IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *NYDIG ABL LLC v. IE CA 3 Holdings Ltd.,* 2023 BCSC 1383

Date: 20230810
Docket: S230488
Registry: Vancouver

Between:

NYDIG ABL LLC

Petitioner

And

IE CA 3 Holdings Ltd. and IE CA 4 Holdings Ltd.

Respondents

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Petitioner:	C. Burr C. Hildebrand
Counsel for the Respondents:	K. Siddall S. Boucher C. Formosa
Counsel for the Receiver, PricewaterhouseCoopers Inc.:	M. Buttery, K.C. E. Paplawski
Place and Dates of Hearing:	Vancouver, B.C. June 13-15, 2023
Place and Date of Judgment:	Vancouver, B.C. August 10, 2023

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I. Introduction

[1] In these proceedings, the petitioner, NYDIG ABL LLC ("NYDIG"), is seeking to recover on debts owed to it by the respondents, 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.

[2] That indebtedness arises from loans that NYDIG made to the Debtors pursuant to two Master Equipment Financing Agreements (the "MEFAs" and each a "MEFA"). The first of these was a MEFA dated as of May 25, 2021 between IE CA 3 and a predecessor of NYDIG (the "IE CA 3 MEFA") and the second, a MEFA dated as of March 24, 2022 between IE CA 4 and NYDIG (the "IE CA 4 MEFA"). 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.

[3] NYDIG commenced these proceedings after the Debtors failed to make the payments required of them under the MEFAs. On February 3, 2023, I granted NYDIG an order appointing PricewaterhouseCoopers Inc. (the "Receiver") as receiver over the Debtors. The Receiver is in the process of, among other things, realising on the Equipment, which was pledged to NYDIG as collateral under the MEFAs. The Receiver expects that a significant shortfall will remain after selling the Equipment.

[4] In the meantime, a dispute has arisen between NYDIG, on the one hand, and the Debtors and their parent company, Iris Energy Limited ("IEL") on the other, about whether NYDIG's collateral under the MEFAs also includes the proceeds derived from the sale of Bitcoin that was mined using the hashpower generated by the Equipment. NYDIG contends that it does.

[5] IEL and the Debtors (the "Respondents") disagree. They say that although the MEFAs notionally granted NYDIG a security interest in Bitcoin mined using the Equipment, that was so *only to the extent that the Bitcoin was, at some stage, either*

owned by or in the possession of the Debtors. The Debtors never actually owned or possessed any Bitcoin, they say, because IEL paid the Debtors a fixed fee in exchange for the hashpower generated by the Equipment pursuant to two inter-company agreements (one written and one not), known as the "Hashpower Agreements." IEL then directed that hashpower into a mining pool, through which IEL received rewards in the form of Bitcoin that it then sold daily on the open market.

[6] NYDIG brings this application with a view to resolving that dispute. The primary relief NYDIG seeks is a declaration to the effect that the MEFAs granted NYDIG a security interest in *all* Bitcoin mined using the Equipment and the proceeds derived from the sale of it, regardless of how IEL and its subsidiaries may have structured their affairs internally. However, if the court finds that the MEFAs did not have that effect, then NYDIG says that IEL has improperly appropriated for its own benefit most of the Debtors' assets, while leaving them burdened with the associated debt, the effect of which was to render them insolvent from the outset. To remedy that situation, NYDIG seeks at least one of the following declarations in the alternative:

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 the IEL and its subsidiaries should be treated, as against NYDIG, as a single debtor entity, pursuant to the doctrine of substantive consolidation.

[7] The Respondents oppose the application. They submit that their interpretation of the MEFAs is the correct one and that NYDIG is merely seeking to rewrite the original bargains in light of changed economic circumstances. They also deny that

the impugned transactions were improper. On the contrary, they say, when the MEFAs were being finalised, NYDIG and its predecessor were aware of and specifically agreed to all of the inter-company arrangements about which NYDIG now complains.

[8] The Receiver takes no position on the application.

[9] For the reasons that follow, I have concluded that the application should be allowed to the extent that the impugned transactions should be declared to be, as against NYDIG, void as fraudulent conveyances.

II. Background Facts

A. The Iris Group and its Business Model

[10] IEL was founded in 2018 by two of its current directors, William and Daniel Roberts, under the laws of New South Wales, Australia. On October 27, 2021, it became a public company under the laws of Australia and its shares are now traded on NASDAQ. It has 27 subsidiaries in Canada, the United States and Australia, including the Debtors, which I will refer to collectively, along with IEL itself, as the "Iris Group". The Debtors are the only entities in the Iris Group that are in receivership.

[11] The Respondents describe the Iris Group as a leading owner and operator of Bitcoin mining data centres. Bitcoin mining involves the application of computational power to generate multiple guesses aimed at solving a mathematical problem. When the guess is successful, the miner receives a "reward" in the form of Bitcoin. In one of my earlier decisions in this proceeding, indexed as 2023 BCSC 638, I described the Bitcoin mining process this way:

> [6] Bitcoin mining is not like mining in the conventional sense. New Bitcoin is created by Bitcoin software as a reward for a process that involves creating new blocks and appending transactions in Bitcoin's blockchain. The creation of new blocks requires repeated trial and error computations conducted by specialised computers called "application-specific integrated circuit miners" also known informally as mining rigs. The goal of the process is to guess the inputs to a mathematical formula known as a hash algorithm.

> If successful, the process results in a so-called "valid hash". The speed at which the computers produce such solutions is called the "hashrate."
>
> [7] Mining rigs demand a great deal of computational power and the process is therefore energy-intensive. …

[12] 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.

[13] First, the Iris Group purchases its mining equipment primarily from a manufacturer known as Bitmain Technologies Limited ("Bitmain"). The Iris Group maintains one account with Bitmain for all of its equipment purchases, although each purchase is generally carried out by a subsidiary that is incorporated for that purpose. The Debtors are examples of subsidiaries that were formed in that manner.

[14] Second, the Iris Group includes another set of subsidiaries that act as "hosts" for the equipment. The hosts acquire or lease the premises where the equipment is operated and provide the associated infrastructure (such as electrical power, cables, shelving, internet connection, heat and ventilation), in exchange for a fixed fee that is set on a per kWh basis, pursuant to a "hosting agreement" between the host, as "Supplier", and the equipment-owning subsidiary as "Client."

[15] Third, IEL earns its own income by purchasing "hashpower services" from its equipment-owning subsidiaries, such as the Debtors, in exchange for a fixed fee that is set on a per kWh basis, pursuant to a "Hashpower Agreement" between itself, as "Customer", and the equipment-owning subsidiary, as "Supplier," and then directing that hashpower into a mining pool to yield Bitcoin that IEL then sells for a profit.

[16] Mining pools allow their participants to aggregate hashpower and share the resulting returns, with a view to securing a more consistent stream of Bitcoin rewards. The pool allocates Bitcoin on a daily basis into each participant's digital "wallet" in proportion to the amount of hashpower each has contributed. IEL began participating in mining pools around the time that the IE CA 4 MEFA was being negotiated. After trying various alternatives, its preferred pool since about April 2021

has been “Antpool”, which is affiliated with Bitmain. IEL does not maintain a digital wallet there, but opts instead to have the Bitcoin it receives transferred directly to an exchange, usually “Kraken”, where it is sold on a daily basis for conventional, or “fiat” currencies, such as American or Canadian dollars.

[17] The Respondents have described the purpose of this tripartite structure, to NYDIG and others, as a means to minimise sales tax.

[18] In 2019, before going public, IEL found its first hosting location in upstate New York, on the site of a decommissioned factory with easy access to electrical power. IEL had a subsidiary incorporated under the laws of Delaware, using the name IE US 1 Holdings Ltd. (“IE US 1”), for the purpose of entering into a hosting agreement with a lessee of those premises and owning and operating Bitcoin mining equipment there. The site proved to be less than entirely suitable for this purpose, however, so IEL began to look elsewhere for its expansion plans.

[19] Later in 2019, IEL found its next promising location at the site of a former sawmill in Canal Flats, British Columbia, which was then owned by an entity known as Podtech Innovation. IEL arranged for a new British Columbia company to be formed under the name IE CA 1 Holdings Ltd. (“IE CA 1”), for the purpose of entering into a hosting agreement with Podtech Innovation and acquiring and operating Bitcoin mining equipment on the site.

[20] IEL later agreed to purchase from the owners of Podtech Innovation its interest in the Canal Flats site and other related assets. IEL caused another company to be incorporated for this purpose, this time under the name Podtech Data Centers Inc. (“Podtech”). Once it was formed, Podtech purchased those assets in exchange for equity in IEL, as well as a vendor loan that was later repaid. Podtech then entered into a new hosting agreement with IE CA 1.

