COURT OF APPEAL

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

B E T W E E N:

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)

RESPONDENT'S CROSS APPEAL FACTUM

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NYDIG ABL LLC

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SECTION 1: RESPONDENT'S FACTUM ON APPEAL

CHRONOLOGY

Date	Event
2020	Arctos Capital ("**Arctos**") and IE CA 2 Holdings Ltd. ("**IE CA 2**"), a subsidiary of Iris Energy Limited ("**IEL**"), negotiate and enter into a Master Equipment Financing Agreement (the "**IE CA 2 MEFA**") pursuant to which Arctos loans IE CA 2 approximately $4 million to finance its purchase of Bitcoin mining equipment, which IE CA 2 in turn uses to mine Bitcoin.
April 2021	Announcement that the Respondent, NYDIG ABL LLC ("**NYDIG**"), will acquire Arctos.
May 25, 2021	Arctos and Appellant IE CA 3 Holdings Ltd. ("**IE CA 3**"), also a subsidiary of IEL, enter into a separate Master Equipment Finance Agreement (the "**IE CA 3 MEFA**") which provides IE CA 3 with advances to fund the purchase of Bitcoin mining equipment, which IE CA 3 deploys at hosting sites located in British Columbia. The IE CA 3 MEFA references a "hashpower agreement" but no hashpower agreement is provided to Arctos or later NYDIG. NYDIG eventually learns that IE CA 3 was providing hashpower to IEL via an unwritten agreement (the "**IE CA 3 Hashpower Arrangement**").
November 2021 - March 2022	NYDIG takes over Arctos' business and has ongoing discussions with Appellant IE CA 4 Holdings Ltd. ("**IE CA 4**", together with IE CA 3, the "**Debtors**"), another subsidiary of IEL, regarding a new credit facility.
March 16, 2022	The Debtors provide copies of the IE CA 4 hashpower agreement (the "**IE CA 4 Hashpower Agreement**" and, with the unwritten IE CA 3 Hashpower Arrangement, the "**Hashpower Agreements**") and

Date	Event
	hosting agreement (the "**Hosting Agreement**"), which are referenced in the IE CA 4 MEFA, to NYDIG.
March 22, 2022	NYDIG and IE CA 4 enter into a Master Equipment Finance Agreement (the "**IE CA 4 MEFA**", together with the IE CA 3 MEFA, the "**MEFAs**" and each a "**MEFA**") for the purposes of funding additional Bitcoin mining equipment (such equipment, together with the mining equipment acquired by IE CA 3 pursuant to the IE CA 3 MEFA, the "**Financed Equipment**")
March 22, 2022	IE CA 4 enters into the hosting agreements with IEL subsidiaries IE CA Development Holdings 2 Ltd., IE CA 4 Holdings 4 Ltd. and Podtech Data Centers Inc. (collectively, the "**Hosts**", and together with the Debtors and IEL, the "**IEL Group**").
March 24, 2022	NYDIG and IEL enter into the "**Parent Letter Agreement**", which states that IEL agrees that its rights to NYDIG's collateral under the IE CA 4 MEFA are subordinate to NYDIG's, and that NYDIG has the right to give notice to terminate the IE CA 4 Hashpower Agreement, which would transfer IEL's right to the hashpower generated by the IE CA 4 Financed Equipment to IE CA 4.
July 2022	IEL approaches NYDIG about potential refinancing of the MEFAs. Since the execution of the IE CA 4 MEFA, IEL has been subsidizing the Debtors' payments to NYDIG because the Hashpower Agreements do not provide the Debtors with enough income to make their scheduled payments under the MEFAs.
October 3, 2022 – November 4, 2022	NYDIG and IE CA 3 and IE CA 4 hold restructuring talks. Such talks are ultimately unsuccessful.

Date	Event
October 25, 2022	The Debtors default on their obligations under the MEFAs due to failures to make payments when due and a failure to maintain sufficient insurance on NYDIG's collateral.
October 25, 2022	NYDIG agrees to extend the payment deadline from October 25 to November 8 on the condition that the Debtors continue to engage in good faith restructuring negotiations with NYDIG.
November 2, 2022	IEL issues a press release (the "**Press Release**") during restructuring negotiations that states, among other things, that the MEFAs were structured to be limited recourse financing arrangements to protect IEL's business structure.
November 4, 2022	After the issuance of the Press Release and the Debtors' presentation of a restructuring term sheet that is unacceptable and unworkable, NYDIG sends an acceleration letter to the Debtors noting that they are in default of the MEFAs and that they have violated the payment deadline extension agreement, resulting in a further default of their obligations to NYDIG.
November 4, 2022	IEL causes the Hosts (who had an identical board of directors as the Debtors, and like the Debtors were under the common control of IEL) to terminate the Hosting Agreements with the Debtors. The Debtors also disconnect the Financed Equipment, which prevents any revenue from being generated from it.
November 15, 2022	NYDIG sends the Debtors notices of default.
November 18, 2022	NYDIG sends the Debtors demand letters, along with notices of intention to enforce security, requiring payment in full by Nov 29, 2022.

Date	Event
January 20, 2023	NYDIG files a petition with the Supreme Court of British Columbia seeking the appointment of PricewaterhouseCoopers Inc. ("**PwC**") as receiver over the Debtors (in such capacity, the "**Receiver**").
February 3, 2023	The chambers judge grants an order (the "**Receivership Order**"), appointing PwC as Receiver.
April 17, 2023	The chambers judge grants the Receiver's application to compel IEL to provide information regarding the Bitcoin proceeds generated with the Financed Equipment. The information subsequently provided by IEL indicates that there is a large discrepancy between the value that IEL receives for the hashpower and the consideration that it pays the Debtors for the same hashpower.
May 9, 2023	NYDIG files an application (the "**Application**") seeking an order, among other things, that (a) any transactions between the Debtors and IEL pursuant to the Hashpower Agreements are fraudulent conveyances that are void as against NYDIG (the "**Fraudulent Conveyance Relief**"), (b) the affairs of the Debtors and/or IEL have been conducted, and the powers of the directors of the Debtors and/or IEL have been exercised, in a manner that is oppressive to NYDIG (the "**Oppression Remedy Relief**"), and (c) the assets and liabilities of the Debtors, IEL and the Hosts are substantively consolidated (the "**Substantive Consolidation Relief**").
June 13-15, 2023	The Application is heard by the chambers judge.
August 10, 2023	The chambers judge releases reasons for judgment in respect of the Application (the "**Reasons**") that grant the Fraudulent Conveyance Relief. Due to the chambers judge's finding that the impugned transactions were fraudulent conveyances, the Reasons provided

Date	Event
	that it was "unnecessary" to consider the Oppression Remedy Relief and "not a case in which it is necessary to consider" the Substantive Consolidation Relief.
August 21, 2023	The appellants file a notice of appeal in respect of the Fraudulent Conveyance Relief.
December 13, 2023	Following the submission of forms of orders in respect of the Reasons by the IEL Group, on the one hand, and NYDIG, on the other, the chambers judge advises the parties in a written memorandum that he had refused the Oppression Remedy Relief and the Substantive Consolidation Relief in the Reasons.
January 15, 2024	NYDIG files an application (the "**Cross Appeal Leave Application**") with the Court of Appeal for an extension of time to file a cross-appeal in respect of the refusal of the Oppression Remedy Relief and the Substantive Consolidation Relief.
January 30, 2024	The Court of Appeal hears the Cross Appeal Leave Application and grants NYDIG's request for an extension of time to file a notice of cross-appeal and cross-appeal factum in respect of the Oppression Remedy Relief and the Substantive Consolidation Relief, which were required to be served and filed on January 30, 2024.

OPENING STATEMENT

The Appellants seek to overturn the decision of the chambers judge that declared certain transactions carried out by the Appellants and IEL to be fraudulent conveyances. The basis of their position is that, because NYDIG was aware of the corporate structure of the IEL Group and the fact that hashpower was being sold by the Debtors to IEL, no fraudulent conveyance could be possible. This mischaracterizes the facts, the Reasons, the law on fraudulent conveyances and the appropriate appellate standard of review.

The Reasons are clear that the requirements of Section 1 of the *Fraudulent Conveyances Act* were all satisfied. In particular, the chambers judge determined that the Debtors had the necessary fraudulent intent necessary to establish a series of fraudulent conveyances under the FCA, based on his finding that numerous factors established by the jurisprudence as "badges of fraud" were present. The chambers judge explicitly acknowledged that NYDIG was generally aware of the IEL Group's corporate structure and that hashpower was being sold by the Debtors to IEL, but he also explicitly found that NYDIG's knowledge did not extend to the underlying facts that formed the very basis for his determination that a series of fraudulent conveyances occurred. This rationale, encapsulated in paragraphs 143-145 of the Reasons, is a full answer to the Appellants' fundamental argument on this appeal and is due considerable deference by this Court.

