanga dictates that debate, compromise and discussion should be encouraged to ensure arrangements are satisfactory for all.[25]

In considering Tūhoe tikanga, the Court took a modern approach by applying the presumption of continuity.[26] This presumption ensures customs of a particular community or in relation to land, particularly those that are long-standing and universally observed, have the force of law, regardless of conquest, cession or settlement, and that such customs continue after any declaration of sovereignty.[27] Glazebrook and Wild JJ accepted that the acquisition of sovereignty in New Zealand did not displace Māori customs and, unless abrogated by statute, these were relevant considerations under the common law.[28] Natalie Coates argues that if the Māori burial custom in this case could meet the common law test for recognition applied by Glazebrook and Wild JJ, presumably this custom would, then, override common law rules such as the "first decider" rule.[29] However, although the Court was progressive in its recognition of tikanga at law, it was constrained by the common law rule that the final decision regarding a deceased's burial lay with the executrix.

The Court of Appeal was more innovative than the Supreme Court in recognising tikanga as part of the common law's values. The majority held that the custom could not be recognised as part of the common law because it was unreasonable. However, the Court developed a workable compromise that balanced Tūhoe burial custom with the common law, by holding that

21 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [88].
22 At [87]–[89].
23 *Takamore* (CA), above n 8, at [163].
24 At [156].
25 Tomas, above n 19.
26 *Takamore* (CA), above n 8, at [112].
27 Law Commission, above n 18, at [46]–[47].
28 *Takamore* (CA), above n 8, at [112].
29 Coates, above n 17, at 17.

the personal representative must consider Tūhoe burial customs. Only where consensus cannot be reached among the parties should the executor's wishes prevail.[30] Nonetheless, the Court articulated effective criteria for the recognition of Māori customary law that future courts may follow.[31]

The Supreme Court took the approach that if a Māori custom did not satisfy the common law test for recognition, it was not fatal to the result and may still be considered by a decision-maker. There is, therefore, room for future courts to explore the situations in which tikanga may be recognised and the circumstances that may require tikanga to be afforded greater weight. However, the extent to which future courts will do so remains uncertain.

V SIGNIFICANCE OF THE DECISION AND FUTURE IMPLICATIONS

The significance of this decision lies in the Supreme Court's approach to tikanga. The Court makes clear that Māori custom according to tikanga Māori form part of the common law's values.[32] However, Tūhoe burial custom, although vital to the Takamore family's claim, was only one of many factors that required Ms Clarke's consideration. Arguably, her rights and role as executrix were placed above those of Mr Takamore's whānau and hapū. As such, the Court missed an opportunity to explore whether a personal representative should give tikanga Māori greater consideration in such circumstances and how tikanga could be recognised as law in New Zealand.

In the author's submission, at the very least, tikanga should be more than a relevant consideration. Indeed, it should be an overwhelming factor in any decision involving the burial of a Māori deceased. Tikanga is vital where a Māori person's whānau has particular views as to how their descendants are buried. More guidance is needed from the Supreme Court as to how tikanga could be applied by courts in similar cases. At a practical level, one is left to wonder how tikanga could be given greater status at law. Potentially, the Supreme Court could have found a solution that better accommodated the values of the Takamore whānau. Under tikanga, Mr Takamore's body belonged in Kutarere; only exceptional circumstances would justify not returning his tūpāpaku to the Tūhoe whenua. Placing greater weight on whakapapa, whenua and whānaunatanga (reciprocal obligations owed among relatives) would have provided the parties with guidelines to help them reach a consensus, without needing to rely on the common law status quo.[33]

Arguably, there may be more appropriate mechanisms for dealing

30 Bennion, above n 6.

31 Coates, above n 17, at 18.

32 *Takamore* (SC), above n 1, at [94].