B. Equipment Purchases Funded by Arctos and NYDIG

[21] With Bitcoin prices rising dramatically, IEL was eager to expand its operations to other sites in British Columbia. During 2020 and 2021, it arranged for the

incorporation in British Columbia of IE CA Developments Holdings 2 Ltd. and IE CA Development Holdings 4 Ltd. (together with Podtech, the "Hosts") for the purpose of acquiring or leasing sites in the Mackenzie and Prince George areas of British Columbia. The Hosts constructed and operated data centres and associated infrastructure at their respective sites, which eventually became operational in 2022. In early 2021, IEL caused the Debtors to be incorporated in British Columbia for the purpose of purchasing and operating mining equipment at those sites, following the same model that was used for, IE US 1, IE CA 1 and IE CA 2.

[22] The Respondents say that in 2020, as part of that effort, William and Daniel Roberts met with the then managing partner of Arctos Credit, LLC ("Arctos"), Trevor Smyth, to discuss the provision by Arctos of equipment financing to the Iris Group. In one of his affidavits, William Roberts has deposed that these discussions proceeded on the basis that Arctos would provide "limited recourse" financing to a special purpose vehicle that IEL would cause to be incorporated in order to receive that financing and take title to the newly-purchased equipment, and that Arctos would not require a guarantee from IEL or its other subsidiaries. Mr. Roberts has deposed further that Mr. Smyth agreed that the new IEL subsidiary to be created for this purpose, IE CA 2, was to provide hashpower to IEL on the same terms that had been arranged for IE US 1 and IE CA 1. To that end, IEL had IE CA 2 incorporated in British Columbia in late 2020.

[23] In the course of drafting the MEFA between Arctos and IE CA 2 (the "IE CA2 MEFA"), the parties specifically discussed whether, prior to an event of default, Arctos' security would include Bitcoin mined using IE CA 2's equipment. In one of the earlier drafts, IEL removed the language that was intended to have that effect. In the next draft, Arctos and its lawyers put it back in. In an email sent December 12, 2020, Mr. Smyth explained why this had been done, stating as follows:

> ... On the Remedies – counsel won't negotiate any of these - I know there was some concern about us not having security in BTC that was mined prior to the event of default - your edits weren't accepted but, from a commercial perspective, we understand that there won't actually be any BTC as the hashpower will have already been sold to [IEL] ...

[24] In the same email, Mr. Smyth asked to be provided with executed copies of the following agreements:

a) the hashpower agreement to be entered into between IEL and IE CA 2; and

b) the hosting agreement to be entered into between the Iris Group hosts and IE CA 2.

[25] It appears from subsequent emails that both were later provided.

[26] Mr. Roberts has deposed further that, to clarify the parties' understanding that Arctos' collateral was not going to include Bitcoin mined using the financed equipment, they agreed to add the words "in the Borrower's possession" into the various definitions of "Collateral" in the IE CA 2 MEFA and related documents. According to Mr. Roberts:

> This was done to provide additional clarity that any security over cryptocurrency would be limited to any theoretical cryptocurrency (like Bitcoin) only in the possession of IE CA 2 and not IEL or any other entity, given that Arctos wanted the theoretical concept to remain in the MEFA notwithstanding they recognised it was superfluous.

[27] NYDIG has not adduced an affidavit from Mr. Smyth, leaving these assertions essentially unanswered.

[28] The IE CA 2 MEFA, as executed, was dated as of December 15, 2020. Two financing schedules were executed at the same time, providing for the advance of US $4,232,025 to fund the purchase by IE CA 2 of 2,459 pieces of mining equipment. From March 2021 onward, NYDIG received financial statements of IE CA 2 identifying the sources and amounts of its revenue and expenses. IE CA 2's equipment became operational in June 2021.

[29] Mr. Roberts has deposed that the rising price of Bitcoin during this period made the acquisition of new mining equipment increasingly difficult and expensive. The Iris Group managed to secure two contracts with Bitmain to supply two further

tranches of equipment worth approximately US $62 million and US $132 million to IE CA 4. Mr. Roberts says that he approached Mr. Smyth with the request that Arctos finance these purchases but that Arctos was willing, at least initially, to provide financing only for the smaller of the two. It appears that negotiations for that second round of financing began in February 2021.

[30] The plan was for IE CA 4 to purchase the equipment for US $62 million and then sell it to IE CA 3. The purchase was to be funded by Arctos through a MEFA that Arctos would enter into with IE CA 3. As the IE CA 2 MEFA had recently been completed, the parties agreed to use the same, or substantially similar terms, for the IE CA 3 MEFA.

[31] It was at this point that NYDIG first became involved. NYDIG is based in New York, New York. Its Chief Executive Officer, Tejas Shah, has deposed that NYDIG offers financial services to North American Bitcoin miners, including the provision of financing for those that need capital. He describes NYDIG as “an industry leader and significant market participant in Bitcoin mining financing,” and “one of the largest lenders and service providers to Bitcoin miners, having commercial relationships with the vast majority of publicly-traded companies in the industry.” NYDIG had recently raised US $1 billion in December 2021 and was looking to expand its business, including by syndicating loans for profit. NYDIG announced its acquisition of Arctos in April 2021.

[32] Following the acquisition, Mr. Smyth, now NYDIG’s Head of Structured Financing, continued to serve as NYDIG’s primary contact with the Iris Group, although Mr. Shah has deposed that Mr. Smyth reported directly to him, and that Mr. Shah was “closely involved” with the IE CA 4 financing and was “acutely aware” of the details of the IE CA 3 financing. The IE CA 3 MEFA, with its four schedules, closed on May 25, 2021 with Arctos, now owned by NYDIG, as the lender.

[33] In November 2021, the Iris Group’s principals approached NYDIG, through Mr. Smyth, seeking a third round of equipment financing. The amount requested this time was considerably larger than any sum previously financed through Arctos.

Mr. Roberts says that the initial request was for a loan in the US $150-250 million range.

[34] Despite Mr. Smyth's continued involvement, the process of settling on terms for this third round of financing proved to be more challenging than before. First, NYDIG's template MEFA, with its associated schedules and adjunct agreements, was considerably longer and more complicated than that used by Arctos for the IE CA 2 and IE CA 3 MEFAs. In addition, NYDIG was willing to grant a loan of the size requested only if IEL was added as a covenantor and guaranteed payment of the debt at the parent level. To that end, NYDIG also insisted that its security include, among other things, IEL's digital wallet or a wallet to be held with NYDIG that IEL would use to collect the Bitcoin mined using the hashpower generated by IE CA 4's Equipment. This was to be achieved by means of an "Account Control Agreement", or "ACA".

[35] In response to one of NYDIG's early drafts of the IE CA 4 MEFA containing those terms, Mr. Roberts sent an email to Mr. Smyth on January 31, 2022, enclosing a revised draft and explaining some of the proposed changes he had made, as follows:

> …
>
> 2. Re-inserting all the Iris relevant items that appeared to be missing, e.g.:
>
> ° Hashpower and Hosting Agreements
>
> ° As you know we liquidate bitcoin daily and don't hold any coins, so we've removed the new language around setting up ACA Wallets etc. which wouldn't be applicable. We have accommodated the new arrangement that Iris will direct its Equipment hashrate to NYDIG pool
>
> 3. Reverting security/collateral/default/enforcement structure back to previous agreements.
>
> …

[36] After several more drafting turns, discussions and revisions, on February 21, 2022, Mr. Smyth circulated a revised draft retaining the ACA Wallet concept but with revisions intended to reflect his understanding of the Iris Group's business model, which he explained as follows:

> "ACA Wallet" language re-inserted - this concept is something that we need for syndication purposes. The language was amended to allow the ACA Wallet to sit with the topco/parent, so that we were not preventing your hashpower sale structure. Mined BTC is allowed to be liquidated or transferred out of this wallet until [an] EOD, and there are not minimum balance or reserve requirements. The ACA between NYDIG and the Iris parent is the only collateral - we will not have any other collateral at the parent level. In practice, of course, there will not be any BTC in this wallet at the point of a potential EOD occurring.

