# Court of King's Bench of Alberta

**Citation: Diamond-Dun Properties Ltd. v 2138809 Alberta Ltd., 2025 ABKB 143**

**Date:** 20250310
**Docket:** 2310-00379
**Registry:** Red Deer

Between:

**Diamond-Dun Properties Ltd.**

Plaintiff

- and -

**2138809 Alberta Ltd., Ming Xiu, Yinan Zhao and Anton Wootliff**

Defendants

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**Decision of the**
**Honourable Mr. Justice O.P. Malik**

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## I. Introduction

[1] The question I must decide is whether a certificate (the "Certificate") issued pursuant to section 5 of the *Guarantees and Acknowledgement Act* RSA 2000, c G-11 (the "*Act*") is sufficient to enforce a guarantee that is fraudulently obtained against a person who has no knowledge of, or participation in, the giving of the guarantee.

[2] This application comes before me as an appeal of an Applications Judge's decision granted on September 17, 2024 (the "Decision"), which dismissed the Plaintiff's summary judgment application brought against Yinan Zhao ("Zhao") and Zhao's cross-application to summarily dismiss the Plaintiff's claim.

[3] The relevant provisions of the *Act* that apply to my decision are sections 3, 4 and 5:

> 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.

## II. Background

[4] The facts are not in dispute.

[5] The Plaintiff owns a commercial premise ("Premise"). On June 28, 2019, the Plaintiff entered into a lease agreement ("Lease Agreement") in respect of the Premise with 2138809 Alberta Ltd. ("213"). The Lease Agreement was executed by 213's directors, Ming Xu ("Xu") and Anton Wootliff ("Wootliff"). Clause 12 of the Lease requires that each of Xu, Zhao and Wootliff provide the Plaintiff with full indemnities on the Plaintiff's standard form of Indemnity Agreement ("Indemnity Agreement").

[6] Zhao's signature appears on an Indemnity Agreement dated January 11, 2019, which was prepared at a meeting (the "Meeting") in Edmonton with a lawyer (the "Lawyer"). The Indemnity Agreement references Zhao as the "indemnifier". It states that the Plaintiff requires the indemnity in exchange for having entered into the Lease Agreement. Zhao's signature was witnessed by Xu. Xu swore an Affidavit of Execution attesting to having personally witnessed Zhao execute the Indemnity Agreement. A Certificate in accordance with Form 1 (Alta Reg 66/2003) was executed by the Lawyer. Zhao's signature appears under the Statement of Indemnifier portion of the Certificate.

[7] The Plaintiff and 213 entered into an Amendment to Lease Agreement ("Amended Lease Agreement") on February 22, 2022. The Amended Lease Agreement is signed by Xu and Zhao as "owners", and by Xu, Zhao and Wootliff as "indemnifiers".

[8] In its Statement of Claim, the Plaintiff alleges that 213 breached its obligations under the Lease Agreement and that each of Zhao, Xu and Wootliff agreed to indemnify the Plaintiff for any loss, costs, damages or liability arising out of 213's failure to pay rent or to comply with its obligations in accordance with the Lease Agreement and to waive any requirement that the Plaintiff first exhaust its remedies against 213.

[9] Zhao filed a Statement of Defence and swore Affidavits on March 1 and on June 14, 2024. The Plaintiff has not cross-examined him. Zhao's evidence is uncontroverted.

[10] Zhao was a passive investor in 213 until August 2019 when he sold his shares to Xu. Zhao describes Xu as 213's operating mind and primary decision maker. Zhao has never had any involvement in, or knowledge of, 213's affairs with the Plaintiff in respect of the Lease Agreement and the Amended Lease Agreement. He denies that he appeared before the Lawyer to sign the Indemnity Agreement and the Certificate. He says that these documents were signed by someone else without his permission or knowledge. He maintains that the Indemnity Agreement and the Certificate are void and unenforceable against him.

[11] Zhao first learned of the Indemnity Agreement in April 2023 when the Plaintiff commenced its Action. He explains that the signature which appears on the Indemnity Agreement is not his because he signs legal documents prepared in Canada using Roman characters rather than Mandarin characters and because he was not present in Edmonton to attend the Meeting. While Zhao acknowledges he was advised by Xu that the Meeting had been scheduled, Zhao informed Xu that he could not attend as he would be in Fort McKay from January 8-15. Xu informed Zhao that the purpose of the Meeting was to sign documents "that were important to move the business of 213 forward", that Xu would "take care of everything", that he was on a "time crunch to get things moving forward" and that he "would find a way to do so notwithstanding [Zhao's] absence if [Zhao] provided him with [his] driver's license". Zhao did not object to Xu's request because he trusted him. Zhao gave Xu his driver's license.

