

CANADA / JUDGMENT

IE CA 3 Holdings Ltd. v. NYDIG ABL LLC

2024 BCCA 38

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 38 IE CA 3 Holdings Ltd. v. NYDIG ABL LLC COURT OF APPEAL FOR BRITISH COLUMBIA Citation: IE CA 3 Holdings Ltd. v. NYDIG ABL LLC, 2024 BCCA 38 Date: 20240130 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 Hunter (In Chambers) 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). Oral Reasons for Judgment Counsel for the Appellants/Respondents on Cross Appeal: K.E. Siddall C.L. Formosa Counsel for the Respondent/Appellant on Cross Appeal: C. Burr C.I. Hildebrand Place and Date of Hearing: Vancouver, British Columbia January 30, 2024 Place and Date of Judgment: Vancouver, British Columbia January 30, 2024 Summary: The respondent applies for an extension of time to file a notice of cross-appeal and a cross-appeal factum. Held: Extension granted. There was a dispute about the scope of the order that was not resolved until after the time for filing a notice of cross-appeal. Finality plays a lesser role in considering extensions to file cross-appeals than it does extensions to bring an appeal. The appellant will not be unduly prejudiced by the delay in filing the cross-appeal. The interests of justice favour all matters in dispute arising from the trial judgment being resolved in one hearing.

- [1] HUNTER J.A.: The respondent, NYDIG ABL LLC ("NYDIG"), applies for an extension of time to file a notice of cross-appeal and a cross-appeal factum.
- [2] The appeal arises from a judgment in which a chambers judge held that certain transactions carried out by the appellants are, as against NYDIG, void as fraudulent conveyances under the Fraudulent Conveyances Act, R.S.B.C. 1996, c. 163, but did not give certain alternative declaratory relief sought by NYDIG.

- [3] The underlying action concerns a claim by NYDIG against the appellants IE CA 3 Holdings Ltd. ("IE CA 3") and IE CA 4 Holdings Ltd. ("IE CA 4", and together with IE CA 3, the "Debtors"). IE CA 3 owes NYDIG in excess of US \$36 million and IE CA 4, in excess of US \$77 million. The Debtors used the borrowed funds to purchase approximately 37,800 pieces of specialized computer equipment (the "Equipment") that generates "hashpower" that is used to mine for Bitcoin, a type of cryptocurrency.
- [4] A receiver has been appointed over the Debtors. The Receiver is in the process of, among other things, realizing on the Equipment, which was pledged to NYDIG as collateral under the financing agreement. A dispute arose between NYDIG on one side, and the Debtors and their parent company, Iris Energy Limited ("IEL") on the other, concerning whether NYDIG's collateral under the financing agreements also includes the proceeds derived from the sale of Bitcoin that was mined using the hashpower generated by the Equipment.
- [5] NYDIG brought an application seeking a declaration to the effect that the financing agreements granted NYDIG a security interest in all Bitcoin mined using the Equipment and the proceeds derived from the sale of it, or alternatively one or more of the following declarations:
- a) that the transactions carried out by the Respondents pursuant to the Hashpower Agreements are, as against NYDIG, void as fraudulent conveyances, and should be reversed;
 - b) that the Respondents have conducted their affairs in a manner that is oppressive to NYDIG, thereby entitling NYDIG to a remedy under s. 227 of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 [BCA]; and
 - c) that IEL and its subsidiaries should be treated, as against NYDIG, as a single debtor entity, pursuant to the doctrine of substantive consolidation.
- [6] In reasons indexed at 2023 BCSC 1383 ("Reasons"), the chambers judge dismissed the primary application concerning NYDIG's claim for security interest in the Bitcoin but granted the declaration that the transactions carried out by the appellants were, as against NYDIG, fraudulent transactions. It is the treatment of the other alternative declarations that has led to this application.
- [7] With respect to this relief, the Reasons provided as follows, under the heading "Other Relief Sought":
- [151] In view of that conclusion, 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.
- [152] 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.

