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 REPLY

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I. THE OPPRESSION REMEDY RELIEF SHOULD BE DECIDED BY THE CHAMBERS JUDGE

1. The Appellants argue that it is open to this Court to consider the evidence on the record itself and make a decision on the merits of the case where the chambers judge failed to do so. They cite three cases in making this argument.

Appellants' Cross Appeal Response Factum at para. 11

2. In one of the cases the Appellants cite to underpin this argument, this Court could not consider remitting the case back to the trial judge because the trial judge had retired in the interim. That is not true in this situation and the chambers judge should be available to reconsider the issue.

Genesis Fertility Inc. v. Yuzpe, 2021 BCCA 420 at para. 38

3. In another case cited by the Appellants, remitting the case to the trial judge was also not considered and the majority of the Supreme Court of Canada decided to make their own determination, in large part because of the length and cost of the appeal proceedings, which had stretched over seven years. The entire proceedings in this instance, including this appeal, have gone on for less than a year and no such delay prejudice to the parties exists.

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

4. Justice Sopinka dissented in *Hollis*, arguing that where the trial judge fails to make factual findings necessary to decide a case, the appeal court should be hesitant to "assume the role of the trial judge." Sopinka J went on to note that in such situations a new trial should be ordered "virtually as of right" and cited several cases that supported that proposition. In this instance, the chambers judge has not only not made any findings of fact on the "Oppression Remedy Relief", he has not provided clear direction in his reasons as to what conclusion he came to and why.

Hollis at para. 92

5. In another case decided after *Hollis*, an appeal court commented that a new trial is appropriate where the reasons of the trial judge are "materially deficient", particularly where the appeal court would be unable to identify an error.

Bertin v. Kristoffersen, 2001 NBCA 118 (reasons of Robertson, J.A.) at para. 12

6. In the third case the Appellants cite, this Court found that an appellate court can substitute its decision in situations where it is "feasible and in the interests of justice to do so."

West Moberly First Nations v. British Columbia, 2020 BCCA 138 **[*West Moberly*]** at paras. 135-136

7. In the circumstances, it would not be in the interests of justice for this Court to make its own determination when the reasons of the chambers judge are inadequate to the point that it is unclear exactly what he decided.

8. A key factor in determining whether it is in the interests of justice for an appeal court to consider the evidentiary record itself and make its own decision is the length and expense of the litigation to date. In this case, the litigation has been going on for less than a year and has not come at great expense. The parties deserve to have the issue considered by the chambers judge, who had the benefit of hearing multiple days of oral argument on the issue and has been seized of the insolvency proceedings since the application for a receivership was made.

West Moberly at paras. 135-136

9. In *West Moberly*, it was also an important consideration for this Court in substituting its decision for the reasons of the trial judge that all of the parties requested that the Court do so. Generally, when the parties request that an appeal court make its own decision on the basis of the record, the appeal court will do so. NYDIG is requesting that this Court not make its own determination on the record for the reasons enumerated above, and, as a result, the decision in *West Moberly* should not be determinative.

West Moberly at para. 136

Kuehn v. Kuehn, 2012 ABCA 67 at para. 41

10. For all the reasons set out above, NYDIG submits that the Oppression Remedy Relief is not an appropriate issue for this Court to make its own decision on the evidence. NYDIG requests that the matter be put newly in front of the chambers judge or remitted to the chambers judge for consideration and reasons.

II. THE SUBSTANTIVE CONSOLIDATION RELIEF SHOULD BE REMITTED TO THE CHAMBERS JUDGE

11. Due to the inadequacy of the chambers' judge's reasons and developments in the substantive consolidation case law, the "Substantive Consolidation Relief" should not be determined by this Court. The Appellants insist that a "failure to give adequate reasons is not a free-standing basis for appeal", but it is the combination of the insufficiency of the reasons of the chambers judge and the inability of this Court to substitute its own decision that necessitates the granting of the cross appeal.

12. In cases where the law on a topic has changed since the lower court decision, it is appropriate for the case to be remitted to the trial judge for further consideration. In this instance, the recent decision of the Manitoba Court of Appeal in *White Oak Commercial Finance, LLC v. Nygard Enterprises Ltd et al* has altered the law on substantive consolidation specifically with respect to the availability of a substantive consolidation order affecting solvent and insolvent entities, which directly undermines the only substantive legal factor on which the chambers judge could be said to have based his decision. The record cannot support the decision of the chambers judge as it stands.

