COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *IE CA 3 Holdings Ltd. v. NYDIG ABL LLC,* 2024 BCCA 244

Date: 20240627
Docket: CA49297

Between:

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

Appellants/
Respondents on Cross Appeal
(Respondents)

And

NYDIG ABL LLC

Respondent/
Appellant on Cross Appeal
(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)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated August 10, 2023 (*NYDIG ABL LLC v. IE CA 3 Holdings Ltd.*, 2023 BCSC 1383, Vancouver Docket S230488).

Counsel for the Appellants/Respondents on Cross Appeal:	K.E. Siddall C.L. Formosa
Counsel for the Respondent/Appellant on Cross Appeal:	C. Bur C.I. Hildebrand
Counsel for the Respondent, Pricewaterhouse Coopers Inc. in its capacity as receiver and manager over IE CA 3 Holdings Ltd. and IE CA 4 Holdings Ltd.:	M. Buttery, K.C.

Place and Date of Hearing:	Vancouver, British Columbia March 12, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 27, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Justice Dickson

Summary:

The appellants IE CA 3 Holdings Ltd. and IE CA 4 Holdings Ltd. are related companies involved in the Bitcoin mining industry. They borrowed funds from the respondent NYDIG ABL LLC to purchase sophisticated computers that, to NYDIG's knowledge, would generate hashpower purchased at a fixed price and used by their parent company Iris Energy Ltd. to mine Bitcoin. When the price of Bitcoin dropped, the debtors defaulted. NYDIG had a receiver appointed, and then brought an application seeking relief against the debtors and Iris. The appellants appeal from the judge's declaration that the hashpower agreements were fraudulent conveyances. The respondent cross appeals from dismissal of its application based on the oppression remedy, and the doctrine of substantive consolidation.

Held: Appeal allowed; cross appeal allowed in part.

The judge erred in concluding that the hashpower agreements were fraudulent conveyances, as any presumed intent was rebutted by the facts of the disclosure of the inter-company arrangements and NYDIG's acceptance of those arrangements prior to it loaning funds. The judge's findings that Iris did not pledge any collateral in the Bitcoin, and that NYDIG knew of the inter-company arrangements, rebuts any presumed fraudulent intent. Since NYDIG knew that it had not negotiated for a remedy in relation to the hashpower sold to Iris, it cannot be said that the debtors intended to deprive it of a just and lawful remedy within the meaning of the Fraudulent Conveyance Act.

The judge did not analyze the alternative claim seeking an oppression remedy. The dismissal of this aspect of the application does not permit appellate review and should be remitted to the trial court for determination. The judge's findings of fact supported his conclusion that the doctrine of substantive consolidation did not apply.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] This appeal raises the question of whether a sophisticated lender can later challenge some of the debtors' transactions with a parent company as fraudulent conveyances and have those transactions set aside, when, before the loan was advanced, the fact of those transactions was disclosed by the debtors. A significant part of the context is the fact the lender asked for, and was refused, recourse to the parent company prior to agreeing to advance the loan to the debtors.

[2] In other words, the central question on this appeal, is whether it can be said in the circumstances of this case, that the debtors made a "disposition of property" "to

delay, hinder or defraud creditors and others of their just and lawful remedies", within the meaning of s. 1 of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 [*FCA*].

[3] The judge below held that the debtor's transactions with the parent company were void as fraudulent transactions. The appellants submit that the judge erred.

[4] For the reasons that follow, I agree with the appellants that the judge erred. In my view, it cannot be said that the transactions with the parent company were made to deprive the creditor of its just and lawful remedies, when the creditor knew, before the loan was advanced, that the transactions were intended as part of the inter-company business model and that the creditor would have no remedy against the parent company in relation to the transactions.

[5] However, I also agree with the respondent, on cross appeal, that the judge did not provide sufficient reasons for dismissal of the alternative ground for relief sought by the creditor based on the oppression remedy. That aspect of the application must be remitted to the trial court for determination.

Background

[6] While the commercial arrangements were somewhat complex, a simplified version of the facts is all that is necessary for the purposes of the issue on appeal.

[7] The creditor, and respondent on this appeal advancing a cross appeal, is NYDIG ABL LLC ("NYDIG" or the "creditor"). NYDIG acquired a company called Arctos Capital ("Arctos") in 2021. A director of Arctos, Trevor Smyth, became an employee of NYDIG. It is undisputed that the knowledge of Arctos became the knowledge of NYDIG. NYDIG is one of the largest financiers of the Bitcoin industry.