[37] In the same email, Mr. Smyth said this:

> "Guaranty Agreement" – since the Borrower is not a bankruptcy remote SPV, it is relying on the parent to make loan payments in any case. Again, there would not be collateral outside of the ACA Wallet at the parent level …

[38] Under the heading "security", Mr. Smyth stated as follows:

> The Borrower will only own the financed equipment, so hopefully this change isn't seen as different in practice, it helps us keep our forms more uniform …

[39] All of this changed in March 2022, when NYDIG unilaterally reduced the size of the financing that it was willing to provide. Mr. Smyth sent Mr. Roberts an email on March 8, 2022 informing him of NYDIG's new position, stating as follows:

> … There has been a very significant tightening in the capital markets generally, which has added additional complexity. What I'd like to see if you'd be okay to proceed with is sizing down the initial commitment to a funding of $60,924,600.00 in June (IO period running through end of 2022). This covers the April '21 contract, and we could look to work towards additional Schedules thereafter. Sizing down will provide more leeway on the legal front. With this in mind:
>
> …
>
> 3. At this initial size (and funding date vs. equip delivery date), I can get the whole concept of the guaranty dropped. At an EOD, the requirement for mined BTC to be directed to an ACA Wallet would spring in.
>
> Hopefully, the removal of the parent being a loan party/guaranty will alleviate the concerns here …

[40] In his response two days later, on March 10, 2022, Mr. Roberts sent Mr. Smyth the next draft. Among other things, the emails explained certain revisions that he and his team had made in response to Mr. Smyth's email of March 8, 2022, including the following:

> 1.Reverted back from “Loan Parties” to “Borrower”, and removed Parent Collateral, Parent Guaranty Agreement etc.
>
> 2. Inserted a new EOD remedy for Collateral Agent to request termination of Hashpower Agreement and a new ACA Wallet to be opened in the name of the Borrower for NYDIG to then have control of the Equipment output.
>
> …

[41] The IE CA 4 MEFA, with its accompanying nine schedules, was finalized and made as of March 22, 2022, incorporating those suggested changes and others.

[42] On the same day, IE CA 4 entered into written hosting agreements with the Hosts, namely, IE CA Development Holdings 2 Ltd. (Mackenzie), IE CA Development Holdings 4 Ltd. (Prince George) and Podtech (Canal Flats).

[43] Just before closing, on March 16, 2022, the Iris Group sent NYDIG a copy of the hosting and hashpower agreements that were used for IE CA 1. Executed copies of the IE CA 4 hosting and hashpower agreements were provided to NYDIG on March 22, 2022, the day they were signed. By mid-2022, the Debtors were also providing NYDIG with monthly financial statements.

[44] In lieu of a parent guarantee, NYDIG and IEL entered into a Parent Letter Agreement dated March 24, 2022, two days after the closing of the IE CA 4 MEFA. The letter stated, among other things, that:

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 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.

[45] The advances that NYDIG made under the IE CA 3 and IE CA 4 MEFAs were sent directly to Bitmain or to an Iris Group bank account at the direction of the Debtors, pursuant to pay proceeds letters dated May 25, 2021 and April 22, 2022, respectively.

C. Default, Forbearance and Realisation

[46] The Bitcoin mining business is young and notoriously volatile. In January 2020 (just before the Iris Group first initiated financing discussions with Arctos), the price of Bitcoin was approximately US $7,300. By the end of March 2021 (just before the IE CA 3 MEFA closed), it had risen nearly eightfold, to US $57,000. In late 2022, however, the price dropped precipitously, from US $45,000 in March 2022 (when the IE CA 4 MEFA closed) to approximately US $20,000 by October 2022 (around the time of the Debtors' defaults). As a result, an increasing number of mining operations were failing and defaulting on their financial commitments.

[47] As this was occurring, IE CA 4 and NYDIG completed a piece of unfinished business left over from the IE CA 4 MEFA negotiations. On September 8, 2022, the parties executed two adjunct agreements, known as the Digital Asset Account Control Agreement (the "DAACA") and the Digital Asset Custodial Agreement (the "DACA"), which required IE CA 4 to deposit the Bitcoin mined with the Equipment into a digital wallet, the contents of which were to be pledged to secure IE CA 4's performance of its obligations under the IE CA 4 MEFA.

[48] Although such agreements are commonly used by NYDIG as part of its standard equipment financing package, in this case their terms were altered to

reflect the parties' agreement that this kind of security would be given only after an event of a default. In an email to Mr. Roberts and others dated May 2, 2022, Mr. Smyth confirmed as much, stating as follows:

> Iris has negotiated that the ACA wallet is only required to be utilized during an EOD, which is outside of our standard structure.

[49] In the end, the Debtors operated only for a few weeks after signing the DACA and the DAACA. In July 2022, members of IEL's board had already asked to meet with NYDIG with a view to exploring potential refinancing scenarios.

[50] From the beginning, the Debtors were not financially viable on their own, but depended heavily on IEL to make the loan payments owing to NYDIG. Apart from the revenue received from IEL under the Hashpower Agreements, less that owing to the Hosts under the Hosting Agreements, IEL was required to supplement the Debtors' income so they could make the payments required of them under the MEFAs. IEL caused those payments to be made only for the brief period between the closing of the MEFAs and the defaults. According to the Respondents, by the time IEL stopped doing so, it had advanced, for this purpose, over CDN $130 million to the Debtors in the form of subordinated inter-company loans that also remain outstanding and unpaid.

[51] In early October 2022, NYDIG agreed to extend the upcoming payment deadline for two weeks, from October 25 to November 8. In its letter doing so, NYDIG permitted the Debtors, in the meantime, to continue to make and receive the payments contemplated by their respective hosting agreements and hashpower agreements.

[52] Since late October or early November, 2022, the Debtors have been in default under their respective MEFAs. IE CA 2 was also in default at the same time, but its debt to NYDIG has since been paid in full, although partly under protest.

[53] On November 2, 2022, IEL issued a press release addressing the Debtors' defaults under their respective MEFAs, which included the following assertions:

a) NYDIG's collateral was not material to the Iris Group's business;

b) NYDIG's collateral was worth less than the amount owed; and

c) the loans had 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.

[54] NYDIG was offended by the tone and content of the press release and formed the view that the Debtors were not negotiating in good faith. It sent them an acceleration letter on November 4, 2022, complaining of a lack of good faith in the refinancing discussions as well as a failure to take out adequate insurance on the Equipment, in breach of the MEFAs. The Debtors made no further payments thereafter.

[55] Shortly after receiving NYDIG's November 4, 2022 letter, the Hosts terminated their respective hosting agreements with the Debtors. The Hosts then shut down the Equipment, disconnected it from a power source, put it on pallets and wrapped it in plastic for shipping. NYDIG and the Receiver have complained that this conduct by the Hosts has complicated their realisation efforts and prevented them from using the Equipment to continue mining for Bitcoin and thereby reducing the outstanding debt.

[56] The Respondents say that the Hosts took that step due to their concerns about the Debtors' ability to continue paying hosting fees under their hosting agreements. They also say that NYDIG could have exercised its rights under the "Landlord Waiver Agreements" that it had entered into with the Hosts in conjunction with the IE CA 4 MEFA. Pursuant to those agreements, if a Host terminates a hosting agreement with IE CA 4 (as the hosting agreements permitted them to do at any time), then NYDIG became entitled to access and operate the Equipment, which was not to be removed for a period of up to 90 days to allow NYDIG to do so. The Respondents say that the Hosts were willing to make the same provision for IE CA 3, although there is no comparable agreement in place in relation to the IE CA 3

MEFA. Rather than exercise those rights, NYDIG applied for the appointment of a receiver on the 91st day.

[57] On November 15, 2022, NYDIG sent the Debtors notices of default. On November 18, 2022, it sent them demand letters, demanding payment in full by November 29, 2022 and enclosing notices of its intention to enforce its security, including, among other things, its charge over all Bitcoin mined with the Equipment.

[58] In a responding letter dated November 26, 2022, the Debtors disputed NYDIG's calculation of the balance owing and the particulars of the defaults alleged.

[59] On February 3, 2023, NYDIG applied to this court for the appointment of receiver over the Debtors. I granted that order on February 3, 2023, essentially in the model form. On June 13, 2023, the first day of the hearing of this application, I also granted the Receiver's unopposed applications seeking orders:

a) approving its proposed sales process for the Equipment; and

b) expanding its powers so as to enable it to assign the Debtors into bankruptcy.

III. Agreement Terms Bearing on the Scope of NYDIG's Security

A. The IE CA 3 MEFA

[60] The scope of NYDIG's security under the IE CA 3 MEFA is set out in s. 3(d), which states, in relevant part, as follows:

> As security for Borrower's Obligations under each Agreement and all Other Agreements (as defined in Section 11), Borrower grants to Lender a first priority security interest in: (i) all Equipment financed pursuant to each Schedule and Proceeds (including any insurance proceeds) thereof; (ii) to the extent arising solely from any Equipment, all Accounts, Contract Rights, Chattel Paper, General Intangibles, Payment Intangibles, leases, subleases, security deposits or other cash deposits and proceeds; (iii) all cryptocurrency and digital currency, including Bitcoin (BTC) mined or otherwise generated by the Equipment and in Borrower's possession (sometimes herein called "Mined Currency") and any and all other cryptocurrency and digital currency related thereto or derived therefrom whether arising from hard fork, airdrop or otherwise and in Borrower's possession (provided that such security interest shall not prohibit Borrower's use, conversion, sale or spending of the Mined

> Currency until such time as Lender declares an Event of Default); and (iv) all other collateral as to which a security interest has been or is hereinafter granted by Borrower to Lender or any Affiliate of Lender to the extent arising from or relating to any Equipment, of Lender in connection with any Other Agreement and all proceeds thereof (collectively, the "Collateral").
>
> [Emphasis added.]