33 Tomas, above n 19.

with Māori burial disputes. Tomas proposes a number of alternative methods including the institution of Māori hearing forum, Māori opting out of the collective process of their hapū and being buried as individuals, and encouraging Māori to make decisions as to their burial during their lifetime. Iwi governance structures and affording greater legislative protection to Māori burial rights may also help to avoid similar disputes. It may also be effective to deal with burial customs in the Māori Land Court or through community mediation.[34] Although the Court should have gone further in recognising tikanga as part of the common law, it is debatable whether courts are the most suitable forum to preside over the content of tikanga. Māori burial disputes, which incorporate significant tikanga issues, may be best resolved elsewhere in a Māori setting.

Takamore v Clarke represents a conflict of legal perspectives. The case highlights the need for a judicial approach or a forum, or both, that will appropriately deal with future disputes. Although the Courts' approach to balancing Māori and non-Māori interests is significant, it remains uncertain when and under what circumstances tikanga Māori will be recognised as valid and enforceable in New Zealand.

34 Tomas, above n 19.

Commissioner of Taxation v Qantas Airways Limited

MATTHEW CONSEDINE*

I INTRODUCTION

The High Court of Australia recently denied Qantas Airways Ltd and Jetstar Airways Pty Ltd (Qantas) a Goods and Services Tax (GST) refund of AUD 34 million. The High Court of Australia held that Qantas must pay the GST on non-refundable (or refundable but unclaimed) domestic airfares received from passengers who reserved and paid for flights but failed to take their flights. This is arguably the most important GST case from a Commonwealth court in recent times.[1] One Australian commentator even ventured to say that *Commissioner of Taxation v Qantas Airways Ltd* (*Qantas*) "will impact almost every commercial transaction entered into every day in Australia".[2]

Given the effect that this case may have on GST in Australia,[3] and the similarity between the New Zealand and Australian GST regimes, it is important to consider the potential consequences this decision may have on New Zealand taxpayers and consumers.

II BACKGROUND

In Australia, GST is charged on suppliers who make supplies (of goods or services, for example) for consideration.[4] It is standard practice for suppliers to pass the financial burden of GST onto their customers by increasing the price of goods or services by ten per cent.[5] Suppliers then pay the 10 per cent that they collect from each customer to the Commissioner of Taxation (Commissioner). Domestic air travel is a supply for Australian (and New Zealand) GST purposes, and therefore Qantas, as a supplier of domestic air travel, must pay GST on all payments it receives for fares. In line with standard industry practice, Qantas increases the cost of its domestic tickets by ten per cent to cover its GST liability.

Every day there are an extraordinary number of seats on Qantas-operated domestic flights that remain empty because paying customers fail to take their purchased flights. Many fares are non-refundable. And

* BProp/LLB(Hons).

1 *Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41, [2012] ATC ¶20–352 [*Qantas*].

2 Paul Stacey "High Court decision changes the nature of GST" (5 October 2012) Institute of Chartered Accountants Australia <www.charteredaccountants.com.au>.

3 Stacey, above n 2; Georgie Rogers "Promise to supply a service now GST taxable: Commissioner of Taxation v Qantas Airways Ltd" (2012) 226 Ethos 16; and Eugen Trombitas "GST: How Broad is 'Supply' — A Perspective on Qantas" (2012) 86 ALJ 675; and Robert Richards "Qantas GST case has wider significance" (2012) 50 LSJ 36.

4 A New Tax System (Goods and Services Tax) Act 1999 (Cth), ss 7–1(1) and 9–5 [Australian Act].

5 Ten per cent is the rate of GST in Australia.

for those that are refundable, many customers do not apply for a refund. This allows Qantas to derive substantial revenue from fares paid by customers who do not present for their flights.

From July 2005 to June 2008, Qantas paid AUD 34 million in GST on non-refunded fare payments from such passengers. Qantas sought to have this amount returned on the basis that GST should not be payable where a paying customer never receives air travel. The High Court of Australia eventually resolved the dispute. Their Honours rejected Qantas's claim by a four to one majority. Gummow, Hayne, Kiefel and Bell JJ decided in favour of the Commissioner. Heydon J dissented.