Accepting the arguments of the Appellants would also lead to a significant and unfounded expansion of the scope of appellate review from its current state. The Appellants' arguments on the alleged consideration of irrelevant evidence ignore the key role of materiality in the law of appellate review. A finding by this Court that any of the factual errors the Appellants allege were committed would widen the definition of the terms "palpable" and "overriding" as they are delineated in the current law on appellate standard of review. The chambers judge based his findings on evidence properly available to him, made factual inferences from those facts that the established law permit him to make, did not err in any way and certainly did not err in any way that was determinative to the broader factual issue of fraudulent intent.

The appeal should be dismissed with costs to the Respondent.

PART 1 – STATEMENT OF FACTS

I. THE DEBTORS' BUSINESS, PROPERTY AND LIABILITIES

1. The Debtors are entities incorporated under the laws of British Columbia and wholly owned subsidiaries of IEL, whose boards of directors were at all relevant times composed of common directors with IEL and the Hosts.

Affidavit No. 2 of Tejas Shah, made May 9, 2023 (the "**Second Shah Affidavit**") at paras. 24-27 and 32, Joint Appeal Book ("**JAB**"), Vol. 1, pp. 497-498

2. The Debtors collectively owe NYDIG over $100 million pursuant to loans that NYDIG made to the Debtors under the MEFAs.

Reasons at para. 1, Appeal Record ("**AR**"), p. 70

3. NYDIG is a New York based company whose business includes providing loans to Bitcoin miners like the Debtors.

Reasons at para. 31, AR, p. 77

4. IEL is an Australian corporation founded by William and Daniel Roberts, both of whom are current directors of IEL. IEL became a public company in 2021 and it has 27 subsidiaries in Canada, the United States and Australia.

Reasons at para. 10, AR, p. 72

5. The Debtors used the funds from the loans to purchase the Financed Equipment, which are used to "mine" cryptocurrency, specifically Bitcoin.

Reasons at paras. 13-15 and 45, AR, pp. 73 and 81

6. Bitcoin uses a technology called the "blockchain" to function. New bitcoins are created as a reward for a process called "mining", the essential process of creating new blocks and appending transactions in Bitcoin's blockchain. Mining is designed to be computationally resource intensive, so that it is impractical for any one entity to modify or control the blockchain. To be considered valid, blocks must contain a "proof of work", a piece of data that is difficult to produce but easy to verify. Producing a proof of work is a random computational process and therefore requires repeated trial and error conducted by the type of specialized computers the Debtors purchased with NYDIG's financing.

Affidavit No. 1 of Tejas Shah, made January 17, 2023 ("**First Shah Affidavit**")
at paras. 14-18, JAB, Vol. 1, pp. 4-5

7. The computing power of a cryptocurrency mining operation is measured in units known as "hashpower". Hashpower is used to make guesses regarding inputs to a mathematical formula known as a "hash algorithm". A correct guess will result in a solution, a valid "hash," which in turn results in Bitcoin. The speed at which these computers produce these solutions, whether correct or not, is called the "hashrate."

First Shah Affidavit at para. 15, JAB, Vol. 1, p. 4

8. As described by the chambers judge, the Debtors and IEL have created a complex corporate structure and business model for their Bitcoin mining operations:

> The Iris Group has divided its own Bitcoin mining operations into three distinct components, mediated through a web of non-arm's length inter-company agreements.

Reasons at para. 12, AR, p. 73

9. The first step of the IEL business structure involves using loans like NYDIG's to finance the purchase of Bitcoin mining equipment via a subsidiary (the Debtors being examples of this type of subsidiary).

Reasons at para. 13, AR, p. 73

10. The second step involves using more subsidiaries (such as the Hosts) that own or lease physical warehouse space to run the miners and provide the necessary electrical power, ventilation and other infrastructure. These hosts are paid pursuant to a contract (in the case of the Hosts, sometimes undocumented) pursuant to which the IEL subsidiary that owns the mining equipment (ie: the Debtors) pay via a flat rate based on a kilowatt per hour (or "kWh") calculation of the electricity provided. As stated above, the Hosts and the Debtors and IEL are subsidiaries of IEL, with common directors and under common control.

Reasons at para. 14, AR, p. 73
Second Shah Affidavit at paras. 24-27 and 32, JAB, Vol. 1, pp. 497-498

11. The third step involves IEL purchasing hashpower from the subsidiaries that own the mining equipment (ie: the Debtors) and then using that hashpower to solve the

problems that produce additional blocks and reward IEL, via a mining pool, with Bitcoin. IEL pays its subsidiaries that own the miners (ie: the Debtors) a fixed fee for the hashpower, set on a kWh basis pursuant to a contract, an unusual arrangement IEL describes as a "hashpower agreement," which in the case of IE CA 3 was undocumented. IEL then liquidates the Bitcoin for fiat currency (in this case, US dollars).

Reasons at para. 15, AR, p. 73

12. The Debtors and the Hosts collectively ran cryptocurrency mining operations at facilities located in Mackenzie, Canal Flats and Prince George, British Columbia, using the Financed Equipment, being approximately 37,800 specialized mining computers financed by, and subject to the security interests of, NYDIG.

First Shah Affidavit at paras. 21, 30 and 38, JAB, Vol. 1, pp. 6, and 8-9

II. THE NYDIG-IEL RELATIONSHIP AND NEGOTIATIONS

A. IE CA 2 MEFA

13. In late 2020, around the time of the incorporation of the Debtors, the principals of IEL met with Arctos, which was in the business of providing equipment loans to cryptocurrency miners, and negotiated and entered into the IE CA 2 MEFA.

Reasons at paras. 22-28, AR, pp. 75-76

B. IE CA 3 MEFA

14. Following the execution of the IE CA 2 MEFA, IEL and Arctos commenced further negotiations, which resulted in the execution of the IE CA 3 MEFA in May 2021.

Reasons at paras. 29-32, AR, pp. 76-77

15. Prior to the closing of the IE CA 3 MEFA, NYDIG announced, in April 2021, that it was acquiring Arctos.

Reasons at para. 31, AR, p. 31

16. The IE CA 3 contained references to a "Hosting Agreement" and a "Hashpower Agreement", but neither document was ever provided to NYDIG and, in fact, no such agreements were ever entered into between IE CA 3 and the Hosts or IE CA 3 and IEL respectively. The Debtors claim that, at all times that IE CA 3's mining

equipment was in use, it operated pursuant to an unwritten hashpower agreement on the same terms as the IE CA 4 Hashpower Agreement described below.

Reasons at paras. 89 and 97, AR, pp. 94-95

C. IE CA 4 MEFA

17. After the closing of the IE CA 3 MEFA, NYDIG and IEL entered into negotiations for a further MEFA. IE CA 4 was the entity chosen to be the vehicle for this particular MEFA, and the IE CA 4 MEFA was executed on March 24, 2022.

Reasons at paras. 32-33 and 41, AR, pp. 77-78 and 80

18. The IE CA 4 MEFA also referenced a "Hashpower Agreement" and a "Hosting Agreement." A copy of the IE CA 4 Hashpower Agreement was provided to NYDIG on March 16, 2022, several days before the IE CA 4 MEFA was executed. NYDIG is not a party to the IE CA 4 Hashpower Agreement and was not consulted on its terms and structure.

Reasons at paras. 35 and 43, AR, pp. 78 and 80

19. Following its appointment, the Receiver, reviewed the IE CA 4 Hashpower Agreement and definitively concluded that the compensation structure thereunder is commercially unreasonable. Fundamental terms that would be expected in such an agreement between arms-length parties are missing, such as the quantity and location of the hashpower delivery and a description of the mining pools that would receive hashpower.

Third Report of the Receiver dated June 7, 2023 (the "**Third Report**")
at para. 10.2, JAB, Vol. 2, pp. 1939-1940

First Report of the Receiver dated March 10, 2023 (the "**First Report**")
at para. 2.16, JAB, Vol. 2, pp. 1774-1775

20. The commercial unreasonableness and missing provisions are concerning for a non-arm's length agreement, which undermines the legitimacy of the Hashpower Agreements (which, again, in the case of IE CA 3 was not even documented).

Second Shah Affidavit at para. 127, JAB, Vol. 1, p. 523

21. The price paid by IEL for the hashpower provided by the Debtors was fixed at a rate that made it impossible for IE CA 4 (and by implication IE CA 3, since IE CA 3's arrangements were undocumented) to make interest payments due to NYDIG.

