1982 CarswellAlta 4, 17 Alta. L.R. (2d) 311, [1982] 2 W.W.R. 204, 35 A.R. 471, (sub nom. Peterson Livestock Ltd. v. Fox) 131 D.L.R. (3d) 716, [1982] 2 C.N.L.R. 58

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Fox v. Peterson Livestock Ltd.

FOX et al. v. PETERSON LIVESTOCK LTD.

Alberta Court of Appeal

McDermid, Lieberman and Belzil JJ. A.

Judgment: January 12, 1982
Docket: Calgary No. 13340

Counsel: *R. M. Theroux*, for appellants.

*R. **Low***, for respondent.

Subject: Corporate and Commercial

Receivers --- Equitable execution — Refusal

Receivers — Equitable execution — Refusal — Remedy available only where legal execution precluded by impediment or difficulty of legal nature — Moneys not yet due and payable to debtor not subject to equitable execution.

The court appointed a receiver by way of equitable execution to receive moneys payable to the execution debtor, a member of an Indian band, for his share of any moneys paid to the band by the government of Canada with respect to the sale of mines and mineral leases or other interests in land situated on the reserve. There was affidavit evidence that a government employee had stated that three payments of such nature would be made in the next few months. The debtor appealed against the receiving order.

Held:

Appeal allowed; receiving order set aside.

Equitable execution is available only where the debtor has possession of an asset which could be reached by legal execution except for some impediment or difficulty of a legal nature. Debts which are not due or accruing due to the debtor cannot be reached by execution in any form. As the distribution of the moneys in question was to be made upon the authority and direction of the minister with the consent of the band council, and as the evid-

ence did not show that such authorization or consent had been received, there was no evidence of any money due or accruing due to the debtor at the date of the application. There was merely an expectation of a gratuitous distribution by the minister. Thus, a case for equitable execution was not made out.

Cases considered:

Hobbs v. A.G. Can. (1914), 7 Alta. L.R. 371, 7 W.W.R. 256, 18 D.L.R. 395 (C.A.) — *followed*

Holmes v. Millage, [1893] 1 Q.B. 551 (C.A.) — *applied*

Imperial Bank v. Twyford (1905), 1 W.L.R. 157 (N.W.T.S.C.) — *not followed*

Manning Wanless Bldg. Supplies Ltd. v. Puskas (1962), 39 W.W.R. 672 (Alta. T.D.) — *not followed*

Statutes considered:

Indian Act, R.S.C. 1970, c. I-6, ss. 64(*a*), 89.

Judicature Act, R.S.A. 1970, c. 193 [now R.S.A. 1980, c. J-1], s. 34(9) [am. 1978, c. 51, s. 39(3)(*c*); now s. 13(2)].

Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66, s. 25(8).

Rules considered:

Alberta Rules of Court, R. 466.

Authorities considered:

Cababé on Attachments, 3rd ed., pp. 92, 102.17 Hals. (4th) 358.Kerr on Receivers, 15th ed. (1978), p. 93.
Appeal from order appointing receiver by way of equitable execution.

The judgment of the court was delivered by *Belzil J.A.*:

1 This is an appeal from an order made by a justice of the Queen's Bench sitting in chambers, appointing the sheriff of the judicial district of MacLeod as receiver

> ... of any and all monies payable from time to time to the respondent, Floyd Fox, arising out of his distributive share of any monies paid by the Government of Canada to the Blood Indian Band No. 148 with respect to the sale of mines and mineral leases or other interests in land situated on the Blood Indian Reserve No. 148.

2 Floyd Fox, the respondent named in that order, has appealed the order. He is a member of the Blood Indian reserve band 148. The remaining appellants are the members of the band council of the Blood Indian reserve 148, and they obtained from this court leave to be added as parties defendant to this action and to file and serve a notice of appeal from the receivership order.

3 Peterson Livestock Ltd., the party who applied for and obtained the receivership order, and the respondent

in this appeal, is an execution creditor of the appellant Floyd Fox.

4 Jurisdiction to appoint a receiver is conferred by s. 34(9) [am. 1978, c. 51, s. 39(3)(*c*)] of the Judicature Act, R.S.A. 1970, c. 193 [now R.S.A. 1980, c. J-1, s. 13(2)], which reads as follows:

> (9) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court or judge of the Court in all cases in which it appears to the Court or judge of the Court to be just or convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or judge of the Court thinks just.

5 Rule 466 of the Alberta Rules of Court provides as follows:

> 466. Where an application is made for the appointment of a receiver by way of equitable execution, the court in determining whether it is just or convenient that the appointment be made shall have regard
>
> (*a*) to the amount of the debt claimed by the applicant,
>
> (*b*) to the amount which may probably be obtained by the receiver and
>
> (*c*) to the probable costs.
>
> and may direct any inquiries on these or other matters befor emaking the appointment.

6 Section 34(9) of the Judicature Act of Alberta is derived from and is substantially to the same effect as s. 25(8) of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict.), c. 66, which reads as follows:

> (8) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made ...

