IN THE COURT OF APPEAL OF NEW ZEALAND

CA88/2017
[2017] NZCA 437

BETWEEN	COLIN BIDOIS AS REPRESENTATIVE OF PIRIRAKAU Appellant
AND	RAPATA (ROBERT) LEEF AS REPRESENTATIVE OF NGATI TAKA First Respondent
	JASON AKE, TE PIO KAWE, LANCE WAAKA, ROBERT URWIN, KIMIORA RAWIRI, PHILIP HIKAIRO, STEPHANIE TAIAPA AND MIKERE WAIRUA AS TRUSTEES OF NGA HAPU O NGATI RANGINUI SETTLEMENT TRUST Second Respondents
	KIMIORA RAWIRI, TE PIO KAWE, TE RURUANGA TE KEETI (LOU GATES), PIRIPI WINIATA, LANCE WAAKA AND GEORGE MATUA EVANS AS REPRESENTATIVES OF THE OTHER HAPU OF NGATI RANGINUI Third Respondents

CA190/2017

BETWEEN	RAPATA (ROBERT) LEEF AS REPRESENTATIVE OF NGATI TAKA FIRST APPELLANT
	JASON AKE, TE PIO KAWE, LANCE WAAKA, ROBERT URWIN, KIMIORA RAWIRI, PHILIP HIKAIRO, STEPHANIE TAIAPA AND MIKERE WAIRUA AS TRUSTEES OF NGA HAPU O NGATI RANGINUI SETTLEMENT TRUST Second Appellants

AND COLIN BIDOIS AS REPRESENTATIVE OF PIRIRAKAU
Respondent

Hearing: 13 July 2017

Court: Harrison, Winkelmann and Gilbert JJ

Counsel: F M R Cooke QC and M J Sharp for Pirirakau
S P Bryers for Ngāti Taka

Judgment: 5 October 2017 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal in CA88/2017 is allowed. The declarations made in the High Court are set aside and judgment is entered for the appellant.

B The appeal in CA190/2017 is dismissed.

C The first respondent in CA88/2017 must pay the appellant in CA88/2017 one set of costs for a standard appeal on a band A basis and usual disbursements.

D Costs in the High Court are to be determined in accordance with the outcome of these appeals.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] Pirirakau and Ngāti Taka are two of the eight hapū associated with the iwi Ngāti Ranginui. Ngāti Ranginui successfully pursued Treaty claims against the Crown in respect of lands in the western Bay of Plenty that were confiscated or compulsorily acquired by the Crown during the New Zealand Wars in the 1860s. These Treaty claims were settled with the Crown in June 2012 and six of the eight hapū have agreed on how the proceeds of settlement are to be allocated among them. However, Pirirakau and Ngāti Taka remain in dispute about the correct allocation as between them because each claims mana whenua in respect of the same land. These appeals arise out of that long-running dispute which is now before this Court for the second time.

[2] The genesis of the present dispute can be traced back to agreements reached by all hapū in March 2010 as to how the settlement proceeds would be allocated and the process for determining this. We will refer to these agreements as the "allocation model" and the "Mana Whenua Process Agreement". By the time those agreements were reached, it was expected that Ngāti Ranginui's claims would be settled by the Crown returning part of the confiscated or compulsorily acquired land and paying compensation. In anticipation of such a settlement, the eight constituent hapū agreed

that the land and compensation would be allocated among them on a property by property basis by determining, according to tikanga, which hapū traditionally held and exercised mana over the land from 6 February 1840 through to May 1865. As noted, six hapū were able to agree on the appropriate allocations applying this mana whenua test but Pirirakau and Ngāti Taka could not.

[3] Pirirakau and Ngāti Taka agreed to refer their dispute for arbitration by a panel which found in 2012 that Pirirakau held exclusive mana whenua in respect of the contested land at the relevant time. All eight hapū then agreed to a settlement which included the allocation of land, cash and shares as between Pirirakau and Ngāti Taka in accordance with the panel's finding.

[4] Despite this settlement, Ngāti Taka then challenged the arbitration award. The High Court upheld its complaint that the nature of the dispute between the two hapū could not be the subject of an arbitration agreement. The Court also found that one of the arbitrators had a conflict of interest and there were breaches of natural justice. Andrews J accordingly set aside the award.[1] However, this Court allowed Pirirakau's appeal and restored the arbitrators' decision (*Bidois* (CA)).[2]

[5] Ngāti Taka now challenges the substantive outcome on a different basis. The hapū acknowledges that the issue of mana whenua was finally determined by the arbitration award but it contends that the consequent allocations were not the subject of the arbitration and remain to be determined in accordance with the Mana Whenua Process Agreement. Pirirakau responds that the arbitration agreement was entered into in substitution for the Mana Whenua Process Agreement and that this latter agreement is no longer operative; that in any event the allocation of the settlement proceeds has been finally determined in accordance with the allocation model that was based on which hapū held mana whenua over particular land at the relevant time; and that the allocations so determined are now enshrined in a Settlement Trust Deed signed on behalf of all hapū, including Ngāti Taka. Further, Pirirakau claims that this Court has already determined in *Bidois* (CA) that the Mana Whenua Process

[1] *Leef v Bidois* [2013] NZHC 1349.
[2] *Bidois v Leef* [2015] NZCA 176, [2015] 3 NZLR 474 [*Bidois* (CA)].