Reasons at para. 50, AR, p. 82

22. Indeed, NYDIG has never encountered a hashpower agreement in connection with any of the miners it finances, and in the face of obvious deficiencies in the document, NYDIG was told by IE CA 4 during the negotiation of the IE CA 4 MEFA that the IE CA 4 Hashpower Agreement was necessary for IEL's overall tax planning structure intended to avoid CRA obligations. This tax justification for the Hashpower Agreements was corroborated by the Receiver in discussions with IEL's tax advisors. The chambers judge subsequently found that "it would have appeared to NYDIG that the Debtors were also receiving a subsidy from IEL in order to put them in a position to meet their financial obligations to NYDIG."

Second Shah Affidavit at para. 127, JAB, Vol. 1, p. 523
Third Report, para. 12.5, JAB, Vol. 2, p. 1943
Reasons at para. 145, AR, p. 109

D. Parent Letter Agreement

23. IEL did not guarantee the obligations of the Debtors, but NYDIG and IEL did enter into the Parent Letter Agreement. The Parent Letter Agreement included four key provisions which were summarized by the chambers judge:

(a) IEL acknowledges the terms of the IE CA 4 MEFA and its adjunct agreements;

(b) IEL agrees that its rights to NYDIG's collateral under the IE CA 4 MEFA (including an acknowledged security interest in all of IE CA 4's personal property, including the Financed Equipment and IE CA 4's rights under the IE CA 4 Hashpower Agreement) are subordinate to those of NYDIG;

(c) IEL agrees that despite IEL's right to terminate the Hashpower Agreement, NYDIG or its agent may give notice to terminate it (as contemplated by the IE CA 4 MEFA), at which point the Hashpower Agreement shall terminate,

and all of IEL's right in the "Hashpower" (as that term is defined in the Hashpower Agreement) will revert to IE CA 4; and

(d) NYDIG and its agent acknowledge and agree that IEL will not be liable or responsible for any of IE CA 4's obligations under the IE CA 4 MEFA and related agreements and does not act as a guarantor thereunder or otherwise.

Reasons at paras. 79-83, AR, pp. 92-93

III. THE DEBTORS' DEFAULTS AND NYDIG'S DEMANDS

24. As noted by the chambers judge, the Debtors "from the beginning…were not financially viable on their own, but depended heavily on IEL to make the loan payments owing to NYDIG." As a result of the Debtors' unsustainable business structure, IEL subsidized the Debtors' income through a series of inter-company transfers.

Reasons at para. 50, AR, p. 82

25. In early October 2022, the Debtors were in dire financial circumstances and restructuring discussions began. In order to try and reach a restructuring agreement, NYDIG, at the request of the Debtors, agreed to extend the pending October 25, 2022 payment deadline by two weeks to November 8, 2022. In exchange for the extension of the payment deadline, the Debtors agreed to commit to good faith restructuring discussions with NYDIG.

Reasons at para. 51, AR, p. 82
First Shah Affidavit at paras. 62-66, AR, pp. 15-16

26. On November 2, during the two-week extension period, IEL issued the Press Release that, among other things, stated that the MEFAs "has been intentionally structured as limited-recourse equipment financings, with a view to protecting the underlying business and data center infrastructure that the Iris Group had built." NYDIG considered the Press Release to signal a clear unwillingness on the part of the IEL Group to find a reasonable resolution to the MEFA defaults.

First Shah Affidavit at para. 70, AR, pp. 17-18

27. The combination of the issuance of the Press Release and further unacceptable restructuring offers by the Debtors led NYDIG to issue an acceleration letter (the "**Acceleration Letter**") declaring the Debtors to be in default of the MEFAs.

Reasons at para. 54, AR, p. 83

28. After the issuance of the Acceleration Letter, the Debtors made no further payments to NYDIG. Additionally, the Hosts (which were, like the Debtors, controlled by IEL) terminated their agreements with the Debtors and, NYDIG subsequently learned after the appointment of the Receiver, disconnected the Financed Equipment (meaning it was no longer producing any hashpower or Bitcoin to generate revenue to cover payments to NYDIG) and put the Financed Equipment, covered in shrink wrap, on pallets. The actions of the Debtors and the Hosts meant that the Financed Equipment only operated at close to full capacity for a very short time (from sometime in October 2022 to November 4, 2022).

Reasons at para. 55, AR, p. 83
Third Report at para. 9.4.1, JAB, Vol. 2, p. 1937

29. NYDIG responded to the actions of IEL, the Debtors and the Hosts by sending a letter to the Debtors on November 15, 2022 that noted the Debtors in default under the MEFAs. On November 18, 2022, NYDIG sent letters to the Debtors requiring full payment within 10 days and attaching notices of intention to enforce security.

Reasons at para. 57, AR, p. 84

IV. APPOINTMENT OF THE RECEIVER

30. NYDIG filed a petition record with the British Columbia Supreme Court for the appointment of PwC as Receiver over the Debtors on January 20, 2023. The petition was heard on February 3, 2023 and the Receivership Order, substantially in the form of the model receivership order, was granted the same day.

Reasons at para. 59, AR, p. 84

V. THE RECEIVER'S ANALYSIS

31. Following its appointment, the Receiver sought information about the Debtors' business structure, particularly the way the hashpower business model functioned

in practice. The Receiver's requests, analysis and preliminary conclusions are set out in its First Report, Second Report, Third Report and Supplement to the Third Report (collectively, the "**Receiver's Reports**"), each of which were before the chambers judge at the hearing of the Application. The Receiver's Reports also describe how the Receiver had great difficulty in getting responses and documentation from IEL and the Debtors, despite repeated contact with IEL.

First Report at paras. 3.1, 4.2, 4.4 and 4.11, JAB, Vol. 2, pp. 1779 and 1785-1786

Second Report of the Receiver dated April 10, 2023
at paras. 2.1 and 6.2, JAB, Vol. 2, pp. 1877 and 1893-1894

32. On April 17, 2023, the chambers judge granted the Receiver's application to compel IEL to provide information regarding the Bitcoin proceeds generated with the Financed Equipment. Following the issuance of this order, the Receiver began to receive some information regarding the Bitcoin proceeds and the Debtors' structure, but IEL continued not to respond to some of the Receiver's requests.

Third Report at paras. 1.7, 8.6, 8.11 and 9.3,
JAB, Vol. 2, pp. 1919, 1933-1934 and 1937

33. The Receiver then conducted a reconciliation of the revenue generated under the IE CA 4 Hashpower Agreement and the undocumented IE CA 3 Hashpower Arrangement. As evidenced by the table below, prepared by the Receiver, the reconciliation showed that the Debtors' hashpower revenue though the period that the Financed Equipment was operational (from December 1, 2021 to November 5, 2022) was approximately $20.9 million, while the hosting fees they paid to the related-party Hosts amounted to approximately $18.8 million, meaning that the Debtors earned a combined net income of less than $2.2 million in that period.

Entity	**Cash settled hashpower income (CAD)**	**Cash settled hosting fee expenses (CAD)**	**Net income (CAD)**
IE CA 3	3,178,482	2,648,735	529,747
IE CA 4	17,725,998	16,103,497	1,622,501
Total	**20,904,479**	**18,752,232**	**2,152,248**

Third Report at para. 9.4.1, JAB, Vol. 2, p. 1937

34. During the same 11 month period, data provided by IEL to the Receiver indicates that the Debtors mined 1,184.52 Bitcoin worth approximately $37 million. As a result, the Receiver determined that there was a $16 million difference between the hashpower revenue received by the Debtors and the value of the Bitcoin mined using that hashpower.

Third Report at paras. 9.4 and 9.8, JAB, Vol. 2, pp. 1938-1939

VI. PROCEDURAL STEPS ON THE APPLICATION

35. On May 9, 2023, NYDIG filed the Application, seeking a declaration that any sale of hashpower pursuant to the Hashpower Agreements be declared a fraudulent conveyance void as against NYDIG. The Application also sought declarations that the Bitcoin mined using the Debtors' hashpower formed part of NYDIG's collateral, that the Appellants' actions were oppressive towards NYDIG (the Oppression Remedy Relief), and that the Debtors' assets and liabilities should be substantively consolidated with those of IEL and the Hosts (the Substantive Consolidation Relief).

Reasons at para. 6, AR, p. 71

36. The chambers judge heard the Application in three full day hearings on June 13, 14 and 15, 2023.

37. On August 10, 2023, the chambers judge released the Reasons, which granted the Fraudulent Conveyance Relief, declaring the transactions for the sale of hashpower pursuant to the Hashpower Agreements were a series of fraudulent conveyances that are void as against NYDIG.

Reasons at para. 153, AR, p. 112

38. The chambers judge dismissed the relief NYDIG requested on the question of NYDIG's security interest in the Bitcoin.

Reasons at para. 119, AR, p. 101

39. The chambers judge declined to consider or give reasons in respect of the Oppression Remedy Relief or the Substantive Consolidation Relief, calling such considerations "unnecessary" in light of the Fraudulent Conveyance Relief.