7 In considering the effect of these provisions, it is helpful to review the historical origins and development of equitable execution up to the enactment of the Supreme Court of Judicature Act, 1873. Summaries of this will be found in Cababé on Attachments, 3rd ed. at p. 92, and at 17 Hals. (4th) 358.

8 Prior to the Supreme Court of Judicature Act, an action to recover a money demand had to be brought and judgment obtained in a court of common law. This judgment conferred upon the judgment creditor the legal right to be paid out of all the assets, both legal and equitable, of the judgment debtor. But the common law writs of execution, e.g., fieri facias, were insufficient to reach the equitable assets of the debtor, because common law courts did not recognize equitable interests, as, for instance, a beneficiary's interest in a trust, or a legacy payable in the future. The deficiency was in the writs of execution, not in the judgment.

9 To supplement this deficiency, courts of equity developed the practice of granting an equitable substitute for execution at common law in respect of equitable property of the debtor by the appointment of a receiver. This became known as equitable execution. This is referred to by Lindley L.J. in the leading case of *Holmes v. Millage*, [1893] 1 Q.B. 551 at 555 (C.A.):

> We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a Court of equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which Courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only.

10 With the enactment of the Supreme Court of Judicature Act of 1873, the jurisdiction theretofore exercised by the courts of equity to appoint a receiver where it was "just or convenient" was conferred on all divisions of the High Court. However, the practice and principles formerly followed in equity were continued, and a receiver would be appointed only in circumstances where the Court of Chancery would, under its practice, have done so.

11 Before the Supreme Court of Judicature Act, 1873, a judgment creditor applying for equitable execution had to show, inter alia, that: (a) he had a judgment which entitled him to execution against the debtor; (b) that he had tried all he could to obtain satisfaction at law; and (c) that the debtor was possessed of a particular equitable estate which common law execution could not reach. After the Supreme Court of Judicature Act, 1873, in addition to condition (a) above, he was required to show in condition (b) that he was unable to obtain satisfaction by ordinary execution, and in condition (c) that the debtor was possessed of a particular asset which he was unable to reach by ordinary execution because of some legal impediment or difficulty but which would be available for execution if the legal impediment or difficulty were removed.

> Again, if the property over which it is sought to appoint a receiver can be reached by ordinary execution, a receiver will not, in the absence of special circumstances, be appointed. (Cababé, p. 102.)
>
> ... It must also be shown that legal execution is impossible owing to some impediment arising from the character in law of the judgment debtor's interest. (Kerr on Receivers, 15th ed., (1978), p. 93.)

12 The English rule which is equivalent to our R. 466 was made for the purpose of limiting the cases in which a receiver should be appointed to those where the probable costs were not out of proportion to the amount receivable or to the debt to be satisfied. The phrase "just or convenient" in the Judicature Act and in R. 466 do not add substantively or jurisdictionally to the scope of equitable execution. Historically, the development and use of equitable remedies did not expand the legal judgment or the property against which the creditor could seek his remedy.

13 So, while the appointment of a receiver is a discretionary matter, the basic principles must be applied in the exercise of that discretion.

14 I turn next to an examination of the matters deposed to in the affidavits used in the application before the learned chambers judge.

15 Clifford Peterson, president of the respondent, deposes that the respondent holds a judgment against the appellant Floyd Fox in the amount of $7,534.70 as of 5th June 1980, and that a writ of execution is filed. He deposes that the appellant Floyd Fox resides on the Blood Indian reserve and that, as a result of examination in aid of execution by his solicitors, he is informed and verily believes that all the assets of the appellant Floyd Fox are located on the said reserve, and that a garnishee of debts owing to the appellant Floyd Fox in November 1976 yielded only $141.94.

16 He then deposes as follows:

> THAT I am informed by my Solicitors, and do verily believe that certain monies are from time to time payable from the Government of Canada to the Respondent through the Blood Tribe Administration at Standoff, Alberta;
>
> THAT I make this Affidavit in support of an application for an Order appointing a receiver, to receive any and all monies owing or payable from the said Blood Tribe Administration to the Respondent, FLOYD FOX.

17 In another affidavit, Richard Alan Low, student-at-law, deposes as follows:

> THAT I am informed by Lillian Clelland, an employee in the land division of the Federal Department of Indian Affairs office in Lethbridge, Alberta, and I do verily believe that monies are from time to time obtained by the Government of Canada from the sale of mines and mineral leases and other interests in land located in the Blood Indian Reserve No. 148;
>
> THAT I am also informed by the said Lillian Clelland, and do verily believe, that these monies are from time to time distributed by the Government of Canada to members of the Blood Indian Band No. 148, on a "per capita" basis pursuant to resolutions of the said Band;
>
> THAT I am further informed by Jean Davis, also an employee in the Land Division of the Lethbridge office of the Federal Department of Indian Affairs, and I do verily believe, that the following per capita payments will be made before the end of 1980:
>
> a) November 19, 1980 — $40.00 per capita;
>
> b) Sometime before Christmas 1980 — $500.00 per capita;
>
> THAT I am further informed by the said Jean Davis and I do verily believe that she has heard of the Blood Band possibly authorizing a further $1,000.00 per capita payment sometime early in 1981;
>
> THAT I make this affidavit in support of an application for an Order appointing a receiver by way of equitable execution.