[61] Clause 8(b) contains a covenant by IE CA 3 that it shall not, among other things:

> …
>
> (v) assign, sell, transfer, sublease, rent or in any way transfer or dispose of all or any part of the rights or obligations under any Agreement or as to any rights, title or interest in the Equipment or other Collateral, in whole or in part to anyone unless in the ordinary course of business or in accordance with a Hosting Agreement or Hashpower Agreement.
>
> [Emphasis added.]

[62] The term "Hashpower Agreement" is defined as follows:

> "Hashpower Agreement" shall mean the hashpower agreement entered into between Iris Energy Pty Ltd and Borrower, in which Borrower will sell Equipment's hashrate to Iris Energy Pty Ltd.
>
> [Emphasis added.]

[63] Section 12 (Remedies) states in relevant part as follows:

> If an Event of Default shall have occurred, Lender may exercise any of the following remedies with respect to any or all Equipment, other Collateral and Agreements:
>
> …
>
> (g) enforce its security interest in all Collateral, including all Bitcoin or other digital currency or cryptocurrency mined using the Equipment and in Borrower's possession …
>
> …
>
> [Emphasis added.]

B. The IE CA 4 MEFA

[64] The scope of NYDIG's security under the IE CA 4 MEFA is set out in, among other places, s. 3(l), which is entitled "Mined Cryptocurrency" and states in relevant part as follows:

> Solely to the extent of any rights of Borrower in or to any Mined Cryptocurrency or any other Digital Asset:
>
> (i) Borrower shall (both before and after an Event of Default, subject only to Collateral Agent's ability to designate an alternative account or wallet for Digital Assets) immediately deposit or cause to be deposited all Mined Cryptocurrency and any other Digital Asset owned by the Borrower into the ACA Wallet (and in accordance with establishing the ACA Wallet and entering in the ACA Wallet Agreement in accordance with Section 7(b), the Borrower shall establish a custodial account with NYDIG Trust Company LLC or a different NYDIG Affiliate as NYDIG may select, and establish and execution account with NYDIG Execution LLC).
>
> (ii) Unless an Event of Default is existing and continuing and subject to Section 8(d), Borrower may sell, trade and otherwise dispose of any Mined Cryptocurrency from the Equipment in the ordinary course.
>
> (iii) If an Event of Default is existing and continuing, all rights of Borrower pursuant to Subsection 3(l)(ii) shall cease, without any requirement for any notice from Lender or Collateral Agent, and Borrower may not Dispose of any Mined Cryptocurrency (or any other Digital Asset owned by the Borrower) without Collateral Agent's written consent, which consent may be withheld in Collateral Agent's sole and absolute discretion.
>
> (iv) If, following the Collateral Agent's delivery of a Hashpower Agreement Termination Notice in accordance with Section 9(c)(vii), any Mined Cryptocurrency from the Equipment or other Digital Asset is not deposited into the ACA Wallet for any reason, Borrower shall segregate and hold in trust on behalf of Collateral Agent, such Mined Cryptocurrency or other Digital Asset and shall deliver it to Collateral Agent as soon as possible.
>
> (v) Following the Collateral Agent's delivery of a Hashpower Agreement Termination Notice in accordance with Section 9(c)(vii), all Digital Assts and Mined Cryptocurrency shall at all times be kept stored in the ACA Wallet, or in such other accounts or wallets as Collateral Agent may consent to from time to time, which consent may be withheld in Collateral Agent's sole and absolute discretion.
>
> [Emphasis added.]

[65] The term "Digital Asset" is defined in s. 1 to mean "a digital asset that is recorded on a decentralized distribution ledger, including, without limitation, Bitcoin."

[66] The term "Mined Cryptocurrency" is defined in s. 1 as follows:

> All Digital Assets produced by or derived from the Equipment and possessed or controlled by the Borrower, however such process is structured or described, including Digital Assets mined, merge-mined, earned, harvested, created, manufactured, awarded, rewarded, received, airdropped, purchased, paid out or otherwise generated in connection with the Equipment and possessed or controlled by the Borrower, and, solely to the extent Borrower continues to possess or control the same, any Digital Assets generated by hashpower sold under a Hashpower Agreement. Mined Cryptocurrency

> includes any Digital Asset network fee amounts greater than zero that are produced by or derived from the Equipment and possessed or controlled by the Borrower, howsoever such fees are structured or described, including transaction fees, channel fees, validator reward fees, staking reward fees, node operator reward fees or other Digital Asset network participant fees.
>
> [Emphasis added.]

[67] The term "Hashpower Agreement" is defined in s. 1 as follows:

> "Hashpower Agreement" means any hashpower agreement entered into between Borrower and [IEL] from time to time, in which Borrower will sell Equipment's hashrate to [IEL].
>
> [Emphasis added.]

[68] The scope of NYDIG's security is also described in s. 5(a), which states as follows:

> As security for the due payment and performance of Borrower's Obligations under the Loan Documents, Borrower hereby pledges, assigns and grants to Collateral Agent, for the benefit of the Lenders under each Loan Schedule, a first priority security interest in all of its right, title and interest in and to the following, whether now owned by or owing to, or hereafter acquired by or arising in favor of Borrower and wherever located (collectively, the "Borrower Collateral"): (i) all Accounts; (ii) all Chattel Paper; (iii) all Documents; (iv) all equipment (as such term is defined in the UCC), including without limitation, the Equipment and any Replacement Equipment; (v) all Fixtures; (vi) all General Intangibles, including, without limitation, all Intellectual Property; (vii) all Goods; (viii) all Instruments; (ix) all Inventory; (x) all Investment Property; (xi) all cash or cash equivalents; (xii) all letters of credit, Letter-of-Credit Rights and Supporting Obligations; (xiii) all Deposit Accounts with any bank or other financial institution including, without limitation, each ACA Account; (xiv) all Commercial Tort Claims; (xv) all Digital Assets and all Digital Asset wallets or wallet accounts and other Digital Asset accounts, including, without limitation, each ACA Wallet and any Bitcoin, Dollars and other assets credited thereto, and general intangibles related to any of the foregoing; (xvi) all property of Borrower in the possession of Collateral Agent or Lender; (xvii) all Money; (xviii) without limiting the generality of the foregoing subclauses (i) through (xvii), all agreements, contracts, warranties, invoices, purchase orders and other agreements, instruments and documents with the Supplier of the Equipment or service provider with respect thereto (including under any Supplier Contract or any Acknowledgement of Rights Agreement in connection with any Supplier Contract); and (xix) all accessions to, substitutions for and replacements, proceeds, insurance proceeds, products, rents, offspring, or profits of any and all of the foregoing, together with all books and records, customer lists, credit files, computer files, programs, printouts and other computer materials and records related to any and all of the foregoing and any General Intangibles at any time evidencing or relating to any of the foregoing; provided however, that notwithstanding the foregoing,

> with respect to the application of proceeds of any Collateral constituting Specified Collateral in which a security interest is granted under any Loan Schedule, the Borrower, Collateral Agent and the Lender agree that any proceeds of Specified Collateral shall first be applied to the Specified Loan in accordance with Section 3. Title to the Borrower Collateral shall at all times be either in Borrower's name, subject to the security interest of the Collateral Agent, or in the name of the Collateral Agent and any certificate of title for the applicable Borrower Collateral (to the extent applicable) shale designate Borrower as owner and Collateral Agent as lien holder.
>
> [Emphasis added.]

[69] Subsection 7(b) imposes the following "Affirmative Post-Closing Covenants", among others, on IE CA 4:

> (i) To the extent not provided on the Closing Date, Borrower shall, no later than the later of (x) the date that Borrower is eligible to open an ACA Wallet with the Wallet Custodian, and (y) that date that is thirty (30) days following the Closing Date (or such later date as may be agreed by Lender in its sole discretion) have entered into an ACA Wallet Agreement with the Collateral Agent and Wallet Custodian in form reasonably satisfactory to Collateral Agent, with respect to the ACA Wallet.
>
> (ii) To the extent not provided on the Closing Date, Borrower shall, no later than the date that is thirty (30) days following the Closing Date (or such later date as may be agreed by Lender in its sole discretion) have caused [IEL] to enter into the Parent Letter Agreement with Collateral Agent, in form reasonably satisfactory to Collateral Agent.
>
> …

[70] Subsection 8(d) imposes the following negative covenants, among others, on IE CA 4:

> (d) Dispositions of Collateral. Borrower shall not Dispose of all or any part of the rights of Borrower in the Equipment or any other Collateral, in whole or in part, to anyone, other than in the ordinary course of business or in accordance with a Hashpower Agreement or Hosting Agreement. Borrower will not move or allow any Item of Equipment to be moved to a location different from the location specified in the applicable Loan Schedule unless consented to in writing by the Lender (such consent not to be unreasonably withheld, conditioned or delayed).
>
> [Emphasis added.]