Subsequently, on December 13, 2023 the chambers judge stated that he had refused the Oppression Remedy Relief and the Substantive Consolidation Relief.

Reasons at paras. 151-152, AR, p. 112

40. On August 21, 2023, the Appellants filed a notice of appeal regarding the Fraudulent Conveyance Relief.

PART 2 – ISSUES ON APPEAL

41. The Respondents submit that the chambers judge committed no errors of law in the following instances as claimed by the Appellants:

(a) Interpreting the FCA, in the context of the purpose of that Act, as established by well developed legal precedent;

(b) Identifying the necessary intent of the Appellants under the FCA test for a fraudulent conveyance; and

(c) Considering evidence related to the "reasonable expectations" of NYDIG and the duty of good faith of IEL pursuant to the Parent Letter Agreement.

42. Moreover, the chambers judge made no palpable and overriding error in making the following factual findings and determinations:

(a) The weight of the evidence provided by the Appellants intended to show the Appellants had no intent to "delay, hinder or defraud" NYDIG;

(b) The price IEL paid to the Debtors for the hashpower the Debtors produced;

(c) The market value of the hashpower;

(d) The consideration provided to the Debtors outside of the Hashpower Agreements, and NYDIG's reasonable expectations with respect to that consideration;

(e) That the consideration paid to the Debtors by IEL took the form of a subsidy; and

(f) That IEL had a duty of good faith and honest performance pursuant to the Parent Letter Agreement to provide the Debtors with subsidies so that they could make required payments under the MEFAs.

43. Finally, the chambers judge did not err in law by considering the duty of good faith and honest performance in response to the submissions of the Appellants.

PART 3 – ARGUMENT

I. ERRORS IN LAW

A. Standard of Review

44. The Respondent agrees with the Appellants that the standard of review on a question of law is correctness and that, in such situations, the appellate court may replace the opinion of the chambers judge with its own.

Housen v Nikolaisen, 2002 SCC 33 [*Housen*] at para. 8

45. This "correctness" standard of review applies to errors in the characterization of a legal standard and errors in the application of a legal standard to a set of facts, but only in the latter scenario where there is a "failure to consider a required element of a legal test, or similar error in principle." Appellate courts must be cautious when choosing correctness review for these errors of mixed fact and law, and they must make sure the legal principle is readily extricable from the factual scenario. Where the actual issue involves the judge's interpretation of the evidence as a whole, it is the standard of palpable and overriding error that must apply.

Housen at paras. 33-36

B. The Chambers Judge Properly Applied the Legal Test for a Fraudulent Conveyance

46. The Respondents agree with the Appellants' characterization of the fraudulent conveyance test and that the chambers judge correctly identified it.

47. The Appellants also correctly note that intent can be inferred from the well-established "badges of fraud", which the chambers judge reproduced from Justice Adair's decision in *Zhu v. Zhang*, 2021 BCSC 2524. Importantly, however, there are further considerations when applying the test for fraudulent conveyance that the chambers judge cited from *Zhu v. Zhang*, including that:

(a) an intent to put one's assets beyond the reach of creditors is all that is required to void a transaction;

(b) a dishonest intent or bad faith is not a necessary element to avoid a transaction under S.1 of the [FCA];...

(c) inadequate consideration paid for the transferred property may be indicative of fraudulent intent;… and

(d) it is no defence that the transfer was also in furtherance of a legitimate business objective.

Reasons at para. 129, AR, pp. 104-105

(1) The chambers judge identified the intent necessary under the FCA

48. The chambers judge properly applied the fraudulent conveyance legal analysis when finding that the Debtors and IEL had the intent to delay, hinder or defraud NYDIG. The Appellants argue that the chambers judge did not make an "express finding of intent", but the Reasons are clear that he used the badges of fraud analysis to conclude that the Debtors and IEL had the requisite intent necessary under the second requirement of Section 2 of the FCA.

Factum of the Appellants ("**Appellants' Factum**") at para. 52
Reasons at paras. 134-136, AR, pp. 106-107

49. The case law on the intent element of the fraudulent conveyance test is unequivocal that "intent must often be inferred from the 'badges of fraud.'" There is no requirement that the judge make an "express finding of intent." Furthermore, no case law has been cited for the proposition that appellate courts can overturn the findings of a lower court judge just because those findings are implicit and not express, and the Respondent is not aware of any such precedent.

Wu v. Gu, 2020 BCSC 396 at para. 84

50. The chambers judge explicitly lists in his Reasons the factors in this case that amount to "badges of fraud". As the chambers judge articulated, "[i]n arguing that [intent can and should be inferred], NYDIG submits that most of the badges of fraud (with the possible exception of haste) are present and weigh in favour of that result." As the chambers judge continued, "I agree with NYDIG that the following factors, present here, are tantamount to "badges of fraud", supporting the relief that NYDIG seeks." The chambers judge identified the following badges of fraud:

(a) The transactions were not at arm's length and that IEL structured transactions within its group of companies to benefit itself at the expense of

its subsidiaries. This satisfies the badge of fraud of a close relationship between the parties to the transfer.

Reasons at paras. 134-136, AR, pp. 106-107

(b) The "effect of [this] structure was to leave the Debtors in need of ongoing subsidies from IEL in order to meet their financial obligations": this satisfies the badge of fraud of "whether the disposition effectively divests the debtor of assets." In making this conclusion, the chambers judge cited *Trans Canada Insurance Marketing v. Fransen Insurance Services Ltd.*, 2019 BCSC 1250, where Justice Forth said that "a voluntary transfer that renders the debtor unable to meet his or her then existing liabilities [serves as] strong evidence of an intent to defraud creditors."

Reasons at paras. 134-135, AR, pp. 106-107

(c) The chambers judge made a finding that "the price that IEL paid the Debtors for the transferred hashpower under the Hashpower Agreements was substantially less than its actual value": this satisfies the badge of fraud of "the absence of valuable consideration."

Reasons at para. 136, AR, p. 107

51. The case law on the badges of fraud demonstrates that the presence of badges of fraud "may support an inference of fraudulent intent." In this case, the chambers judge found that several badges of fraud were present and proceeded to make the very inference that this Court has stated that it is open to him to make.

Mawdsley v. Meshen, 2012 BCCA 91 [*Mawdsley*] at para. 41

Reasons at paras. 134-136, AR, pp. 106-107

(2) The chambers judge properly relied on the effect of the transaction

52. The chambers judge considered the effect of the impugned transactions, in addition to other evidence that demonstrated intent and the evidence presented by the Debtors, which follows the law on fraudulent conveyance as set out by this Court in *Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd.*, 2009 BCCA 521 and *Mawdsley*. In doing so, he committed no error of law.

Mawdsley at para. 71.

Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd., 2009 BCCA 521 [*Botham Holdings*] at para. 75

53. It is entirely open to the chambers judge to infer intent from the effect of the impugned transactions, and a presumption may be based on the effect of a transaction in some cases. Evidence contradicting the fact that the effect proves the intent of the transferor may serve to prevent the FCA elements from being satisfied, but the mere evidence of an "honest purpose in the making of the transfer", as the Appellants argue, is not enough. *Mala fides* by the transferor is not required to establish intent, and any concurrent *bona fide* intent of the transferor with respect to making the transaction (and its effect) is not sufficient to dispel the finding of fraudulent intent.

Mawdsley at paras. 53 and 71

Botham Holdings at paras. 55-57

54. The chambers judge made a finding of intent based on the effect of the impugned transactions and the actions and statements of IEL. He then explicitly considered the arguments put forward by the Appellants at the Application, including NYDIG's awareness of the Appellants' corporate structure, and determined that they did not refute his finding of intent.

Reasons at paras. 134-136 and 141-145, AR, pp. 106-107, and pp. 108-109

55. The chambers judge correctly recognized that, although the Appellants may have carried out the impugned transactions for a legitimate business purpose (the minimization of sales tax), that purpose was not enough to prevent a finding of fraudulent intent. Only when a transaction is carried out <u>*solely*</u> for a "lawful or bona fide intent" and not "in furtherance of an improper purpose" will a finding of fraudulent intent be rebutted. The chambers judge identified a concurrent legitimate purpose of the Appellants in making the transactions, but also found that the Appellants carried out the transactions with an eye to sheltering the Debtors' assets from NYDIG.

Mawdsley at para. 53

Reasons at para. 142, AR, p. 108

C. No Improper Consideration of Irrelevant Evidence

56. The consideration of "irrelevant evidence" is only an error of law that merits appellate intervention if the decision is based on such evidence. In other words, the error must be material and go to the core of the decision. As this Court stated in *Escape 101 Ventures Inc. v. March of Dimes Canada*, "a misapprehension of evidence that goes to the core of the outcome is an extricable error of law."

Escape 101 Ventures Inc. v March of Dimes Canada, 2022 BCCA 294 [*Escape 101*] at para. 43.

