# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Skychain Technologies Inc. v. The9 Limited,* 2023 BCCA 150

Date: 20230406
Docket: CA48613

Between:

**Skychain Technologies Inc.**

Appellant
(Defendant)

And

**The9 Limited and 1111 Limited**

Respondents
(Plaintiffs)

Corrected Judgment: The text of the judgment was corrected at paragraph 48 on April 13, 2023.

Before: The Honourable Mr. Justice Frankel
The Honourable Justice MacKenzie
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated September 20, 2022 (*The9 Limited v. Skychain Technologies Inc.*, 2022 BCSC 1666, Vancouver Docket S225466).

| | |
|---|---|
| Counsel for the Appellant: | P. Bychawski<br>R.I. Loten |
| Counsel for the Respondents: | J.C. MacInnis, K.C.<br>E. Chen |
| Place and Date of Hearing: | Vancouver, British Columbia<br>March 20, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 6, 2023 |

**Written Reasons by:**
The Honourable Mr. Justice Frankel

**Concurred in by:**
The Honourable Justice MacKenzie
The Honourable Mr. Justice Fitch

***Summary:***

*The appellant, Skychain Technologies Inc., and the respondent, The9 Limited, are parties to a multi-agreement financing of a cryptocurrency mining facility Skychain planned but failed to build. When Skychain defaulted on its time-limited obligations related to construction of that facility, The9 and its wholly-owned subsidiary 1111 Limited claimed the $2 million loaned under debentures as immediately due and payable. Skychain responded that repayment was not yet due on the basis that a clause in one of the agreements limited The9's remedies to liquidated damages. The chambers judge granted summary judgment to The9 for the total amount loaned, finding that Skychain's proposed interpretation of that clause did not raise a genuine issue for trial. On appeal, Skychain submits that the judge erred by going outside the parties' pleadings and that properly interpreted the clause limits The9 to liquidated damages. Held: Appeal dismissed. Even assuming the chambers judge went outside the pleadings, he was correct in finding The9 and 1111 were entitled to accelerate repayment of the debentures. It is apparent from the wording of the clause, in the context of the agreements, that it was intended to provide The9 with additional rather than exclusive rights. It does not make good business sense for the liquidated damages remedy to have been intended for anything but compensation for short-term delays. The clause is not a defence to the action in debt.*

**Reasons for Judgment of the Honourable Mr. Justice Frankel:**

## Introduction

[1] Skychain Technologies Inc. appeals from the order of Justice Gomery of the Supreme Court of British Columbia, granting a summary judgment application and ordering Skychain to pay The9 Limited and its wholly-owned subsidiary 1111 Limited in excess of $2 million. That order relates to a loan The9 made to Skychain through the purchase of debentures as part of a multi-agreement financing of a cryptocurrency mining facility Skychain initially planned to build in Birtle, Manitoba. Being unable to obtain the necessary permits in Birtle, Skychain hoped to relocate to Melita, Manitoba, but was not in a financial position to develop a facility there.

[2] It was common ground that Skychain had defaulted on its time-limited obligations with respect to the completion of the facility. The issue was whether those defaults resulted in the debentures becoming immediately due and payable or, as submitted by Skychain, only entitled The9 and 1111 to a capped amount of

liquidated damages. This required the chambers judge to interpret a provision in one of the agreements. In finding The9 and 1111 were not limited to liquidated damages, the chambers judge stated the loan had "failed of its purpose" because it had been made to finance a facility in Birtle, and Skychain had not delivered that facility and would never do so.

[3] On appeal, Skychain submits the judge erred by going outside the boundaries of the parties' pleadings because he grounded his finding on the agreement in question having "failed of its purpose". This, Skychain says, is tantamount to a finding of "fundamental breach", which The9 and 1111 had not pleaded. Skychain asks this Court to accept its interpretation of the provision it says precludes acceleration of repayment of the debentures and, in the result, to dismiss the summary judgment application.

[4] For the reasons that follow, I would dismiss this appeal. As I will explain, even assuming the chambers judge went outside the pleadings, he was correct in finding The9 and 1111 were entitled to accelerate repayment of the debentures.

## Background

[5] Skychain planned to build a cryptocurrency mining facility in Birtle, and incorporated Miningsky Technologies (Manitoba) Inc. for that purpose. The9 agreed to advance $4 million to support that project: $2 million in equity for Skychain shares and warrants, and $2 million advanced as debt under convertible debentures issued by Skychain to The9's nominee, 1111 Limited. Skychain's shares are publicly traded on the TSX Venture Exchange ("TSXV").