Interclaim Holdings Ltd. v. Down, 2004 ABCA 60 at paras. 10-14

White Oak Commercial Finance, LLC v. Nygard Enterprises Ltd et al, 2023 MBCA 73 **[*Nygard*]** at paras. 43 and 52

13. Given the paucity of reasons regarding the Substantive Consolidation Relief, and given the acutely relevant developments in substantive consolidation law, it is just and appropriate for the chambers judge to reconsider the Substantive Consolidation Relief.

III. THE RECORD SUPPORTS GRANTING THE OPPRESSION REMEDY RELIEF AND SUBSTANTIVE CONSOLIDATION RELIEF

A. Oppression Remedy Relief

14. The Appellants state that the chambers judge found that NYDIG's collateral did not include the Bitcoin mined by IE CA 3 and IE CA 4. This finding does not preclude NYDIG from having a reasonable expectation that the Bitcoin was its collateral

because reasonable expectations are based on “fairness and equity rather than on legal rights.”

Appellants’ Cross Appeal Response Factum at para. 16

BCE Inc., Re., 2008 SCC 69 at para. 71

B. Substantive Consolidation Relief

15. If the record is fully considered in the light of the current law on substantive consolidation, it is clear that a substantive consolidation order should be granted. The Appellants effectively argue that the chambers judge was correct that the application of the doctrine of substantive consolidation in the circumstances would be an extraordinary remedy out of line with the general application of the doctrine.

Appellants’ Cross Appeal Response Factum at para. 28

16. However, in light of the decision in *Nygard*, it would not be unprecedented to consolidate solvent and insolvent entities. Although the decision in *Nygard* was released after the hearing of this case was concluded, it is the role of this Court to consider every relevant authority that is key to the proceedings, particularly if this Court is also going to examine the record to make a determination on the merits.

Lougheed Enterprises Ltd. v. Armbruster, 1992 CanLII 1742 (BC CA) at paras. 36-38

17. In fact, the record demonstrates that, once the issue of consolidating insolvent and solvent entities is resolved, an order substantively consolidating IEL with IE CA 3 and IE CA 4 would not be extraordinary. NYDIG provided copious amounts of evidence, including from the independent receiver of IE CA 3 and IE CA 4, demonstrating that the ‘elements of consolidation’ from the test for substantive consolidation were present. NYDIG also showed how the balance of prejudices from the test weighed in favour of granting a substantive consolidation order and that such an order would be fair and reasonable.

Transcripts Vol. 1 at pp. 118-134 and pp. 135-138

18. The Appellants argue that there is no prejudice to NYDIG since the Bitcoin was not found to be its collateral. Yet, NYDIG was clearly prejudiced by fraudulent

conveyances by the Appellants that reduced the funds available to NYDIG via IE CA 3 and IE CA 4.

Appellants' Cross Appeal Response Factum at para. 29

Transcripts Vol. 1 at p.140-141 II. 35-47 and p. 141. II. 1-7

19. The Appellants' argument in support of the chambers judge's very brief statement that the substantive consolidation relief too closely resembled the parent guarantee that NYDIG did not obtain fails on similar grounds. The chambers judge did not connect his consideration of the parent guarantee to the test for substantive consolidation, which would provide the necessary legal basis for his decision. Moreover, although the Parent Letter Agreement did not make IEL responsible for the obligations of IE CA 3 and IE CA 4, it did not absolve them of their complicity in carrying out the fraudulent conveyances and allow them to prevent NYDIG from obtaining funds that are rightfully part of its collateral through those conveyances. An order for substantive consolidation alongside the existing order on fraudulent conveyances is therefore not incongruent with the Parent Letter Agreement.

Appellants' Cross Appeal Response Factum at para. 31

20. As a result, the "why" of the chambers judge's decision is not evident on the record and the cross appeal should be allowed in that respect.

21. All of which is respectfully submitted.

Dated at the City of Vancouver, this 27th day of February 2024.

Chris Burr and Claire Hildebrand

Counsel for the Appellant by Cross Appeal

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