[8] The appellants are IE CA 3 Holdings Ltd. ("IE CA 3") and IE CA 4 Holdings Ltd. ("IE CA 4"), and their parent company Iris Energy Limited ("Iris"). IE CA 3 and IE CA 4 are the entities (the "debtors") that borrowed money from NYDIG (or its predecessor Arctos) to finance the purchase of specialized computers.

[9] Iris structures its business, with its subsidiaries, as follows:

a) Iris is an Australian public company. It owns and operates Bitcoin mining data centres.

b) The debtors are subsidiaries of Iris. They purchase and operate specialized computers called “application-specific integrated circuit miners”, known in this proceeding as the “Mining Equipment”. They produce what is described as “hashpower” which is the computing power used to solve algorithms and ultimately to generate Bitcoin.

c) Iris purchases the hashpower from its subsidiaries, and submits it to a mining pool, where it earns Bitcoin through a combination of block rewards and transaction fees, and then it exchanges Bitcoin for dollars on a daily basis.

[10] More specifically, the business model as between Iris and the debtors, is:

a) the debtors purchase Mining Equipment;

b) the debtors enter into hosting agreements with “host” entities that provide data centre facilities to host the Mining Equipment. The debtors pay the host to operate the Mining Equipment for a fixed fee (CAD $0.08/kWh);

c) the debtors sell the generated hashpower at a fixed rate to Iris under hashpower agreements at CAD$0.096/kWh;

d) the debtors’ net income is generated by selling the hashpower to Iris pursuant to the hashpower agreements; but less their expenses paid to the host entities pursuant to the hosting agreements; and

e) Iris has all rights to the Bitcoin it generates from the hashpower, and the proceeds of sale of the Bitcoin.

[11] The host entities are also subsidiaries of Iris. They lease the premises where the equipment is operated and provide the associated infrastructure such as electricity.

[12] The purpose of NYDIG's loans to the debtors was to finance the purchase of the Mining Equipment.

[13] Crucially, the above business model and inter-company relationships were disclosed to and known to NYDIG prior to it entering into any agreements to loan funds to the debtors.

[14] Indeed, Arctos provided financing to another subsidiary of Iris, IE CA 2 Holdings Ltd. ("IE CA 2"), in late 2020 pursuant to this business model. IE CA 2 entered into a limited recourse equipment financing loan with Arctos, pursuant to a Master Equipment Financing Agreement (the "IE CA 2 MEFA"). The IE CA 2 MEFA expressly references hashpower agreements and hosting agreements, and executed copies of these agreements were provided to Arctos.

[15] Furthermore, over the years, IE CA 2 provided financial statements to Arctos, and later NYDIG, which reference the hashpower revenue and hosting fees.

[16] IE CA 2 repaid NYDIG the full amount due and owing under the IE CA 2 MEFA.

[17] IE CA 3 entered into a Master Equipment Finance Agreement ("the IE CA 3 MEFA") with Arctos on substantially the same terms as the IE CA 2 MEFA, on May 25, 2021.

[18] IE CA 4 entered into a Master Equipment Finance Agreement with NYDIG on March 22, 2022 (the "IE CA 4 MEFA").

[19] Before that date, IE CA 4 provided NYDIG with copies of hashpower agreements and hosting agreements in respect of the IE CA 2 MEFA. As well, IE CA 4 provided NYDIG with an executed copy of the hashpower agreement which provided for the fees that IE CA 4 would receive from Iris in return for the

hashpower. IE CA 4 also provided NYDIG with an executed copy of the hosting agreements setting out the fees that IE CA 4 agreed to pay to the host entities for use of their data centre facilities.

[20] As with the earlier MEFAs, the IE CA 4 MEFA also expressly references hashpower agreements and hosting agreements.

[21] IE CA 3 did not have written hosting agreements or a written hashpower agreement, but operated on the same basis and same terms and pursuant to the same business model as IE CA 2 and IE CA 4. This was understood by Arctos (later NYDIG) as the IE CA 3 MEFA expressly references hashpower agreements and hosting agreements.

[22] Prior to the IE CA 4 MEFA, NYDIG requested Iris to provide a guarantee of the loan, and to pledge the Bitcoin obtained by Iris using the hashpower, as collateral. Iris expressly declined and NYDIG removed the requirements.