[6] On April 21, 2021, Skychain issued a press release announcing it had obtained financing for a facility in Birtle. That release included the following:

> Skychain Technologies Inc. (TSXV:SCT) … is pleased to announce signing of a binding term sheet for a $4 million financing to construct and operate a 12 MW crypto hosting facility in Birtle, Manitoba (the "Project").
>
> …
>
> The9 may use up to a maximum of 8 MW of operating capacity for its own miners at the Project with a fixed-price hosting fee over a term of 10 years.

[7] The terms and conditions of the financing are contained in three interconnected documents: (i) a "Financing Agreement" ("FA"), dated May 14, 2021, between Skychain and The9; (ii) a "General Security Agreement" ("GSA") dated May 14, 2021, between Skychain and The9; and (iii) a "Debenture Certificate" dated June 2, 2021, issued by Skychain.

[8] The opening recitals in the FA include the following:

> B. Skychain intends to set up a cryptocurrency hosting facility (the "Facility") in Birtle, Manitoba, Canada, on real property located in Prairie View Municipality leased from a third party;
>
> C. Skytrain needs to raise funds in order to finance and develop the Facility, and The9 is interested in providing Skychain with the funds necessary for the development of the Facility;

The definitions section includes the following:

> "Closing" means the completion of the issue and sale by Skychain of the Units and Debentures pursuant to this agreement and the Subscription Agreements;
>
> "Closing Date" means the date of the Closing, or such other date or dates The9 and Skychain may agree;

[9] Section 2.1 of the FA states:

> 2.1 The9 wishes to invest $4 million dollars (the "Financing") as follows in Skychain to provide Skychain with the funds necessary to develop the Facility:
>
> A. An equity investment of Cdn. $2,000,000 through the purchase of units (the "Units") of Skychain at a price of $0.76 per Unit. Each Unit shall be comprised of one common share (a "Share") in the capital of Skychain and one share purchase warrant (a "Warrant"). Each Warrant shall permit the holder thereof to purchase a common share (a "Warrant Share") in the capital of Skychain at any time up to 5:00 p.m. (Vancouver time) on the third anniversary of the Closing Date at a price of $1.22 per Warrant Share; and
>
> B. A debt financing of Cdn. $2,000,000 through the purchase of debentures (the "Debentures") at a price of $0.85 per Debenture. Each Debenture shall have the following terms attached to it:
>
> (1) The Debentures shall mature (the "Maturity") on the fourth (4th) anniversary of the Closing Date. The9 shall have an option (the "Maturity Option") to extend Maturity for an additional twelve (12) months, and The9 may exercise the Maturity Option by providing Skychain written notice of such intention on or before Maturity.

> (2) Each one Debenture shall be convertible (the "Conversion") at the sole option of The9 into one common share (the "Conversion Share") in the capital of Skychain at any time up to the time up to the earlier of (a) the time that the Debentures are repaid in full, and (b) five (5) years from the date of issuance of the Debentures, at a conversion price of $0.85 per Conversion Share. For the avoidance of doubt, Conversion shall be cashless and not require further payment from the debentureholder.
>
> (3) The Debentures shall bear interest (the "Interest") at a rate of one percent (1%) per annum commencing from the Closing Date up to the time that the Debentures are either converted or are repaid in full. Commencing from the Closing Date, Interest owing shall be payable at the end of each quarter.
>
> (4) The Debentures shall be secured (the "Security") against all of Skychain's present and after acquired property located at the Facility, including any movable and immovable structures, but not including any real property, namely a land plot described as Lot 1, Block 5, Plan 820 (Roll #45900) in the Prairie View Municipality in the province of Manitoba, Canada, upon which the Facility is located.

[10] Skychain's "covenants" are set out in s. 5 of the FA. Section 5.1(n) contains Skychain's time-limited obligations with respect to obtaining permits and approvals for, and completion of, the facility:

> Skychain understands that the timely construction and energization of the Facility is a material inducement for The9 to provide the Financing. To this end, as soon as practicable following the Closing, but in no event later than [June 30, 2021] (the "Long Stop Date") Skychain shall obtain necessary documents, approvals and permits, as applicable, on the basis of which construction and energization of the Facility shall be completed by December 7, 2021 (the "Facility Delivery Date"), which shall include, but may not be limited to: …

[11] Other covenants by Skychain include it agreeing to use commercially reasonable efforts to maintain the listing of its common shares on the TSVX for at least five years after the Closing Date (s. 5.1(h)) and giving The9 the right to nominate a person to Skychain's board of directors, provided The9 legally or beneficially holds a least 10% of Skychain's outstanding common shares (s. 5.1(l)).

