COURT OF APPEAL

ON APPEAL FROM the order of The Honourable Mr. Justice Milman of the Supreme Court of B.C. pronounced on the 10th of August 2023.

BETWEEN:

IE CA 3 HOLDINGS LTD., IE CA 4 HOLDINGS LTD. and IRIS ENERGY LTD.

Appellants
(Respondents)

AND:

NYDIG ABL LLC

Respondent
(Petitioner)

AND:

PRICEWATERHOUSECOOPERS INC. in its capacity as receiver and manager over IE CA 3 Holdings Ltd. and IE CA 4 Holdings Ltd.

Respondent
(Receiver)

APPELLANTS' CROSS APPEAL RESPONSE FACTUM

IE CA 3 Holdings Ltd., IE CA 4 Holdings Ltd., and Iris Energy Ltd.

IE CA 3 Holdings Ltd.,
IE CA 4 Holdings Ltd. and Iris Energy Ltd.

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CHRONOLOGY

Date	Event
May 11, 2023	NYDIG files the Application seeking, among other things, a declaration regarding the scope of its collateral under the MEFAs, and other various alternative relief.
June 13-15, 2023	At the hearing of the Application, NYDIG submits to the chambers judge that the oppression relief and substantive consolidation relief were essentially dependent on the main "two questions": (1) whether NYDIG's collateral included Bitcoin; and (2) whether the appellants had engaged in fraudulent conveyances.
August 10, 2023	The chambers judge issues Reasons for Judgment for the Application which dismissed the relief sought in respect of the collateral but granted the fraudulent conveyance relief. The chambers judge also dismissed the relief sought in respect of the oppression remedy and substantive consolidation.
August 21, 2023	The appellants file a notice of appeal in respect of the fraudulent conveyance relief and proceed with its appeal.
December 13, 2023	The chambers judge releases a written memorandum advising counsel for the parties that, apart from the fraudulent conveyance relief, all other alternative relief sought in the Application is dismissed.
January 15, 2024	NYDIG files an application to extend the time to file a cross-appeal.
January 30, 2024	Justice Hunter grants NYDIG's request to extend the time to file a cross-appeal.

OPENING STATEMENT

Before the chambers judge, NYDIG sought a declaration that the Bitcoin mined by IEL using the hashpower generated by the financed equipment formed part of its collateral (the "**Collateral Relief**"). The claim for this relief was dismissed. NYDIG did not appeal from that order. In the alternative, NYDIG sought what it describes as the "Fraudulent Conveyance Relief", which the chambers judge granted. The appellants have appealed from that order.

In the further alternative, NYDIG sought what it describes as the "Oppression Remedy Relief" and the "Substantive Consolidation Relief". Both claims for relief were dismissed. NYDIG is seeking to remit these claims for relief to the chambers judge for consideration and reasons in the event that the appellants' appeal is allowed, on the basis that the chambers judge provided inadequate reasons.

The chambers judge found in his reasons that it was unnecessary to consider the appropriateness of the Oppression Remedy Relief in view of the conclusion he reached on the Fraudulent Conveyance Relief. However, on a practical level, and in the interests of justice, the appellants ask this Court to make its own determination on the record and dismiss the Oppression Remedy Relief. The chambers judge's findings in connection with the Collateral Relief foreclose any notion that NYDIG could have had a reasonable expectation, either as a shareholder or creditor, that the Bitcoin mined using hashpower generated by the financed equipment formed part of NYDIG's collateral, which is the primary basis on which NYDIG sought this relief. For this reason alone, the Oppression Remedy Relief must fail.

There is no basis for this Court to intervene with the chambers judge's dismissal of the Substantive Consolidation Relief. The "why" for dismissing the relief can readily be determined from the chambers judge's reasons and the record. NYDIG urged the chambers judge to apply and expand the doctrine in a novel way, which the chambers judge declined to do, finding that the relief sought more closely resembled the parent guarantee that NYDIG abandoned at the bargaining table.

The cross-appeal should be dismissed with costs to the appellants.

PART 1 – STATEMENT OF FACTS

I. THE APPLICATION BEFORE THE CHAMBERS JUDGE

1. In oral argument before the chambers judge, counsel for NYDIG stated that there were a number of different heads of relief sought on the Application, but really there were only two questions at stake: first, whether the Bitcoin that was mined using the financed equipment is included as "collateral" pursuant to the MEFAs (the Collateral Relief) and, second, whether the appellants engaged in a series of fraudulent conveyances (the Fraudulent Conveyance Relief). The Oppression Remedy Relief and Substantive Consolidation Relief were framed as further alternative relief sought arising from these two questions.

