IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20180001438

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Matata Parish 39A 2A Ahu Whenua Trust
BETWEEN	RAE BEVERLY ADLAM Appellant
AND	GRAEME NIAO, KERERUA SAVAGE, CARRIE SAVAGE, WILLIAM DONEY, ALAN NIAO, MARTIN NIAO AND JASON DOWIE AS TRUSTEES OF LOT 39A SEC. 2A PARISH OF MATATA BLOCK Respondents

Hearing: 8 May 2018, 2018 Māori Appellate Court MB
(Heard at Rotorua)

Court: Judge S R Clark (Presiding)
Judge S F Reeves
Judge M J Doogan

Appearances: L Van for the Appellant
D Stone for the Respondents

Judgment: 22 August 2018

JUDGMENT OF THE COURT

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Introduction

[1] In 2014, Ms Adlam was found to have breached her duties as a trustee by wrongfully profiting from the development of two geothermal power stations and the sale of shares in a power station company.[1] As a result she was ordered to pay the Matata Parish 39A 2A Ahu Whenua Trust (The Bath Trust) $12,780,111.75 plus interest and costs.[2] Ms Adlam is yet to pay any of the judgment debt.

[2] That decision was the subject of appeals to the Māori Appellate Court and then the Court of Appeal.[3] The result of the appeals is that Judge Coxhead's original decision stands and the judgment debt remains due.

[3] On 30 November 2017, Judge Coxhead granted a charging order over all funds derived from the revenue payable or to become payable to Ms Adlam from her Maori land interests to the sum of the judgment debt ($12,780,111.75).[4]

[4] Ms Adlam now appeals against the granting of the charging order. She argues that her entitlement to any revenues is subject to the will of the Trustees and any future revenues are currently unknown and incapable of being identified or quantified. Because the property sought to be charged does not currently exist, it does not "belong" to Ms Adlam and there is no absolute legal expectation that it will ever exist or that she will ever receive it. As such, it is not an interest capable of sustaining a charging order.

[5] The issue on appeal is whether the charging order can stand.

The charging order

[6] His Honour Judge Coxhead granted a charging order in the following terms:[5]

> Pursuant to section 82(1)(c) of Te Ture Whenua Māori Act 1993, the Court makes a charging order over all funds derived from the revenue payable or to become payable to Rae Beverly Adlam up to the sum of $12,780,111.75 or until further order of the Court from the Māori land interests listed in the schedule

[1] 95 Waiariki MB 176 (95 WAR 176).
[2] Above n 1.
[3] *Adlam v Savage* [2016] NZCA 454; *Adlam v Savage – Lot 39A Sect. 2A Parish of Matatā and Lot 39A Sec. 2B No. 2B No. 2A Parish of Matatā* [2015] Māori Appellate Court MB 59 (2015 APPEAL 59).
[4] 176 Waiariki MB 226 (176 WAR 226).
[5] 176 Waiariki MB 226 (176 WAR 226).

> marked 'A' filed in support of the application to Rae Beverly Adlam in favour of the trustees of Matata Parish 39A 2A Ahu Whenua Trust.

The argument for Ms Adlam

[7] Ms Van, counsel for Ms Adlam, argues that Ms Adlam's interests are as a discretionary beneficiary. Her only entitlement to revenue from the land is subject to the will of the trustees. Any entitlement is presently unknown and is incapable of being quantified. In her written submissions, Ms Van argues:

> Put simply there is no basis at law for a charging order because the property sought to be charged does not exist and it does not "belong" to Ms Adlam, nor is there any absolute legal expectation that it will ever exist or that she will ever receive it.

[8] Accordingly, counsel argues that a charging order is incapable of attaching to Ms Adlam's interests. In support of this argument, counsel relies upon the approach adopted by the High Court. Reliance was placed on the High Court Rules and authorities developed by that court which provide that a charging order is incapable of attaching to a sum of money to which the liable party presently has no absolute legal entitlement. The relevant error of law is therefore said to be Judge Coxhead's failure to apply the approach set out in the *Algert*[6] and *Andrews*[7] cases.