57. In general, any appellate interference with a finding of law or fact by the trial judge can only be justified if there is a material error.

Armstrong v Kotanko 2023 BCCA 321 at para. 45

Chu v. Chu, 2023 BCCA 129 at para. 6

(1) No material error in considering "reasonable expectations" of NYDIG in entering into MEFAs

58. The Appellants submit that the chambers judge relied on irrelevant evidence by considering the reasonable expectations of NYDIG in entering the MEFAs.

Appellants' Factum at para. 71

59. The evidence of NYDIG's reasonable expectations was not the primary basis of the chambers judge's finding of fraudulent intent and was therefore not material to that finding. NYDIG's expectations were raised in evidence by NYDIG in connection with its position regarding the interpretation of the MEFAs, the Oppression Remedy Relief and Substantive Consolidation Relief sought in the Application, and in NYDIG's view was only specifically referred to by the chambers judge as a response to the Debtors' original arguments at the hearing of the Application. It is accordingly not material to the granting of the Fraudulent Conveyance Relief, nor is it a ground for appellate intervention.

Appellants' Factum at paras. 70, 71 and 78

60. One of the examples that the Appellants took issue with is in paragraph 145 of the Reasons. Here, the Appellants argued the chambers judge's findings regarding

NYDIG's expectations regarding the source of the consideration for hashpower sold by the Debtors were improperly used to support a finding of fraudulent intent.

Appellants' Factum at para. 74

Reasons at para. 145, AR, p. 109

61. However, the Appellants neglect to acknowledge the context of the quotation (paragraph 145 of the Reasons) they cite at paragraph 73 of their Factum. As the chambers judge articulated just two paragraphs earlier, "I also appreciate that, as [the Debtors] argue, NYDIG was generally aware of, and specifically agreed to, the Iris Group's use of that corporate structure." In other words, the chambers judge commented on the subjective expectations of NYDIG specifically because the Appellants themselves raised it as a previous argument, not because such subjective expectations were fundamental to his finding of fraudulent intent.

Reasons at para. 143, AR, p. 109

62. The Appellants' assertion that the chambers judge relied on the finding of NYDIG's subjective expectations to reach a finding of intent to defraud also conveniently sidesteps the actual findings of the chambers judge in the Reasons (summarized in paragraph 50 above).

63. A full reading of the Reasons show that the chambers judge's finding of intent was clearly based on a finding of the existence of the badges of fraud and did not rest on the chambers judge's findings with respect to NYDIG's subjective expectations.

Reasons at para. 142, AR, p. 108

64. As described above, mischaracterization of evidence only becomes an error of law if it is material. Since the chambers judge did not rely on NYDIG's subjective expectations in making his decision on fraudulent intent, it did not play any material role in the judge's finding that the Debtors had the necessary fraudulent intent.

(2) Discussion of good faith and honest performance not in error or material to decision of chambers judge

65. The chambers judge's findings that IEL owed NYDIG a duty of good faith in connection with the Parent Letter Agreement was not in error, nor was it incongruent with his finding that IEL did not provide NYDIG a parent guarantee.

The duty of good faith and honest performance is not an implied term but a duty of contractual performance grounded in the words of the contract. The chambers judge recognized this approach and properly applied it.

Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7 [*Wastech Services*] at para. 92

Reasons at paras. 146-148, AR, pp. 110-111

66. The chambers judge also explained why his finding on fraudulent conveyance was not tantamount to granting NYDIG a parent guarantee:

> Finally, I am not persuaded that the declaration NYDIG seeks here is the back-door equivalent of the parent guarantee that it was initially demanding in relation to the IE CA 4 MEFA, but ultimately abandoned when the loan amount was reduced. If that declaration is made, NYDIG will be in a position to recover for the receivership estate the full value of the hashpower that was transferred (less the consideration that IEL paid for it), which is not necessarily the same as a sum sufficient to make NYDIG whole on the debt it is owed.

Reasons at para. 149, AR, pp. 111-112

67. Finally, the context of the chambers judge's Reasons reveal that he had already made a finding of fraudulent intent, and only brought up the duty of good faith in response to the Appellants' submissions. His findings in this respect were not material to the outcome, and there was no error of law.

Reasons at para. 143, AR, p. 109

Escape 101 at para. 43

II. PALPABLE AND OVERRIDING ERRORS OF FACT

A. Standard of Review

68. The seminal case of *Housen* defined the palpable and overriding error standard of review for appellate courts assessing decisions of trial judges. Palpable means "plainly seen" and overriding means that the error was "determinative in the assessment of the balance of probabilities with respect to that factual issue."

Housen at paras. 4 and 6

Schwartz v. Canada, [1996] 1 S.C.R. 254, 133 D.L.R. (4th) 289 at para. 35

69. The SCC in *Housen* commented that appellate courts are not meant to reweigh evidence and determine if the chambers judge's conclusion is reasonably supported by the findings or if a different view is preferable. The SCC also cautioned appellate courts that, although it is open to them to "find that an inference of fact made by the trial judge is clearly wrong", they should be "hard pressed to find a palpable and overriding error" where "evidence exists to support this inference."

Housen at paras. 21-22

70. The fact that a trial judge does not mention a particular piece of evidence does not mean the judge committed a palpable and overriding error. According to this Court, "a trial judge is not required to address every piece of evidence or argument advanced by the parties."

8640025 Canada Inc. (Re), 2019 BCCA 473 [*8640025*] at para. 76

71. This Court has found on multiple occasions that a finding of fraudulent intent under the FCA is a factual question and must be reviewed on a standard of palpable and overriding error.

Mawdsley at para. 52

Botham Holdings at paras. 84-85

B. The Chambers Judge Made No Palpable and Overriding Errors in His Consideration of the Facts

(1) The chambers judge properly weighed the evidence presented by the Applicants

72. The Appellants are incorrect in stating at paragraph 54 of their factum that the chambers judge's lack of findings of inferences of fact that might challenge his finding of fraudulent intent by the Appellants (described by the Appellants as a "failure to give weight to evidence that rebutted any presumption of intent") under the FCA should be judged on a correctness standard.

Appellants' Factum at para. 54

73. The Appellants are challenging the particular weight that the chambers judge gave to evidence, but this Court has stated that it is not open to an appellate court to interfere with a lower court decision on giving weight to evidence unless the lower

court judge made a palpable and overriding error. The chambers judge in this instance correctly identified the test for a fraudulent conveyance and applied it. The Appellants' position that weighing the evidence in connection with applying the proper test should be reviewed on the standard of correctness is simply incorrect. The legal precedents are clear that deference should be given.

Good Guys Recycling Inc. v. 676083 B.C. Ltd., 2023 BCCA 128 at paras. 62 and 66

74. Furthermore, in this instance where there are clear factual considerations at play, an issue of law must be extricable to move the standard to one of correctness. This Court has commented on this standard specifically with respect to the FCA: "the normal standard of review formulated in *Housen* for findings of fact… applies to the trial judge's finding in the case at bar that Ms. Meshen did not have the intention of delaying, hindering or defrauding Mr. Mawdsley." In another case before this Court, the standard of palpable and overriding error was also applied to the question of the intent of the party accused of committing a fraudulent conveyance.

Housen at para. 37

Mawdsley at para. 52

Botham Holdings at paras. 84-85

75. There can be no extricable question of law where factual considerations are paramount. The Supreme Court of Canada stated in *Housen* that "making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review." Therefore, by the Appellants' own characterization of the issue, deference is owed, and the standard of palpable and overriding error must apply.

Housen at para. 24

76. In any event, regardless of the proper standard of review, the chambers judge correctly made his finding of intent, including in considering any factors cited by the Appellants that may have rebutted that finding.

77. The Appellants argue that the chambers judge erred when he did not consider a set of evidentiary points that the Appellants list in their factum at paragraph 85.

However, this Court (also in the context of an insolvency proceeding) has previously stated that considering all evidence and arguments is not necessary:

> Further, a trial judge is not required to address every piece of evidence or argument advanced by the parties. Where a judge fails to discuss a relevant factor in depth, it is only a material error if it leads to a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion."

8640025 at para. 76

78. In his Reasons, the chambers judge discussed the Appellants' arguments at length. He considered the Appellants' claim that the transactions were "carried out solely for a legitimate business purpose." He considered the Appellants' argument regarding NYDIG's awareness of the Iris Group's corporate structure. He refuted the Appellants' argument that the finding of a fraudulent conveyance amounted to the "back-door equivalent of the parent guarantee that it was initially demanding."

