In the Court of Appeal of Alberta

Citation: Diamond Dun-Properties Ltd v Zhao, 2026 ABCA 307

Date: 20260928
Docket: 2501-0103AC
Registry: Calgary

Between:

Diamond-Dun Properties Ltd.

Appellant

- and -

Yinan Zhao

Respondent

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Jolaine Antonio
The Honourable Justice Tamara Friesen

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice O. Malik
Dated the 10th day of March, 2025
Filed on the 28th day of April, 2025
(2025 ABKB 143, Docket: 2310 00379)

Memorandum of Judgment

The Court:

[1] The appellant, Diamond-Dun Properties Ltd., attempted to rely on a certificate issued pursuant to s 5 of the *Guarantees Acknowledgement Act*, RSA 2000, c G-11 in seeking summary judgment against the respondent, Yinan Zhao as a guarantor for debts owed to it by a third party. The respondent asserted the guarantee was obtained fraudulently and applied for summary dismissal of the appellant's claim. On appeal from the applications judge's decision, the chambers judge found an impersonator had forged the respondent's signature on both the guarantee and the certificate and therefore s 5 did not bind the purported guarantor: 2025 ABKB 143.

[2] We dismiss the appeal from the chambers judge's decision for the following reasons.

The law

[3] The following sections of the *Act* are relevant to determining this appeal:

> Requirements
>
> 3 No guarantee has any effect unless the person entering into the obligation
>
> (a) appears before a lawyer,
>
> (b) acknowledges to the lawyer that the person executed the guarantee, and
>
> (c) in the presence of the lawyer signs the certificate referred to in section 4(1).
>
> ...
>
> Certificate
>
> 4(1) Where the requirements set out in section 3 are satisfied, the lawyer, after being satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it, must issue a certificate in the prescribed form.
>
> ...
>
> (2) Every certificate issued under this Act shall be attached to or noted on the instrument containing the guarantee to which the certificate relates.
>
> Certificate as evidence
>
> 5 A certificate issued under this Act that is

(a) substantially complete and regular on the face of it, and

(b) accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with,

shall be admitted in evidence and is conclusive proof that this Act has been complied with.

Facts

[4] The appellant agreed to lease a commercial property to 2138809 Alberta Ltd (the Company). The Company's directors, Ming Xu and Anton Wootliff, executed the lease agreement. The agreement included a provision requiring Xu, Wootliff, and the respondent, Zhao, to guarantee the appellant full indemnity for any loss, costs, damages or liability arising out from the company's failure to pay rent or to comply with its obligations under the agreement.

[5] The appellant received a copy of a standard form indemnity agreement dated January 11, 2019, which appeared to have been signed by Xu, Wootliff, and Zhao, together with various supporting documents. Xu swore an affidavit of execution attesting that he witnessed Zhao sign the indemnity agreement in the presence of a lawyer. The lawyer then prepared a certificate in accordance with Form 1 (Alta Reg 66/2003) pursuant to s 4 of the *Act* (the Certificate). Zhao appears to have signed his name under the "Statement of Indemnifier" portion of the Certificate. The lease agreement was amended February 22, 2022. Xu and Zhao signed as owners and Xu, Zhao and Wootliff signed as indemnifiers.

[6] The appellant filed a Statement of Claim alleging that the Company had breached its obligations under the lease agreement and each of Zhao, Xu and Wootliff had agreed to accept liability for that breach through execution of the indemnification agreement. The appellant applied for summary judgment against the respondent relying on the Certificate as "conclusive proof" the *Act* had been complied with in obtaining indemnification.

[7] The respondent filed his Statement of Defence, cross-applied for summary dismissal of the appellant's claim, and swore an affidavit in support.

[8] In his affidavit, the respondent says he was a passive investor in the Company until August of 2019 when he sold his shares to Xu, who he describes as the Company's primary decision-maker. He denies having any involvement with the lease agreement or amended lease agreement. Importantly, he denies signing the indemnity agreement and the Certificate. He claims he did not appear before the lawyer, and the documents were signed by someone else without his permission or knowledge. He says he was not in Edmonton the day the indemnity agreement was signed,

although he knew a meeting had been scheduled. He explains Xu told him he would "take care of everything" if Zhao would give him his driver's licence. Zhao trusted Xu and gave him his driver's licence.

[9] Zhao asserts he only learned about the indemnity agreement in April of 2023 when the appellant commenced its action against him. In July 2023 Xu told him he had provided Zhao's driver's license to a third party, Shuo Liu, who he had asked to impersonate Zhao. Liu then attended the meeting with the lawyer, provided Zhao's driver's license to the lawyer, and forged Zhao's signature on the indemnity agreement and Certificate. Xu admitted to him that he had also forged Zhao's signature on the amended lease agreement and other credit applications.

[10] The appellant did not cross-examine Zhao on his affidavit.