[23] The evidence supported the conclusion that NYDIG believed that its security in the Mining Equipment was adequate security for its loan. The value of Mining Equipment fluctuates with the value of Bitcoin.

[24] Instead of a guarantee or pledge of Bitcoin as collateral by Iris, NYDIG and Iris signed a parent letter agreement dated March 24, 2022 in relation to the loan to IE CA 4 (the “Parent Letter Agreement”). The Parent Letter Agreement, in summary, expressly:

a) confirmed that Iris would not be responsible or liable for IE CA 4’s obligations under the loan and was not a guarantor of the loan to IE CA 4;

b) identified that Iris acknowledged that IE CA 4 granted NYDIG a lien and security interests on all personal property assets of IE CA 4, including the Mining Equipment and its rights under the hashpower agreement;

c) confirmed that any rights of Iris in this collateral would be subordinate to NYDIG’s rights; and

d) provided that upon NYDIG giving notice of termination of the hashpower agreement (upon IE CA 4's default), the hashpower agreement would terminate and all rights in the untransferred hashpower would revert to IE CA 4.

[25] The hashpower agreement between IE CA 4 and Iris was attached to the Parent Letter Agreement.

[26] Through the respective MEFAs, NYDIG financed approximately 37,800 pieces of Bitcoin mining equipment purchased by IE CA 3 and IE CA 4. These were held in facilities in smaller communities in the interior of BC.

[27] The market for Bitcoin dramatically fell in late 2022. The drop of the market also dramatically negatively affected the market value of the Mining Equipment serving as collateral for the debt owed to NYDIG.

[28] On November 4, 2022 the host entities terminated the respective hosting agreements with the debtors, pursuant to the terms of those agreements. This was because there was no assurance from the debtors that they could continue to pay the hosting fees.

[29] Pursuant to terms that had been agreed upon, NYDIG had 90 days to collect or sell the Mining Equipment, however it took no steps to do so. Rather, it brought a petition to appoint a receiver over the property of the debtors.

[30] The debtors did not oppose this relief and a receiver was appointed on February 3, 2023.

[31] In the course of the receivership petition proceeding, NYDIG brought an application seeking to obtain some relief related to the Bitcoin mined by Iris using the hashpower, namely:

a) a declaration that the Bitcoin mined by Iris, and the proceeds thereof, were collateral for the debt owed by the debtors to NYDIG;

or, in the alternative:

b) a declaration that the transactions carried out pursuant to the hashpower agreements between the debtors and Iris were fraudulent conveyances and void as against NYDIG;

c) a declaration that the affairs of the debtors and Iris had been conducted in a manner oppressive to NYDIG, pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57; and

d) a declaration that the debtors and Iris be treated, as against NYDIG, as a single debtor entity, by consolidating all of their assets and liabilities pursuant to the doctrine of “substantive consolidation”.

[32] The respondents opposed the application.

[33] The receiver ostensibly took no position. However, the receiver filed evidence of its own analysis of the business model of Iris and the debtors, which in summary, suggested that the hashpower agreements were not commercially reasonable agreements, because, among other things, Iris appeared able to profit significantly more from the hashpower through Bitcoin mining than it was paying the debtors for that hashpower. Further, the debtors were not making enough revenue, after paying the hosting fees, to service the interest on the debt. However, all of this was known to NYDIG or knowable based on disclosure to it, prior to it advancing the loans.

[34] No expert opinion evidence was provided as to the fair market value of the hashpower and how that related to the fixed fees being charged under the hashpower agreements.

[35] At present, IE CA 3 owes NYDIG in excess of US $36 million and IE CA 4 owes in excess of US $77 million.

Chambers Judgment

[36] The chambers judge dismissed parts of NYDIG's application but granted other relief, in reasons indexed at 2023 BCSC 1383 (the "Reasons").

[37] In particular, the judge:

a) dismissed NYDIG's application for a declaration that its collateral included the Bitcoin and proceeds derived from the Bitcoin mined pursuant to the hashpower agreements;

b) dismissed NYDIG's application for a declaration that the affairs of the debtors and Iris were conducted in a manner oppressive to NYDIG;

c) dismissed NYDIG's application for substantive consolidation of the debtors' and Iris's assets and liabilities; and

d) granted NYDIG's application for declaration that the hashpower agreements between Iris and IE CA 4 and IE CA 3, were void as against NYDIG, as fraudulent conveyances.