[9] In the *Algert* case, Justice Fisher recorded as uncontentious the principle that a debt "accrues due" as soon as there is an absolute legal obligation to pay a sum of money. It does not matter whether the sum is payable immediately or at some future date, so long as the obligation to pay is unconditional and perfected. Justice Fisher cited Lindley L J in the *Webb v Stenton* case as authority for these propositions.[8]

[10] Ms Van argued that, in accordance with Justice Fisher's decision, Ms Adlam's interests are not able to be charged as she has no absolute legal entitlement to the revenue from her Māori land interests.

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[6] *Algert Co Inc & Anor v United States Imports Limited (In Liquidation) & Ors* HC Auckland CP350-SW99, 11 March 2002.
[7] *Andrews v Farmer* [1924] NZLR 504.
[8] *Webb v Stenton* [1883] 11 QBD 518.

The argument for the Trustees

[11] Mr Stone counsel for the Trustees of the Savage Papakāinga Land Trust argued in support of the charging order. The Trustees he represents are responsible for securing the repayment of the judgment debt for the benefit of the beneficial owners and they oppose the appeal.

[12] Mr Stone argues that the charging order regime under Te Ture Whenua Māori Act 1993(the Act) is a specific and unique statutory scheme which overrides and displaces the common law relating to charging orders in so far as Māori land interests are concerned.

[13] A key distinction between a charging order over Māori land and a charging order under the common law and High Court Rules is that the ultimate common law remedy (sale of the property to satisfy the debt) is not available with respect to Māori land. This is why a charging order over Māori land is necessarily focused on revenue derived from the Māori land or on the proceeds of a voluntary alienation.

[14] Counsel also notes that it is common practice for the Māori Land Court to issue charging orders over beneficial interests in Māori land in general with the intention of ensuring that all revenue associated with those interests are available to discharge the judgment debt. To proceed otherwise would render a charging meaningless.

[15] In conclusion, Mr Stone submits that there was no error of law or fact in the application of the law in this case and the high threshold for appeal from a discretionary decision is not met.

Law

[16] The Māori Land Court's power to grant charging orders is set out in s 82 of Te Ture Whenua Māori Act 1993:

> **82 Charging orders**
>
> (1) Without limiting anything in section 81, for the purpose of enforcing any order made by the court for the payment of money, a Judge may, on the application of any party or of the Judge's own motion, order that the money payable or to become payable under the order shall be a charge on—

(a) any Maori land; or

(b) any legal or equitable interest in any Maori land; or

(c) any revenues derived from any Maori land; or

(d) the proceeds of the alienation of any Maori land,—

to which the person liable to pay the money is entitled.

(2) Subject in the case of any interest in land to registration under subsection (6), the property shall become subject to a charge accordingly in favour of the person to whom for the time being and from time to time the money is or becomes payable.

(3) A charging order shall specify, in such manner as to identify it, the property on which the charge is imposed.

(4) A charging order may at any time be varied or discharged by the court.

…

[17] The power to grant a charging order pursuant to s 82 of the Act is discretionary. It is well established that an Appellate Court may only intervene in an exercise of discretion by a lower court if satisfied that:[9]

(a) The lower Court acted on an error of law or a wrong principle;

(b) The lower Court failed to take into account a relevant consideration;

(c) The lower Court took into account an irrelevant consideration; or

(d) The lower Court was plainly wrong.

[18] Also of relevance is s 342 of the Act which creates a prohibition against alienation of Māori land interests for execution of an owner's debts or liabilities:

342 Protection of Maori land against execution of debt

(a) Except as provided in section 343 of this Act, no interest of any person in Maori customary land, and no beneficial freehold interest in Maori freehold land, shall be capable of being taken in execution or otherwise rendered available by any form of judicial process for payment of the owner's debts or liabilities, whether in favour of Her Majesty or of any other person.

(b) Nothing in subsection (1) of this section shall limit or affect the operation of any mortgage or charge to which any Maori land is subject, or shall apply to the recovery of rates or taxes payable in respect of Maori land.