Agreement is no longer available. Accordingly, Pirirakau argues that this issue cannot be revisited because of the doctrine of issue estoppel.

[6] In a judgment delivered on 25 January 2017 Heath J found that although the arbitration award finally determined that Pirirakau held mana whenua over the disputed lands from 1840 to 1865, it did not resolve whether the proceeds of settlement "presumptively receivable by Pirirakau should be held by Pirirakau alone or be the subject of some adjustment as between Pirirakau and Ngāti Taka".[3] The Judge declared that the parties were bound by the Mana Whenua Process Agreement and that Ngāti Taka may invoke that agreement to resolve whether any adjustment to the presumptive allocation should be made.[4] In reaching this conclusion, the Judge found that this Court's statements in *Bidois* (CA) to the effect that the Mana Whenua Process Agreement was no longer operative do not give rise to an issue estoppel because they were obiter.[5]

[7] In a separate judgment delivered on 15 March 2017, Heath J ordered that costs for the proceedings should lie where they fall.[6]

[8] Pirirakau appeals against the substantive judgment. Ngāti Taka appeals against the costs judgment.

[9] The essential issue is whether the final allocation was determined by the arbitration award and is now enshrined in the Settlement Trust Deed or whether, despite these formal steps, the Mana Whenua Process Agreement remains operative. We start by reviewing the relevant background. We then summarise the reasoning in the High Court's substantive judgment before commencing our analysis.

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[3] *Leef v Bidois* [2017] NZHC 36 [High Court judgment] at [83(b)].
[4] At [83(c)].
[5] At [75].
[6] *Leef v Bidois* [2017] NZHC 440.

Background

The Mana Whenua Process Agreement

[10] In anticipation of reaching a settlement with the Crown, the eight hapū of Ngāti Ranginui resolved at a hui in March 2010 the basis upon which they would allocate the settlement proceeds among them (the allocation model): 30 per cent of the proceeds would be allocated equally to each of the hapū; 50 per cent would be allocated in proportion to the amount of land each hapū lost through land confiscations; and the remaining 20 per cent in proportion to the amount each hapū lost through compulsory acquisition. The latter two components of the allocation would be determined by which hapū held mana whenua over the particular land at the relevant time in accordance with the following test:

> The test of mana whenua is the mana that Hapu traditionally held and exercised over the land, determined according to tikanga including the demonstration of ahi ka roa from 6 February 1840 through to and including the Raupatu of more than 290,000 acres in May 1865.

[11] The hapū also agreed that any dispute concerning mana whenua over the confiscated or compulsorily acquired land would be determined by a "Confirmed Mana Whenua Process for Hapū of Ngāti Ranginui" (the Mana Whenua Process Agreement). This agreement stipulated that the settlement proceeds "will be allocated to Hapū on the basis of mana whenua" and provided for a three-stage dispute resolution process to commence within two months of the Crown's implementation of the settlement, which was expected sometime in 2012. Stage 1 was to involve the identification of claims to mana whenua over specified land areas. Stage 2 was to allow a period of negotiation regarding disputed areas. Any unresolved disputes were to be determined in stage 3 which provided for mediation and, if necessary, adjudication by a three-member adjudication panel. The three-stage process was expected to commence by 31 August 2012 and be completed by 1 July 2014. We emphasise that the hapū contemplated the Manu Whenua Process Agreement would only come into effect after the Crown finalised the settlement and only if any disputes were then unresolved between hapū.

Arbitration agreement

[12] However, as matters transpired, all hapū, other than Pirirakau and Ngāti Taka, reached agreement prior to the settlement with the Crown being finalised. There was unchallenged evidence before the High Court that in late 2010 representatives of Ngāti Taka and Pirirakau advised the Chairperson of Te Roopu Whakamana o Ngā Hapū o Ngāti Ranginui,[7] Antoine Coffin, that they wished to invoke the Mana Whenua Process Agreement to resolve their differences. Mr Coffin responded that the process could not then be invoked because it would not take effect until the settlement with the Crown had been implemented. He also pointed out that the adjudication process envisaged by the Mana Whenua Process Agreement would be complex and costly. The two hapū would have to meet all the costs including the appointment of three adjudicators to carry out the stage 3 process.

[13] Mr Bidois, a representative of Pirirakau and Mr Leef, a representative of Ngāti Taka, then advised Mr Coffin of their agreement, in Mr Coffin's words, to "run their own much more simplified dispute resolution process". In August 2011 Ngāti Taka and Pirirakau signed an agreement to refer their dispute to arbitration by a two-member panel (the arbitration agreement). This agreement recorded:

> Both Hapu have come to an agreement in using a Mana Whenua Arbitration Process which portrays which hapu and its rangatira had Mana Whenua status from 6th February 1840 to 15th [M]ay 1865.