[12] The9 was also given an option to "compel" Skychain to provide it with the hosting services Skychain offers its customers at the Birtle facility at a specified fixed price. The first provision in this section of the FA reads:

> 10.1 Upon the date of commercial operation of the Facility, The9 shall have a first right of offer (the "ROFO") on up to eight (8) MW DC of electrical power at Skychain's twelve (12) MW DC Facility located in Birtle, Manitoba, Canada for up to a term of ten (10) years.

[13] Section 6 of the FA deals with The9's ability to terminate the FA. It states, in part:

> 6.2 The9 may terminate its obligations under this Agreement at any time if:
>
> (a) any order to cease trading (including communicating with persons in order to obtain expressions of interest) in the securities of Skychain is made by a competent regulatory authority and that order is still in effect;
>
> (b) Skychain is in breach of any material term of this Agreement and Skychain has not remedied such breach within 30 days; or
>
> (c) The9 determines that any of the representations or warranties made by Skychain in this Agreement is materially false or has become materially false.
>
> 6.3 If The9 exercises its right to terminate this Agreement, then Skychain will immediately issue a press release setting out particulars of the termination.
>
> In the event Skychain fails to secure any of the material approvals or permits listed in Section 5(n) by the Long Stop Date, The9 shall have a right, acting reasonably in its own discretion, to either: (i) prolong the Long Stop Date and allow Skychain to postpone the Facility Delivery Date to the earliest practicable date or (ii) charge Skychain liquidated damages in the amount of 0.1% of the Financing for each day of delay after the Facility Delivery Date until either 1) the date when the Facility is completed for operations, or 2) the Termination date of this Agreement (the "Liquidated Damages"). The Liquidated Damages shall be capped at 5% of the total Financing amount. Accrued Liquidated Damages shall be paid in a lump sum together with the Interest. In the event due Liquidated Damages are not paid in a timely manner on the date when the next Interest payment is due, such Liquidated Damages shall bear interest at the rate of 1.5% per month (prorated for partial months) until paid in full. Nothing herein shall limit The9's right to pursue actual damages for the failure to deliver the Facility, and The9 shall have the right to pursue all remedies available to it at law or in equity including, without limitation, a decree of specific performance and/or injunctive relief. This right does not prejudice any other right of termination of this Agreement.

(Note: The long paragraph in s. 6.3 is at the heart of this appeal. Its original version contains a few additional words the parties agree were included in error, are meaningless, and can be ignored. Accordingly, they have been removed.)

[14] The FA contains a "time is of the essence" provision.

[15] Under the GSA, Skychain granted The9 a secured interest in its personal property located at the "Birtle facility":

> 3.1 The Security Interest (as hereinafter defined) is granted to [The9] by [Skychain] as continuing security for the payment of the Debentures and for the performance and observance of the other obligations of [Skychain] to [The9] under or arising out of the Debentures (collectively, the "Obligations").
>
> 4.1 [Skychain] hereby grants, mortgages, charges, transfers, assigns and creates to and in favour of [The9] a security interest in all of [Skychain's] present and after-acquired personal property located at [Skychain's] cryptocurrency mining hosting facility (the "Birtle Facility") in Birtle, Manitoba, Canada, but excluding any interest that [Skychain] has or may acquire, legally or beneficially, in or to any real property upon which the Birtle Facility is located (collectively, the "Collateral"). For greater certainty, notwithstanding the foregoing, the security interest granted under this Section 4.1 to [The9] is strictly limited to personal property owned by [Skychain] and located at the Birtle Facility.

[16] The GSA sets out a number of events that would accelerate Skychain's obligation to repay the $2 million debt evinced by the debentures. The one The9 relies on states:

> 11.1 The Debentures will become immediately due and payable at the option of [The9] in any of the following events (each an "Event of Default"):
>
> (a) if a default be made in the performance or observance by [Skychain] of any term or condition of the Financing Agreement or the Debentures and such default continues for ten Business Days following written notice thereof to [Skychain];

Section 29.1 of the GSA states that, "[The GSA] is subject to the terms of the Financial Agreement."