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[9] *Kacem v Bashir* [2010] NZSC 112 at [32]. See also *Matthews v Matthews – Estate of Graham Ngahina Matthews* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512) at [56].

> (c) Nothing in subsection (1) of this section shall apply to any revenue derived by any person from any interest in land to which that subsection applies; and all such revenue shall be available for the payment of that person's debts.

Discussion

Revenue v debt

[19] We accept that the principles and authorities referred to by Ms Van represent an accurate statement of the law concerning charging orders in the civil jurisdiction of the High Court. However, we do not accept that His Honour Judge Coxhead was bound to apply that law in the way now argued by counsel for Ms Adlam.

[20] In the *Algert* case, Justice Fisher was concerned with a charging order pursuant to what was then r 579 of the High Court Rules.[10] This rule set out the kinds of property, other than land, which could be subject to a charging order. Rule 579 provided that a charging order may charge, among other things, "a debt or sum of money due or accruing due to the opposite party".[11] The current High Court Rules 2016 contain a similar provision at r 17.53.[12]

[21] The common law authorities relied on by Ms Van are therefore authorities specific to the interpretation of the words "debt or sum of money due or accruing due" as found in r 17.53(1)(a) of the High Court Rules.

[22] The charging order in this case derives from a statutory power to charge "any revenues derived from any Māori land" as set out in s 82(1)(c) of the Act. Power to charge revenue/s is a very different concept from the power to charge a debt. At its most general, revenue is a term that would include gross income or receipts.[13] Amongst its more particular meanings, it would include Crown or municipal income and it would also encompass the yearly rent that accrues to a person from his or her land and possessions.[14] The concept of revenue, capturing as it does the idea of a future income flow, is quite distinct from the concept of a debt or sum of money due or accruing due.

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[10] *Algert,* above n 7; Judicature Act 1908, r 579.
[11] Rule 579, above n 11.
[12] High Court Rules 2016, r 17.53(b).
[13] B Garner *Black's Law Dictionary* (9th ed, Thomson West, St Paul, United States, 2009) at 1433.
[14] P Spiller *Butterworths New Zealand Law Dictionary* (7th ed, Lexis Nexis, Wellington, 2011) at 268.

[23] In the *Algert* case, Justice Fisher had this to say about the broader policy considerations in regard to charging debt:[15]

> The policy consideration underlying the exclusion of contingent debts is unclear. Perhaps it was thought impractical to leave the potentially difficult question wherever a contingency has been satisfied to the determination of the Registrar or Baliff required to execute a right of sale pursuant to the charging order. Certainly, existing authority as to the meaning of "a debt or sum of money due or accruing due" seems to exclude contingent debts from charging orders.

[24] The *Webb v Stenton* case makes it clear that monies that may be paid by a trustee to beneficiaries are not debts:[16]

> The results seem to me to be this: you may attach all debts, whether the equitable or legal; but only debts can be attached; and monies which may or may not be become payable from a trustee to his cestui que trust are not debts.

[25] Monies that may be payable by a trustee to a beneficiary would, however, clearly fall within the meaning of revenue as that term is used in ss 82, 83 and 342 of the Act.

A distinct statutory scheme?

[26] This distinction between the charging order over a debt and the charging order over revenue also illustrates the wider point that the charging order powers under s 82 of the Act represents a distinct statutory scheme. A number of features of that scheme tell against uncritical application of common law authorities. We note and endorse the obiter comments in *Sanders v King* where the Court discerned a statutory scheme to restrict the availability of Māori freehold land and beneficial interests to satisfy debts and liabilities.[17]

[27] Section 82 of the Act gives the Court the power to charge (in the alternative):

1) Any Māori land; or
2) Any legal or equitable interest in any Māori land; or
3) Any revenues derived from any Māori land; or
4) The proceeds of the alienation of any Māori land…

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[15] Above n 7 at [9].
[16] Above n 9 at 528.
[17] *Sanders v King – Part Parish of Whangape Lot 15B Block and Parish of Whangape Lot 15C (Urupa)* (2014) 81 Waikato Maniapoto MB 109 (81 WMN 109) at [56]-[59].