Transcript, Vol. 1, p. 14, ll. 12-22

2. Specifically, counsel for NYDIG asserted that the Oppression Remedy Relief was not a standalone head of relief but flowed from the contractual interpretation of the MEFAs and the expectations that were created by those contracts, as well as the way the appellants conducted their business. Counsel repeatedly stated that NYDIG's reasonable expectations were that the collateral under the MEFAs included the Bitcoin generated by the equipment financed by NYDIG.

Transcript, Vol. 1, p. 14, ll. 1-11;
Transcript, Vol. 1, p. 18, ll. 5-15;
Transcript, Vol. 1, p. 20, ll. 27-45;
Transcript, Vol. 1, p. 114, ll. 1-14

3. With respect to the Substantive Consolidation Relief, counsel for NYDIG stated that the relief sought was "based out of the conduct and behaviour of the companies and the way that they structured themselves, but the justification for making the substantive consolidation order goes back to our first two questions".

Transcript, Vol. 1, p. 14, ll. 1-11;
Transcript, Vol. 2, p. 294, ll. 44-47

4. In fact, NYDIG's stated purpose for seeking the Substantive Consolidation Remedy was to trace the value of the assets it alleged should not have left the

Debtors' estates, whether because it was proceeds of collateral or because it was fraudulently conveyed. In other words, NYDIG was seeking to invoke this doctrine for the limited purpose of recovering the Bitcoin proceeds that were realized by IEL from the hashpower services it purchased from the Debtors.

Transcript, Vol. 1, p. 107, ll. 31-35 and Vol. 2, p. 288, ll. 24-33

5. NYDIG's approach to the application before the chambers judge was, therefore, that the Oppression Remedy Relief and the Substantive Consolidation Relief relied entirely on the chamber judge's findings with respect to the main "two questions" the chambers judge had to answer. The chambers judge adopted the same approach in his reasons.

II. THE CHAMBERS JUDGE'S REASONS

6. In his reasons, the chambers judge spent approximately 26 pages outlining the background facts that were material to the Application. After doing so, the chambers judge addressed at length the two key questions that were presented to him by NYDIG's counsel, the first, whether the scope of NYDIG's collateral under the MEFAs included Bitcoin; and second, whether the appellants engaged in a series of fraudulent conveyances.

Transcript, Vol. 1, p. 14, ll. 12-22

7. After dismissing the Collateral Relief and granting the Fraudulent Conveyance Relief, the chambers judge considered the other relief sought, finding it was unnecessary to decide the Oppression Remedy Relief given that the Oppression Remedy Relief takes the form of a similar declaration to the Fraudulent Conveyance Relief. As noted above, this was the exact approach that NYDIG urged the chambers judge to adopt at the hearing of the Application.[1]

RFJ, para. 151;

[1] During oral submissions, counsel for NYDIG also noted that the same facts and issues relevant to the scope of the collateral and the fraudulent conveyance analysis are relevant to the Oppression Relief and the Substantive Consolidation Relief: Transcript, Vol. 1, p. 18, ll. 16-27 and p. 20, ll. 27-45.

Transcript, Vol. 1, p. 77, ll. 42-47, p. 78, l. 2 and p. 139, ll. 13-15

8. With respect to the Substantive Consolidation Relief, the chambers judge noted that such relief has previously been available in a liquidation or reorganization of a corporate group but, as acknowledged by counsel for NYDIG, had never been applied in Canada to consolidate solvent companies like IEL with its insolvent affiliates. The chambers judge decided it was unnecessary to consider expanding the ambit of the doctrine in the manner urged and noted, as a second reason for refusing that relief, that it would resemble the parent guarantee that NYDIG abandoned in the course of negotiations.

RFJ, para. 152

PART 2 – ISSUES ON APPEAL

9. The chambers judge found in his reasons that it was unnecessary to consider the appropriateness of the Oppression Remedy Relief (relief which was sought by the respondent in the alternative) in view of the conclusion he reached on the Fraudulent Conveyance Relief. However, on a practical level, and in the interest of justice, the appellants invite this Court to make its own determination on the record and dismiss the Oppression Remedy Relief.

10. The chambers judge did not err in law in respect of the Substantive Consolidation Relief. The "why" for dismissing this relief can readily be determined from the chambers judge's reasons and the record. The failure of a chambers judge to include an extract of a legal test is not a standalone ground of appeal and instead is subsumed by the adequacy of reasons analysis.

PART 3 – ARGUMENT

I. THE OPPRESSION REMEDY RELIEF SHOULD BE DISMISSED

11. If a judge does not consider an issue, it is open to the appellate court to make the determination itself. It is also well established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level.