[17] As The9's nominee, 1111 acquired in excess of $2.35 million debentures from Skychain. The schedule to the Debenture Certificate contains the following:

> 2.2 Debenture Terms
>
> Each Debenture has the following terms:
>
> Principal: $0.85 per Debenture.
>
> Interest Rate: The Debentures shall bear a simple rate of interest of one percent (1%) per annum, accruing monthly, and shall be paid in cash to the holder of the Debentures every three months thereafter until the

> Debentures are repaid in full or are converted in accordance with the terms and conditions attaching to the Debentures.
>
> Maturity: Four (4) years from the date of issuance (the "Maturity") of the Debentures, subject to an option on the part of the Debentureholder to extend the Maturity for an additional twelve (12) months (to five (5) years in total) from the date of issuance of the Debentures. Upon Maturity of the Debentures, [Skychain] shall, within 15 days of the Maturity Date, pay the holder of the Debentures the face value of the Debentures plus all accrued and unpaid interest owing thereon.
>
> Security: The Debentures are secured only against [Skychain's] present and after acquired property located at [Skychain's] cryptocurrency mining hosting site in Birtle, Manitoba, Canada (the "Birtle Site"). The security does not provide the Debentureholder with any rights or interest in or to any real property, namely land plots identified as Lot 1, Block 5, Plan 820 (Roll #45900) in the Prairie View Municipality, upon which the Birtle Site is located, regardless whether such real property is owned, legally or beneficially, by [Skychain].
>
> Conversion: The Debentureholder may, at any time and from time to time up to Maturity, elect to convert the outstanding Debentures into Common Shares at the Conversion Price.
>
> Conversion Price: The Debentureholder may, at its sole election, convert all or some of the Debentures into Common Shares on the basis of one Common Share for every Debenture converted. For the avoidance of doubt, 1111 Limited's Conversions shall be cashless and not require further payment from 1111 Limited.

[18] On June 4, 2021, The9 provided the first tranche of the equity-financing component of the FA and the debentures were issued. The second tranche remained subject to TSXV approval.

[19] On July 27, 2021, the TSXV approved the second tranche and The9 provided Skychain with the remaining funds. This became the Closing Date as defined in the FA.

[20] On November 1, 2021, Miningsky Technologies and NBTC Limited, a wholly owned subsidiary of 1111, entered into two "hosting agreements" under which Miningsky Technologies agreed to provide cryptocurrency mining hosting services to NBTC. The location where those services were to be provided is set as follows in those agreements:

> 5.1 Miningsky and [NBTC] shall work together to determine a location (the "Location") suitable for the operations. Miningsky shall identify sites that may

> be used by the [NBTC] for the purposes of "mining" cryptocurrency, and Miningsky shall provide [NBTC] with all relevant information on available sites. [NBTC] shall have the right to visit any of the sites at an agreed upon date and time by Miningsky and [NBTC]. The final choice of Location will be made by Miningsky and Miningsky shall notify [NBTC], in writing, of the chosen Location. The default Location is Birtle, Manitoba, Canada.
>
> 5.2 Once the Location has been chosen, Miningsky shall prepare the Location to receive the Mining Machines. In furtherance thereof, Miningsky shall: …

Pursuant to the terms of the Hosting Agreements, NBTC provided Miningsky Technologies with deposits totalling in excess of $2.6 million.

[21] Skychain was unable to obtain the permits and approvals required to construct a cryptocurrency mining facility in Birtle. On March 18, 2022, it issued a press release stating it was considering relocating the facility to a new site. On May 6, 2022, it issued a press release stating it was no longer feasible to continue with efforts to construct the facility in Birtle, and that the facility was being moved to Melita, Manitoba.

[22] On June 20, 2022, The9 notified Skychain in writing that it considered Skychain in default of obligations under s. 5.1(n) of the FA by failing to: (i) obtain all necessary permits and approvals by June 30, 2021 (i.e., the Long Stop Date); and (ii) construct and energize the facility by December 7, 2021 (i.e., the Facility Delivery Date). With reference to s. 11.1(a) of the GSA, The9 advised Skychain that if those defaults were not cured after ten business days, then the debentures would become due and payable.

[23] On July 6, 2022, The9, 1111, and NBTC filed a joint notice of civil claim naming Skychain and Miningsky Technologies as defendants. That notice contained a claim in debt by The9 and 1111 against Skychain based on the debentures having become due and payable under s. 11.1(a) of the GSA as a result of Skytrain having defaulted on its obligations under s. 5.1(n) of the FA. The amount sought was $2 million in principal plus $6,808, being unpaid interest owing as of July 6, 2022. The9 did not plead the FA had been terminated. The notice also contains claims by NBTC

against Miningsky Technologies based on Miningsky Technologies having "materially defaulted on its contractual obligations under the Hosting Agreements."

[24] Skychain and Miningsky Technologies filed a joint response to civil claim. Skychain denied being indebted to The9 and 1111. Although Skychain accepted it had defaulted on its obligations under s. 5.1(n) of the FA, it pleaded that, by reason of s. 6.3, liquidated damages were the only remedy available for that default. For its part, Miningsky Technologies denied it had materially breached its contractual obligations to NBTC under the Hosting Agreements. It pleaded that it remained open to it to meet its obligations to NBTC "if certain conditions are met, including the obtaining of additional financing and necessary documents, approvals and permits for the Birtle Facility or another location."