[28] Section 82(1) concludes with the words "to which the person liable to pay the money is entitled". In the present case, so long as the charge remains in place, it would operate to divert any current or future revenue to which Ms Adlam may be entitled from her Māori land interests towards satisfaction of the judgment debt. Future revenue is expressly caught under ss82(1) (c). This seems to us to be the ordinary and natural meaning of the statutory scheme .and one which is necessary if charging orders over Māori land are to have practical effect.

[29] We are reinforced in this view by the terms of ss 83 and 342 of the Act. When read in context, s 82 is part of a carefully constructed statutory regime which modifies the extent of creditors' remedies over Māori land interests. Section 82 allows Māori land interests to be the subject of a charging order. Section 83 provides for the appointment of a receiver to enforce a charging order, but specifies there is no power to realise that interest by selling Māori land. Section 342 further protects Māori land by providing that (bankruptcy aside), Māori land interests cannot be taken in execution for payment of an owner's debts or liabilities.

[30] We consider this a statutory regime to allow creditors *some* relief when the land itself is not able to be alienated. Taking a purposive approach to the interpretation of s 82(1)(c) leads us to the conclusion that future revenue can be charged. To interpret this section otherwise would render charging orders over Māori land of little practical effect.

[31] Also of significance in the context of this statutory scheme is the fact that any revenue derived by a person from their Māori land interests is not protected from execution for debt. We agree with and adopt the following submissions made by Mr Stone:

> First, section 342(3) expressly provides that nothing in section 342(1) applies to *any revenue* derived by *any person* from *any interest in land*. This statutory language is broad and inclusive. It is not, for example, limited to known and quantifiable revenue. Therefore, *any revenue* derived by a debtor in relation to his or her Māori land interests is not protected by section 342(1).
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> Second, the second limb of section 342(3) confirms that *all such revenue* is available for the payment of a person's debts. Again, the statutory language is broad and inclusive, and is not limited to known or quantifiable revenue. Accordingly, as a matter of principle *all of the revenue*, including future revenue, derived from Māori land interests is available for payment of a person's debts.

Error of law?

[32] As previously noted, Ms Van argued that Judge Coxhead erred in law by failing to apply the approach set out in the *Algert* and *Andrews* cases[18] regarding the inability to attach a charging order to a sum of money to which the liable party has no present legal entitlement.

[33] In the lower Court decision, Judge Coxhead reasoned as follows:[19]

> 37. His point as I understand it is that the revenue derived or to be derived must be quantified before a Court can order a charging order.
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> 38. That is not how Māori land works.
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> 39. Many trust have dividend policies and distribution polices, but there is very seldom cases where a holder of beneficial interest in Māori land will know with any certainty as to what their dividend or distribution will be – or, whether they are going to receive a dividend or distribution. The operation of Māori land is different to the circumstances outlined in the cases Mr Hughes refers to.
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> 40. To apply the principles of the cases Mr Hughes refers to, to the Māori Land situation would in my view, make section 82(1)(c) redundant and meaningless. That was surely not the intention of that section.
>
> 41. Section 82(1)(c) applies to the Māori land situations and as I read it in the context of Māori land, that leads me to the conclusion that revenues are not required to be absolute and certain before a charging order can be applied.

[34] For reasons set out above we consider that future revenue can be charged pursuant to s 82(1)(c) and therefore see no error of law in the Judge Coxhead's approach.

[35] While there are relatively few cases in the Māori Land Court where charging orders have been applied, it has been uncontroversial that a charging order could attach to future revenue. In *Clark v Grey*, the Court held:[20]

> I accept that a charging order over the future revenue of the Poukawa 9G Trust is appropriate, and I note that it is not uncommon for the payment of equitable compensation to be secured in this way.

[36] Ms Van sought to distinguish this case on the basis that the charging order was granted over the entire Trust and the Trust owned the land legally not beneficially. We do not

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[18] Above n 7; Above n 8.
[19] 176 Waiariki MB 226 (176 WAR 226) at 242.
[20] *Clarke v Grey - Poukawa 9G Trust* (2016) 48 Tākitimu MB 182 (48 TKT 182) at [54].

think much turns on this distinction. The essential point is that the Court in *Clark* considered it appropriate to charge future revenue even if the quantum of that revenue is unknown at the time the order is made.