[38] The judge relied on *0848052 B.C. Ltd. v. 0782484 B.C. Ltd*., 2023 BCCA 95 at para. 57, for the three elements of a fraudulent conveyance, namely:

a) A disposition of property;

b) Made with the "intent to delay, hinder or defraud creditors and others"; and

c) That the transaction has that effect.

[39] The dispute over whether the transfer of hashpower to NYDIG was a fraudulent conveyance turned on the second element, intent.

[40] The judge cited various authorities for the approach to intent under the *FCA*, noting that it does not require dishonesty and can be inferred from "badges of fraud":

> [129] In *Zhu v. Zhang*, 2021 BCSC 2524, Adair J. helpfully summarised the applicable test in the following terms:

[117] *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521, is one of the leading cases interpreting the *Fraudulent Conveyance Act*. The principles from that case can be summarized as follows:

> (a) the *Fraudulent Conveyance Act* is to be construed liberally (para. 62);
>
> (b) an intent to put one's assets beyond the reach of creditors is all that is required to void a transaction (paras. 64, 73);
>
> (c) a dishonest intent or bad faith is not a necessary element to avoid a transaction under s.1 of the Act (para. 65);
>
> (d) intent is a state of mind and a question of fact (para. 74);
>
> (e) intent can be proven by direct evidence of the transferor's intent as well as by inferences from the transferor's conduct, the effect of the transfer and other circumstances (para. 80);
>
> (f) where a transfer of property has the effect of delaying, hindering or defeating creditors, the necessary intent is presumed (paras. 58-59 and 75);
>
> (g) inadequate consideration paid for the transferred property may be indicative of fraudulent intent (para. 76);
>
> (h) it is not necessary to show the transferor was insolvent at the time of the transfer (para. 60);
>
> (i) it is not necessary for an applicant to show the applicant was a creditor at the time of the transfer, and future creditors are also protected (paras. 60, 78 and 87); and
>
> (j) it is no defence that the transfer was also in furtherance of a legitimate business objective (paras. 84-85).

[118] An intent to put assets beyond the reach of creditors can be inferred from what have been described as the "badges of fraud." As MacNaughton J. wrote in [*Wu v. Gu*, 2020 BCSC 396], at para. 84:

> [84] The intent to put assets out of the reach of creditors must often be inferred from the "badges of fraud". The cases repeatedly consider the following indicia or badges of fraud:
>
> (a) the state of the debtor's financial affairs;
>
> (b) the relationship between the parties to the transfer;
>
> (c) whether the disposition effectively divests the debtor of assets;
>
> (d) evidence of haste in making the disposition;
>
> (e) timing of the transfer relative to notice of the debts;
>
> (f) the presence of valuable consideration; and

> (g) whether the transferor continued in possession after the transfer.
>
> [citations omitted [in *Zhu.*]]
>
> [130] In *Trans Canada Insurance Marketing Inc. v. Fransen Insurance Services Ltd.* 2019 BCSC 1250, Forth J. added the following observations about the requisite element of intent:
>
> > [90] Where the impugned transaction is made for no consideration, a presumption arises that it was carried out fraudulently: [*Mawdsley v. Meshen*, 2012 BCCA 91] at para. 53. This presumption may be rebutted by evidence that the transferor did not dispose of the assets in furtherance of an improper purpose: *Mawdsley* at para. 53. If the consideration paid is inadequate or nominal, the plaintiff need only show that the transferor intended to delay, hinder or defraud the creditors of its remedies. If valuable consideration has passed, the plaintiff must show that the transferee actively participated in the fraud: *Sutton v. Oshoway*, 2011 BCCA 245, at para. 4, citing *Chan v. Stanwood*, 2002 BCCA 474 at para. 20.
> >
> > [91] A voluntary transfer that renders the debtor unable to meet his or her then existing liabilities will furnish strong evidence of an intent to defraud creditors: *Hawkeye Power Corporation v. Sigma Engineering Ltd*., 2014 BCSC 1444 at para. 110, aff'd 2015 BCCA 451.