[14] The roles and responsibilities of the two arbitrators were set out as follows:

> (a) To listen, to question, to enquire, to consult at their discretion.
>
> (b) To make a decision that will be final and binding on both parties.
>
> (c) To ensure the process is conducted in a Rangatira ki te Rangatira manner.

[15] The arbitrators, Heta Hingston, a retired judge of the Māori Land Court, and Kuku Wawatai, issued their award on 23 March 2012. They observed that Ngāti Taka relied upon their descent from Maungapohatu, the acknowledged paramount chief in the area at the relevant time, as determinative of their rights. The

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[7] A body made up of representatives of the eight hapū of Ngāti Ranginui appointed for the purpose of negotiating a settlement with the Crown.

arbitrators found that the descent line was Pirirakau at the relevant time. However, the arbitrators considered that Maungapohatu and his descendants acknowledged both Pirirakau and Ngāti Taka lineage. This explains why the arbitrators expressed their ultimate conclusion in the following terms:

> We acknowledge that our enquiry was restricted to the finite period 1840-1865 and therefore taking all of the evidence into account, we find that in the relevant period the "mana whenua" in respect to the lands mentioned above was held by Pirirakau but the descendants of Maungapohatu who claim to be Ngati Taka are in our view an integral part of Pirirakau and are thus entitled to be involved as Pirirakau not as a separate entity.

Deed of Settlement Trust

[16] In April 2012 Ngāti Ranginui distributed a Ratification Booklet to all its members seeking their approval for a Deed of Settlement with the Crown. One of the requirements for settlement was the establishment of a post-settlement governance entity to receive and administer the settlement assets. Accordingly, approval was also sought for a Deed of Settlement Trust authorising trustees to receive the settlement proceeds and transfer these proceeds to each of the hapū in accordance with specified allocations. These allocations were set out in the Ratification Booklet and were based on the allocation model, the subsequent agreements reached as to which hapū held mana whenua at the relevant time and, in the case of Ngāti Taka and Pirirakau, the arbitration award. Pirirakau, including Ngāti Taka members who were able to establish the requisite lineage, was allocated a cash settlement of $6.56 million together with designated blocks of land and shares. Ngāti Taka was allocated $2 million, including cash of $1.4 million, other blocks of land and shares. These entitlements were calculated in accordance with the arbitration award.

[17] The Ratification Booklet advised:

> In voting for this Deed of Settlement, you will be specifically directing the trustees for Nga Hapu o Ngati Ranginui Settlement Trust to transfer each hapu settlement redress (cash, land, shares and, where relevant, Rights of First refusal) as it appears in this Ratification Information Booklet to each of the hapu.

[18] A ratification poll was conducted by ballot at an information hui on 21 April 2012 and by postal and internet voting between 19 April and 26 May 2012. The poll was passed by an overwhelming majority of members of each hapū who voted.

[19] Following ratification, the Deed of Settlement Trust, entitled Deed of Trust of Ngā Hapū o Ngāti Ranginui Settlement Trust, was executed by mandated representatives on behalf of each of the eight hapū on 19 June 2012. One of the specified objects of the trust was to receive and distribute the settlement property and transfer or re-settle these assets in accordance with the allocations set out in the Ratification Booklet which was annexed as a schedule to the deed. Two days later, the Deed of Settlement was signed with the Crown (including by 10 representatives of Pirirakau and four from Ngāti Taka).

[20] In June 2012, prior to the Settlement Trust Deed being executed, Ngāti Taka's solicitors advised that it intended to challenge the arbitration award and sought an undertaking from Te Roopu Whakamana o Ngā Hapū o Ngāti Ranginui that no disputed proceeds would be distributed prior to resolution of the dispute. This was declined but Ngāti Taka's mandated representative signed the Settlement Trust Deed anyway. Ngāti Taka has never sought to challenge or set aside the deed on the ground that its mandated representative acted outside the scope of his authority in signing it. By signing the deed, all hapū representative trustees accepted an obligation to allocate the settlement property in accordance with the Ratification Booklet. Ngāti Taka nevertheless claimed that the trustees were wrong to regard the allocations as having been finally determined by the arbitrators' findings on mana whenua.

Subsequent litigation

[21] After the Settlement Trust Deed was signed, Ngāti Taka commenced its proceedings in the High Court challenging the validity of the award on various grounds. In reinstating the arbitral award, this Court in *Bidois* (CA) concluded with the observation that "this judgment says nothing about the legitimacy or otherwise of the iwi processes that followed the making of the award, but is limited to a

conclusion that it was a valid arbitral determination".[8] The Supreme Court declined leave for a further appeal.[9]

[22] Ngāti Taka then issued these proceedings in the High Court contending that although the arbitration award determined which hapū and its rangatira had mana whenua status from 6 February 1840 to 15 May 1865 in respect of the disputed land, the separate issue of allocation of the settlement proceeds had not been referred to the arbitrators for determination and remained to be resolved under the Mana Whenua Process Agreement. Ngāti Taka sought orders: declaring that the arbitration award was not a binding allocation decision under the Mana Whenua Process Agreement; declaring that the ratification process was invalid; setting aside the ratification decision; directing the appointment of an adjudication panel under the Mana Whenua Process Agreement to determine the allocation of the disputed resources; and for rectification of the Deed of Settlement Trust.

