

Does an Ontario Court Have the Jurisdiction to Enforce an Ontario Guarantee against an Alberta Guarantor?

Introduction

It is common for lenders and other parties in Ontario to require a guarantor in another province to execute an Ontario form of guarantee. Typically, this form will contain a clause providing that the guarantee shall be governed by and construed in accordance with the laws of the Province of Ontario and that the guarantor accepts and irrevocably submits to the jurisdiction of the courts of the Province of Ontario. In the recent case of TFS RT Inc. v. Kenneth Dyck, 2017 ONSC 2780, the Ontario Superior Court of Justice reviewed the law regarding the ability of an Ontario court to assume jurisdiction over two guarantors in Alberta who signed personal guarantees in favour of a corporation in Ontario. Mr. Justice M. D. Faieta rejected the argument of the guarantors that the Ontario court lacked jurisdiction in respect of the proceeding and dismissed the guarantors' motion to stay the Ontario corporation's action for payment on the guarantees.

Facts

1. TFS RT Inc. ("TFS") was a corporation incorporated pursuant to the laws of Ontario with an office in Toronto, which provided short-term financing, specializing in accounts receivable factoring arrangements.
2. Green Patch Environmental Consulting Ltd. (the "Borrower") was a corporation incorporated pursuant to the laws of Alberta with an office in Edmonton.
3. Kenneth Dyck ("Kenneth") and his son Shaun Dyck ("Shaun") were the only officers, directors, and shareholders of the Borrower.
4. On August 12, 2015, TFS sent Kenneth a term sheet outlining the credit facility that TFS was prepared to provide to the Borrower, which included the requirement for personal guarantees from Kenneth and Shaun (the "Guarantors") in support of the Borrower. Kenneth signed the term sheet and returned it to TFS the following day.



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5. The loan documents, together with the personal guarantees (the “Guarantees”) in favour of TFS signed by the Guarantors, were subsequently signed and returned by e-mail to TFS on August 25, 2015.

6. Each of the Guarantees contained a choice of law clause and a forum selection clause that stated as follows:

“This Guarantee shall be governed by and construed in accordance with the laws of the province of Ontario and the laws of Canada applicable therein and the Guarantor hereby accepts and irrevocably submits to the jurisdiction of the courts of the province of Ontario and acknowledges their competence and agrees to be bound by any judgment thereof except that nothing herein shall limit the Lender’s right to bring proceedings against the Guarantor elsewhere.”

7. After the loan from TFS matured on December 31, 2015 and the Borrower failed to repay it in full, TFS demanded payment from the Guarantors pursuant to their Guarantees.

8. On March 17, 2016, TFS entered into a forbearance agreement with the Borrower and the Guarantors which contained a clause that stated:

“Each of the Borrower and the Guarantors hereby acknowledge and agree to and in favour of the Secured Parties as follows . . . The Guarantees are valid and a binding

Obligation of the Guarantors to the Secured Parties enforceable in accordance with the respective terms . . .”.

9. Following the expiry of the forbearance period under the above Agreement, TFS arranged, with the Borrower’s consent, for the appointment of a receiver over all of the Borrower’s assets, undertaking and property, pursuant to an order of the Ontario Superior Court of Justice dated June 7, 2016.

10. On July 11, 2016, TFS commenced an action against the Guarantors in the Ontario Superior Court of Justice for payment of \$924,344.55 pursuant to their Guarantees.

11. The Guarantors brought a motion to stay the proceeding against them on the basis that Ontario lacked jurisdiction to hear the proceeding. In support of this position, the Guarantors argued that even though they signed Guarantees which provided that the governing law was that of Ontario and that the jurisdiction for any disputes was Ontario:

(a) the choice of law and exclusive jurisdiction provisions in favour of Ontario were not brought to the Guarantors’ attention before they signed their Guarantees; and

(b) they did not sign the Guarantees before a lawyer in Alberta, as required pursuant to the Alberta *Guarantees Acknowledgement Act* and that, as a result, under Alberta law their

Guarantees had no effect.

12. The jurisdiction analysis applied by the Court is a two stage test:

(a) Part 1: does Ontario have jurisdiction *simpliciter* - i.e. does Ontario meet the minimum threshold of connection to the subject matter of the legal action in order to allow it to assert jurisdiction; and

(b) Part 2: is Ontario *forum non conveniens*? – i.e. if the first stage is passed and *jurisdiction simpliciter* is established, should the Ontario court nonetheless decline to exercise jurisdiction for the reason that there is an alternative jurisdiction which is more appropriate.

