

Ontario Hydro v. Endacom 2000 Inc.

Between
Ontario Hydro, applicant, and
Endacom 2000 Incorporated, respondent
[1995] O.J. No. 4546
Doc. B21/95
Ontario Court of Justice (General Division)
Commercial List
Spence J.

Heard: March 3, 1995.
Judgment: May 4, 1995.

Counsel:

Kenneth W. Chalmers, for the applicant.
J. Gardner Hodder, for the respondent.

¶ 1 **SPENCE J.**— Ontario Hydro as applicant applies for an order confirming the appointment of Orenstein & Partners Inc. as a private receiver of the respondent, Endacom, and for an order that Endacom deliver up control and possession of its property to Orenstein.

¶ 2 Endacom is in default under a demand debenture dated December 8, 1993 by which Endacom granted to Ontario Hydro a security interest in all of Endacom's undertakings, property and assets. Ontario Hydro demanded payment of the outstanding sum of \$250,000. Endacom failed to repay the amount demanded. On January 13, 1995, Ontario Hydro gave notice to Endacom of its intention to enforce its security in accordance with the provisions of the Bankruptcy and Insolvency Act. Ontario Hydro appointed Orenstein as a private receiver of Endacom pursuant to the terms of the debenture but Endacom refuses to deliver up possession and control of its property to Orenstein.

¶ 3 In addition to its default in payment, Endacom is in default under the debenture in other respects. It has moved its assets from its principal place of business without Ontario Hydro's written consent. It has failed to pay its payable when due. It is insolvent and it has effectively ceased to carry on business.

¶ 4 There is no indication that repayment of the amounts due to Ontario Hydro can be made by Endacom otherwise than through the exercise of Ontario Hydro's rights under the debenture.

¶ 5 Ontario Hydro submits that the applicable principle is that, since there is a default and the debenture provides for the appointment of a receiver, that appointment is to be confirmed as a matter of course unless the respondent can show that the appointment will result in irreparable harm not compensable in damages. See the decision of Borins J. in *Confederation Trust Co. v.*

Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 and the decision of Farley J. in Confederation Life Insurance Co. v. Double Y Holdings Inc. [1991] O.J. No. 2613.

¶ 6 The respondent contends that under s. 63(2) of the Personal Property Security Act of Ontario any disposal by a secured party of the collateral for an obligation must be made on terms under which "every aspect of the disposition is commercially reasonable". I think it is clear from the provisions of s. 63 that that section is dealing with a disposition involving a transfer of the interest in the collateral as part of a realization. The appointment of a private receiver, which is in issue here, does not involve any such transfer. Nor does the appointment affect the rights which the parties would have in the event that such a transfer is proposed. Accordingly, s. 63 does not present an impediment to the appointment of a receiver in this case.

¶ 7 Ontario Hydro indicated that it was willing to consider the alternative of a court-appointed receiver, although that would involve additional cost, but Endacom did not request such an appointment.

¶ 8 Endacom contends that Ontario Hydro is in breach of its obligations under the contractual arrangements between them, under which Endacom was to supply meters to Ontario Hydro in return for payments for those meters. Endacom alleges that Ontario Hydro failed to accept and pay for certain meters but there is a dispute between the parties as to the type of meters that were to be delivered and whether other terms of the arrangement were performed by Endacom. Endacom in effect asserts a right to set-off in respect of the amounts which it claims Ontario Hydro has defaulted in paying under these arrangements. It is not clear that Endacom has any claim against Ontario Hydro for the alleged default. The claim is disputed and is the subject of other proceedings between the parties. There is nothing in the terms of the demand debenture or the other arrangements between the parties that would make the payment obligation under the demand debenture subject to the dispute claim of Endacom, so I see no basis for any set-off.

¶ 9 With respect to irreparable harm, it appears that Endacom is not in a position to do the further work necessary to develop the meters itself. It has lost almost all of its senior staff and other employees and has no financial resources. Slokker Canada Holdings Limited ("Slokker") owns 40 per cent of the shares of Endacom but there is no indication that Slokker is prepared to underwrite the work. Accordingly, there is no reason to consider that the appointment of the receiver will interfere with the preservation of the asset. On the contrary, the appointment may facilitate that result, since it will afford Ontario Hydro an opportunity to determine whether it will support the undertaking of further development work on the meters.

¶ 10 Endacom claims that the receivership is contrary to the provisions of a non-disclosure agreement between Endacom and Ontario Hydro dated November 12, 1993. I do not see any basis for concluding that the non-disclosure agreement prevents the appointment of a receiver under the debenture.

¶ 11 Whether the non-disclosure agreement would bear upon any steps that might subsequently be taken by Ontario Hydro or the receiver was not specifically canvassed in argument and it is not necessary to determine that question at this stage.

¶ 12 For these reasons, it is in order to confirm the appointment of Orenstein & Partners Inc. as receiver of the respondent and to require the respondent to deliver up control and possession of its property to the receiver. Orders are to go accordingly. The order confirming the appointment of the receiver is to provide that the receiver shall not dispose of the assets of the respondent without first giving 60 days' advance written notice to the respondent or such other written notice as the court may approve. The parties may make submissions as to any undertaking for damages that may appropriately be required from Ontario Hydro. These orders are to be without prejudice to any rights that Endacom may have under its non-disclosure agreement with Ontario Hydro dated November 12, 1993 with respect to any disclosure concerning the property of Endacom which may be made or proposed to be made by Ontario Hydro or the receiver to third parties, subject to any further order of the court in this regard.

¶ 13 The respondent requests an order that Slokker be added as a party respondent and an applicant by counter-application. Order to go as sought. Slokker seeks an order setting aside the subordination agreement entered into between Slokker and Ontario Hydro relating to Endacom's outstanding indebtedness to Slokker. Nothing in respect of the efforts made by Ontario Hydro to assert its rights under the debenture indicates any basis for such an order. The application is accordingly denied. It is not clear whether the same issue between Slokker and Ontario Hydro is also raised in Endacom's action against Ontario Hydro. Subject to any submissions by the parties, the disposition here of the counter-application by Slokker should not, it seems to me, determine any issue in this regard which may be raised in the Endacom action.

¶ 14 The respondent seeks to have its action against Ontario Hydro added to the Commercial List. In view of the disposition of the present application and the possible interaction of the receivership with matters in issue in the action, it may be appropriate that an order go to that effect. However, I think that should now be a matter for submissions by the parties to the court, so that a decision can be made in the event such a transfer is still desired. The parties may make submissions as to costs.

SPENCE J.