High Court judgment

[23] Heath J considered that the Mana Whenua Process Agreement provided for a four-stage process to determine the allocations.[10] The fourth stage came after mana whenua was agreed or determined and required consideration of whether any "adjustments" to the "intended allocation" (described elsewhere in the judgment as "the proceeds of settlement presumptively receivable"[11]) were required:[12]

> Had the dispute been resolved by adjudication [in accordance with cl 6.14 of the Mana Whenua Process Agreement], the [arbitration] panel would have made a decision about mana whenua and then considered whether any adjustments to the intended allocation were required as between the disputants. A range of options would have been available to determine whether any adjustments were required.

[24] The Judge considered that the parties' agreement to arbitrate the question of mana whenua over the lands "did not clothe the arbitrators with jurisdiction"[13] to

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8 *Bidois* (CA), above n 2, at [99].
9 *Leef v Bidois* [2015] NZSC 128.
10 High Court judgment, above n 3, at [23].
11 At [74] and [83(b)].
12 At [25].
13 At [26].

decide the “adjustments” to be made in terms of cl 6.14 of the Mana Whenua Process Agreement, which provided:

> The Adjudication Panel will reach a decision on allocation of the Disputed Lands … in accordance with the mana whenua test set out at clause 4.2. The Adjudication Panel shall have the power to:
>
> 6.14.1 Allocate the Disputed Resources to one Hapū; or
>
> 6.14.2 Allocate the Disputed Resources to more than one Hapū in joint or multiple ownership as tenants in common in a resource, either divided in equal shares or proportionally according to the respective interests of the Hapū;
>
> 6.14.3 Allocate the Disputed Resources to one Hapū, but acknowledge the relationship of the other Hapū with the land in a specified manner;
>
> 6.14.4 Implement any other solutions proposed by one or more of the parties, subject to any modifications determined by the Panel.

[25] The Judge differentiated between “the process of allocation” which would determine the “proceeds of settlement presumptively receivable” and the final allocation after any “adjustments” to “respond to any unusual situation”. He considered that the problem in the present case had arisen because the parties had used the term “allocation” in the legal documents to refer to these separate concepts:

> [55] In my view, the main reason why the present problem has arisen is that the various documents use the term “allocation” in different ways. The word has been used to identify two distinct concepts:
>
> (a) The first is the process of allocation agreed among hapū and set out in both the Allocation Resolution [allocation model] and the Allocation Agreement [Ratification Booklet].
>
> (b) The second is the need for an adjudication panel to determine the consequences of its findings in relation to mana whenua. The powers conferred on the panel by cl 6.14 of the Mana Whenua [Process] Agreement are intended to enable the adjudicators to respond to any unusual situation. Any adjustment must be tailored to meet the particular nature of the mana whenua decision.
>
> (Footnotes omitted.)

[26] Once this distinction was drawn and the fourth stage in the allocation process identified, the Judge’s conclusion followed inevitably. On his analysis, only the third stage was referred for determination by the arbitrators. They were not empowered to make any determination regarding any adjustments required in the fourth stage, nor

did they purport to do so.[14] Accordingly, the parties continued to be bound by the Mana Whenua Process Agreement as the agreed means for determining any dispute arising in the fourth stage in order to finalise the allocation between them:

> [56] The difficulty that has arisen in the present case can be traced back to the decision of Ngāti Taka and Pirirakau to resolve the mana whenua question through a dispute resolution mechanism not contemplated by the Mana Whenua [Process] Agreement. I interpret the Mana Whenua [Process] Agreement as a solemn compact among hapū to resolve questions of mana whenua *and adjustments* in accordance with their tikanga. Although Ngāti Taka and Pirirakau entrusted the first of those questions to the arbitrators, no provision was made for any cl 6.14 *adjustments* to be considered as part of the arbitral process. That issue remains outstanding. …
>
> (Emphasis added.)

[27] The Judge explained the nature of the adjustments that might need to be made in stage 4 in view of the arbitrators' conclusion:

> [62] As a result of the arbitrators' award, Ngāti Taka is characterised as "an integral part of Pirirakau" for the purpose of the mana whenua decision. If the mana whenua dispute had been resolved by an adjudication panel, the adjudicators could have exercised a discretion under cl 6.14 of the Mana Whenua [Process] Agreement to ensure a just division of settlement proceeds was made. By that, I mean a decision that recognised that while Ngāti Taka and Pirirakau are presently regarded as separate hapū, the arbitrators found that one was an integral part of the other during the period between 1840 and 1865. On the face of it, at least to an untutored outsider, there is a credible argument that one part of what was regarded as Pirirakau at that time is being excluded from proceeds of settlement that are properly to be allocated to the hapū of [Ngāti Taka].
>
> (Footnotes omitted.)