- [8] The appellants filed their notice of appeal on August 21, 2023 and their factum on November 15, 2023. NYDIG filed its respondents' factum on December 15, 2023. The appellants filed their reply factum on December 22, 2023. The appeal books were filed on January 12, 2024. The appeal is ready for hearing and has been scheduled to be heard for one day on March 12, 2024.
- [9] While the factums were being exchanged, draft orders were exchanged between the parties. A disagreement arose as to the terms of the order.
- [10] In NYDIG's interpretation of the Reasons, the chambers judge had declined to dismiss or refuse its requests for a declaration that it is entitled to a remedy under s. 227 of the BCA (the "Oppression Remedy") and for a declaration that IEL and its subsidiaries be treated as a single debtor entity, pursuant to the doctrine of substantive consolidation (the "Substantive Consolidation Remedy").
- [11] In the appellants' interpretation of the Reasons, the chambers judge had refused NYDIG's request for the Oppression Remedy and the Substantive Consolidation Remedy.
- [12] In a memorandum issued to the parties on December 13, 2023, the chambers judge advised the parties that he had refused NYDIG's application for the Oppression Remedy and the Substantive Consolidation Remedy. The formal order, entered January 17, 2024, reflects that determination.
- [13] On December 19, 2023, counsel for NYDIG advised counsel to the other parties that NYDIG intended to bring the present application for an extension of time to file a notice of cross-appeal regarding the Oppression Remedy and Substantive Consolidation Remedy.
- [14] On January 16, 2024, NYDIG filed its application for an extension of time to file a notice of cross-appeal and cross-appeal factum.

Legal Framework

- [15] Section 32 of the Court of Appeal Act, S.B.C. 2021, c. 6 provides:
 - (1) A justice may dispense with a requirement of the rules.
 - (2) A justice may extend or shorten a time limit, provided in this Act or the rules, for doing an act, including the time limit for commencing an appeal or application for leave to appeal.
 - (3) Subsection (2) applies to an extension of a time limit even if the time limit for doing an act expires before

- (a) a person applies for the extension, or
- (b) the justice orders the extension.

[16] The criteria applicable to whether to grant an extension of time were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.) and can be summarized as follows:

- 1) Was there a bona fide intention to appeal?
- 2) When were the respondents informed of the intention?
- 3) Would the respondents be unduly prejudiced by an extension of time?
- 4) Is there merit in the appeal?
- 5) Is it in the interests of justice that an extension be granted?

[17] While these considerations also apply to an extension of time to bring a cross-appeal, the weighting of the criteria may be adjusted to account for the reality that a late-filed cross-appeal does not disturb the finality of litigation in the same way that a late-filed appeal does: *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2019 BCCA 439 (Chambers) at paras. 45-46 [Douglas Lake].

[18] Justice Lambert explained this distinction in *Newson v. Newson* (1980), 18 B.C.L.R. 203 (C.A.) in these terms:

[15] In my opinion the factors that should influence the court or a judge in deciding whether to exercise the discretion to extend the time for filing a notice of appeal are not applicable with the same force or in the same way in deciding whether the court or a judge should exercise the discretion to extend the time for filing a factum embodying a notice of cross-appeal.

[16] The concept of finality of litigation underlies the strict view that is taken by this court in considering whether to exercise its discretion to extend the time for filing a notice of appeal. Once a dispute has been submitted to litigation, and has been decided, and the time for appeal has expired, then the parties should be able to pursue their affairs on the basis that the dispute has been finally put to rest, for better or worse. They may make irrevocable decisions based on that assumption. They ought to be able to do so.

[17] But where a notice of appeal has been filed, it is clear that the litigation is not over. The parties must manage their affairs with a regard for the continuance of the dispute and the possibility of more than one result. Since the dispute is going to continue, it remains an important consideration that all the issues that were involved in the dispute at trial and that continue to vex the parties should be considered and decided in the appeal.

- [19] The most significant factors in assessing an application to extend the time to file a cross-appeal are whether the appellant would be unduly prejudiced by permitting the cross-appeal to be filed and whether, having regard to the nature of the appeal, the issues to be canvassed in the appeal, and the time available for the appellant to respond to the issues raised in the cross-appeal, it is in the interests of justice that all matters in dispute arising from the trial judgment be resolved in one hearing: Douglas Lake at para. 46.
- [20] If the proposed cross-appeal has no merit, the application to extend the time to file should be dismissed: *The Law Society of British Columbia v. Cole*, 2022 BCCA 55 (Chambers) at para. 29 [Cole]. However, unless the lack of merit is obvious, the merits question should be left to the division hearing the appeal: Douglas Lake at para. 46.
- [21] Whether the extension would be in the interests of justice is the "overriding question" that "embraces the first four questions": Davies at 260-261.