[41] The judge did not make an express finding as to the actual intent of the debtors but found that there were "badges of fraud". The judge held:

> [133] The main issue in dispute between the parties in this regard is whether the second element (intent) can fairly be inferred on the facts of this case. In arguing that it can and should, NYDIG submits that most of the badges of fraud (with the possible exception of haste) are present and weigh in favour of that result.
>
> [134] I agree with NYDIG that the following factors, present here, are tantamount to "badges of fraud", supporting the relief that NYDIG seeks:
>
> > a) the impugned transactions were not at arm's length;
> >
> > b) IEL directed the flow of funds within the Iris Group in a manner that caused IEL to reap most of the financial benefit generated by the Equipment, while leaving the Debtors carrying most of the associated burden; and
> >
> > c) the effect of that structure was to leave the Debtors in need of ongoing subsidies from IEL in order to meet their financial obligations.
>
> [135] In the words of Forth J. in [*Trans Canada Insurance Marketing Inc. v. Fransen Insurance Services Ltd.*, 2019 BCSC 1250], the Hashpower Agreements brought about "[a] voluntary transfer that renders the debtor unable to meet his or her then existing liabilities," which serves as "strong evidence of an intent to defraud creditors."

> [136] I am also satisfied that the price that IEL paid the Debtors for the transferred hashpower under the Hashpower Agreements was substantially less than its actual value, as reflected in:
>
> a) the cost to the Debtors of producing it (particularly, the purchase of the Equipment and assumption of the associated debt and hosting fees); and
>
> b) the consideration ultimately received by IEL in disposing of it.
>
> [Emphasis added.]

[42] The crux of the chambers judge's reasoning in granting the fraudulent conveyance declarations turned on the receiver's opinion that there is a large discrepancy between the value that Iris received for the hashpower when it used it to mine Bitcoin, and the consideration it paid to the debtors for the hashpower under the hashpower agreements, such that Iris received millions more in selling Bitcoin than it paid the debtors: paras. 136–140.

[43] Further, the judge concluded that Iris had made additional payments to the debtors, in addition to the payments under the hashpower agreements, whether as loans or otherwise. According to the judge, this meant that it "would have appeared" to NYDIG that Iris would subsidize the debtors so that they could meet their debt obligations.

[44] The debtors and Iris argued that their transactions could not be fraudulent conveyances when the business model had been fully disclosed to NYDIG before it made the loans. The judge did not accept this argument, holding:

> [143] 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. 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, [Iris]'s apparent subsidy of their loan payments, which was booked internally as a series of subordinated inter-company loans.

[144] NYDIG was aware that the Debtors would be unable, on their own, to meet the obligations they were taking on under the MEFAs, if their sole source of revenue was the fees payable to them by Iris under their respective hashpower agreements. In Mr. Smyth's email of February 21, 2022, sent when the concept of a parent guarantee was still on the table, he noted that IE CA 4 would be "relying on the parent to make loan payments" and that IE CA 4 "is not a bankruptcy remote SPV."

[145] However, NYDIG also 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. In addition, it would have appeared to NYDIG that the Debtors were also receiving a subsidy from [Iris] in order to put them in a position to meet their financial obligations to NYDIG. That was the apparent pattern that began with IE CA 2 and continued with the Debtors. NYDIG never agreed, and was never told, that [Iris] would treat its supplemental cash transfers to the Debtors not as a subsidy, but rather as a series of subordinated loans – loans that, moreover, [Iris] would consider itself at liberty to cease advancing whenever [Iris] unilaterally determined that its own interest was no longer served by doing so.

[146] Although NYDIG ultimately abandoned its demand for a formal parent guarantee, it does not follow that [Iris] was left free thereafter to direct the inter-company flow of funds in any manner it pleased. [Iris]'s commitment not to conduct itself as it did arises implicitly from the language of the Parent Letter Agreement, which must be interpreted in light of [Iris]'s implied duty of good faith in its implementation….

[147] In the Parent Letter Agreement, [Iris] acknowledged the commitments it had caused IE CA 4 to make to NYDIG and confirmed that it was "financially interested in [IE CA 4]'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]."

[148] Viewed in that light, the Respondents' assertion that NYDIG alone, with its eyes wide open, assumed the risk of the steep drop in Bitcoin prices that occurred in the second half of 2022, is not supported by the evidence. Although I have rejected NYDIG's argument that the MEFAs contained a pledge of all Bitcoin mined with the Equipment, it does not follow that these were "limited recourse" loans, in the sense that they were secured only by the pledge of the Equipment, as the Respondents have sought to characterise them. Rather, NYDIG took security in *all* property of the Debtors, including all proceeds from the sale of the hashpower generated by the Equipment, with the attendant right to expect fair consideration to be paid for it.