[28] Finally, the Judge dismissed Pirirakau's claim that his conclusions were precluded by issue estoppel arising from this Court's judgment in *Bidois* (CA).

Analysis

[29] Pirirakau's appeal must succeed on three alternative grounds. First, we are satisfied that the arbitration agreement effectively replaced the Mana Whenua Process Agreement. Second, the allocations set out in the Settlement Trust Deed are final and binding on all hapū. Third, in any event, the Mana Whenua Process

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[14] At [74].

Agreement does not contemplate a fourth stage involving adjustments to the allocation after mana whenua is determined.

Effect of arbitration agreement

[30] The agreement by the two hapū in August 2011 to refer their dispute about mana whenua to an arbitration panel and the panel's subsequent award rendered the Mana Whenua Process Agreement inoperative.

[31] In rejecting Pirirakau's defence of issue estoppel Heath J found that this Court's observations in *Bidois* (CA) were obiter and equivocal.[15] However, irrespective of whether or not the Court's statements amounted to an issue estoppel or were obiter, in our judgment this Court correctly explained the legal effect of the arbitration agreement on the status of the Mana Whenua Process Agreement as follows:[16]

> [51] Second, and related to this, we respectfully disagree with the Judge's reasoning that the arbitral award does not affect the allocation of settlement proceeds. *As matters presently stand, the arbitration initiated a process that has been determinative of the wider fiscal issue. The dispute between Pirirakau and Ngāti Taka was seemingly the last outstanding inter-hapū dispute concerning who had mana whenua at the relevant time.* Consequent on this, the iwi governing entity created a Ratification Information Booklet which contained conclusions on the mana whenua issue and the proposed allocations. As regards the land in dispute between these two hapū, the allocation reflected the arbitration outcome — namely, all the money attaching to this land was allocated to Pirirakau. This Ratification Booklet was adopted by a majority vote of iwi members. The allocations then found their way into a Settlement Trust Deed. This Deed, another internal iwi document, establishes a trust to receive the funds from the Crown and to distribute those funds in accordance with the terms of the Settlement Trust Deed.
>
> (Emphasis added and footnote omitted.)

[32] This Court also went on to observe that "the arbitration has had direct consequences on the entitlement to a share of the settlement funds proceeds"[17] and that:

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15 High Court judgment, above n 3, at [75].
16 *Bidois* (CA), above n 2.
17 At [52].

> [53] The judgment under appeal refers at one point to stage 3 of the Mana Whenua [Process] Agreement not having been completed by the parties, and at another to the parties still needing to follow the adjudication procedure under the Mana Whenua [Process] Agreement. *Contrary to the proposition underlying these statements, in fact the adjudication process contemplated by the Mana Whenua Agreement is no longer available*. Because all other hapū had also settled their disputes, the Mana Whenua [Process] Agreement was seen to be unnecessary and was not included as part of the settlement agreements. Recital D cited above makes it plain that as matters presently stand the issue is considered to be resolved. In this regard the judgment under appeal proceeds under a misunderstanding of the correct factual situation.
>
> [54] Standing back and looking at the overall context, we equally have no doubt that the issue between the parties could properly be the subject of an arbitration agreement. The starting point is that there were extant claims before the Waitangi Tribunal. The Tribunal had issued an interim report identifying breaches of the principles of the Treaty of Waitangi in relation to the land. In the context of settling these Tribunal claims, an allocation formula for distribution of the anticipated settlement money was agreed within the iwi. The two parties to the arbitration had each claimed to satisfy the formula in relation to the same land. Arbitration was chosen as the method of resolution. The process agreed for determining who satisfied the formula was accepted by the disputants, and also the iwi, to deliver a result that was final and binding. The consequence to the victor would be a very significant financial payout.
>
> (Emphasis added and footnote omitted.)

[33] We disagree with Heath J's characterisation of these statements as equivocal. This Court was simply confirming what was established by Mr Coffin's uncontradicted evidence and the parties' arbitration agreement. The Mana Whenua Process Agreement was of a contingent nature. It would only come into effect if, following the Crown's transfer of land and other compensation, hapū were unable to agree on allocation. The hapū were not bound to invoke its terms and were free to resolve any disputes by whatever means they chose.

[34] In this case both hapū agreed that the Mana Whenua Process Agreement was an inappropriate mechanism for resolving their dispute before the Crown settled its obligations. They agreed to seek finality through an alternative, less complex and less costly method of resolution. The arbitrators' finding on mana whenua would necessarily dictate the parties' allocation rights as agreed by all hapū at the March 2010 hui. The same test of mana whenua was adopted. The question was "which hapu and its rangatira had Mana Whenua status from 6th February 1840 to [M]ay 1865". The arbitrators' answer, which was final and binding on the parties,

was that Pirirakau had that status at the relevant time. The allocation therefore had to be made to Pirirakau in accordance with the agreed allocation model.