Reasons at paras. 141-150, AR, pp. 108-112

79. The chambers judge's Reasons demonstrate that the chambers judge was alive to the Appellants' counterarguments, and his Reasons also include considerations of the very arguments that the Appellants insist he ignored. For example, the Appellants say that the chambers judge's finding that the Bitcoin was not part of NYDIG's collateral undermines his finding of fraudulent intent on the part of the Debtors. However, the chambers judge specifically addressed this point in his Reasons when he stated that, although the MEFAs did not include a pledge of Bitcoin, they did include a pledge of all the proceeds of the sale of the hashpower generated with the Financed Equipment, which showed the Debtors' intention to "delay, hinder or defraud" through the inadequate consideration paid to NYDIG.

Reasons at paras. 144-146 and 148 AR, pp. 109-111

Appellants' Factum at para. 56

80. The chambers judge was not required to consider every point advanced by the Appellants, but he nevertheless addressed virtually all of their arguments and found them to be unpersuasive based on the whole of the evidence before him. He very clearly considered the possibility that the evidence of intent established by

the badges of fraud was refuted by the Appellants' submissions but exercised his discretion to come to a different conclusion. This cannot amount to an error of law, let alone a palpable and overriding error.

Reasons at paras. 141-150, AR, pp. 108-112

81. The Appellants further submit that the chambers judge erred because his decision led to the voiding of transactions that were subject to a negotiated agreement, thus eroding the purpose of the FCA, which they claim is to "protect creditors from transactions that they have no knowledge of, have not agreed to, and that hinder or defeat their interests." The Appellants cite no authority for this proposition, and this is not the purpose of the FCA.

Appellants' Factum at para. 58

82. The case law on fraudulent conveyances is clear that the FCA provides a remedial purpose to benefit wronged creditors, and this Court has said that the purpose of the FCA is to "protect creditors where property dispositions by debtors '... were effected for the purpose of defeating the legitimate claims of creditors.'" The Appellants state that the Reasons unnecessarily expand the scope of the FCA, but, in truth, the Appellants unreasonably *narrow* the actual purpose of the FCA as stated by this Court. The only intent necessary under the FCA is "to put one's assets out of the reach of one's creditors," and nothing further is required.

Botham Holdings at paras. 70 and 73
Appellants' Factum at para. 58

83. The Appellants go on to cite *Botham Holdings* for the principle that they were free to structure their corporate group to minimize their liability and that NYDIG's knowledge of that structure demonstrates an error in the Reasons.

Appellants' Factum at para. 60

84. However, this Court has explained that there are limits to the extent businesses can go to "manipulate" their assets for "protective purposes to the detriment of creditors." The chambers judge was mindful of this point and commented that the necessary intent on the part of Appellants was present *despite* NYDIG's knowledge of the Appellants' corporate structure.

Mawdsley at para. 3

Reasons at para. 143, AR, p. 109

85. The Appellants argue that, because NYDIG was aware that the Debtors were selling hashpower to IEL, there cannot have been a fraudulent conveyance. This mischaracterizes what NYDIG knew and did not know. On this point, the Reasons speak for themselves:

> I also appreciate that, as the Respondents argue, NYDIG was generally aware of, and specifically agreed to, the Iris Group's use of that corporate structure. However, the same cannot be said about the inter-company flow of funds, which the Receiver is only now in the process of reconstructing.

Reasons at para. 143, AR, p. 109

(2) No palpable and overriding error on finding of hashpower price agreed to

86. The chambers judge, supported by the evidence, found that NYDIG had expectations that the Debtors would receive more for the hashpower than what was stipulated in the Hashpower Agreements. Again, this goes to the extent of NYDIG's knowledge of the transactions and what it did not know or agree to:

> In particular, NYDIG did not agree to any particular price being paid for the Debtors' hashpower. Although NYDIG was provided with the executed hashpower and hosting agreements of IE CA 4 (but not those of IE CA 3, which never existed in written form) and monthly financial statements showing the flow of funds in and out of the Debtors, the underlying financial arrangements were complex, and, in the case of IE CA 3, essentially undocumented. They also included, until the Debtors defaulted, IEL's apparent subsidy of their loan payments, which was booked internally as a series of subordinated inter-company loans.

Reasons at paras. 143 & 145, AR, p. 109

87. In the case of IE CA 3, NYDIG was never provided with a hashpower agreement. Despite the MEFAs referring to a "Hashpower Agreement", NYDIG could not have agreed to a price when it was never presented with one. NYDIG only found out that IE CA 3 was selling its hashpower pursuant to an undocumented agreement in accordance with the IE CA 4 Hashpower Agreement after the Debtors' defaults.

Reasons at para. 89, AR, p. 94

Affidavit No. 2 of William Roberts, made June 3, 2023 at paras. 90-91, JAB, Vol. 1, pp. 891-892

88. In IE CA 4's case, although NYDIG was presented with the IE CA 4 Hashpower Agreement, the chambers judge determined that NYDIG had "reason to believe that the consideration paid to the Debtors in exchange for their hashpower was not confined to the fees payable to them under their respective hashpower agreements." The chambers judge cited an email from one of NYDIG's employees who was a key representative in the IE CA 4 MEFA negotiations that demonstrates NYDIG's belief that the Debtors would be receiving additional funds from IEL so that the Debtors could make their loan payments to NYDIG.

Reasons at paras. 145-146, AR, pp. 109-111

89. The chambers judge could not have made an error in finding that NYDIG did not agree to a price for the sale of IE CA 3's hashpower, as it never saw what the price would be. Regarding the price of IE CA 4's hashpower, the chambers judge determined that evidence existed to support the inference that NYDIG expected IE CA 4 to receive greater consideration than what was laid out in the IE CA 4 Hashpower Agreement and, as per the SCC in *Housen*, it is not the place of this Court to overturn that finding.

Housen at para. 22

90. Even if there was an error that was "palpable", that error could not also have been "overriding". The chambers judge had already determined that the badges of fraud established the necessary fraudulent intent of the Debtors in making the fraudulent conveyances. In doing so, he had already refuted the argument that the Debtors only had a legitimate business purpose for the impugned transactions. Any finding that NYDIG had agreed to the price of the hashpower would not have had a material (or any) effect on the chambers judge's finding of fraudulent intent since he had already determined that IEL was subsidizing the Debtors so that they could meet their loan payments to NYDIG. There still would have been an obvious improper purpose on the Appellants' part in that scenario because their withdrawal of the subsidy payments showed their intent to benefit IEL at NYDIG's expense.

Reasons at paras. 134-136, 141 and 145, AR, pp. 106-107, 108 and 109

(3) Evidence of hashpower market value

91. The chambers judge was presented with evidence by both NYDIG and the Receiver that the value of the hashpower produced by the Debtors was intrinsically tied to the value of the Bitcoin that was directly mined with the Debtors' hashpower. He was also presented with the Receiver's analysis of the pricing summarized in paragraph 33, above. He then correctly used this connection to determine that the consideration paid for the hashpower was inadequate.

Reasons at para. 136, AR, p. 107

92. The chambers judge cited case law that states that "inadequate consideration for the transferred property may be indicative of fraudulent intent." The Appellants have cited a case in their factum that correctly notes that determining whether consideration is inadequate is a subjective exercise. Such a subjective determination must be reviewed by this Court on the standard of palpable and overriding error and given considerable deference.

Zhu v Zhang, 2021 BCSC 2524 at para. 117
Kootenay Savings Credit Union v. Brar, 2021 BCSC 2027 at para. 95
People's Department Stores Ltd. (1992) Inc., Re, 2004 SCC 68 at para. 87
Montor Business Corp. (Trustee of) v. Goldfinger, 2016 ONCA 406 at para. 58

93. The chambers judge used his discretion to determine based on the evidence provided to him that the consideration provided by IEL for the hashpower was subjectively inadequate. NYDIG had provided evidence of the cost of producing the hashpower and evidence showing the value of hashpower to produce Bitcoin. The chambers judge also considered the evidence of the Receiver, whose analysis showed that the Debtors had received $20.9 million from IEL for the hashpower, and acknowledged IEL's evidence that they received $37 million for the Bitcoin produced with that hashpower (which the Receiver was still verifying).

Second Shah Affidavit at para. 106, JAB, Vol. 1, pp. 517-518
Reasons at paras. 137-140, AR, pp. 107-108

94. Importantly, and implicit in the analysis of the chambers judge, is that the value of the hashpower was not materially different than the value of the Bitcoin produced.

The chambers judge was presented with evidence that the entire purpose of hashpower is to produce Bitcoin (or another cryptocurrency). IEL used all of the hashpower produced by the Debtors to mine Bitcoin because there is no other use for it. Therefore, the chambers judge correctly determined that the value received for the hashpower should be closely connected to the price IEL received for the associated Bitcoin (as well as the cost to the Debtors in producing the hashpower).

