

THE SKY IS THE LIMIT: B.C. COURT OF APPEAL UPHOLDS \$2 MILLION SUMMARY JUDGMENT AWARD FOR BREACH OF CONTRACT

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In a recent decision of the British Columbia Court of Appeal, the Court upheld the chambers judge's award of approximately \$2 million for breach of contract. [\[1\]](#)

The parties disagreed on the interpretation of a clause in a financing agreement. In particular, Skychain Technologies Inc. ("**Skychain**") argued that a certain clause limited the remedies available to the claiming parties, The9 Limited ("**The9**") and 1111 Limited ("**1111**"). On this basis, Skychain argued that it was not open to The9 and 1111 to seek full repayment of the loan amount advanced, as they were restricted to liquidated damages, as calculated under the contract.

The British Columbia Supreme Court and Court of Appeal disagreed with Skychain, finding that Skychain's interpretation of the contract would not accord with principles of commercial reasonableness.

Facts

Skychain required funding to construct a cryptocurrency hosting facility (the "**Facility**") in Birtle, Manitoba. Accordingly, it entered into an arrangement with The9 for \$4 million, in which \$2 million of The9's funding was paid for shares and warrants, and the other \$2 million was debt financing under convertible debentures (the "**Debt Financing**") obtained by The9's nominee, 1111.

The Debt Financing was governed by three documents: a financing agreement between Skychain and The9 (the "**Financing Agreement**"); a general security agreement between Skychain and The9 (the "**GSA**"); and a debenture certificate issued by Skychain (the "**Debenture**"). These documents required Skychain to: (1) use the proceeds substantially to fund construction and energization of the Facility; (2) acquire the permits and approvals required for the Facility by June 30, 2021 (the "**Long Stop Date**"); and (3) complete construction and energization of the Facility by December 7, 2021 (the "**Facility Delivery Date**").

Skychain could not obtain the permits required to build the Facility in Birtle and instead sought to build the Facility in Melita, Manitoba (a town approximately 100 km away). There was no dispute that Skychain had not

obtained the necessary permits and approvals by the Long Stop Date or completed the construction and energization of the Facility by the Facility Delivery Date.

The9 and 1111 brought an application for summary judgment for the total amount loaned plus interest. Skychain's argued that The9 and 1111 were not entitled to repayment of the total amount loaned at that time.

The Parties' Arguments

The9 argued that the GSA entitled it to judgment for the total amount loaned, as the GSA provided that the Debt Financing would immediately become due and payable in the event of default by Skychain and such default continued for ten business days' following written notice of the same. The9 had provided written notice and Skychain was unable to cure its defaults (i.e., failure to obtain necessary permits and complete construction and energization of the Facility).

However, the GSA provided that it was subject to the terms of the Financing Agreement. As a result, the core of the dispute was in relation to the interpretation of section 6.3 of the Financing Agreement, which stated the following:

In the event if [sic] 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"). ... Nothing herein shall limit such The9's right to pursue actual damages for the failure to deliver the Facility, and such 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.

The parties agreed that the Financing Agreement had not yet been terminated. Skychain argued that the first sentence of section 6.3 meant that, until The9 terminates the Financing Agreement, the only remedies available to The9 for Skychain's failure to secure permits and approvals by the Long Stop Date are to: (a) agree to an extension of the Long Stop Date and a corresponding extension of the Facility Delivery Date; or (b) claim liquidated damages according to the specified formula in section 6.3

Accordingly, Skychain argued that The9 could only seek liquidated damages before the court.

The Chambers Judge's Analysis

Justice Gomery set out the test for summary judgment under Rule 9-6: a court must pronounce judgment if it is satisfied that there is no genuine issue for trial, and may pronounce judgment if it is satisfied that the only genuine issue is a question of law. In making such a determination, a court cannot weigh evidence beyond determining whether it is incontrovertible, and may draw inferences of fact based on undisputed facts before the court if such inferences are strongly supported by the facts. [2]

The parties' dispute concerned the interpretation of the loan documentation, a question of mixed fact and law. Thus, The9 and 1111 bore the burden of showing, on the evidence, that there was no genuine issue of material fact requiring a trial.