[25] On August 11, 2022, The9 and 1111 filed an application under Rule 9-6 of the *Supreme Court Civil Rules*, seeking summary judgment against Skychain. They took the position that s. 6.3 was not a valid defence to a claim in debt. The "Material To Be Relied On" section of the application lists two affidavits: (i) Affidavit #2 of Kwok Ho Lai, Chief Financial Officer of The9; and (ii) Affidavit #1 of Ashley Cardeno, a legal assistant to counsel for The9, 1111, and NBTC. Mr. Lai's affidavit sets out the dealings between the parties. Ms. Cardeno's affidavit is limited to placing a Skychain press release in evidence.

[26] In its application response, Skychain acknowledged it had defaulted on its obligations under s. 5.1(n) of the FA but contended The9 and 1111 were only entitled to the liquidated damages. The "Material To Be Relied On" section of the response lists only Affidavit #1 of Donald Gordon, Skychain's Chief Executive Officer. In that affidavit, Mr. Gordon deposes, among other things, that Skychain expended more than the $4 million generated by the financing provided by The9 on the construction and energization of "the Facility" but that it had not obtained the approvals etc. to complete the facility by December 7, 2021, as contemplated by s. 5.1(n) of the FA.

[27] The9 also filed an application seeking the appointment of a receiver over all of Skychain's assets. Skychain filed an application response, opposing a receiver. One of the affidavits in the "Material To Be Relied On" section of that response was Mr. Gordon's Affidavit #2. In that affidavit, Mr. Gordon deposes, among other things that: (i) Skychain's wholly-owned subsidiary, 10117749 Manitoba Ltd., owned a property in Melita "which is intended to serve as the new location of the proposed" cryptocurrency mining facility; (ii) Skychain's plans to develop a cryptocurrency mining facility in Birtle "did not come to fruition due to its inability to secure the required permitting", and (iii) Skychain "is currently in a difficult financial position and further financing and solutions to other challenges will be required before the Melita site can be developed to the point of potentially being able to host" a cryptocurrency mining facility.



**The Chambers Hearing**

[28] The chambers judge heard the applications for summary judgment and the appointment of a receiver, one following the other.

[29] The parties agreed that the application for summary judgment turned on the interpretation of s. 6.3, i.e., whether it precluded The9 and 1111 from accelerating repayment of the $2 million debt-financing pursuant to s. 11.1(a) of the GSA. For convenience, in what follows, The9 and 1111 will be referred to collectively as The9.

[30] At the outset of his submissions, counsel for The9 referred to Skychain's May 6, 2022 press release—which was an exhibit to Mr. Lai's affidavit—as an acknowledgement by Skychain that it was relocating its proposed cryptocurrency mining facility to a site in Melita. He said Skychain had offered no evidence to indicate it was pursuing a new site. He noted that statements in Mr. Gordon's Affidavit #2 regarding Skychain's plans with respect to Melita were not before the court on the summary judgment application because that affidavit had been filed only on the receivership application.

[31] The9's counsel stated The9 had the right to terminate the FA but had elected not to do so because it contained a number of provisions relating to the equity-

financing as well as the debt-financing. He said The9 had chosen to exercise its rights under the GSA because Skychain had abandoned the Birtle project.

[32] In his initial submission, Skychain's counsel, in responding to a question by the judge, stated Skychain had not conceded it had "given up" on the Birtle project. He later submitted there was nothing in the financing documents requiring the facility to be in Birtle, i.e., that locating the facility in Birtle was not an essential term of the agreements. In response to other questions from the judge, counsel stated there was still a possibility that the facility would be delivered and that a failure to deliver the facility had not been pleaded in the notice of civil claim as a material change giving rise to termination of the FA or damages. The judge agreed that had not been pleaded and, accordingly, it was not an issue he needed to address.

[33] Towards the end of his submissions, Skychain's counsel applied to have Mr. Gordon's Affidavit #2 admitted on the summary judgment application. Counsel for The9 objected save for the paragraph in which Mr. Gordon deposed that: (i) Skychain was making efforts to relocate the facility to a property in Melita owned by 10117749; and (iii) Skychain was "currently in a difficult financial position and further financing and solutions to other challenges will be required before the Melita site can be developed to the point potentially being able to host the Facility."