[149] 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 [Iris] paid for it), which is not

> necessarily the same as a sum sufficient to make NYDIG whole on the debt it is owed.
>
> [Emphasis added.]

[45] In light of his findings, the judge found it unnecessary to consider the appropriateness of the oppression remedy sought by NYDIG pursuant to s. 227 of the *Business Corporations Act*: para. 151.

[46] The judge further held that it would expand the doctrine of "substantive consolidation" to combine a solvent company's assets with its insolvent affiliates, and this was not a case where it was necessary to do so. Furthermore, the judge found that this form of relief "more closely resembles the parent guarantee that NYDIG abandoned at the bargaining table": para. 152.

Grounds of Appeal and Cross Appeal

[47] The appellants submit that the chambers judge made errors of law and palpable and overriding errors of fact in his analysis of the claim of fraudulent conveyance.

[48] On cross appeal, NYDIG submits that the chambers judge erred in dismissing the application for oppression relief or in relation to substantive consolidation, by not providing adequate reasons, and not considering or applying the relevant legal test.

Analysis

[49] I will address the main appeal before turning to the cross appeal.

Appeal: Did the Judge Err in Determining that the Hashpower Agreements were Fraudulent Conveyances?

[50] The analysis must start with the *FCA* which consists of two sections:

> 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.

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.

[Emphasis added.]

[51] The disposition of property was the hashpower sold by the debtors to Iris under the hashpower agreements.

[52] The application below turned on the question of whether the debtors had the necessary intent under the *FCA*.

[53] In summary, the appellants submit that the judge made a combination of errors that led to the wrong conclusion that the hashpower agreements were fraudulent conveyances and therefore void as against NYDIG.

[54] Respectfully, I agree that the judge made a combination of errors:

a) He assumed fraudulent intent from “badges of fraud” without recognizing that these were rebutted by NYDIG’s agreement to the business model; and

b) He buttressed his finding of fraudulent intent by making findings as to NYDIG’s subjective expectations and implied contractual terms that were unsupported by evidence and directly inconsistent with the express terms of the contract.

[55] In my view, at its heart, the judge’s findings that the hashpower agreements were fraudulent conveyances are internally inconsistent with the judge’s findings as to the parties’ negotiations and express agreements.

[56] The necessary intent has long been held to not require a subjectively dishonest state of mind, but it does require something more than simply proving that

the effect of the transfer is to hinder or delay creditors. The claimant must still prove as a matter of fact that there was an intention to "delay, hinder or defraud creditors… of their just and lawful remedies": *Mawdsley v. Meshen*, 2012 BCCA 91 at para. 7, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 182.

[57] The law is well established that intent may be inferred from all the circumstances, and that "badges of fraud" can create a presumption of the necessary fraudulent intent. However, that presumption is rebuttable: *Mawdsley* at para. 70.

[58] The judge agreed with NYDIG that there were certain badges of fraud, namely: the transfer of hashpower was between parties that were not at arm's length; the business model allowed Iris to reap most of the financial benefit generated by the Mining Equipment, leaving the debtors with most of the burden; and the effect of the business model meant that the debtors would need ongoing "subsidies" from Iris in order to meet their financial obligations: at para. 134. In addition, the judge found that Iris paid the debtors for the hashpower substantially less than it was actually worth: para. 135.

[59] What is missing in the judge's analysis is recognition of the implications that all of this was disclosed or available to NYDIG before it entered into the loan transactions, and this disclosure rebutted any presumption of fraudulent intent.

[60] On the judge's own findings, NYDIG's collateral under the MEFAs did not extend to Bitcoin mined by Iris using the hashpower it acquired under the hashpower agreements, nor did it extend to proceeds of sale of Bitcoin: para. 119. NYDIG understood that the hashpower agreements meant that hashpower that would have otherwise belonged to the debtors, was transferred to Iris: para. 111. NYDIG knew that only Iris would receive Bitcoin from mining the hashpower, and NYDIG agreed it would have no interest in that Bitcoin. NYDIG instead agreed to the lesser remedy of a right to terminate the hashpower agreement so that the hashpower would remain with IE CA 4 after an event of default: para. 113.