Justice Gomery rejected Skychain's narrow interpretation of section 6.3, noting that the clause expressly indicated that The9 was not limited to the remedies in section 6.3, and could pursue all remedies available to it in law or equity. Justice Gomery also held that Skychain's interpretation was not consistent with other language in section 6.3. For example, section 6.3 provided that The9 has "a right" to claim one of the two options identified in the section, not "the right" to only those two options.

Justice Gomery also stated that, even if Skychain's interpretation of section 6.3 was textually plausible, it was not a commercially appropriate one. Justice Gomery noted that while liquidated damages may be appropriate when a party's performance under a contract is delayed, it is not appropriate where the contract will never be performed. As Skychain will never build the Facility in Birtle, The9's loan had failed its purpose and it was not commercially reasonable to limit The9's nor 1111's remedies to liquidated damages.

Given all this, Justice Gomery held that the interpretation of section 6.3 did not raise a genuine issue of fact requiring a trial and, as a result, Skychain's only defence to the claim failed. Accordingly, Justice Gomery granted summary judgment to the plaintiffs in the amount of approximately \$2 million, as well as contractual interest.

The Court of Appeal Decision

On appeal, Skychain argued that Justice Gomery erred by effectively deciding that Skychain had fundamentally breached its contractual obligations when it abandoned its plans to construct the Facility in Birtle, although this had not been pleaded by the plaintiffs.

Specifically, Skychain alleged that Justice Gomery:

- 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 section 6.3;
- Grounded his judgment in a theory that the Facility's location was fundamental and material to the Financing Agreement, a theory which was not tested in the course of litigation; and

- Opened the possibility of inconsistent judgments being rendered on factual and legal issues in dispute in the litigation involving related parties.

Rather than ground its determination on the above grounds of appeal, the Court of Appeal found that it was able to determine whether section 6.3 precluded The9 to accelerate repayment of the Debt Financing requiring Skychain to repay the entire amount. The Court of Appeal was satisfied that it could do so as the relevant facts were not in dispute and it had full submissions from both parties on the interpretation of section 6.3, meaning that it was not necessary to determine whether Justice Gomery went outside of the pleadings and improperly grounded his decision on there being a fundamental breach of contract.

The Court of Appeal held that, using a contextual interpretation of the wording of section 6.3, it was clear that this provision gave The9 two additional rights in the event that the Long Stop Date was missed; section 6.3 did not limit The9's rights for such breach, as Skychain had argued.

Additionally, the Court of Appeal also reiterated that Skychain's proposed interpretation did not make good business sense, nor accord with sound commercial principles. If Skychain's interpretation was to be accepted, then The9 would be required to wait until the Debenture expired in June 2025 before seeking repayment of the Debt Financing and, in the meantime, would only be able to claim minimal liquidated damages and interest while waiting in the interim period.

Accordingly, the Court of Appeal unanimously dismissed Skychain's appeal.

Takeaways

This decision is a good reminder that, while the legal test for summary judgment is difficult to meet, the courts will not shy away from granting judgment if the requirements of Rule 9-6 are satisfied.

Further, this decision affirms that courts will look to commercial reasonableness as a guiding principle in interpreting contracts. Even when a certain interpretation seems plausible, courts may reject such interpretation if it does not accord with the principles of commercial reasonableness.

[1] *Skychain Technologies Inc v The9 Limited*, 2023 BCCA 150, aff'g *The9 Limited v Skychain Technologies Inc*, 2022 BCSC 1666.

[2] Citing *Beach Estate v Beach*, 2019 BCAC 277; *Canada (Attorney General) v Lameman*, 2008 SCC 14.

by [Carina Chiu](#) and [Cole Bailey](#)

A Cautionary Note

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