[34] In other paragraphs in his affidavit, Mr. Gordon deposed that: (i) Skychain was advancing a civil claim against its former CEO, Ningtao (Bill) Zhang, alleging, among other things, that Mr. Zhang had "misled and/or coerced [Skychain's] Board into spending significant sums on the Birtle Project despite it becoming apparent to him, or ought to have become apparent to him that, both technically and financially, the project was unfeasible, and which caused a diversion and waste of company resources"; (ii) the hosting equipment owned by Miningsky Technologies as of September 9, 2021, was being stored in Birtle; Regina, Saskatchewan; Surrey and Houston, British Columbia; and Union City, South Carolina; and (iii) "[t]he equipment … located outside of Manitoba was never shipped to the Birtle site so as not to incur the associated high shipping costs given that the Facility is not being constructed."

The list of equipment attached to the affidavit indicates that of the approximately $2.7 million in equipment purchased by Miningsky Technologies, approximately $1.6 million is stored outside of Birtle.

[35] The judge reserved judgment on the admission of Mr. Gordon's Affidavit #2, the application for summary judgment, and the appointment of a receiver. The application for a receiver was later dismissed and nothing more need be said about it.

**Chambers Judge's Reasons**
(2022 BCSC 1666)

[36] The judge granted Skychain's application to admit Mr. Gordon's Affidavit #2 on the summary judgment application: para. 10.

[37] The judge determined that the test for summary judgment pursuant to Rule 9-6 of the *Supreme Court Civil Rules* had been met, as the only dispute between the parties concerned the interpretation of the loan documentation and in particular, s. 6.3: paras. 11–13.

[38] The judge found the requirements of s. 11.1(a) of the GSA to accelerate repayment of the debentures had been met because Skychain had breached s. 5.1(n) of the FA by reason of the fact it had been "unable to obtain necessary permits for the construction of the contemplated facility in Birtle", had "not complete[d] construction and energization of the facility", and had not cured those defaults after being given notice by The9: para. 15.

[39] The judge noted the parties agreed the FA had not been terminated and The9's position was that it had grounds to terminate but had chosen not to do so: para. 19.

[40] The judge then turned to the parties' competing interpretations of s. 6.3. He rejected Skychain's interpretation—i.e., that The9 was only entitled to the specified liquidated damages—as not being reasonably arguable. In particular, it did not accord with the penultimate sentence of s. 6.3, which provided that The9's right to

claim damages or any other legal or equitable remedy was not limited. He also found that this reading was consistent with the use of the indefinite article in the first sentence, i.e., the reference to The9 having "a right" rather than "the right" indicated that rights under options (i) and (ii) were not an exhaustive list of The9's rights.



[41] The judge also rejected Skychain's argument that because it hoped to replace the proposed Birtle facility with one in Melita, it could not yet be said it had "failed to deliver the Facility": paras. 27–29. He noted the two towns were 100 km apart and that all of the financing documents specified Birtle as the location of the facility. He also noted that in its response to civil claim, Skychain had admitted the following statements in the "Statement of Facts" section of The9's notice of civil claim:

> 12. In May 2021, The9 and Skychain entered into the following agreements to facilitate Skychain's development of a cryptocurrency hosting facility in Birtle, Manitoba (the "Birtle Facility"): …
>
> 13. Pursuant to the terms of the [FA], The9 agreed to finance the development of the Birtle Facility in part by way of a debt financing of $2,000,000 through the purchase of debentures …

[42] After referring to the above mentioned excerpts, the judge stated:

> [30] The indisputable fact of the matter is that Skychain has decided not to pursue development of the cryptocurrency hosting facility contemplated in the agreements, being a facility located in Birtle, Manitoba. Skychain has not delivered that facility. It will never deliver that facility. The loan has failed of its purpose.

[43] Finally, after noting that commercial contracts should be construed in accordance with sound commercial principles and good business sense, the judge stated:

> [31] … Even if Skychain's interpretation of cl. 6.3 were textually plausible, it is difficult to see how it could be considered as commercially sensible. The liquidated damages calculation contained in cl. 6.3 is commercially appropriate to a situation in which performance has been delayed, but not to one in which the facility will never be delivered and the contract will never be performed.

[44] On the basis that Skychain's interpretation of s. 6.3 did not raise a genuine issue of fact requiring a trial, the judge held Skychain did not have a defence to the

claim in debt. As a result, he granted judgment for the full amount owing under the debentures: para. 32.

## Grounds of Appeal

[45] Skychain submits the chambers judge erred in law by finding liability on a ground not pleaded. More specifically, it contends the judge:

- Misconstrued the issue on which the parties required a judicial decision by deciding whether the "relocation" of the facility to Melita triggered the reservation of rights in the penultimate sentence of s. 6.3;
- Grounded his judgment on a theory that the location of the facility was fundamental and material to the FA, a theory not tested in the crucible of the adversarial process;
- Opened the possibility of inconsistent judgments being rendered on factual and legal issues in dispute in the litigation involving NBTC and Miningsky Technologies.