[71] Some of the remedies made available to NYDIG or its agent on default are set out in s. 9(c), which states in relevant part as follows:

> If an Event of Default shall have occurred and is continuing, Collateral Agent may, at its option, and shall, as directed by the Required Lenders, exercise any of the following remedies with respect to any or all Collateral, Specified Collateral, and Loan Documents:
>
> …
>
> (ii) in conjunction with promptly exercising Collateral Agent's rights pursuant to this Section 9(c), require Borrower to immediately assemble, make available and if requested by Collateral Agent, deliver all Mined Cryptocurrency related to the Equipment and all other Collateral and Specified Collateral in Borrower's possession to Collateral Agent at a time and place, within the United States or Canada, designated by Collateral Agent; and take such actions as Collateral Agent may request to grant Collateral Agent exclusive access and control over any Digital Asset wallet or other Digital Asset platforms where Borrower stores or houses any Digital Assets that are Collateral hereunder;
>
> …
>
> (v) Dispose of Mined Cryptocurrency, any other Digital Asset, and other Collateral or Specified Collateral at private or public sale …
>
> (vi) at Collateral Agent's sole discretion, apply from time to time, in whole or in part, any proceeds following Disposition of Mined Cryptocurrency, or any other Digital Asset included in the Collateral or in Lender's (or it's Affiliate's) possession or control, to reduce the Obligations of Borrower;
>
> (vii) require that the Borrower and [IEL] terminate any or all Hashpower Agreements pursuant to a notice delivered to the Borrower and [IEL] directing the same (any such notice, a "Hashpower Agreement Termination Notice");
>
> …
>
> (ix) give notice of sole control or any other instruction under any ACA Wallet Agreement with any Wallet Custodian and take any action therein with respect to such Collateral, including, without limitation, immediately blocking Borrower's access to the ACA Wallet and Disposing of the Digital Assets in such ACA Wallet in the enforcement of Collateral Agent's right under this Master Agreement;
>
> (x) in conjunction with promptly exercising Collateral Agent's rights pursuant to this Section 9(c), direct any Mined Cryptocurrency from the Equipment to a wallet or address for Digital Assets that is not the ACA Wallet; and
>
> …

[72] The term "Collateral" is defined in s. 1 to mean, collectively, the Borrower Collateral and the Specified Collateral. The term "Borrower Collateral" is defined with reference to s. 5(a). The term "Specified Collateral" is defined with reference to the schedules. One of the schedules states at s. 3 in relevant part as follows:

> **Grant of Security**. As security for the due payment and performance of Borrower's Obligations to the Lender under this Loan Schedule (the "Specified Lender") with respect to the Loan advanced pursuant to this Loan Schedule (the "Specified Loan"), Borrower hereby pledges, assigns and

> grants to Collateral Agent a first priority security interest in all of its right, title and interest, whether nor owned or owing to, or hereafter acquired or arising, in (collectively, the "Specified Collateral"): (i) all Equipment and, if applicable, Replacement Equipment; (ii) to the extent arising from or solely relating to any Equipment, all Accounts, Contract Rights, Chattel Paper, leases, subleases, security deposits or other cash deposits; (iii) without limiting the generality of the foregoing clause (ii), all agreements, contracts, warranties, invoices, purchase orders and other agreements, instruments and documents with the Supplier of the Equipment, if any, or service provider with respect thereto including, without limitation, the Supplier Contract, in each case to the extent relating to the Equipment; and (iv) all accessions to, substitutions and replacements for, and insurance proceeds of, the foregoing, together with all books and records, credit files, computer files, programs, printouts and other computer materials and records related to any of the foregoing. Title to the Specified Collateral shall at all times be in Borrower's name, subject to Collateral Agent's security interest, or in the Collateral Agent's name and any certificate of title for the applicable Specified Collateral (to the extent applicable) shall designate Borrower as owner and Collateral Agent as lien holder. The parties hereto acknowledge and agree that the Obligations under this Loan Schedule shall also be secured by the Collateral Agent's Lien in the Borrower Collateral as defined in Section 5 of the Master Agreement (and that the Borrower Collateral thereunder includes Digital Assets and Mined Cryptocurrency, neither of which constitute Specified Collateral hereunder), together with all other obligations owing to other Lenders with respect to other Loan Schedules under the Master Agreement. …
>
> [Emphasis added.]

C. The DAACA

[73] The DAACA begins with a series of recitals. In them, IECA 4 is identified as the "Pledgor", NYDIG as the "Secured Party" and a NYDIG affiliate as the "Custodian". The IE CA 4 MEFA, and its associated schedules and related agreements, are identified as the "Loan Agreement." One of the other recitals states as follows:

> WHEREAS, pursuant to the Loan Agreement, Pledgor will from time to time pledge to, and grant security interests in, its personal property assets including, but not limited to, the Account described below, certain unencumbered Digital Assets (as described below), including Mined Cryptocurrency (as described in the Loan Agreement), and cash deposits (if any) to secure Pledgor's obligations under the Loan Agreement.
>
> [Emphasis added.]

[74] Section 1 states in relevant part as follows:

> Account. (a) Custodian, in its capacity as "securities intermediary" as defined in Article 8 of the UCC ("Article 8") to the extent same may be applicable, shall hold within the Account for the benefit of Pledgor but subject to the security interest and control of Secured Party as pledgee in accordance with the terms of this Agreement, all cash, securities, financial assets, digital units of exchange, Digital Assets (including Mined Cryptocurrency) and other property and amounts credited thereto and any rights or proceeds derived therefrom (the "Account Collateral"), which have been pledged by Pledgor to Secured Party pursuant to the Loan Agreement …

[75] Section 2 states in relevant part as follows:

> Security Interest; Secured Party's Authority over Account. Pledgor has granted a security interest in the Account to Secured Party. Pledgor hereby confirms the security interest granted by Pledgor to Secured Party in all of Pledgor's right, title and interest in and to the Account and the Account Collateral.

D. The DACA

[76] The recitals to the DACA state that its purpose is to set forth "the terms and conditions pursuant to which the Custodian [a NYDIG affiliate] is to act as a custodian for digital assets for Client [IE CA 4]."

[77] The agreement contains a number of representations, warranties and covenants by IE CA 4, including the following at ss. 6(b)(iv):

> Client represents, warrants and covenants that:
>
> …
>
> (iv) it has all rights, title and interest in and to the Custodied Assets as necessary for Custodian to perform its obligations under this Agreement.

[78] The term "Custodied Assets" is defined to mean "Custodied Digital Assets and Custodied Cash." The term "Custodied Digital Assets" is defined as follows:

> (i) Eligible Assets property sent to Custodian in accordance with Section 4(g) and held by Custodian in custody for the benefit of Client in the Digital Asset Account pursuant to the Agreement; and
>
> (ii) any digital assets received and held by the Custodian on behalf of and for the benefit of Client through air drops, forks or other similar mechanisms, but only to the extent and in the amount such assets have been deemed to be included in Client's Digital Asset Account as shown on at least one customer account statement sent to Client. For the avoidance of doubt, forked or air dropped assets shown as potentially being included in the Digital Asset Account are not Custodied Digital Assets.

E. The Parent Letter Agreement

[79] The Parent Letter Agreement takes the form of a letter from NYDIG, as Lender and Collateral Agent, to IEL, that is signed by Mr. Smyth, on behalf of NYDIG, and counter-signed by William and Daniel Roberts, on behalf of both IEL and IE CA 4, to indicate their acceptance of its terms.

[80] The letter begins by referencing the recently concluded IE CA 4 MEFA and identifies IEL as "the direct owner of 100% of the equity in [IE CA 4]", adding that IEL is "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]."

[81] The letter goes on to state that its purpose is to:

> … among other things, clarify [IEL's] rights under any Hashpower Agreement entered into between [IEL] and [IE CA 4] … in relation to [NYDIG]'s rights in [IE CA 4]'s equipment and other Collateral subject to such Hashpower Agreement.