[35] The Judge in distinguishing this Court's statements in *Bidois* (CA) observed that the question of whether any adjustment should be made to the proceeds of settlement presumptively receivable by Pirirakau was not submitted to nor determined by the arbitrators.[18] However, as this Court observed in *Bidois* (CA), the parties agreed to refer their dispute to arbitration to "deliver a result" both as to mana whenua in the relevant lands and entitlements to the settlement proceeds — "[t]he consequence to the victor would be a very significant financial payout".[19] Once the two hapū entered into their own arbitration agreement in substitution for the stage 3 adjudication process provided by the Mana Whenua Process Agreement there was nothing left to be adjudicated. The parties chose and must be bound by their simplified allocation resolution process.

Effect of Deed of Settlement Trust

[36] We also accept Mr Cooke QC's submission that the arbitrators' allocation is now enshrined in the Deed of Settlement Trust that was signed on behalf of all hapū in accordance with the ratification poll. This deed requires the trustees to:

> … receive, manage, distribute, administer and apply the Trust's Assets … in accordance with this Trust Deed including, without limitation … a transfer or resettlement of Trust Assets in accordance with … the Ratification Booklet (as set out in the Sixth Schedule) …

These include the allocations to Ngāti Taka and Pirirakau resulting from the arbitrators' award and the agreed allocation model.

[37] The mandated settlement representatives declined to give any undertaking not to distribute the proceeds of settlement pending resolution of Ngāti Taka's intended proceedings, nor would they have been entitled to do so in the absence of Pirirakau's agreement. Despite no undertaking being given, the trustee appointed by Ngāti Taka

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18 High Court judgment, above n 3, at [74].
19 *Bidois* (CA), above n 2, at [54].

proceeded to sign the Settlement Trust Deed and Ngāti Taka's entitlements as a beneficiary are now embodied in that deed.

[38] Mr Bryers submits that the Settlement Trust Deed is merely an undertaking by the trustees to administer the assets in accordance with the Ratification Booklet, the relevant pages of which are annexed as a schedule to the deed. He argues that this is not an inter-hapū agreement barring Ngāti Taka's claim. He notes that the trustees are abiding the decision of the Court and he submits that it is reasonable to assume that if the declarations made in the High Court are confirmed, the trustees will cooperate in implementing any change to the allocations that might follow.

[39] We do not accept these submissions. The Ratification Booklet made plain that in voting for the Deed of Settlement, hapū members would be specifically directing their nominated trustees to enter into the Deed of Settlement with the Crown and the Deed of Settlement Trust as the Post Settlement Governance Entity:

> **WHAT AM I BEING ASKED TO VOTE ON?**
>
> **Matters for Voting**
>
> 1. Yes/Āe to approve the Deed of Settlement (as presented in the Ratification Information Booklet).
>
> 2. Yes/Āe to approve the Ngā Hapū o Ngāti Ranginui Settlement Trust as the Post Settlement Governance Entity with the Trust Deed (as presented in the Ratification Information Booklet).
>
> 3. Yes/Āe to approve Antoine Coffin (Independent Chairperson), Shadrach Rolleston, Caine Taiapa, Kimiora Rawiri, Te Ruruanga Te Keeti, Nepia Bryan, Te Pio Kawe, Lance Waaka and Rob Urwin as the trustees of the Ngā Hapū o Ngāti Ranginui Settlement Trust signing the Deed of Settlement on behalf of Ngā Hapū o Ngāti Ranginui.
>
> …

[40] The Ratification Booklet further explained:

> In voting for this Deed of Settlement, you will be specifically directing the trustees for Nga Hapu o Ngati Ranginui Settlement Trust to transfer each hapu settlement redress (cash, land, shares and, where relevant, Rights of First refusal) as it appears in this Ratification Information Booklet to each of the hapu.

[41] As noted, an overwhelming majority of hapū members voted in favour of all aspects of the settlement including the specified allocations. Caine Taiapa of Ngāti Taka was approved as one of the nominated trustees to sign the Settlement Trust Deed and administer the settlement redress in the manner specified. Contrary to Mr Bryer's submissions, the Deed of Settlement Trust is binding as an inter-hapū agreement. There is no basis on which it could be rectified.

Interpretation of Mana Whenua Process Agreement

[42] We are satisfied the Judge erred in finding that the parties had used the word "allocation" in two different senses and in finding that the allocation process involved a fourth stage where adjustments would be made to the presumptive allocation determined in stage 3.

[43] It is necessary to examine the key provisions of the relevant agreements with some care to determine the correct interpretation.

[44] The starting point is the allocation model agreed by all hapū at the March 2010 hui. In terms of this agreed model, 70 per cent of the proceeds of settlement with the Crown were to be determined by the Mana Whenua Process Agreement. This agreement sets out the "principles of process", the first of which is critical because it stipulated how the allocation was to be made:

> The Cross Claimed Resources … will be allocated to Hapū on the basis of mana whenua, and the agreements reached between Hapū in a kanohi ki te kanohi process or otherwise determined by this Mana Whenua Process.