## Positions of the Parties

[46] The central theme of Skychain's argument is that the chambers judge went outside the boundaries of the parties' pleadings. More particularly, Skychain says the judge erred by, in effect, deciding Skychain had fundamentally breached its contractual obligations under the FA when it abandoned its plans to construct a facility in Birtle, even though such a breach had not been pleaded in the notice of civil claim. This, Skychain says, is evinced most clearly in para. 30 of the reasons for judgment reproduced in para. 42 above. Skychain says the statements that it "will never deliver [a facility located in Birtle]" and that "[t]he loan has failed its purpose", amount to a finding that locating the facility in Birtle was a material term of the FA that had been breached.

[47] Skychain points to the fact that the claim against it in regard to the debentures was time-based, not location-based, and, therefore, whether the facility had to be located in Birtle was not in issue between it and The9. It says that had The9 wished

to allege Skychain was contractually obligated to locate the facility in Birtle it could easily have done so, as NBTC had done in its pleadings against Miningsky Technologies. It further says that because this issue had not been pleaded it was treated unfairly, as it was denied the opportunity to lead evidence and make submissions on whether the location of the facility was a material term of the FA.

[48] With respect to the NBTC–Miningsky Technologies litigation, Skychain notes that Miningsky Technologies has pleaded relocating the facility from Birtle to another location is not a breach of the Hosting Agreements, and that issue is to be decided at a forthcoming trial. Skychain says the result of that trial on the issue of location could well be inconsistent with what the judge found. Accordingly, it says the judge's determination of an issue not pleaded should not be allowed to stand as it opens the gates to the possibility of inconsistent judgments.

[49] In its factum, Skychain sought an order setting aside the judge's order on the basis that it was treated unfairly. That would result in the summary judgment application being returned to the Supreme Court for a new hearing. However, at the hearing of this appeal, Skychain submitted this Court should accept its interpretation of s. 6.3 and, on that basis, set aside the judge's order and dismiss the application.

[50] The9's position is that the judge did not err in interpreting s. 6.3. It further says the judge did not decide the summary judgment application on the basis of fundamental breach, noting the judge did not mention this doctrine. The9 says the judge's comment about the loan failing its purpose was in response to a late argument by Skychain that there was some relevance to the relocation of the facility to Melita. It was in connection with that argument that Skychain sought admission of Mr. Gordon's Affidavit #2. The9 further says Skychain admitted the loan was for a facility in Birtle when it did not dispute statements to that effect in its notice of civil claim (see para. 41 above).

[51] The9 says it never argued location was a factor with respect to its ability to accelerate repayment of the debentures. It says its position throughout has been time-based—failure to meet the Long Stop Date and Facility Delivery Date—and that

s. 6.3 does not limit its ability to accelerate repayment under s. 11.1 of the GSA as a result of Skychain's failure to meet those dates. Accordingly, it seeks an order dismissing this appeal.

[52] In reply, Skychain says The9 was the first to raise the location issue and that this occurred before Skychain made its submissions.

**Analysis**

[53] It is not necessary to determine who first raised the issue of location and whether the chambers judge went outside the pleadings and improperly grounded his decision on there having been a fundamental breach of contract. That is because, even assuming the judge erred in that regard, the relevant facts are not in dispute and we have had the benefit of full submissions on the interpretation of s. 6.3. Accordingly, we are in a position to determine whether s. 6.3 precludes The9 from accelerating repayment of the debentures. Like the chambers judge, I would reject Skychain's interpretation of that provision.

[54] For ease of reference, I will again set out the relevant provisions of the FA and GSA:

> FA, 5.1(n)
>
> Skychain understands that the timely construction and energization of the Facility is a material inducement for The9 to provide the Financing. To this end, as soon as practicable following the Closing, but in no event later than [June 30, 2021] (the "Long Stop Date") Skychain shall obtain necessary documents, approvals and permits, as applicable, on the basis of which construction and energization of the Facility shall be completed by December 7, 2021 (the "Facility Delivery Date"), which shall include, but may not be limited to: …
>
> FA, s. 6.3
>
> In the event Skychain fails to secure any of the material approvals or permits listed in Section 5(n) by the Long Stop Date, The9 shall have a right, acting reasonably in its own discretion, to either: (i) prolong the Long Stop Date and allow Skychain to postpone the Facility Delivery Date to the earliest practicable date or (ii) charge Skychain liquidated damages in the amount of 0.1% of the Financing for each day of delay after the Facility Delivery Date until either 1) the date when the Facility is completed for operations, or 2) the Termination date of this Agreement (the "Liquidated Damages"). The Liquidated Damages shall be capped at 5% of the total Financing amount.