[82] In the substantive provisions that follow, IEL indicates its agreement to various terms, including the following:

> 1) [IEL] acknowledges (a) that it has received and is familiar with the terms of the [IE CA 4 MEFA] and the other Loan Documents, (b) that [NYDIG] has financed or intends to finance equipment pursuant to which the "Hashpower" under the Hashpower Agreement is generated (the "Equipment") and (c) that [IE CA 4] has granted to [NYDIG], a Lien and security interest on all personal property assets of the [IE CA 4], including without limitation the Equipment and rights under the Hashpower Agreement (collectively, the "Collateral"). [IEL] hereby acknowledges and consents to the Lien in [IE CA 4]'s Collateral on behalf of [NYDIG] (including the collateral assignment of [IE CA 4]'s rights in the Hashpower Agreement to [NYDIG]).
>
> 2) [IEL] agrees that any rights and interests [IEL] may have whatsoever in and to the Collateral, whether such right or interest, if any, arises under the Hashpower Agreement or arises at law, whether statutory or otherwise, including any right to distrain against or to take ownership of the Equipment or any other Collateral, and whether or not such right or interest is presently vested in [IEL] or is contingent on a future event, shall be subordinate in all respects to the Lien of [NYDIG] in the Collateral and the payment in full of all Obligations under the Loan Documents.

> 3) [IEL] agrees that, notwithstanding the applicable termination provisions of the Hashpower Agreement, including without limitation, the provision of Section 5 of the Existing Hashpower Agreement, upon the [NYDIG]'s delivery of a Hashpower Agreement Termination Notice to [IEL] and [IE CA 4] in accordance with Section 9(c)(vii) of the [IE CA 4 MEFA], the Hashpower Agreement shall automatically terminate without any further action of any party thereto, and all rights in the "Hashpower" as defined under the Hashpower Agreement shall revert to [IE CA 4] upon such termination.

[83] In a subsequent paragraph, NYDIG:

> … acknowledges and agrees that, notwithstanding any other provision of any Loan Document (including this Parent Letter Agreement), [IEL] 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].

F. The Hashpower Agreements

[84] The IE CA 4 Hashpower Agreement was executed on March 22, 2022 and made effective retroactively as of December 1, 2021. In it, IE CA 4 is identified as the "Supplier" and IEL as the "Customer."

[85] Section 1.1 states that "[t]he Supplier will provide the Customer with access to and use of the Services." The term "Services" is defined in the last of the recitals as follows:

> This Agreement governs the Customer's access to and use of the exported computational power and hash rate ("**Hashpower**") and other services offered by the Supplier (together, the "**Services**").

[86] Section 1.2 states as follows:

> This Agreement is for the provision of Hashpower from the Supplier to the Customer. The Hashpower may be employed for whatever purposes the Customer so desires and as described in Section 3 (Customer obligations) below, the Customer acknowledges the risks associated with generating and providing Hashpower and acknowledges that significant variations may occur with the Services.
>
> The Supplier will use reasonable efforts to provide the Customer the Hashpower using the Supplier's hardware (as selected and agreed between the Parties from time to tome), subject to Section 1.3 (Service Level Agreement and Variances).

[87] Under the heading “FEES”, s. 2.1 states as follows:

> In consideration for the Services provide by the Supplier, the Customer shall pay and owe the Supplier the hashpower fee (“**Hashpower Fee**”).
>
> The Hashpower Fee shall be calculated by multiplying the actual kilowatt hour power consumption of the Supplier’s hardware used in the provision of the Serves under this Agreement by the Hashpower Unit Fee. The “**Hashpower Unit Fee**” is C$0.096/kWh.

[88] Pursuant to s. 5.1, the Hashpower Agreement was to remain in effect for a term commencing on December 1, 2021 and ending on a “date set by mutual agreement in writing.”

[89] IE CA 3 never entered into a written hashpower agreement with IEL, but the Respondents say that IE CA 3 and IEL operated according to those same terms.

G. The Hosting Agreements

[90] The three IE CA 4 Hosting Agreements were executed on March 22, 2022 and made effective retroactively as of December 1, 2021. In them, IE CA 4 is identified as the “Client” and the respective Host as the “Supplier.”

[91] Pursuant to s. 2.1, the Supplier promises to supply “Electricity” to the Client. Pursuant to s. 3.1, the Supplier promises to supply “Facility Infrastructure”, “Services” and “Electricity” to the Client.

[92] The term “Facility Infrastructure” is defined in s. 1 to mean:

> … all land, substations, transformers, Metering System, electrical, power distribution units, network, connectivity, filtration, cooling, heating, facilities, ventilation, racks, shelves, Data Centres, and ethernet cables, and any other infrastructure required to provide the Electricity to, and support and operate, the Client Equipment …

[93] The term “Services” is defined in s. 1 to mean the services to be provided by the Supplier under the Hosting Agreement.

[94] The term “Electricity” is defined in s. 1 to mean “the net usable and reliable electricity available for consumption by the Client Equipment and Ancillary Equipment, as approved by the Client.”

[95] Pursuant to s. 6, the Client promises to pay, in exchange for the Services provided by the Supplier, a fee calculated by multiplying the amount of electricity consumed (as measured in kWh) by $0.08/kWh.

[96] Pursuant to s. 8.1, either party may terminate the Hosting Agreement at any time by providing written notice of the intended termination date.

[97] IE CA 3 never entered into written hosting agreements with the Hosts, but the Respondents say that IE CA 3 and the Hosts operated according to those same terms.

IV. Discussion

A. Does NYDIG's collateral under the MEFAs include all Bitcoin mined using the Equipment, and the proceeds derived from the sale of it?

[98] The parties agree that the scope of NYDIG's collateral under the MEFAs is a matter of contractual interpretation. They also agree on the applicable principles of interpretation, which were conveniently and authoritatively set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.

[99] There, Rothstein J., writing for the Court, summarized those principles in the following terms:

> [47] … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > …

> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …. As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> [Citations omitted.]

[100] Justice Rothstein went on to describe how the surrounding circumstances may be considered as part of the interpretive exercise, stating as follows:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement … The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract …. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement …
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract …, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" … Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Citations omitted.]

[101] In this case, both sides argue that the language of the MEFAs clearly and unambiguously supports their respective positions. Of course, they cannot both be right about that and, in my view, neither of them is. In fact, both the IE CA 3 MEFA and the IE CA 4 MEFA contain seemingly contradictory terms, making the task of

discerning the parties' common intention as to the intended scope of the collateral particularly challenging.

[102] Complicating matters further is the fact that the parties themselves have made, or allowed to be made, public pronouncements that appear, at least to some extent, to be at odds with their respective positions on this application.

[103] For example, after the execution of the IE CA 4 MEFA, NYDIG reviewed and approved a press release that IEL issued on March 27, 2022, describing the terms of IE CA 4 MEFA in the following manner:

a) US $71 million limited recourse equipment financing facility;

b) secured by 19,800 Bitmain S19j Pro miners (1.98 EH/s); and

c) 25-month term, 11% p.a. interest rate…

with no mention of security in the Bitcoin mined using the Equipment.

[104] On the other hand, after the IE CA 4 MEFA closed, IEL, in a filing with the U.S. Securities and Exchange Commission, appears to have acknowledged that NYDIG's collateral did in fact include Bitcoin mined with the Equipment:

> On March 24, 2022, a wholly-owned subsidiary of Iris Energy Limited entered into a $71.2 million limited recourse equipment finance and security agreement with NYDIG ABL LLC (the "NYDIG Agreement"). The facility established pursuant to this agreement (the "NYDIG Facility") has a contractual term of 25 months and is secured by 19,800 Bitmain S19j Pro miners (1.98 EH/s), as well as the digital assets mined therewith, with an applicable interest rate of 11% per annum. The NYDIG Facility is repaid through blended monthly payments of principal and interest with the final payment due April 2024. As of June 30, 2022, the facility was fully utilized with $71.2 million of borrowings outstanding.
>
> [Emphasis added.]

[105] Ultimately, however, the answer to this question must turn essentially on the language of the MEFAs and associated agreements themselves.

[106] In that regard, I agree with NYDIG that those agreements devote a great deal of attention to specifying the rights and obligations of the parties in connection with Bitcoin contemplated to be in the hands of the Debtors. NYDIG's position finds especially compelling support in s. 3 of the schedule to the IE CA 4 MEFA in which the parties specifically acknowledge and agree that the security granted by IE CA 4 in s. 5 of the IE CA 4 MEFA includes Digital Assets and Mined Cryptocurrency. In the absence of any contradictory terms, the intent conveyed by that provision would appear, at first blush, to be dispositive in favour of NYDIG.