Genesis Fertility Inc. v. Yuzpe, 2021 BCCA 420 at para. 37;

Hollis v. *Dow Corning Corp*., 1995 CanLII 55 (SCC) at para. 33;

West Moberly First Nations v. British Columbia, 2020 BCCA 138 at para. 136

12. In the present case, all the evidence on the Application was documentary and forms part of the record, the disposition of the case did not turn on credibility, the evidentiary record underlying controversial findings is sufficiently clear, and the Application was made in the context of an ongoing insolvency proceeding. In these circumstances, the appellants submit it is both appropriate and in the interests of justice for this Court to make a determination on this issue.

13. Section 227 of the *Business Corporations Act*, SBC 2002, c 57 provides shareholders, and creditors in some circumstances, with the ability to seek an order from the court declaring that the affairs of the company have been exercised in a manner that is oppressive to one or more shareholders.

14. Leaving aside whether NYDIG has standing to bring an oppression claim as a shareholder of IEL or a creditor of the Debtors (which was a contested issue at the Hearing), based on the chambers judge's uncontested findings, it is clear that NYDIG cannot satisfy the test for a finding of oppression on the record.

15. The test for a finding of oppression requires that evidence be presented to meet the standard laid out in two related questions: (a) does the evidence support the reasonable expectation asserted by the claimant, and (b) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest.

BCE Inc. v. 1976 Debentureholders, 2008 SCC 69 at para. 56

16. The reasonable expectations of commercial parties who enter into contracts with a company that are negotiated at arm's length can only be the expectations grounded in the agreement negotiated between the parties. A bad bargain cannot alter a creditor's reasonable expectations or render any alleged breach of a contract as oppressive.

J.S.M. Corp (Ontario) Ltd. v. Brick Furniture Warehouse Ltd., 2008 ONCA 183 at para. 62;

Cote v. Milltown Marina & Boatyard Ltd., 2015 BCSC 2033 at para. 79

17. On the Application, the evidence presented by NYDIG to the Court regarding NYDIG's reasonable expectations was that the collateral included any Bitcoin that was mined using the hashpower from the financed equipment. NYDIG's affiant deposed that NYDIG did not, and would not, have entered into the MEFAs if the Bitcoin mined by the financed equipment was not part of NYDIG's collateral package.

Shah #2 at paras. 93, 111-114, 137, JAB pp. 513, 520, 525

18. However, in his reasons, the chambers judge found that the collateral did not include the Bitcoin mined by IEL. This finding is not contested on appeal.

19. In this regard, the chambers judge made an express finding that the parties understood the MEFAs did not include Bitcoin that IEL obtained by using the hashpower generated by the financed equipment. This conclusion was based on written emails exchanged between the parties during the negotiations for the MEFAs and specific terms of the MEFAs themselves.

RFJ, paras. 107-109

20. In light of these findings by the chambers judge, there is no basis on which NYDIG could have had the reasonable expectations that it asserts.

21. At the Hearing, NYDIG also argued that it had reasonable expectations that there would be no fraudulent conveyances. However, if the appellants' appeal is allowed, there were no fraudulent conveyances and no remedy would be available. In other words, even if NYDIG had such expectations, there was no breach.

Transcript, Vol. 1, p. 101, ll. 1-11, p. 113, ll. 44-47, and p. 114, ll. 1-14

22. For these reasons, this Court should dismiss the Oppression Remedy Relief.

II. THERE IS NO REASON TO INTERVENE WITH THE DISMISSAL OF THE SUBSTANTIVE CONSOLIDATION RELIEF

A. Adequacy of Reasons: The Law

23. Reasons are sufficient if they address the live issues and the parties' key arguments. Even where the logical connection between the evidence and the decision cannot be discerned (i.e., the reasons are objectively inadequate), appellate intervention will not be justified if the appellate court can discern the "why" of a decision from the record.

Robertson v. Dhillon, 2015 BCCA 469 at para. 63;

Kooner v. Kooner, 2019 BCCA 188 [***Kooner***] at para. 34

24. This analysis is contextual, and includes the issues raised at trial, the evidence adduced, and the arguments made before the trial judge. The reasons are to be read as a whole with a presumption that the trial judge knows the record, the law, and considered the parties' arguments.

1346134 Ontario Limited v. Wright, 2023 ONCA 307 at para. 55

25. A failure to give adequate reasons is not a free-standing basis for appeal. Nor can the appellate court intervene merely because it believes the judge did a poor job of expressing themselves.

Kooner at para. 34

B. The Record Supports a Dismissal of the Substantive Consolidation Relief

26. There is no specific authority in the *Bankruptcy and Insolvency Act* to grant an order for substantive consolidation. However, some Canadian courts have invoked their equitable jurisdiction under section 183 of the Act when making such orders.