[11] Zhao's lawyer obtained an order directing that Xu attend a *de bene esse* questioning due to concerns about Xu's health. The order directed that the transcript could be relied upon by any party to the action. Zhao's lawyer examined Xu at the questioning in April of 2024, which was attended by the appellant's lawyer who did not otherwise participate.

[12] The appellant sought summary judgment, and the respondent sought summary dismissal of the claim. On September 17, 2024, after hearing argument and reviewing the evidence submitted by the parties, which included the respondent's affidavit and the transcript of Xu's questioning, the applications judge dismissed both applications. Both parties appealed.

[13] The chambers judge on appeal noted that the evidence of both Zhao and Xu was uncontroverted: Xu had orchestrated a fraud: Zhao's signature on the lease agreement, indemnity agreement, and Certificate was forged. He found as fact:

> Xu provided Liu with Zhao's driver's license for the purpose of impersonating Zhao. Liu forged Zhao's signature on the Indemnity Agreement and impersonated Zhao to the Lawyer who prepared the Certificate. Xu witnessed Liu sign the Indemnity Agreement on Zhao's behalf. Xu arranged for an unknown third party to forge Zhao's signature on the Amended Lease Agreement. Xu orchestrated the fraud. There is no evidence before me that would allow me to conclude that Zhao knew or should have known what the purpose of the Meeting was, or that Xu would use his driver's license and enlist Liu to impersonate him in a scheme he was unaware of. There is no evidence that the fraud was carried out with Zhao's knowledge, approval, or participation.

[14] Observing that no deference is owed on an appeal from an applications judge, the chambers judge dismissed the appellant's application for summary judgment against the respondent and granted the respondent's application for summary dismissal of the appellant's claim.

[15] He reasoned there was no genuine issue that required a trial, as s 5 "is not a sufficient legal basis to enforce a guarantee that is obtained fraudulently against an innocent party ... Such a result undercuts the consumer protection objective of the *Act* and more specifically the purpose for which the *Act* requires a Certificate..." He went on to find the objective of s 5 "is to protect the public by ensuring that an individual who enters into a guarantee understands the potential legal liabilities and obligations they may be subject to."

[16] The appellant argues on appeal the chambers judge erred in interpreting the *Act*: the Certificate complies with the *Act* on its face, and therefore, the chambers judge should have admitted it as conclusive proof that the respondent was responsible for indemnifying Diamond-Dun.

Decision

[17] We do not accept the appellant's position that the issue raised in the appeal is purely one of statutory interpretation subject to review on a correctness standard; rather, in addition to the interpretive issue, it posits a question infused with factual, public policy and equitable considerations: was the respondent's purported guarantee a forgery, and if so, should the guarantee be enforced against him in all the circumstances? This is a question of mixed fact and law subject to review for palpable and overriding error: ***Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd***, 2017 ABCA 378 at para 63, per Paperny J.A., dissenting; ***Magneson v Alberta Securities Commission***, 2023 ABCA 348 at para 6; see also ***Coulter v Co-operators Life Insurance Company***, 2013 ABCA 295 at paras 13-14, 29; ***McBride v Bacovsky***, 2024 ABCA 61 para 45. Likewise, "[t]he chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are all entitled to deference": ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 10.

[18] The chambers judge explained that the purpose of the *Act* is to ensure the guarantor is fully aware of the potential legal liabilities and obligations they may be subject to, but this explanation is incomplete. Sections 3 – 5 of the *Act* are also intended to protect creditors by preventing guarantors from later claiming they did not understand what they were signing, thus avoiding liability by asserting *non est factum*. These sections promote "certainty and security in commerce" by allowing creditors to rely on compliant certificates as proof the issuing lawyer examined the person entering into the obligation and was satisfied they understood the consequences of the

guarantee, *without more*: ***Alberta (Treasury Branches) v Ronsdale Construction Inc***, 1984 CanLII 1251 at paras 69-75 (ABQB); ***Business Development Bank v 1956680 Alberta Inc***, 2021 ABQB 141 at para 21.

[19] With this legislative purpose in mind, some courts have found guarantors to be liable for debts and losses based on facially compliant certificates even without factual compliance with the requirements in s 3 of the *Act*, while other courts have found that evidence intended to disprove factual compliance with the requirements in s 3 is inadmissible in the face of an apparently valid certificate: ***Ronsdale*** at paras 76-79; ***Pensionfund Properties Limited v RK Giblin & Associates Ltd***, 1984 CanLII 1179 at paras 17-19 (ABQB); ***Lambert v Caisse Populaire de Morinville Savings & Credit Union Ltd.***, 1984 ABCA 73 at paras 10-11.