[12] In July 2023, Xu informed Zhao that he had provided Zhao's driver's license to a Mr. Shuo Liu ("Liu"), who physically resembled Zhao. Xu asked Liu to impersonate Zhao at the Meeting. Liu did so and provided the Lawyer with Zhao's driver's license, following which Liu forged Zhao's signature on the Indemnity Agreement and on the Certificate. Xu acknowledged that Zhao had not given him permission to enlist Liu to impersonate him and that Zhao was unaware Xu had done so. Xu admitted that he forged Zhao's signature on the Amended Lease Agreement and on various other credit applications.

[13] Owing to Xu's medical condition, this Court granted the parties permission to conduct a *de benne esse* questioning of him on terms that Xu would be considered adverse in interest to any party choosing to question him and that the questioning transcript could be relied on by any party to the Action in the event Xu was unable to give further evidence. Xu was questioned by Zhao's lawyer in April 2024. The Plaintiff's lawyer attended the questioning but declined to participate in Xu's questioning. Consequently, Xu's evidence is not in dispute. The parties do not know if Xu is still alive.

[14] Xu acknowledged that the purpose of the Meeting was for Wootliff and Zhao to execute their Indemnity Agreements. He confirmed the following:

- Xu did not inform Zhao what the purpose of the Meeting was or why he needed Zhao's driver's license;
- Zhao did not attend the Meeting;
- Zhao did not know Xu would have someone else sign the Indemnity Agreement on Zhao's behalf and Zhao had not given Xu permission to do so;
- Xu, Wootliff, and Liu attended the Meeting;
- Liu provided the Lawyer with Zhao's driver's license;
- Liu forged Zhao's signature on the Indemnity Agreement and the Certificate;
- Xu executed the Affidavit of Execution despite knowing that Zhao had not signed the Indemnity Agreement and the Certificate;
- Zhao had no knowledge of the Amended Lease Agreement; and
- Xu procured some "random person", whose identity he did not recall, to sign the Amended Lease Agreement on Zhao's behalf.

[15] The undisputed evidence before me is that Zhao had no knowledge of the Plaintiff's dealings with 213 in respect of the Lease Agreement and the Amended Lease Agreement. 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.

## III. Appeal from an Applications Judge

[16] An appeal from the decision of an Applications Judge is *de novo* and the standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30. No deference is owed to their decision.

## IV. The Parties' Arguments

[17] The Plaintiff asserts that pursuant to section 5 of the *Act*, a Certificate which is complete and regular on its face is conclusive proof that the requirements of the *Act*, including those found in sections 3 and 4, have been complied with: ***Alberta Treasury Branches v Ronsdale Construction Inc***, 1984 CarswellAlta 183; ***Pensionfund Properties Ltd v RK Giblin &Associates Ltd***, 1984 CarswellAlta 82; and ***Business Development Bank v 1956680 Alberta Inc***, 2021 ABQB 141. The Plaintiff says that section 5 obviates the need to go "behind" the Certificate and verify

that fraud has not occurred. The Plaintiff argues that it is immaterial that Zhao was a victim of fraud and that as section 5 of the *Act* has been complied with, Zhao is bound by the guarantee, notwithstanding it was given by someone else and without Zhao's knowledge. I surmise that the Plaintiff's strict reliance on section 5 of the *Act* as the complete basis for its claim explains why it elected not to question Zhao and Xu.

[18] Zhao argues that a forged Certificate that has been fraudulently obtained without a guarantor's knowledge or consent is a nullity (***Welcome Investments Ltd v Sceptre Investment Counsel Ltd***, 2000 CanLII 22776 (ON SC) at para 68) which cannot be cured merely because it meets the requirements of section 5 of the *Act*. He says that the Plaintiff's cases do not apply because none of them involved a fraud perpetrated on an innocent guarantor. He argues that the Plaintiff's reliance on section 5 of the *Act* misconstrues the *Act's* consumer protection purpose, namely protecting the "ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate...": ***Ronsdale*** at para 56.