III ARGUMENTS OF THE PARTIES

Qantas

The basis of Qantas's argument was as follows:

- The sole purpose of the transactions with prospective passengers was for air travel;
- Passengers who did not present for their flights did not receive air travel;
- Therefore, Qantas did not supply anything to those passengers for GST purposes; and
- Accordingly, any GST that Qantas paid in relation to these fare payments should be refunded.

The Full Court of the Federal Court of Appeal accepted this argument. Qantas relied on the same reasoning in the High Court of Australia.[6] In the Federal Court, Edmonds and Perram JJ, with whom Stone J agreed, emphasised the need to undertake a substance and reality approach in answering the question of what was supplied for GST purposes under the transactions. Their Honours found that the flight itself "is the essence, and sole purpose, of the transaction".[7]

Commissioner

The Commissioner, on the other hand, submitted that GST was duly payable in respect of passengers who did not present for their flights:

- Qantas received the fare payments pursuant to contracts which gave rise to reciprocal rights and obligations;

---

6 *Qantas*, above n 1, at [13].

7 *Qantas Airways Ltd v Federal Commissioner of Taxation* [2011] FCAFC 113, (2011) 195 FCR 260 at [56] [*Qantas Federal*].

- The creation of rights and the entry into obligations constitute GST supplies in Australia;[8] and,
- Therefore, Qantas made taxable supplies to prospective passengers regardless of whether those passengers caught their flights.

IV HIGH COURT OF AUSTRALIA

The High Court of Australia found in favour of the Commissioner. Having assessed Qantas's terms and conditions, the majority held that:[9]

> The Qantas conditions did not provide an unconditional promise to carry the passenger and baggage on a particular flight. They supplied something less than that. This was at least a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operations of the airline.

In their Honours' view, it would then follow that this promise was supplied whether or not the prospective passenger received any air travel. The promise or right is a GST-taxable supply. Accordingly, GST was duly payable on fares where customers failed to take their purchased flights. In other words, the supply of a conditional right to receive goods and services is a GST-taxable supply, regardless of whether the right is exercised or not. It is submitted that such a statement accords with the understanding of GST as a value-added tax.[10] In this case, the value is in the right to fly. Accordingly, GST should be payable when a person pays for such a right.

Unlike the Federal Court, the majority of the High Court did not employ a substance and reality approach.[11] Instead, their Honours adopted a strict contractual analysis. In their Honours' view, the particular content of the legal arrangement between Qantas and the prospective passenger was critical, not its overall substance or purpose. Their Honours gave significant weight to a particular clause in Qantas's terms and conditions which stated that, "[Qantas] will take all *reasonable measures* necessary to carry you and your baggage and to avoid delay in doing so".[12]

In his Honour's dissent, Heydon J agreed with the Federal Court decision that Qantas did not make taxable supplies to passengers who did not present for their flights. He did, however, express his reasoning in a more subjective way. Heydon J stated that:[13]

> What the intending *passenger wanted* was not so much a chose

8 Australian Act, above n 4, ss 9–10(2)(e) and 9–10(2)(g).

9 *Qantas*, above n 1, at [33].

10 *Commissioner of Inland Revenue v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 13,193.

11 *Qantas*, above n 1, at [27].

12 At [30] (emphasis altered).

13 At [43] and [44] (emphasis added).

> in action — a qualified promise to supply an air journey ... . The intending *passenger wanted* the actual supply of an air journey ... . What the *passenger wants* is an actual air journey, not a heavily conditional promise to supply one.

To some degree, the Federal Court adopted a similar substance and reality approach, but nonetheless placed greater emphasis than Heydon J on the terms of the contract.