Misinterpretation of s 82(1)?

[37] Ms Van argues that the Court below misinterpreted s 82(1) in so far as the reference in that section to an "order that the money payable or to become payable under the order". Ms Van argues that this is a reference to the money to become payable under the original order giving rise to the debt not a reference to sums that may become payable to the person charged.

[38] Ms Van goes on to argue that Judge Coxhead's apparent misunderstanding flows through to the terms of the charging order itself, which he granted "over all funds derived from the revenue payable or *to become payable to Rae Beverly Adlam*...". Ms Van submits that this transposition of the words "to become payable" to future contingent accrual of revenue is incorrect as it should apply to accrual of monies under the judgment debt such as costs and interest.

[39] We do not discern any error in the approach taken by Judge Coxhead. Section 82(1)(c) allows a charging order over "any revenues derived from any Māori land…to which the person liable to pay the money is entitled". That, in our view, clearly contemplates any revenues to which Ms Adlam is entitled both at the time the order is made and in the future.

Error of fact?

[40] It was argued that there was no proper basis for Judge Coxhead to find that Ms Adlam was seeking to avoid paying the judgment debt. Various factors are pointed to in support of an argument that, even if the Court had jurisdiction to grant a charging order, it should not have exercised its jurisdiction to do so in light of indications from some owners that they wished to explore with Ms Adlam the possibility of resolving matters out of Court. Ms Van argued that, rather than impose the charging order, Judge Coxhead ought to have adjourned the application and directed a family meeting occur to discuss resolution of the judgment

debt, having regard to Ms Adlam's financial position and "evidence that she does not have sufficient funds to meet the entire judgment debt".

[41] It was further argued that Judge Coxhead did not have proper regard to evidence that Ms Adlam had disclosed her assets for the purposes of discussions regarding payment of the debt. It was also argued that lawyers for the Trustees had failed to provide a form for this to be done.

[42] What is clear from the evidence available in the lower Court is that Ms Adlam has never provided a complete, transparent and verified disclosure of her assets. There is a conspicuous lack of any evidence explaining what she has done with the very considerable profits she received.

[43] Before Judge Coxhead Ms Adlam had submitted an affidavit in opposition to the charging order. She said that her land interests were small and did not generate any income, and she did not get a distribution or dividend from the land. Before us Ms Van argued that there was no evidence of a potential or proposed distribution to Ms Adlam from either the Farm or Bath trusts, or the trustees of any of the land subject to the charging order. The short point is that Ms Adlam's interests in the land administered by the Farm and Bath trusts is subject to the charging order, and it was Ms Adlam's improper diversion to herself of very considerable income from those lands that led to this litigation in the first place.[21]

[44] We can see no failure by Judge Coxhead to have regard to relevant considerations, nor can we see weight being placed on irrelevant considerations. On the evidence before him, it was entirely open to Judge Coxhead to conclude that there had been no attempt to repay any funds. We also think it was entirely reasonable for him to express concern that, having lost in the litigation, Ms Adlam was now looking to get out of making any repayment of the funds she has wrongly taken.

[45] We concur with Judge Coxhead's expression of concerns about Ms Adlam's conduct and we agree that the Trustees and beneficiaries should be given some certainty regarding any necessary steps to enforce the judgment debt. A charging order is one such means of doing this.

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[21] Above n 93; Above n 146.

Result

[46] We see no error of law or fact in Judge Coxhead's approach to the charging order granted.

[47] The appeal is dismissed.

[48] The Trustees are entitled to costs. If these cannot be agreed, counsel for the Savage Papakāinga Land Trust may submit a memorandum within 14 days. Counsel for Ms Adlam may respond within 14 days thereafter.

Pronounced at 1.00 pm in Hamilton on this 22nd day of August 2018.

S R Clark	S F Reeves	M J Doogan
JUDGE	**JUDGE**	**JUDGE**