> Accrued Liquidated Damages shall be paid in a lump sum together with the Interest. In the event due Liquidated Damages are not paid in a timely manner on the date when the next Interest payment is due, such Liquidated Damages shall bear interest at the rate of 1.5% per month (prorated for partial months) until paid in full. Nothing herein shall limit The9's right to pursue actual damages for the failure to deliver the Facility, and The9 shall have the right to pursue all remedies available to it at law or in equity including, without limitation, a decree of specific performance and/or injunctive relief. This right does not prejudice any other right of termination of this Agreement.
>
> GSA, s. 11.1
>
> 11.1 The Debentures will become immediately due and payable at the option of [The9] in any of the following events (each an "Event of Default"):
>
> (a) if a default be made in the performance or observance by [Skychain] of any term or condition of the Financing Agreement or the Debentures and such default continues for ten Business Days following written notice thereof to [Skychain];

[55] Skychain does not dispute the $2 million advanced through the debentures was for the purpose of constructing a facility in Birtle. It also does not dispute s. 5.1(n) of the FA imposed time-limited performance obligations on it with respect to the Birtle facility and that it failed to meet those obligations. Skychain says that although s. 11.1 of the GSA provides for accelerated repayment if it defaults on any of its obligations as set out in the FA, s. 6.3 creates an exception for failure to meet the June 30, 2021 Long Stop Date. Skychain says that in the event it failed to obtain the necessary permits and approvals by that date, s. 6.3 limited The9 to either: (i) providing Skychain with more time to obtain those permits and approvals, and allowing Skychain to reasonably postpone the Facility Delivery Date (i.e., completion of the facility); or (ii) requiring Skychain to pay liquidated damages calculated on the basis of a stipulated formula. It says these were The9's exclusive rights. I disagree.

[56] Reading s. 6.3 in the context of the parties' agreement, it is apparent that this provision was intended to provide The9, in its discretion, with two additional rights (i.e., options) in the event the Long Stop Date was missed. In non-technical terms, The9 could either: (i) allow Skychain to secure the necessary permits sometime after June 30, 2021 and to complete the Birtle facility after December 7, 2021, without having to pay compensation for the delay; (ii) require Skychain to pay compensation

in the form of liquidated damages for a post-December 7, 2021 delay; or (iii) leave the deadlines as they were and pursue any other recourse available to it, including repayment of the debentures.

[57] First, it is apparent that liquidated damages were intended to address short-term delays. Under the liquidated-damages formula, The9 was entitled to $4,000 per day (0.1 % of $4 million) for a maximum of only 50 days, i.e., to a maximum of $200,000 (5% of $4 million). To accept Skychain's interpretation would leave The9 in the position of having to wait until the debentures mature in June of 2025 to seek repayment. In other words, The9 would have ostensibly agreed to provide a $2 million loan in order to gain all the benefits it expected from the timely construction of the Facility, but in the event the Facility was not built, it was content to wait years to call in the loan, claiming only minimal interest and minimal liquidated damages in the meantime. This does not accord with sound commercial principles nor make good business sense.

[58] Second, the penultimate sentence of s. 6.3 makes it clear that the above options are non-exclusive and not in derogation of any other rights The9 may have. With respect to the words "failure to deliver the Facility", to which the parties devoted considerable attention, I am of the view that, when read in the context of s. 6.3 as a whole, they refer to a failure to deliver the Birtle facility by December 7, 2021, or, if The9 agreed to extend the June 30, 2021 Long Stop Date, then by any new (i.e., postponed) Facility Delivery Date resulting from that extension. The disputed section is grouped as a single paragraph. As the first portion of that paragraph deals with delays to the Long Stop Date and postponements of the Facility Delivery Date, it makes obvious sense that the penultimate sentence's reference to a "failure to deliver the Facility" deals with the same matter, i.e., a failure to deliver by the Facility Delivery Date.

[59] I also note that even were s. 6.3 to limit the remedies available to The9, it would do so only in regards to a failure to meet the Long Stop Date, as indicated by

the first sentence. Yet as Skychain readily admits, it also failed to meet its obligations in regards to the Facility Delivery Date.

[60] The9 never elected to extend the June 30, 2021 Long Stop Date or to charge Skychain liquidated damages for a post-December 7, 2021 delay. Rather, when Skychain failed to meet its obligation in regard to those dates The9 elected to accelerate repayment of the debentures and commenced an action in debt when Skychain refused to pay. For the reasons just expressed, s. 6.3 is not a defence to that action.



## Disposition

[61] I would dismiss this appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Fitch"