[61] The evidence was clear that prior to entering into the loan transactions, NYDIG had disclosed to it and understood: the fact that the debtors were subsidiaries of Iris; the amount of the fixed hashpower rates being paid by Iris to the debtors; the fees that the debtors had to pay under the hosting agreements with related parties; that Iris would use the hashpower to mine Bitcoin; that the debtors, and NYDIG, would have no recourse against the Bitcoin mined by Iris or the proceeds of sale of the Bitcoin; the debtors' only assets were the Mining Equipment; and the debtors' only revenue came from the hashpower rates.

[62] The judge had also rejected NYDIG's argument that it would make no commercial sense for it to agree to finance the acquisition of equipment that depreciated as quickly as this equipment did, without taking additional security: para. 114. The judge was not persuaded that NYDIG considered itself under-secured without additional security: para. 115. NYDIG could well have believed its security in the Mining Equipment to be adequate: para. 118.

[63] The judge failed to grapple with the significance of his own findings regarding what NYDIG knew and agreed to, which rebutted any presumption of fraud.

[64] In *Mawdsley*, certain estate planning by the deceased common law wife, which deprived her surviving third husband of some of her assets, was found not to be a fraudulent conveyance because the wife believed she had an agreement with the claimant that he would not make a claim to the assets: para. 56. This was despite the fact that her intention was clearly to put her assets out of his reach so that her children would benefit from them after her death. The estate planning was conducted with the husband's knowledge and he did not object to it.

[65] I see *Mawdsley* as an application of the words of the *FCA* in the full context of what was known to the claimant at the time of the transactions being challenged, an analysis missing in the present case.

[66] If it was disclosed to the creditor, prior to the transaction being challenged, and the creditor agreed and understood that the creditor would have no remedy

against the assets being transferred, it cannot be said the transfer was depriving the creditor of a “just and lawful remedy”. The creditor knows it has no remedy against those assets, and agrees with the arrangement, so it is not being deprived of anything.

[67] In my view, the judge erred in not appreciating that NYDIG agreed not to have any remedy in relation to the inter-company transfer of hashpower, other than that which it expressly negotiated would occur if the debtors went into default. Given the debtors’ disclosure to NYDIG and NYDIG’s agreement to the entire business model, the debtors could not have intended to deprive NYDIG of any “just and lawful” remedy when they transferred hashpower to Iris under the hashpower agreements. This is a complete answer to the claim under the *FCA*.

[68] The flaw in the chambers judge’s analysis under the *FCA* is not only due to his failure to consider that the presumption of fraudulent intent was rebutted, but was exacerbated by the judge drawing inferences regarding NYDIG’s expectations and implying terms of its contract with Iris, findings that are plainly unsupported by the loan agreements and evidence, namely:

a) that NYDIG had reason to believe that the consideration paid to the debtors for their hashpower was not confined to the fees payable under the respective hashpower agreements: para. 145;

b) that when NYDIG took security in all the property of the debtors, including proceeds from sale of the hashpower, it had a “right to expect fair consideration to be paid for it”: para. 148;

c) that NYDIG did not know that Iris would consider itself free to cease advancing supplemental funds to the debtors without obligation to NYDIG (implied by findings at para. 145); and

d) under the Parent Letter Agreement, Iris had an implied good faith obligation to fund the debtors (paras. 146–147).

[69] The above findings of fact are inferences that are unsupported by direct evidence and inconsistent with the actual business negotiations and contracts entered into by the parties, and do not make sense given the disclosure to NYDIG prior to the transactions. NYDIG was a sophisticated lender and given the arrangements disclosed to it, Iris's refusal to be responsible for the debt, and the lack of any promise by Iris to subsidize the debtors, NYDIG had no basis for an expectation that Iris would pay the debtors more than what the hashpower agreements provided.

[70] The business model disclosed to NYDIG was that it was the parent company, Iris, that would benefit from the Bitcoin mined using the hashpower, not the debtors. NYDIG knew that Iris was unwilling to provide a guarantee or to provide the Bitcoin as collateral. All forms of security for NYDIG were negotiated and dealt with by express terms. In all the circumstances, NYDIG had no reason to believe that Iris had any legal obligation to support the debtors beyond paying for the hashpower pursuant to the hashpower agreements.

[71] Further, the appellants submit that the finding by the chambers judge, that the Parent Letter Agreement meant that Iris had an implied duty of good faith to fund the debtors, was not pleaded or argued. The appellants contend that it is contrary to the negotiations and express content of the Parent Letter Agreement to imply that Iris had an obligation to pay the debtors something more than what was provided for under the hashpower agreements, if the debtors were struggling with repaying the debt to NYDIG.