[45] The test of mana whenua was set out in cl 4.2 of the agreement and is quoted in [10] above. It is clear from these provisions that the allocation was to be made on the basis of which hapū traditionally held and exercised mana over the relevant land from 6 February 1840 to May 1865.

[46] Clause 2.4 sets out the fourth principle of the Mana Whenua Process Agreement and provides that the allocation will be made to particular hapū:

> Allocation of Cross Claimed Resources … will be to Hapū only, or their nominees (acknowledging that it is up to Hapū whether they make their own internal arrangements with Hapū or other entities).

[47] In stage 1 of the process, hapū were to provide maps to the iwi post-settlement governance entity[20] identifying the extent of their claimed mana whenua interests over the disputed lands. This would enable the post-settlement governance entity to identify: areas of land for which a particular hapū has exclusive mana whenua interests; those areas where agreement has not been reached; and the particular hapū claiming mana whenua interests over the contested areas. This reinforces that the allocation was to be made to particular hapū based solely on the mana whenua test:

> **Stage 1 — Identification of Mana Whenua Interests —** ***First 6 months***
>
> 4.1 Within two months of the Settlement Date (expected to be 31 August 2012), each Hapū will provide maps to the Iwi PSGE indicating the extent of their mana whenua interests over the Cross Claimed Resources.
>
> 4.2 The test of mana whenua is the mana that Hapu traditionally held and exercised over the land, determined according to tikanga including the demonstration of ahi ka roa from 6 February 1840 through to and including the Raupatu of more than 290,000 acres in May 1865.
>
> …
>
> 4.5 … the Iwi PSGE will identify, based on the maps provided by the Hapū pursuant to clause 4.1:
>
> 4.5.1 the areas of Cross Claimed Resources in which a particular Hapū has exclusive mana whenua interests; and
>
> 4.5.2 the extent to which there is agreement on allocation of particular areas of Cross Claimed Resources to particular Hapū. …
>
> 4.5.3 areas of land for which agreement has not been reached, and the Hapū that are claiming that land;
>
> …
>
> 4.7 … the Iwi PSGE will record in its draft Final Allocation Agreement the agreed allocations under clauses 4.5.1 and 4.5.2.
>
> 4.8 … all Hapū for which allocation is not agreed will be the subject of the Stage 2 process of negotiation between Hapū kanohi ki te kanohi.

[20] Referred to in the Mana Whenua Process Agreement as the "Iwi PSGE".

[48] Stage 2 of the process confirms the hapū-centric nature of the allocation based on the mana whenua test. It also sheds light on the purpose of cl 6.14, which the Judge regarded as stage 4 of the process where "adjustments" were to be made to the presumptive allocations indicated in stage 3:

> **Stage 2 — Kanohi ki te kanohi negotiation …**
>
> 5.1 Following Stage 1, Hapū must embark on kanohi ki te kanohi negotiations with Hapū with whom they have overlapping claims, to reach agreement on allocation of the Cross Claimed Resources in question.
>
> …
>
> 5.3 The Hapū concerned in each process will endeavour to reach consensus on the allocation of the Cross Claimed Resources in question, having regard to the strength of the mana whenua interests. Innovative solutions that reflect tikanga, whanaungatanga, manaakitanga and kotahitanga, and the complexity of mana whenua interests could include, but are not limited to:
>
> 5.3.1 Joint or multiple ownership of land or rights as tenants in common, either divided in equal shares or proportionally according to the respective interests of the Hapū;
>
> 5.3.2 One Hapū becoming the owner of the Cross Claimed Resources, but acknowledging the relationship of other Hapū with the Cross Claimed Resources in an agreed manner;
>
> 5.3.3 Agreeing not to transfer title of the Cross Claimed Resources from the Iwi PSGE, but the Iwi PSGE acknowledging mana whenua interests in a manner agreed by the Hapū.

[49] The third and final stage was to determine any remaining areas of disagreement concerning the allocation. As noted, it provided for mediation followed by adjudication, if necessary. Clause 6.14, which the Judge characterised as the stage 4 "adjustments", is included within this stage of the allocation process. Although we have already quoted this clause, it is helpful to set it out again, in context:

> **Stage 3 — Finalising Allocation Agreement …**
>
> 6.1 On completion of Stage 2, the Iwi PSGE will prepare a further draft of the Final Allocation Agreement, in which it records:
>
> 6.1.1 The agreements reached on allocation of Cross Claimed Resources;