First Shah Affidavit at para. 15, JAB, Vol. 1, p. 4

Appellants' Factum at paras. 2-3

95. Furthermore, it is not correct that there was no evidence of the market value of the hashpower before the chambers judge, as the Appellants allege. NYDIG and the Receiver provided an analysis of the market value of the Bitcoin that would have been produced by the hashpower based on Bitcoin price and the hashpower produced for each month the Financed Equipment was in operation. Because the only function of hashpower is to produce Bitcoin (or other cryptocurrency), the market value of hashpower is necessarily closely connected to the market value of Bitcoin, especially when that hashpower is only being used to produce Bitcoin (as opposed to another cryptocurrency, which may have a different market value).

Second Shah Affidavit at para. 106, JAB, Vol. 1, pp. 517-518

96. If the Appellants believe that there was an alternative, lower market value of hashpower than what was proffered by NYDIG and the Receiver (a Court officer), it was open to them to lead evidence of that market value. It was likewise open to the chambers judge to draw an adverse inference from their failure to do so, and accept NYDIG's and the Receiver's evidence of market value.

(4) Facts show that reasonable expectations would include consideration beyond hashpower fees

97. The chambers judge correctly identified that NYDIG expected the Debtors to receive consideration greater than that provided by the hashpower fees under the Hashpower Agreements. This is discussed, with reference to the numerous points in the Reasons that support such a conclusion, in paragraphs 86 to 89 above.

Reasons at paras. 144-145, AR, p. 109

98. The Appellants state that the chambers judge's factual inference cannot "reasonably be supported by the evidence." This type of analysis is precisely what the SCC in *Housen* cautioned appellate courts to avoid. The applicable standard of review requires this Court to determine whether the chambers judge made a palpable and overriding error when making a factual inference: he did not.

Housen at para. 21

99. Even if the chambers judge made an error in this instance (which he did not), it was not palpable; the chambers judge reviewed the evidence and made a reasonable conclusion available to him regarding NYDIG's expectations. It was not overriding, since the chambers judge made the inference in response to arguments by the Appellants that he had already refuted and after his finding that badges of fraud were present and the Appellants' fraudulent intent established.

Reasons at paras. 134-136, 141 and 148-149, AR, pp. 106-107, 108 and 111-112

(5) Appellants' structure demonstrated that consideration paid to Debtors was subsidy

100. The evidence before and accepted by the chambers judge indicated that the payments IEL made to the Debtors were in fact subsidies and that they would have appeared as such to any reasonable party. The Receiver, in its Third Report to the Court, referred to the IEL transfer as a "transfer pricing adjustment of $12,014,632 to increase hashpower income". The hashpower fees provided to the Debtors were otherwise insufficient, and the Debtors needed the transfer payments to IEL to service NYDIG's debt. This situation indicates a textbook example of a subsidy.

Third Report at para. 8.11, JAB, Vol. 2, p. 1934

Second Shah Affidavit at para. 103, JAB, Vol. 1, pp. 516-517

101. The Appellants argue that NYDIG knew that the subsidies were in fact loans and equity agreements because IE CA 4 asked NYDIG to use its income to reduce that equity. However, IE CA 4's self-interested characterization of the nature of the payments does not impact the reality of what those payments amounted to, as confirmed by the Receiver. The chambers judge thus made no palpable and overriding error in relying on the Receiver's analysis to determine that the payments from IEL to the Debtors were, in fact, subsidies.

Appellants' Factum at para. 97

(6) Parent Letter Agreement established duty of IEL to continue subsidy payments to Debtors

102. The chambers judge made no palpable and overriding error in finding that IEL was bound by a duty of good faith and honest performance to continue subsidizing the Debtors' income so that they could continue to make their loan payments to NYDIG. The Appellants mischaracterize the chambers judge's Reasons and the law on good faith contractual performance when they argue that the chambers judge implied a term into the Parent Letter Agreement and misapplied the duty of good faith.

Appellants' Factum at paras. 100 and 106

103. The chambers judge stated that IEL was not at liberty to stop advancing the subsidy payments to the Debtors because doing so would cause it to breach its duty of good faith in upholding the Parent Letter Agreement's terms. The Appellants argue that the Parent Letter Agreement's terms suggest the opposite. However, a full consideration of the Parent Letter Agreement indicates that the chambers judge made no palpable error in making his inference.

Reasons at para. 146, AR, pp. 110-111

Appellants' Factum at para. 101

104. The chambers judge quoted from the Parent Letter Agreement, which reads that IEL is "financially interested in [IE CA4]'s affairs and business, and expects to derive substantial direct and indirect financial benefits from the financial accommodations to be provided by [NYDIG] to [IE CA 4] under or in connection with the [IE CA 4 MEFA]." The chambers judge relied on this portion of the Parent Letter Agreement to infer that IEL's interest in IE CA 4's affairs and its "substantial direct and indirect" benefit from NYDIG's loan meant that it could not stop funding IE CA 4 to the point where it would default on the IE CA 4 MEFA and no longer have those benefits.

Reasons at para. 146-147, AR, pp. 110-111

105. The chambers judge's finding does not signal that IEL was guaranteeing the Debtors' payments to NYDIG, as he explained in his Reasons. The implied good faith performance was necessary to prevent IEL from taking exactly the actions it did to "delay, hinder or defraud" NYDIG, but it did not mean that IEL would still be on the hook for the full amount of the Debtors' obligations, only for the "full value of the hashpower that was transferred."

Reasons at para. 149, AR, pp. 111-112

106. The chambers judge's Reasons indicate clearly that he was not implying a term into the contract, as the Appellants argue, but only applying the SCC's concept of good faith contractual performance from *Bhasin v. Hrynew,* which describes good faith contractual performance as a "general organizing principle of the common law of contract." The Appellants cite pre-*Bhasin*, Alberta case law on contractual implied terms that is irrelevant to the chambers judge's Reasons. The Appellants are correct that the duty of good faith must be grounded in the words of the contract itself, but the chambers judge did exactly that, and, as a result, there can be no palpable error.

Bhasin v. Hrynew, 2014 SCC 71 at para. 33
Reasons at para. 146, AR, pp. 110-111
Appellants' Factum at paras. 102-104
Wastech Services at para. 92

107. Even if there is a palpable error, that error would not also be overriding for the same reasons noted at paragraph 99 above.

III. NO BREACH OF PROCEDURAL FAIRNESS

108. As discussed in the foregoing section, the chambers judge made no error in his reference to the duty of good faith. The Appellants' claim that the chambers judge erred in law, and that his decision should be overturned on this basis, is meritless.

109. While a judgment may be overturned when a trial judge does not give a party the chance to make submissions with respect to an issue or a point of law, that issue or point of law must be material to the outcome of the decision.

Malton v. Attia, 2016 ABCA 130 at para. 27

R. v. Edelenbos, 2004 CanLII 875, 71, OR (3d) 698 (Ont. CA) at paras. 19-20

Brown, Donald JM & David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2019) at § 13:40.

110. In this instance, the chambers judge's discussion of the duty of good faith was not material because it was in response to arguments of the Appellants that he had already rejected and after he had already made a finding of fraudulent intent by the Debtors in carrying out the fraudulent conveyance.

Reasons at paras. 134-136 & 141, AR, pp. 106-107 and 108

111. It would be a significant and unwarranted expansion of appellate review to allow appellate courts to overturn a trial judge's decision based on comments made by the trial judge that do not affect the outcome of their decision. Appellate intervention is properly for situations where the trial judge has relied on legal theories not before the parties in a way that was prejudicial to one of the parties because it materially affected their decision. That is not the case on this appeal.

Brown, Donald JM & David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2019) at § 13:40.

PART 4 – NATURE OF ORDER SOUGHT

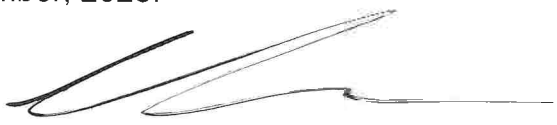
112. The Respondent seeks:

(a) An order dismissing the appeal of the Appellants;

(b) An order awarding the Respondent costs of this appeal.

113. All of which is respectfully submitted.

Dated at the City of Toronto, this 15th day of December, 2023.



Chris Burr and Claire Hildebrand
Counsel for the Respondent

SECTION 2: RESPONDENT'S CROSS APPEAL FACTUM

PART 1 – STATEMENT OF FACTS

114. On May 9, 2023, NYDIG filed the Application, seeking declarations in respect of the Fraudulent Conveyance Relief, that the Bitcoin mined using the Debtors' hashpower formed part of NYDIG's collateral, that the Appellants' actions were oppressive towards NYDIG (the Oppression Remedy Relief), and that the Debtors' assets and liabilities should be substantively consolidated with those of IEL and the Hosts (the Substantive Consolidation Relief).