[72] I agree with the appellants that the chambers judge's finding of such an implied duty is unsupported and contrary to the express terms of the Parent Letter Agreement.

[73] The judge appeared to ground the implied duty in the Parent Letter Agreement, as follows:

> [147] In the Parent Letter Agreement, IEL acknowledged the commitments it had caused IE CA 4 to make to NYDIG and confirmed that it was

> "financially interested in [IE CA 4]'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]."

[74] However, the passage quoted from the Parent Letter Agreement is simply the recital that explains the consideration flowing from NYDIG to Iris, consideration that supports holding Iris to the limited contractual commitments it makes in the Parent Letter Agreement. It does not expand the commitments made by Iris beyond that expressly stated in the Parent Letter Agreement.

[75] The fact that Iris might voluntarily pay more to the debtors from time to time was not in any way a commitment that it was bound to do so. Further, NYDIG was a sophisticated commercial lender, and there was no finding that Iris or the debtors made any misrepresentations to it about the business model.

[76] Importantly, the Parent Letter Agreement makes it quite clear that NYDIG will have no recourse against Iris. As noted by the judge earlier in his reasons at para. 83, in that agreement, NYDIG:

> … acknowledges and agrees that, notwithstanding any other provision of any Loan Document (including this Parent Letter Agreement), [Iris] will not be liable or responsible for any of [IE CA 4]'s obligations under the Loan Documents and does not act [as] a guarantor in respect of any such obligations under the Loan Documents or otherwise in relation to [IE CA 4]. [Emphasis added.]

[77] Nor was there any promise made by Iris in respect of the loan to IE CA 3.

[78] In short, the judge appears to have implied an obligation on the part of Iris to pay more for hashpower than what the hashpower agreements provided for, or to subsidize the debtors, if the debtors were unable on their own to service the debt to NYDIG, and in order that the debtors could service the debt. This is despite express language that indicates a contrary contractual intent: Iris was going to purchase hashpower in a non-arm's length transaction at a fixed rate and without agreeing to be in any way responsible for the debt. In my view, the judge's finding of an implied obligation was a palpable and overriding error.

[79] For these reasons, I conclude that the judge erred in treating as fraudulent conveyances, debtor-related-company transactions that were part of a known business model, disclosed to the creditor prior to the loans. These debtor-related companies structured their affairs in part to maximize profit to the parent company and minimize the parent company's exposure to liability, but NYDIG was a sophisticated lender that knew of this before it entered into the transactions. NYDIG knew, and accepted as part of its loan arrangements, that it would have no recourse against the parent company Iris, and accepted that the debtors would transfer hashpower to Iris at fixed rates. It cannot be said that the debtors had the necessary intent under the *FCA* when they carried out the transfer of hashpower pursuant to the hashpower agreements.

[80] I would set aside the judge's declaration that the hashpower transfers to NYDIG were void as fraudulent conveyances.

Cross Appeal: Did the Judge Err in Disposing of Other Grounds Advanced in NYDIG's Application?

[81] Because the judge granted relief pursuant to the *FCA*, the judge clearly felt it unnecessary to analyze the legal principles, factors and relevant evidence in respect of NYDIG's claims for relief pursuant to the statutory oppression remedy. The judge devoted only a single paragraph to this claim, and his reasons do not permit appellate review. In my view, it is not appropriate that we act as a court of first instance in analyzing this alternative basis for relief: *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.,* 2020 BCCA 371 at para. 109. I will not comment on whether, as the appellants assert, this basis for relief will in any event be precluded by the findings of fact made by the judge. Given my conclusion that the judge erred in granting relief pursuant to the *FCA*, this ground for NYDIG's application should be remitted to the trial court for consideration.

[82] Although the judge's reasons in relation to the doctrine of substantive consolidation are also brief, in my view, they do permit appellate review. In short, the judge concluded that it was inappropriate on the facts to expand the doctrine to

apply to a solvent parent company in the circumstances, and it too closely resembled the parent company guarantee that was precluded by his findings of fact. I agree with the judge in this regard and see no basis for appellate interference in this conclusion.

Disposition

[83] The appeal is allowed, and the judge's declaration of fraudulent conveyances is set aside.

[84] The cross appeal is allowed in part. The respondent's application for relief in relation to the oppression remedy is remitted to the trial court.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Dickson"