[107] The Respondents argue in response that much of the text relied on by NYDIG was indeed acknowledged by NYDIG to be surplusage, because the parties understood that the Debtors would never actually hold any Bitcoin, at least not before an event of default. They point in particular to Mr. Smyth's email of February 21, 2022, in which he acknowledged that such language had to be included "for syndication purposes" but would not affect the actual scope of the security being provided. According to Mr. Roberts, NYDIG "wanted the theoretical concept to remain in the MEFA notwithstanding they recognised it was superfluous." The bargain that was eventually struck in relation to IE CA 4 was that such security would indeed be given, but only in respect of Bitcoin mined by IE CA 4 after NYDIG terminated the Hashpower Agreement in response to an event of default.

[108] That this was not just Mr. Roberts' subjective view, but rather a commonly held understanding acknowledged by both sides, as he has deposed, is borne out not only by the written emails exchanged between the parties during the negotiations, but also by other, more specific terms of the MEFAs themselves.

[109] For example, if NYDIG's interpretation were correct, then the following words added into the text of the MEFAs would likewise serve no apparent purpose:

a) "and in Borrower's possession" in ss. 3(d) and 12 of the IE CA 3 MEFA;

b) “Solely to the extent of any rights of Borrower in or to any Mined Cryptocurrency or any other Digital Asset” at the beginning of s. 3(l) of the IE CA 4 MEFA;

c) “owned by the Borrower” in s. 3(l) of the IE CA 4 MEFA;

d) “possessed or controlled by the Borrower” and “solely to the extent Borrower continues to possess or control the same” in the definition of the term “Mined Cryptocurrency” in s. 1 of the IE CA 4 MEFA; and

e) The granting of specific permission under s. 3(d) of the IE CA 3 MEFA and s. 8(d) of the IE CA 4 MEFA for the Debtors to sell, transfer or dispose of their property, not just in the ordinary course, but also pursuant to a hashpower agreement.

[110] NYDIG’s explanation for these insertions is that they were merely intended to reflect the understanding that the Debtors would be permitted to sell the Bitcoin generated by the Equipment in the ordinary course. One of the difficulties I have with that suggestion is that the permission to sell assets, including Bitcoin, in the ordinary course is already provided for separately, elsewhere in the agreements.

[111] NYDIG also argues that whatever effect the Hashpower Agreements may have had, they did not result in an alienation of any of the Debtors’ property. I disagree. That the parties understood the Hashpower Agreements to have resulted in an alienation to IEL of the hashpower generated by the Equipment (hashpower that would otherwise belong to the Debtors), is clear from, among other things, the definitions of the term “Hashpower Agreement” in s. 8(b) of the IE CA 3 MEFA and s. 1 of the IE CA 4 MEFA.

[112] Another compelling factor favouring the Respondents’ interpretation is that, when the size of the proposed IE CA 4 financing was reduced, NYDIG abandoned its demand that IEL be added as a party to the IE CA 4 MEFA for the purposes of:

a) guaranteeing IE CA 4’s obligations; and

b) pledging the Bitcoin obtained by IEL using the hashpower generated by the Equipment.

[113] NYDIG wanted that additional measure of protection precisely because it has known all along that only IEL would receive the Bitcoin in which NYDIG now claims a security interest. In the end, NYDIG agreed to do without those things and settled instead for a weaker right to redirect the hashpower away from IEL and back to IE CA 4 after an event of default. This is clear from, among other things, the Parent Letter Agreement, which describes how the right to use the Equipment's hashpower to generate Bitcoin will "revert" from IEL to IE CA 4 only with the termination of the IE CA 4 Hashpower Agreement by NYDIG in the wake of a default. NYDIG's actual security in mined cryptocurrency under the DAACA, the DACA and through the digital wallet that IE CA 4 was required to open with NYDIG or its agent, was evidently intended to "spring in" only after that occurred.

[114] Finally, NYDIG also argues that the Respondents' interpretation makes no commercial sense, because no prudent lender would finance the acquisition of equipment that depreciated as quickly as this equipment did, without taking additional security beyond the equipment itself. That is, however, far from clear.

[115] The parties have presented conflicting estimates of the degree to which the Equipment's value was financed by NYDIG, but neither estimate leads inexorably to the conclusion that NYDIG must have considered itself under-secured at the time without an accompanying pledge of the mined Bitcoin.

[116] The value of Bitcoin mining equipment is conventionally measured in US dollars per "terahash" (1 trillion hashes per second), commonly abbreviated as "TH." That value appears to fluctuate with the price of Bitcoin. According to Mr. Roberts, the IE CA 3 MEFA was financed at approximately US $30.7/TH, and the IE CA 4 MEFA at US $36.0/TH. At an early stage of the negotiations of the IE CA 4 MEFA, NYDIG produced a worksheet showing that it had calculated the Equipment's orderly liquidation value at US $56.39/TH. On May 24, 2021, at the time the IE CA 3 MEFA closed, the Equipment was said to be worth approximately US $115/TH. On March

24, 2022, the date the IE CA 4 MEFA closed, the Equipment was said to be worth approximately US $85/TH. Using those figures, Mr. Roberts says that the purchases were financed at a rate of approximately 27-42%. As a result of the steep drop in the price of Bitcoin in late 2022, however, by October 1, 2022, the Equipment was worth only US $23.67/TH.

[117] Mr. Shah presents a different set of figures. According to him, the total purchase price of IE CA 3's Equipment was US $62,100,000, of which NYDIG advanced a total of US $49,680,000, yielding a financed rate of 80%. The total purchase price of IE CA 4's Equipment was US $117,393,100, of which NYDIG advanced a total of US $71,195,850, yielding a financed rate of over 60%. The latter rate does not include two Bitmain credits totaling US $14,580,500. After accounting for those, the total cash and credit consideration for the IE CA 4 Equipment would have been US $131,973,600, of which NYDIG financed 54%.

[118] Regardless of which set of figures is to be preferred, I am satisfied that NYDIG could well have believed its security to be adequate without an additional pledge of the mined Bitcoin, at least before the steep drop in the price of Bitcoin that occurred later in 2022.

[119] In summary, I have concluded that NYDIG's collateral under the MEFAs does not extend to Bitcoin that IEL received through mining pools using hashpower that it acquired from the Debtors pursuant to the Hashpower Agreements, written or unwritten, let alone to the proceeds derived from IEL's sale of such Bitcoin.

B. Should the transactions carried out by the Respondents pursuant to the Hashpower Agreements be declared, as against NYDIG, void as fraudulent conveyances?

[120] If, as I have now found, NYDIG's collateral does not include any of the proceeds derived from IEL's Bitcoin sales, then NYDIG seeks a variety of relief in the alternative, including, first, a declaration that the transactions carried out by the Respondents pursuant to the Hashpower Agreements are void and should be reversed as fraudulent conveyances.

[121] The Respondents raise a preliminary objection to the granting of that relief in this context, arguing that such a claim can properly be advanced only as an action, commenced with a notice of civil claim. NYDIG argues in response that nothing in the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c.163 [*FCA*] or the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*], precludes such relief being granted by way of an application in this proceeding, referring in particular to Rule 8-1(2), which allows for applications to be brought at the hearing of a petition.

[122] This court has previously held that relief under the *FCA* should ordinarily be sought by way of an action commenced with a notice of civil claim. That was the conclusion of Harvey J. in *Nagra v. Janif*, 2009 BCSC 700. There, a judgment creditor had commenced a proceeding by way of petition, seeking to set aside a pair of transactions as fraudulent conveyances. Although Harvey J. was of the view that the claim should have been advanced as an action, he chose nevertheless to treat the procedural defect as a mere irregularity, rather than a nullity, and to resolve the issue on the merits, relying on the predecessor to Rule 22-7, the so-called “slip rule”.

[123] That Rule states, in relevant part, as follows:

> Non-compliance with rules
>
> (1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify
>
> (a) a proceeding,
>
> (b) a step taken in the proceeding, or
>
> (c) any document or order made in the proceeding.
>
> Powers of court
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may
>
> (a) set aside a proceeding, either wholly or in part,
>
> (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
>
> (c) allow an amendment to be made under Rule 6-1,
>
> (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
>
> (e) make any other order it considers will further the object of these Supreme Court Civil Rules.

> Proceeding must not be set aside for incorrect originating pleading
>
> (3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.
>
> …

[124] More recently, in *Fu v. Lai*, 2014 BCSC 2286, Savage J. (as he then was) allowed a claim seeking relief under the *FCA*, although commenced by petition, to proceed to a hearing on the merits, after directing the parties to conduct cross-examinations on their respective affidavits. However, Savage J. did not specifically address whether the proceeding had properly been commenced by petition in the first place.