Analysis

- [22] The parties have been diligent in filing their factums and appeal materials so that the appeal can be heard on a timely basis. The reason for the need for an extension of time is that there was a dispute concerning the interpretation of the order made by the chambers judge. NYDIG interpreted the reasons for judgment as not addressing their alternative relief sought, focussing on the statement in the reasons that "it is unnecessary to consider the appropriateness of the relief sought under s. 227 of the BCA", and "this is not a case in which it is necessary to consider expanding the ambit of the [substantive consolidation] doctrine". The appellants rely on the statement that "[a] second reason for refusing that relief " for the conclusion that the judge had refused the order sought (although I note that this statement applies only to the substantive consolidation claim).
- [23] The dispute was not resolved until December 13, 2023 when the judge issued his memorandum clarifying that he had refused both alternative declarations sought. The respondent has proceeded promptly to bring this application forward. The question is whether it is in the interests of justice to permit the cross-appeal to be filed, given the impending appeal date.
- [24] The appellants have taken the position that while it should have been apparent that the alternative relief had been refused, if there was any real doubt NYDIG ought to have filed a protective cross-appeal until the matter could be clarified, thereby avoiding the risk of being unable to challenge the judge's conclusion if their interpretation was rejected. At a minimum, they should have advised the appellants of their provisional intention of filing a cross-appeal if the judge confirmed that he had dismissed both applications for alternative declaratory relief.
- [25] The failure of NYDIG to notify the other parties of its intention to bring a cross-appeal within the applicable timeframe for bringing the cross-appeal is not fatal to its application: *Cole* at para. 15. I do agree that it would have been prudent to either file a protective cross-

appeal or at a minimum, advise the appellants of their intention to do so if necessary. If the issue was whether the time should be extended to file a notice of appeal, the approach taken by NYDIG would have counted against extending the time. In the normal course, once the time for filing a notice of appeal has expired, a successful party is entitled to conclude that the dispute has ended, and govern itself accordingly. The onus on a party seeking to appeal a judgment out of time can be a heavy one.

- [26] However, the significance of unwisely relying on an interpretation of the judgment to allow relevant time limits to expire has somewhat different implications for a cross-appeal. Once the appellants filed their notice of appeal, it was obvious to all that the dispute had not ended and was heading for a different forum. Finality no longer plays a role in assessing the appropriateness of permitting a cross-appeal to proceed. There may be circumstances where the cross-appeal so changes the nature of the appeal proceedings that the failure to comply with the requisite time limits creates some real prejudice, but it is difficult to see what difference it would have made to the appellants in this case to know that NYDIG wished to preserve its rights to assert the declaratory relief they did not obtain at trial.
- [27] In my view, the reason for the delay in filing has been satisfactorily explained by the respondents. The Head of Structured Financing for NYDIG has filed an affidavit swearing that had it been clear to NYDIG, based on the Reasons, that the chambers judge dismissed the Oppression Relief and/or the Substantive Consolidation Relief, NYDIG would have filed a notice of cross-appeal in accordance with the prescribed timelines. The appellants have taken issue with this evidence on the basis that it does not disclose which individual from NYDIG made the determination as to the meaning of the reasons for judgment, but I am satisfied that Mr. Smyth's affidavit provides an adequate basis for a conclusion that NYDIG would have filed a cross-appeal within the required time limits had it understood that its alternative relief had been refused rather than simply not addressed.
- [28] The most significant consideration in my view is whether the appellants will be unduly prejudiced by permitting the cross-appeal to proceed. To be relevant, the prejudice must arise from the delay in filing, not the fact that the appellants would now be required to meet an additional argument on appeal: *Aslanimehr v. Hashemi*, 2019 BCCA 421 (Chambers) at para. 44. The appellants have taken the position that they will suffer prejudice, primarily because of the short time before the appeal is scheduled to be heard in March.
- [29] The issue the respondent wishes to raise was squarely before the chambers judge, so responding to it will not require the appellants to address a new point not previously considered. Amended appeal books will not be required. Both parties are represented by experienced counsel, and I am satisfied that the prejudice to the appellants from the delay is not so great that the application should be refused.
- [30] NYDIG has stated that if the extension is granted, it will deliver its cross-appeal factum today in order to preserve the appeal date.

Disposition

[31] In these circumstances, I am satisfied that it is in the interests of justice that the extension be granted on the following terms:

- i. The time for filing and delivering a notice of cross-appeal and cross-appeal factum is extended to January 30, 2024; ii. The time for the appellants to file and deliver their factum on cross-appeal is extended to February 20, 2024; and iii. The appellants are entitled to their costs of this application in any event of the appeal. "The Honourable Mr. Justice Hunter"

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Prepared on 28 October 2026 · Esheria