[20] In ***Pensionfund***, the contents of the certificates were found to be "false in fact", while the certificates that issued were regular on their face. Justice McFadyen, as she then was, found it impossible to reconcile ss 3 and 5 of the *Act* on the facts before her. She held:

> While the existence of a certificate does not purport to preclude defences available at common law, it is my view that the existence of an apparently valid certificate precludes a defence of non-compliance with the provisions of s. 3 of the *Guarantees Acknowledgment Act*. The certificate is expressed to be conclusive proof that the *Act* has been complied with. Had the legislature intended the court to go behind the certificate to determine whether in fact s. 3 of the *Act* had been complied with, the word "conclusive" would not have been used in this section.

[21] We agree that the clear wording in s 5 imposes an obligation on the court to admit a facially compliant certificate into evidence as conclusive proof that the *Act* was complied with and that, in keeping with legislative intention and the *Act*'s purpose, this will be enough to establish liability in most cases. However, this does not mean an admissible certificate is sufficient to establish liability in every case. In ***Pensionfund*** the guarantors executed the guarantees having had an opportunity to read them and receive independent legal advice, but did not actually sign the facially valid certificates: paras 4-8. Here, the respondent's purported signatures, appearing on both the guarantee and the certificate, were forged.

[22] The respondent asserts he is not liable for the appellant's losses because he never executed the guarantee or certificate and only became aware of their existence because of the action. He says the guarantee and certificate were obtained fraudulently and are therefore nullities, relying on ***Welcome Investments Ltd v Sceptre Investment Counsel Ltd***, 2000 CanLII 22776 (ON SC) at para 68, which cites several English authorities for this proposition. Author Kevin P. McGuinness notes "[t]here is little Canadian case law dealing with forged guarantees", hypothesizing this is

"most likely because where an actual forgery is shown to have occurred, the creditor will abandon any claim under the guarantee": *The Law of Guarantee*, 4th Edition, §11.293 (Toronto: LexisNexis Canada, 2026). However, the general rule at common law is that a forged document is a nullity: ***Eisenberg v 910234 Alberta Ltd.***, 2013 ABQB 580 at para 21, aff'd 2014 ABCA 22; ***Lee v Kassam***, 2020 ABQB 608 at paras 25-29.

[23] The appellant asserts it had no knowledge of what was happening with respect to the signatures, no red flags were raised, and it reasonably relied on the certificate and guarantee in moving forward with the lease agreement, whereas the respondent was negligent, and did not exercise reasonable care, diligence and prudence. Relying on ***Welcome Investments***, ***Distribulite Ltd. v Toronto Board of Education Staff Credit Union Ltd***., 1987 CanLII 4162 (ONSC), and ***Marvco Colour Research Ltd. v Harris***, 1982 CanLII 63 (SCC), the appellant argues that applying equitable principles, as "between two innocent parties, the loss should be borne by the party who put the wrongdoer in the position to cause the loss." They say the respondent is the person most responsible for the loss in this case.

[24] The principles arising from these cases say that a defendant's negligence may estop it from relying on the defence of *non est factum* (***Marvco***); a principal's negligence may estop it from denying the authority of its agent, even where the agent commits fraud (***Welcome Investments***); and an employer's negligence may estop it from denying the authority of its employee, even where the employee commits fraud (***Distribulite***). However, these principles do not apply in this case, on these facts.

[25] The chambers judge found "Liu forged Zhao's signature on the Indemnity Agreement and impersonated Zhao to the Lawyer who prepared the Certificate", and Xu subsequently "arranged for an unknown third party to forge Zhao's signature on the Amended Lease Agreement". He further determined there was no evidence before him on which he could conclude "Zhao knew or should have known" about the fraudulent scheme or that "the fraud was carried out with Zhao's knowledge, approval, or participation." These are findings of fact, reasonably supported on the evidence, to which we pay deference. Likewise, there is no palpable and overriding error in the chambers judge's further determination that the guarantee was a nullity, unenforceable against the respondent, because it was a forgery. This was a question of mixed fact and law subject to review on a reasonableness standard.

[26] The chambers judge correctly interpreted the *Act* and reasonably concluded that s 5 does not result in automatic liability on the part of an innocent third party where a facially valid certificate and guarantee are both proven to have been forged, without the knowledge and participation of the purported guarantor, who received no personal benefit from the transaction. Accordingly, his decision to dismiss the appellant's application for summary judgment and grant

the respondent's application for summary dismissal was also reasonable. There was no genuine issue requiring trial and the court was able to reach a fair and just determination based on the evidence before it: ***Weir-Jones*** at para 47; ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at paras 5, 12-13, 52, 145.

[27] The appeal is dismissed.

Appeal heard on June 16, 2026

Memorandum filed at Calgary, Alberta
this 28th day of September, 2026

Authorized to sign for: Strekaf J.A.

Antonio J.A.

Friesen J.A.

Appearances:

K. Lavery
for the Appellant

T. Kovacs
D. Vezzosi
for the Respondent