Moral objection

Heydon J issued a moral objection in respect of what his Honour considered "a superficially unattractive feature" of Qantas's argument.[14] Qantas had sought a GST refund where it did not carry the financial burden of the GST. As stated above, Qantas calculates its domestic fares to recover the GST payable from the customers. In essence, Qantas was seeking a windfall.

Heydon J was the only judge in either the High Court or the Federal Court to comment on this aspect of Qantas's case. However, Heydon J did not consider this fatal to Qantas' claim.[15] In his Honour's opinion, Qantas had a greater claim to the money than the Commissioner or the prospective passengers collectively.[16]

V HOW SHOULD A NEW ZEALAND COURT DECIDE?

In the foundational GST case of *Commissioner of Inland Revenue v New Zealand Refining Co Ltd*, Blanchard J stated the following test for determining what is supplied for GST purposes under a transaction:[17]

> ... the Court is concerned with the *legal arrangements* actually entered into and the *rights and duties* they create, not with the economic or other consequences of the arrangements ... .

In *Marac Life Assurance Ltd v Commissioner of Inland Revenue*, Richardson J stated that the true nature of a legal transaction can only be found by carefully considering the legal arrangements entered into, not the broad substance of the transaction.[18] And, in *Commissioner of Inland Revenue v Gulf Harbour Development Ltd*, Chambers J stated: "This Court has expressly repudiated a 'substance and reality' test."[19]

These authorities support the High Court's strict contractual

14 At [47].
15 At [47].
16 At [47].
17 *New Zealand Refining Co*, above n 10, at 13,192 (emphasis added).
18 *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) at 706.
19 *Commissioner of Inland Revenue v Gulf Harbour Development Ltd* [2005] 2 NZLR 162 (CA) at [42].

analysis in *Qantas* and implicitly reject Heydon J's subjective assessment of the customer's understanding of the transaction. Similarly, the substance and reality approach of the Federal Court is inconsistent with the above authorities. Accordingly, it is submitted that the reasoning of the majority of the High Court of Australia in *Qantas* would be followed in New Zealand.

VI SIGNIFICANCE FOR NEW ZEALAND

Qantas has significant implications for airlines that provide domestic flights in New Zealand. But the influence of this case extends well beyond the airline industry. *Qantas* is authority for the general principle that the right to receive a supply can be GST-taxable, regardless of whether it is exercised. The case has the potential to influence any situation in which rights are exchanged for consideration.

The rule in *Qantas* can logically extend to other ticketed arrangements such as sporting events, concerts and films. In such situations, a customer may pay for his or her tickets but not attend the relevant event. It would be plausible to also extend this rule to everyday contracts for goods and services.

The current view is that GST is charged on every transaction, whether or not the customer makes use of the good or service. Under the approach taken by the Federal Court of Australia, because the customer has not received the good or service that he or she paid for, the substance and reality of the transaction has not been fulfilled and GST should not be payable. Such a result would be undesirable because it would drastically alter the current treatment and administration of GST in New Zealand. As a result, the Government's revenue from GST would decrease, leading to a potential change in the legislation. Consumers may also cry foul in the event that retailers retain a GST windfall without passing the amounts onto customers from whom they levied the tax. In this instance legal action, on the basis of some form of misleading conduct, is not out of the question.

VII CONCLUSION

If New Zealand courts follow the decision of the High Court of Australia over the Federal Court's approach, this would maintain the status quo and avoid the potential consequences discussed above. Such an outcome is by no means certain, especially in light of the academic criticism levelled at the High Court's decision.[20] Moreover, a leading New Zealand commentator considers that New Zealand law is more in line with the

20 Stacey, above n 2; Rogers, above n 3; Trombitas, above n 3; and Richards, above n 3.

approach taken by the Federal Court of Australia.[21] Evidently, the issues posed by *Qantas* are challenging and require detailed consideration in order to ensure that GST jurisprudence and practice is not drastically altered by this decision.

21 Trombitas, above n 3.