> 6.1.2 Any remaining areas of Cross Claimed Resources for which agreement has not been reached amongst the Hapū who claimed mana whenua interests in that area in the maps provided under clause 4.1 ("Disputed Resources").
>
> …
>
> 6.5 If agreement is not reached through mediation … then the dispute will be determined by Adjudication.
>
> 6.6 Following determination of the dispute over any Disputed Lands, the decision reached will be recorded in the Final Allocation Agreement.
>
> …
>
> 6.12 The Adjudication Panel will hear the claims of the Hapū interested in the Disputed Land.
>
> …
>
> 6.14 The Adjudication Panel will reach a decision on allocation of the Disputed Lands … in accordance with the mana whenua test set out at clause 4.2. The Adjudication Panel shall have the power to:
>
> 6.14.1 Allocate the Disputed Resources to one Hapū; or
>
> 6.14.2 Allocate the Disputed Resources to more than one Hapū in joint or multiple ownership as tenants in common in a resource, either divided in equal shares or proportionally according to the respective interest of the Hapū;
>
> 6.14.3 Allocate the Disputed Resources to one Hapū, but acknowledge the relationship of the other Hapū with the land in a specified manner;
>
> 6.14.4 Implement any other solutions proposed by one or more of the parties, subject to any modifications determined by the Panel.
>
> 6.15 A decision with reasons will be given. The decision of the Adjudication Panel will be final and binding on all the parties.

[50] We are satisfied that the word "allocation" has been used in a singular sense. It simply means the allocation required to be made to particular hapū in accordance with the mana whenua test as defined. The outcome applying that test, whether by agreement or adjudication, would dictate the allocation of the disputed lands to one hapū if that hapū established exclusive mana whenua interests over particular lands, or to more than one hapū in shares proportionate to their respective mana whenua interests in those lands. The allocation was entirely dependent on which hapū

satisfied the mana whenua test as defined, which focuses exclusively on the position in 1840 to 1865, not now.

[51] We therefore disagree that the word "allocation" has been used to refer to two distinct concepts.[21] The powers intended to be conferred on the adjudication panel under cl 6.14 as part of stage 3 are there to ensure that the allocation reflects the determination in accordance with the mana whenua test. There is no stage 4 where "adjustments" are made to the allocation in the exercise of a "discretion". Clause 6.14 requires the allocation to be made "*in accordance with* the mana whenua test". Once the arbitration award was delivered there was no power to make "adjustments" to the allocation, including to recognise that "while Ngāti Taka and Pirirakau are *presently* regarded as separate hapū … there is a credible argument that one part of what *was* regarded as Pirirakau at that time *is* [now] being excluded from proceeds of settlement".[22]

[52] We do not accept Mr Bryers' submission that cl 6.14 was intended to allow adjustments to the allocations in view of the "significant developments that have occurred since 1865; in particular, whatever the mana whenua situation may have been in the 1840 — 1865 period … Ngāti Taka is not part of Pirirakau today". On the contrary, the agreed allocation model, the Mana Whenua Process Agreement and the arbitration agreement all provided for the allocation to be made in accordance with the mana whenua test focusing exclusively on the 1840–1865 period. Contrary to Mr Bryers' submission, our interpretation does not deprive cl 6.14 of all effect. The clause provides for all eventualities. So, for example, if one hapū established exclusive mana whenua interests in a particular area of land at the relevant time, then the allocation would be made under cl 6.14.1 to that hapū. On the other hand, if the adjudication panel determined that the disputed resources were held by more than one hapū at that time, the allocations to reflect those proportionate interests would be made in exercise of the powers under cl 6.14.2.

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21 See High Court judgment, above n 3, at [55].
22 At [62].

Issue estoppel

[53] We agree with Heath J that the doctrine of issue estoppel does not apply. The issue in the earlier appeal to this Court was confined to whether a dispute about which of the parties satisfied the mana whenua test would found a valid arbitration. The Court expressly left open the prospect of further litigation concerning all stages subsequent to the making of the award:[23]

> [99] … We conclude by observing that this judgment says nothing about the legitimacy or otherwise of the iwi processes that followed the making of the award, but is limited to a conclusion that it was a valid arbitral determination.

[54] The Court did not determine the issues that arise on the present appeal. However, we observe that our analysis and conclusion are entirely consistent with this Court's reasoning in the earlier appeal.

Summary

[55] The mana whenua dispute was finally determined by the arbitrators. The final allocations to Pirirakau and Ngāti Taka consequent on the award follow inevitably in accordance with the agreed allocation model. The final allocations have also been ratified by Ngāti Taka and Pirirakau in the ratification poll. They were again confirmed by all hapū, including Ngāti Taka and Pirirakau, by entering into the Deed of Settlement Trust. The declaration made in the High Court, that the Mana Whenua Process Agreement remains in force and can be invoked by Ngāti Taka to determine whether any adjustment should be made to the allocation, cannot stand.

[56] It follows that the appeal against the costs judgment must be dismissed.

Result

[57] The appeal in CA88/2017 is allowed. The declarations made in the High Court are set aside and judgment is entered for the appellant.

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[23] *Bidois* (CA), above n 2.

[58] The appeal in CA190/2017 is dismissed.

[59] The first respondent in CA88/2017 must pay the appellant in CA88/2017 one set of costs for a standard appeal on a band A basis and usual disbursements.

[60] Costs in the High Court are to be determined in accordance with the outcome of these appeals.

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