Reasons at para. 6, AR, p. 71

115. The chambers judge released the Reasons on August 10, 2023, which were clear that the chambers judge: (a) refused to grant the requested declaration that Bitcoin mined using the Debtors' hashpower formed part of NYDIG's collateral and (b) granted the Fraudulent Conveyance Relief.

Reasons at paras. 119 and 153, AR, pp. 101 and 112

116. The Reasons address the Oppression Remedy Relief in a single paragraph (paragraph 151), which states:

> In view of [the granting of the Fraudulent Conveyance Relief], it is unnecessary to consider the appropriateness of the relief sought under s. 227 of the *BCA*, which takes the form of a similar declaration.

Reasons at para. 151, AR, p. 112

117. The Reasons similarly address the Substantive Consolidation Relief in a single paragraph (paragraph 152), which states:

> With respect to NYDIG's request for a declaration that IEL and the Debtors be treated as a single consolidated entity, such relief has previously been said to be available, "[i]n a liquidation or reorganization of a corporate group": *Nortel Networks Corporation (Re)*, 2015 ONSC 2987, leave to appeal refused, 2016 ONCA 332, at para. 213. As counsel for NYDIG candidly acknowledged during the hearing, the doctrine has never been applied in Canada to bring about the substantive consolidation of a *solvent* company like IEL with its insolvent affiliates. Given that NYDIG has been successful in

> obtaining other declaratory relief, this is not a case in which it is necessary to consider expanding the ambit of the doctrine in the manner urged. A second reason for refusing that relief is that it more closely resembles the parent guarantee that NYDIG abandoned at the bargaining table.

Reasons at para. 152, AR, p. 112

118. The chambers judge issued a memorandum to counsel on December 13, 2023, clarifying the Reasons with respect to the Oppression Remedy Relief and the Substantive Consolidation Relief, stating that "the application was allowed in respect of the relief that was granted, but otherwise refused".

119. On January 30, 2024, the Court of Appeal granted an extension of time to permit NYDIG to file its notice of cross-appeal and cross-appeal factum, which were required to be served by January 30, 2024.

PART 2 – ERRORS IN JUDGMENT

120. The chambers judge made errors of law in respect of the Oppression Remedy Relief and the Substantive Consolidation Relief by: (a) not providing adequate reasons, (b) not stating or considering the legal test, and (c) not applying the legal test.

PART 3 – ARGUMENT

I. ERRORS IN LAW

A. Standard of Review

121. The standard of review on a question of law is correctness.

Housen at para. 8

B. The Chambers Judge Provided Inadequate Reasons for Oppression Remedy Relief and Substantive Consolidation Relief

122. Not providing reasons adequate for exercising meaningful appellate review is an error of law. Judges in courts of first instance are expected to provide conclusions on the "main issues". An appellate court can still decide not to intervene with a lower court decision if it can determine the "why" of the decision from the record, but, otherwise, reasons that are inadequate do not allow for proper appellate review and are therefore a threshold issue on appeal.

R. v. Sheppard, 2002 SCC 26 at paras. 28 and 33
Robertson v. Dhillon, 2015 BCCA 469 at para 63
Bedwell v. McGill, 2008 BCCA 6 [*Bedwell*] at para 21

123. This Court has commented on multiple occasions that the proper remedy for inadequate reasons is to order a new trial. Without any insight as to why the lower court judge made their decision, an appellate court is not in a position to make its own findings of fact and conclusions.

Bedwell at para. 21
M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd., 2020 BCCA 371 at para. 109

124. The Reasons do not provide any legal basis for why the Oppression Remedy Relief was refused. Reasons must provide a legal and factual basis for what the judge decided, and why, so that appellate courts can determine if an error took place. The chambers judge states in the Reasons that it was "unnecessary" to consider the Oppression Remedy Relief, but this rationale provides no legal basis for refusing it.

R. v. G.F., 2021 SCC 20 [*G.F.*] at paras. 71-75
Reasons at para. 151, AR, p. 112

125. The Reasons similarly state that it is "not a case in which it is necessary" to consider the Substantive Consolidation Relief. The chambers judge adds that the Substantive Consolidation Relief "resembles the parent guarantee that NYDIG abandoned", but this does not provide a legal basis for the refusal of the Substantive Consolidation Relief, as the legal test for substantive consolidation encompasses many factors.

Reasons at para. 152, AR, p. 112

126. The chambers judge references the unprecedented application of substantive consolidation to solvent and insolvent entities in the Reasons. By themselves, these two sentences do not provide a sufficient legal basis for the refusal of the Substantive Consolidation Relief.

Reasons at para. 152, AR, p. 112

127. Where an area of law is new or controversial, there is a greater burden on lower court judges to provide a legal basis for their reasons.

G.F. at paras. 74-75

128. The test for substantive consolidation is evolving. For example, the Manitoba Court of Appeal issued a decision after the release of the Reasons holding that substantive consolidation can be used to consolidate solvent and insolvent entities. Without a clear delineation in the Reasons of the law on substantive consolidation, there would be no path for an appellate court to determine if the law on substantive consolidation was properly applied by the chambers judge, or the basis on which any discretion was exercised to grant or refuse the relief requested.

White Oak Commercial Finance, LLC v. Nygard Enterprises Ltd et al, 2023 MBCA 73 [*Nygard*] at para. 52

129. Additionally, the record is not sufficient to determine that the Reasons refusing the Substantive Consolidation Relief were adequate. It was open to the chambers judge to determine that the substantive consolidation of an insolvent entity with a solvent entity was possible (as the Manitoba Court of Appeal commented in *Nygard*). NYDIG set out in great detail, in both written and oral submissions, how the chambers judge could have exercised his discretion to grant a substantive consolidation order. Neither the record, nor the Reasons, provide sufficient explanation or legal basis for why that relief was not granted.

Transcripts, Vol. 1, pp. 115-141

130. In respect of both the Oppression Remedy Relief and the Substantive Consolidation Relief, NYDIG has no meaningful right of appeal, and its recourse against the Debtors and IEL is seriously curtailed, because the Reasons do not provide a legal basis for determining whether the chambers judge applied the law properly (or at all).

131. Additionally, the chambers judge declined to consider the Oppression Remedy Relief and Substantive Consolidation Relief on the basis that he granted the Fraudulent Conveyance Relief – if the Fraudulent Conveyance Relief is overturned on appeal, the basis stated in the Reasons for dispensing with the Oppression Remedy Relief and Substantive Consolidation Relief falls away. Moreover, the relief available following a finding of oppression is materially different from the relief following a finding that a fraudulent conveyance took place.

Reasons at paras. 151-152, AR, p. 112

C. The Chambers Judge Did Not Consider the Legal Test for the Oppression Remedy and Substantive Consolidation

132. It is a key role of appellate courts to determine whether the legal principle that governs an issue is properly and precisely articulated by a lower court. Future disputes will be governed by a judge's decision, and all parties, present and future, should be able to know whether the applicable principles were considered. Not considering and stating the applicable legal principle is therefore an error of law.

Brown, Donald JM & David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2019) at § 14:6
Lawson v. Lawson, 2006 CanLII 26573, 81 O.R. (3d) 321 (ON CA) at para. 9

133. The chambers judge did not state the legal test for the oppression remedy pursuant to Section 227 of the *Business Corporations Act*, S.B.C. 2002, c.57, and there is no indication from the Reasons that he considered it.

134. Similarly, the chambers judge did not state the test for substantive consolidation.

135. The Reasons in this respect do not rise to the level demanded of lower courts in articulating with precision the legal principles of oppression and substantive consolidation, and certainly do not describe those same legal principles in a way that will allow future litigants to understand and apply the Reasons.

D. The Chambers Judge Did Not Apply the Legal Test for the Oppression Remedy and Substantive Consolidation

136. A judge must not only cite the correct legal test or principle, but also apply that test or principle. Failure to do so is an error of law.

Clayworth v. Octaform Systems Inc., 2020 BCCA 117 at para. 47

137. Even if the Reasons articulated a legal test or principle (which they do not), they certainly did not apply it. As a result, the chambers judge committed an error of law.

PART 4 – NATURE OF ORDER SOUGHT

138. The Respondent (appellant by cross appeal) seeks an Order:

(a) remitting the Oppression Remedy Relief and the Substantive Consolidation Relief to the chambers judge for consideration and reasons, and

(b) awarding the Respondent costs of this cross-appeal.

139. All of which is respectfully submitted.

Dated at the City of Vancouver, this 30th day of January 2024.

Chris Burr and Claire Hildebrand

Counsel for the Appellant by Cross Appeal

APPENDICES: LIST OF AUTHORITIES

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APPENDICES: ENACTMENTS

FRAUDULENT CONVEYANCE ACT

[RSBC 1996] CHAPTER 163

Fraudulent conveyance to avoid debt or duty of others

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

(a) a disposition of property, by writing or otherwise,

(b) a bond,

(c) a proceeding, or

(d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.