18 The affidavit of Clifford Peterson appears to satisfy items (a) and (b) above. But neither that affidavit nor the affidavit of Low shows that the debtor, Floyd Fox, is possessed of an asset which would be available for execution if legal impediments or difficulties were removed. These affidavits fail to show that there was any money owing and payable to the debtor at the date of the application.

19 It is settled law that only those debts which are due or accruing due to the debtor form part of his assets available in execution under whatever form.

> To be capable of attachment these must be in existence, at the date the attachment becomes operative, something which the law recognizes as a debt, and not merely something which may or may not become a debt. (17 Hals. (4th) 327.)

20 The legal authority for the payment by the government of Canada of moneys received from the sale of mines and mineral leases is in s. 64(*a*) of the Indian Act, R.S.C. 1970, c. I-6, which provides as follows:

> 64. With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> (*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands.

21 It is clear that distribution is to be made upon the authority and direction of the minister, with the consent of the council of the band. Nowhere in the material is it shown that the minister has authorized and directed such a distribution.

22 Even if we were to strip away all impediments which stood in the way of attachment of these moneys said to be "payable from time to time", impediments arising from the exemptive provisions of the Indian Act or from the fact the moneys would in the first instance be payable by the Crown, the moneys could not be attached, because they were not shown to be due or accruing due and therefore could not be made the subject of equitable execution.

23 In *Holmes v. Millage*, supra, Lindley L.J. says at p. 555:

> Courts of equity proceeded upon well-known principles capable of great expansion; but the principles themselves must not be lost sight of. The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by Cotton, L.J., in *Anglo-Italian Bank v. Davies* (1878) 9 Ch. D. 275 (C.A.); it is that Courts of equity gave relief where a legal right existed and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them. The Court could not restrain him from receiving them until his creditor could attach them under the process of garnishment; nor did the Court ever presume to enlarge a judgment creditor's rights; *nor, under colour of assisting him to enforce those rights, did the Court of Chancery reach by its process a kind of property which was not liable to execution*. (The italics are Belzil J.A.'s.)

24 And again, at p. 557:

> In the last-mentioned case [*Manchester & Liverpool Dist. Banking Co. v. Parkinson* (1888), 22 Q.B.D. 173 (C.A.)] an order for a receiver was discharged, because there was no difficulty in enforcing payment of a judgment by the ordinary legal methods. In this case there is such a difficulty; but is does not arise from any impediment which the old Court of Chancery had jurisdiction to remove. *The difficulty arises from the fact that future earnings are not by law attachable by any process of execution direct or indirect*. (The italics are Belzil J.A.'s.)

25 And at p. 559:

> Unless a man has assigned or charged his future earnings or has made a sum payable out of them, *they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable*. (The italics are Belzil J.A.'s.)

26 This was adopted by Beck J.A. of the Appellate Division of the Supreme Court of Alberta in *Hobbs v. A.G. Can.* (1914), 7 Alta. L.R. 371, 7 W.W.R. 256, 18 D.L.R. 395.

27 The respondent relies on *Manning Wanless Bldg. Supplies Ltd. v. Puskas* (1962), 39 W.W.R. 672 (Alta. T.D.), as supporting the proposition that future sums of money payable as income from the granting of real property leases may be the subject of a receiving order in Alberta. In that case Farthing J. made an order appointing the sheriff receiver "of the rents now, *or in the future*, payable by the various tenants of the said lands and premises". (The italics are mine.)

28 The learned judge found that the necessity of having to resort to a monthly succession of garnishment proceedings and the likelihood of such proceedings proving abortive was a "special difficulty" which justified equitable execution. In making the order, he followed *Imperial Bank. v. Twyford* (1905), 1 W.L.R. 157, where Harvey J. (later C.J.A.) of the Supreme Court of the Northwest Territories, sitting in chambers, made a similar order to receive future rents, but without reported reasons.

29 To the extent that these decisions purported to make future rents which were not yet due and payable the subject of equitable execution, they are contrary to authority and were wrongly decided. And, with all due respect, the "special difficulty" found by the learned judge in *Manning Wanless Bldg. Supplies Ltd.*, supra, was not an impediment in law which would have justified equitable execution.

30 The moneys which were made the subject of the receivership order here were moneys not yet declared payable. There was only an expectation of a gratuitous distribution by the minister. This was not a case for equitable execution. The learned chambers judge had no jurisdiction to appoint a receiver in these circumstances.

31 Having reached the conclusion that this appeal should be allowed and the receiving order set aside because the applicant did not in his material show his entitlement to the order, it is not necessary for us to consider the exemptive provisions of s. 89 of the Indian Act.

32 In the result, the appeal is allowed and the receiving order is set aside, with costs to the appellant here and in chambers below.

Appeal allowed; receiving order set aside.

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