[125] In light of these authorities, the better view appears to be that NYDIG's claim under the *FCA* should have been advanced as an action. However, like Harvey J., I have concluded that any such procedural defect gives rise to an irregularity, rather than a nullity. Rule 22-7(3), states that the court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed. In *Tomic v. Tough*, 2013 BCCA 355, Saunders J.A., writing for the Court in upholding the decision under appeal, relied on a number of authorities for the proposition that "commencing a proceeding using the wrong form constitutes an irregularity, not a nullity" (at para. 19).

[126] That being so, I am also satisfied that, to the extent required, I can and should invoke the discretion I have under Rule 22-7(2)(e) to allow NYDIG's application for relief under the *FCA* to be addressed in this context, even if the claim should properly have been advanced as an action.

[127] There are a number of reasons that lead me to that conclusion. First, there is extensive overlap between that aspect of the relief sought and the other matters that are, without dispute, properly before me on this application. Second, there is no real dispute between the parties as to the underlying facts, or any suggestion by either side that the issues raised do not lend themselves to summary disposition on affidavit evidence. No one has sought to cross-examine any of the affiants. Finally,

if, as NYDIG alleges, the receivership estate was improperly diminished by means of a series of fraudulent conveyances, then it should be open to NYDIG, as the petitioning creditor, to apply for the appropriate relief here rather than being forced to commence a separate action, with the attendant risks of delay, duplication, increased expense and inconsistent rulings: *Cepuran v. Carlton*, 2022 BCCA 76.

[128] Turning then to the substance of the issue, the elements of the test to be applied in determining whether a transaction should be declared void as a fraudulent conveyance under the *FCA* were recently set out by Voith J.A. in *0848052 B.C. Ltd. v. 0782484 B.C. Ltd*., 2023 BCCA 95, as follows:

> [57] … The elements of a fraudulent conveyance are that i) "a disposition of property" be ii) made with the "intent to delay, hinder or defraud creditors and others" and iii) that the transaction has that effect. In relation to the second element, this Court has held "[t]he only intent now necessary to avoid a transaction under the modern version of the [*Fraudulent Conveyance Act*] is the intent to "put one's assets out of the reach of one's creditors' (per *RBC v. Clarke*). No further dishonest or moral blameworthy intent is required": *Abakhan* at para. 73; *Mawdsley v. Meshen*, 2012 BCCA 91 (leave to appeal to SCC ref'd, 34798 (27 April 2012) at paras. 69–70.

[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*, 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* 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.

[131] In this case, I have already found that the Hashpower Agreements resulted in a "disposition of property", namely, a transfer from the Debtors to IEL of the hashpower generated by the Equipment, so as to satisfy the first element of the test.

[132] Likewise, I am satisfied that the third element (that the *effect* of the transfer has been to put a valuable asset of the Debtors beyond the reach of their main creditor) is also satisfied on the basis that, had the impugned transfers not occurred, the hashpower generated by the Equipment would have remained with the Debtors, in which case the Bitcoin mined with it would have formed part of the collateral charged by the MEFAs.

[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*, 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.

[137] On April 17, 2023, I granted the Receiver's application for an order to compel IEL or its relevant subsidiary to provide the information demanded by the Receiver regarding the Bitcoin proceeds generated with the Equipment (my earlier decision in that regard is indexed as 2023 BCSC 638). IEL has since responded with information suggesting that it received proceeds of approximately CDN $37 million through those Bitcoin sales. The Receiver is still reviewing that information and was not yet in a position to comment on its accuracy at the time of the hearing of this application.

[138] As they have on other matters, the parties have presented conflicting tallies of the consideration paid to the Debtors in exchange for that same hashpower. According to the Receiver, whose work and analysis in this regard too is still ongoing, the Debtors received net income of CDN $2.2 million during the relevant period. They should have earned, by the Receiver's calculation, revenue of CDN $20.9 million pursuant to the Hashpower Agreements.

[139] The Respondents calculate that latter figure at closer to CDN $33 million, the difference being attributable to approximately CDN $12 million in transfer pricing adjustments, which, in the opinion of the Receiver, are not properly included in the calculation.

[140] The discrepancy between the value that IEL received for the hashpower, and the consideration that it paid the Debtors for it, therefore lies somewhere between CDN $4 million and CDN $16 million. I have been given no reason to question the correctness of the Receiver's calculation, which is based simply on the formula for determining the fees payable to the Debtors under the IE CA 4 Hashpower Agreement, having regard to the quantity of electricity actually consumed during the relevant period.

[141] The Respondents argue in response that, regardless of these factors, the impugned transactions were carried out solely for a legitimate business purpose, namely, to minimise sales tax, and without any fraudulent intent. The proof of this, they say, lies in the fact that NYDIG was made aware of and specifically agreed to everything, including the terms of the hashpower and hosting agreements and their impact on the Debtors' finances, before advancing the loans and without raising any complaint at the time. I do not find that argument persuasive.

[142] I accept that the Iris Group's interest in minimising sales tax forms part of the rationale for its corporate structure. However, I also agree with NYDIG that another purpose it serves is to allow for otherwise exigible corporate assets to be sheltered from creditors like NYDIG. In addition to the badges of fraud identified above, further support for this conclusion can be found in the press release issued by IEL on November 2, 2022, where one of the goals of that structure was described as follows:

> Non-Recourse SPV's and their limited recourse equipment financing arrangements were intentionally structured for prudent risk management to protect the underlying business and data center infrastructure that the [Iris] Group has built.

[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, IEL'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 IEL 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 IEL 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 IEL would treat its supplemental cash transfers to the Debtors not as a subsidy, but rather as a series of subordinated loans – loans that, moreover, IEL would consider itself at liberty to cease advancing whenever IEL 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 IEL was left free thereafter to direct the inter-company flow of funds in any manner it pleased. IEL'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 IEL's implied duty of good faith in its implementation. The scope of that duty was explained by Masuhara J. in *Govorcin Fisheries Ltd. v. Medanic Fisheries Ltd.*, 2022 BCSC 1201, in the following terms:

> [194] The duty of good faith and honest performance were discussed in a series of decisions: *Bhasin v. Hrynew*, 2014 SCC 71; *C.M. Callow Inc. v. Zollinger,* 2020 SCC 45; and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7. The principles from these cases are identified and summarized in the decision of *2343680 Ontario Inc. v. Bazargan*, 2021 ONSC 6752 at para. 28::
>
> > (a) Canadian common law has a long history of respecting private ordering and the freedom of contracting parties to pursue their own self-interest. The principle of good faith must be applied in a manner consistent with this history. The pursuit of economic self-interest, often at the expense of others, is not necessarily contrary to the principle of good faith. (*Bhasin*, para. 70; *Wastech*, para. 73);
> >
> > (b) The principle of good faith performance simply requires that parties generally perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. (*Bhasin*, para. 63);
> >
> > (c) While the duty of honest performance does not require parties to act "angelically", they must refrain from lying or knowingly misleading another contracting party (*Bhasin*, para. 86).
> >
> > (d) A duty of honest contractual performance does not impose obligations of loyalty or trust. It is not a fiduciary duty. It does not mean that parties cannot legitimately take advantage of bargains they have reached. But it does mean that parties must not lie or knowingly mislead each other (*Bhasin*, paras. 60 and 65);
> >
> > (e) The duty of honest performance is not an obligation of honesty at large. It is directly linked to performance of the contract. Absent a linkage requirement, the duty would be to simply not tell a lie, which would broaden the scope of liability beyond acceptable limits (*Callow*, para. 49);
> >
> > (f) Tethering the good faith analysis to a consideration of what was reasonable according to the parties' own bargain tends to prevent the analysis from "veering into a form of ad hoc judicial moralism or 'palm tree' justice." (*Wastech*, para. 74.);

> (g) The duty of honest performance "constrains the manner in which all contractual rights and obligations are exercised or performed, as a matter of contractual doctrine." (*Callow*, para. 54). By extension, exercising a discretionary power dishonestly is a breach of contract; and,
>
> (h) Honest performance requires that the exercise of contractual discretion be carried out in a manner consistent with the purposes for which it was granted. Said another way, that it be carried out reasonably. The assessment of reasonableness may be expressed in the following question: was the exercise of discretion unconnected to the purpose for which the contract granted discretion? If the answer is yes, then the exercise of discretion has not been carried out in good faith. (*Wastech*, para. 69).

[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]."

[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 IEL paid for it), which is not necessarily the same as a sum sufficient to make NYDIG whole on the debt it is owed.

[150] Having considered all of these circumstances, I have concluded that the transactions carried out by the Respondents pursuant to the Hashpower Agreements should be declared, as against NYDIG, void as fraudulent conveyances.

C. 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.

V. Summary and Conclusion

[153] The application is allowed to the extent that the impugned transactions are declared to be, as against NYDIG, void as fraudulent conveyances.

"Milman J."