13. The Guarantors argued that the Ontario Court did not have jurisdiction *simpliciter* and, in the alternative, that even if jurisdiction *simpliciter* was established, the Ontario court should nonetheless stay the proceeding as Alberta was the more convenient forum. The Court dismissed the Guarantors’ motion to stay the Ontario action by TFS on the Guarantees on both counts.

The Court’s Reasoning

The Court reviewed the case law concerning the two-stage test to be applied in circumstances where jurisdiction is questioned by a party to the action. The analysis of the Court was as follows:

1. Did the Ontario court have jurisdiction *simpliciter* to hear the

proceeding?

(a) This question turns on whether there exists a “presumptive connecting factor” between the subject matter of the litigation and the Ontario forum. The “presumptive connecting factor” relied upon by the Court in this case was the location in which the contract was made. If a contract was “made” in Ontario, this will be sufficient to establish a presumptive connecting factor. The Court held that the location in which a contract is made is the location that acceptance of the contract is received. As the Alberta Guarantors, who signed the Guarantees in Alberta, communicated their acceptance of terms of the Guarantees by e-mail sent to TFS in Ontario, the contract was found to have been made in Ontario and a presumptive connecting factor was established.

(b) If a presumptive connecting factor exists, the defendants may attempt to rebut the presumption by showing that the presumptive connecting factor points only to a weak relationship between the subject matter of the litigation and the presumptive forum. The Court held that the Guarantors had not satisfied the burden of rebutting this presumption.

2. Should the Court decline to exercise its jurisdiction on the basis that another jurisdiction is a more appropriate forum for this action?

(a) In answering this question, the Court referred to the case law that applies when a contract contains a forum selection clause.

In such cases, the Ontario courts will normally enforce a clause in a contract selecting Ontario as a forum, especially where the contract is between sophisticated commercial parties.

(b) The Court held that the Guarantors had failed to show “strong cause” that Alberta was the more appropriate forum for the action. In making this decision, the Court noted the following factors:

(i) The Guarantors were sophisticated business people and this was not the first time they had acted as personal guarantors.

(ii) The Guarantors understood from the term sheet issued by TFS that the financing would not be provided unless personal guarantees were given. The Guarantors had the choice of refusing this request and seeking alternative financing from another party.

(iii) The Guarantors’ lawyers were involved in the transaction and the Guarantors had the opportunity to seek legal advice prior to the execution of their Guarantees.

(iv) There was no obligation on TFS to draw the forum selection clause in the Guarantees to the Guarantors’ attention.

(v) The Guarantors argued that they were deprived of the benefit of Alberta law relating to the Guarantees. In Alberta, no guarantee has any effect unless the guarantor appears before a

lawyer, and the guarantor and the lawyer sign the required legal certificates relating to the guarantee. In rejecting this argument, the Court upheld the choice of law provision in the forum selection clause in the Guarantees, which provided that the laws of Ontario and Canada govern the Guarantees. The Court found that TFS had not gained an unfair advantage by the enforcement of the forum selection clause in the Guarantees.

Conclusion

This decision is a good decision for parties in Ontario who do business with guarantors in the other provinces. It provides an analysis of the factors that an Ontario court will consider in deciding whether it is entitled to assume jurisdiction over an out-of-province defendant. Take away points from the decision include the following:

- The case underscores the importance of having a properly drafted clause in guarantees and other contracts confirming that these documents will be governed by and construed in accordance with the laws of the Province of Ontario and that the parties accept and submit to the jurisdiction of the courts of the Province of Ontario.
- On the facts of this case, there was found to be no obligation on the party who prepared the documents to draw the forum selection clause to the attention of the Guarantors. According to the Court in this case, “a person who

signs a contract, particularly a business person, is taken to have read the contract that he or she signs and to have agreed to its terms". This is a welcome decision for Ontario lenders and their lawyers because it promotes commercial certainty in interprovincial transactions.

- The case stands as a reminder that lenders should be mindful of whether any laws exist in the jurisdiction of a non-resident party which could present an issue if the contract falls into dispute, notwithstanding the presence of a forum selection clause. In this case, had TFS required the Guarantors to execute the Guarantees in the presence of lawyer and obtain the required certificate under the *Alberta Guarantees Acknowledgement Act*, this would have significantly undermined the position of the Guarantors.

- The case is a recent example which addresses the question: "where is a contract made"? In modern commercial transactions, it is common for signature pages to be transmitted across borders via e-mail. In such circumstances, many parties likely do not appreciate the significance of the location where acceptance of the contract is received as being a potentially important factor in a jurisdictional analysis. The nuances of this analysis could potentially lead to unintended consequences, particularly so

where the intentions of the parties as to the governing forum are not evidenced in a forum selection clause.