## V. Legal Test for Summary Judgment

[19] Summary judgment may be granted where there is no genuine issue requiring a trial and where the court can reach a fair and just determination based on the evidence before it. The "no genuine issue" test should be assessed according to what is procedurally fair rather than by weighing the merits of the parties' respective positions. Summary judgment is appropriate where the record allows the court to make the necessary findings of fact, apply the law to those facts, and arrive at a just result in an expeditious way: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47 and ***Hannam v Medicine Hat School District No.76***, 2020 ABCA 343 at paras 145-161.

[20] The burden rests on the moving party to show that there is no genuine issue requiring trial. The moving party must prove the factual elements of the case on a balance of probabilities. If it cannot do so, its application fails. The resisting party must demonstrate that the record, facts, and law preclude a fair, just, and final disposition.

[21] Finally, on an application for summary judgment, each party must put its best foot forward. The focus is on the actual evidentiary record available to the judge rather than on speculation about what might "turn up in the future" or whether a party can produce a "better" record should the matter proceed to trial: ***Weir-Jones*** at paras 37 and 39.

[22] The parties agree that their respective claims can be determined summarily in accordance with r 7.3. I concur. There is no conflicting evidence and the facts are not disputed. The parties have been given a full opportunity to put their best foot forward in terms of eliciting relevant evidence. The evidentiary record is therefore complete. The sole question before me is whether compliance with section 5 of the *Act* renders the Indemnity Agreement enforceable against Zhao. I find that I can reach a just and fair determination based on the evidence before me and that there is no genuine issue that requires a trial.

## VI. Discussion

[23] I find that the Plaintiff's cases are readily distinguishable and do not apply to the case before me.

[24] In ***Ronsdale***, the Court found at para 37 that as the guarantee was validly given, signed and notarized by a lawyer and as the accompanying certificate was proper, there was no reason to set it aside:

> ... A guarantee is a contract. A guarantor cannot say that the creditor would still have advanced the loan to the debtor without this contract (i.e., the guarantee) and so the guarantor should not be liable even though he did enter into the contract. The effect of that defence would be to treat the situation as if a guarantee had not been given. There is a contract. It is not possible to deem there is not a contract. It is not possible to treat the situation as if a guarantee had not been given.

[25] The Court noted the previous decision of ***Teachers' Investment and Housing Co-operative v SH Properties Ltd***, 1984 CanLII 1192 which, at paras 20-22, discussed the objective of the *Act*:

> [20] The Institute of Law Research and Reform of Alberta has stated the purpose of the Act as follows:
>
> > The Guarantees Acknowledgement Act is designed to protect the ordinary individual who through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question.
>
> [21] The words "to protect the ordinary individual" are very advisedly used. As already discussed, the Act does not direct independent legal advice nor any explanation. Section 4(1) requires the notary public to be satisfied that the guarantor "is aware of the contents of the guarantee and understands it". No more than a general understanding of the nature of the obligation can be expected when the legislature entrusts the examination of the guarantor to persons not necessarily trained in the interpretation of legal documents. Clearly the Act is designed to protect the inexperienced, the ignorant, the unwary and the ordinary person by insuring that he is aware at least of the general nature of the obligation undertaken by him. In my opinion, another aspect was added to the purpose of the Act by the addition in 1969, [Guarantees Acknowledgement Act, 1969 (Alta.), c. 41] of s. 5...
>
> [22] In my view the Act now serves not only to give basic protection to the ordinary individual, but also, once a notary public is satisfied that a guarantor understands the essential nature of the obligation he has entered, and issues the certificate required, then the creditor guaranteed is spared from spurious pleas of non est factum. I would not say that the provisions of s. 5 absolutely exclude the plea, but it would only be in the most exceptional circumstances that the plea might successfully result from the conduct of the notary public.

[26] In ***Ronsdale***, the Court confirmed that a duly executed Certificate is "decisive that the requirements of the *Act* have been complied with (para 52) and precludes a guarantor from raising the defence of *non es factum*, or that they misunderstood the nature and character of the guarantee as a result of their own carelessness: para 74. However, it is important to note that the Court did

not foreclose the possibility that a guarantor might have a defence to a claim on a guarantee: para 74.

[27] In ***Pensionfund***, the Court found that the guarantors signed the guarantees and certificates prior to sending them to be notarized by their lawyer, who failed to satisfy himself that the guarantors were aware of the contents of the guarantees and understood them. It appears that the lawyer affixed the guarantors' signatures to the certificate in their absence. While the Court confirmed that an apparently valid certificate is conclusive proof that the requirements of the *Act* have been complied and that a creditor need not make further inquiries, it nevertheless allowed for the possibility that a guarantor might have a valid defence: paras 17-18.