27. The chambers judge noted, citing *Nortel Networks Corporation (Re)*, 2015 ONSC 2987 [***Nortel***], that substantive consolidation has previously been said to be available "[i]n a liquidation or reorganization of a corporate group." In *Nortel,* Justice Newbould summarized the doctrine of substantial consolidation as follows:

> [213] In a liquidation or reorganization of a corporate group, the doctrine of substantive consolidation has emerged in order to provide a

> mechanism whereby the court may treat the separate legal entities belonging to the corporate group as one. In particular, substantive consolidation allows for the combination of the assets and liabilities of two or more members of the group, extinguishes inter-company debt and creates a single fund from which all claims against the consolidated debtors are satisfied. In effect, under substantive consolidation, claims of creditors against separate debtors instantly become claims against a single entity.

Nortel at para. 213

28. In this case, it would be unprecedented to employ the doctrine to consolidate separate, solvent, entities that are not a party to the liquidation or reorganization proceedings. The chambers judge recognized this in his reasons, noting that counsel for NYDIG candidly acknowledged during the Hearing that the doctrine has never been applied in Canada to bring about the substantive consolidation of a solvent entity like IEL (who is not a party in the receivership proceedings) with its insolvent affiliates.

RFJ, para. 152

29. Further, NYDIG sought to use this extraordinary remedy as a means to resolve the alleged prejudice it suffered as a result of "the alienation of Bitcoin or the hashpower from the collateral." As noted above, in essence, NYDIG sought to use the doctrine of substantive consolidation as a tracing remedy to receive the proceeds of what it alleged was its collateral, as it would "ease" the collection process if the court were to void or set aside the Hashpower Agreements.

Transcript, Vol. 1, p. 135, ll. 14-24 and p. 140, ll. 30-44

30. The use of the doctrine in the manner urged by NYDIG would be entirely inconsistent with the result of an order for substantive consolidation which is to combine all of the assets and liabilities of different entities into one. Counsel for NYDIG acknowledged in oral submissions that this would be "pushing the application of substantive consolidation."

Transcript, Vol. 2, p. 294, ll. 44-45

31. More fundamentally, the Substantive Consolidation Relief is clearly inconsistent with the chambers judge's finding, which was not disputed at the Hearing, that IEL did not provide a parent guarantee to secure the Debtors' obligations under the MEFAs. If substantive consolidation were ordered, IEL would be liable for the full amount of the debt the Debtors owe NYDIG, contrary to the express terms of the MEFAs, and also the Parent Letter Agreement in which NYDIG acknowledged and agreed that IEL will not be liable or responsible for any obligations under the MEFAs and does not act as a guarantor thereunder or otherwise.

RFJ, para. 44

32. The chambers judge expressly refused the Substantive Consolidation Relief for this reason, that is, it more closely resembled the parent guarantee that NYDIG abandoned at the bargaining table.[2]

RFJ, para. 152

33. For these reasons, the "why" of dismissing the Substantive Consolidation Relief is evident on a review of the record. As adequacy of reasons is not a stand-alone reason for appeal, the chambers judge did not commit an error of law that warrants this Court's intervention. NYDIG's suggestion that failing to provide an extract of the legal test is a separate error of law is not supported by the cases it relies on. As such, the cross-appeal should be dismissed.

III. IN THE ALTERNATIVE, REMIT TO THE CHAMBERS JUDGE

34. In the alternative, the appellants submit that the Oppression Remedy Relief and the Substantive Consolidation Relief should be remitted to the chambers judge for reconsideration on the evidence that was before him at the hearing of the Application.

Sabey v. von Hopffgarten Estate, 2014 BCCA 360 at para. 83

[2] The chambers judge found that when NYDIG unilaterally reduced the size of the financing it was willing to provide, NYDIG abandoned its demand that IEL guarantee the obligations under the MEFAs: RFJ, paras. 39 and 112.

PART 4 - NATURE OF ORDER SOUGHT

35. The appellants seek an Order that:

(a) the cross-appeal is dismissed;

(b) in the alternative, the Oppression Remedy Relief and the Substantive Consolidation Relief is remitted to the chambers judge for reconsideration on the evidence that was before the chambers judge at the original hearing of the Application; and

(c) the appellants be granted their costs of this cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF FEBRUARY, 2024.

Kieran E. Siddall, Scott Boucher, and Candace Formosa

Counsel for the Appellants (Respondents by Cross Appeal)

APPENDICES: LIST OF AUTHORITIES

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APPENDICES: ENACTMENTS

BUSINESS CORPORATIONS ACT

[SBC 2002] C 57

Complaints by shareholder

227 (1) For the purposes of this section, “shareholder” has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

(a) directing or prohibiting any act,

(b) regulating the conduct of the company’s affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

(5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

(6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,

(a) the company is prohibited from paying the person the full amount of money to which the person is entitled,

(b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and

(c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.

(7) If an order is made under subsection (3) (o), Part 10 applies.

BANKRUPTCY AND INSOLVENCY ACT

[RSC 1985] C B-3

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.