[28] In ***Business Development Bank***, the guarantors signed loan agreements and personal guarantees. The guarantees were executed in the presence of a lawyer who said she explained the contents and terms of the guarantees to them. The guarantors raised the defence of *non es factum* because the creditor told them their loans were unsecured and that there was nothing for them to worry about. They also argued that the lawyer had not explained the guarantees to them. The Court concluded that the guarantees and the certificates were valid and enforceable. It found that even if the lawyer failed in her obligation to ensure her clients fully understood the guarantees, the creditor was entitled to rely on the certificates as proof that the requirements of the *Act* were met and that consequently, the guarantors' only recourse was to sue their lawyer: para 28. The Court dismissed the defence of *non es factum* on the grounds there was insufficient evidence the guarantors were unaware of what they were signing and, if they were, then they were careless: paras 37-38.

[29] In the cases cited by the Plaintiff, the courts apply basic principles of contract law to find there to be a binding guarantee contract where a guarantor agrees to give a guarantee in exchange for a benefit, formalizes the agreement by signing the guarantee, and confirms their understanding of the obligation which the guarantee requires by signing the Certificate. The courts reject the argument that technical non-compliance with the requirements of the *Act* is fatal where a seemingly proper Certificate is issued.

[30] I agree with Zhao that these cases do not help us here where, rather than there being technical non-compliance with the *Act* in respect of the execution of a guarantee which a guarantor was aware of and can be found to have intended to give, the guarantee was obtained by fraud, without the guarantor's knowledge, agreement, or participation.

[31] I am not prepared to find that compliance with section 5 of the *Act* constitutes a sufficient legal basis to enforce a guarantee that is obtained fraudulently against an innocent party who has no knowledge of, or participation, in the granting of the loan for which the guarantee is sought and the guarantee itself. Such a result undercuts the consumer protection objective of the *Act* and more specifically the purpose for which the *Act* requires the Certificate, particularly where, in the case of forged personal identification or the use of a "look-alike", the professional preparing the Certificate has no way of reasonably knowing whether the person who appears before them to sign the Certificate is who they claim to be, despite the professional's reasonable inquiries.

[32] As far as I can tell, the primary objective of the *Act* and the promulgation of section 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: ***Ronsdale*** at para 56; Alberta, Legislative Assembly, Hansard, 20th Leg, 3rd Sess (23 May 1985) at 1129-1135; Alberta,

Legislative Assembly, Hansard, 21st Leg, 1st Sess (11 September 1986) at 1611-1617; and Alberta, Legislative Assembly, Hansard, 28th Leg, 1st Sess (3 December 2013) at 3351.

[33] I surmise that it is only *because* of the safeguard which section 5 of the *Act* affords, that a creditor can rely on a Certificate that appears in all respects to be regular and proper.

[34] In this case, the guarantee was obtained through a fraud. The purported guarantor was unaware that a guarantee and the accompanying Certificate were executed in his name in exchange for a benefit of which he was unaware and did not receive. I do not see how, in such a case, the guarantee is anything other than a nullity. The guarantee is a contract to which the purported guarantor never agreed to be made a party, and the obligation which the guarantee carries is one that the purported guarantor never agreed to assume. No authority has been cited that would allow me to apply the *Act* in such a way as would require a party to be bound by a contractual obligation he was never aware of or agreed to. I am not unsympathetic to the Plaintiff given that it reasonably relied on the Certificate as it was entitled to do so. As unjust as the outcome of my decision might be, I conclude that that the circumstances before me constitute an appropriate defence to the Plaintiff's claim notwithstanding that the requirements of section 5 of the *Act* are satisfied.

## VII. Disposition

[35] In the result, I set aside the Decision. I dismiss the Plaintiff's application for summary judgment, and I grant Zhao's application for summary dismissal of the Plaintiff's claim.

[36] Zhao is successful and is presumptively entitled to costs. Unless the parties agree on costs, they shall provide me with their submissions of no more than 5 pages, within 21 days.

Heard in Red Deer on February 12, 2025

**Dated** at the City of Calgary, Alberta on March 10, 2025.

**O.P. Malik**
**J.C.K.B.A.**

**Appearances:**

Kelsey L. Lavery
for the Applicant, Diamond-Dun Properties Ltd.

Tanner J. Kovacs and Martin Abramowski
for the Respondent, Yinan Zhao