Court of King's Bench of Alberta

Citation: Impero Inc v 1035352 Alberta Ltd, 2025 ABKB 605

Date: 20251016
Docket: 1803 11372
Registry: Edmonton

Between:

Impero Inc

Plaintiff

- and -

1035352 Alberta Ltd

Defendant

Reasons for Decision
of the
Honourable Justice G.S. Dunlop

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1. Introduction

[1] Impero Inc. sues 1035352 Alberta Ltd. for breach of a lease.

[2] The parties signed a lease dated October 3, 2016, in which 1035352 leased premises in central Edmonton to Impero. In the rest of these reasons, I refer to the October 3, 2016, lease as the "Lease", 1035352 as the "Landlord" and Impero as the "Tenant". I refer to the portion of the Landlord's building leased by the Tenant as the "Premises."

[3] The term of the Lease was slightly more than 5 years, from October 3, 2016, to October 31, 2021. The permitted use was:

> "continuous operation of a Restaurant, Lounge and such other use(s) as may be first approved in writing by the Landlord."

[4] The Tenant made improvements to the Premises, installed equipment and furniture, and sought and obtained various permits which enabled it to open for business in August 2017, as "Impero Restaurant and Lounge".

[5] Between September 2017 and January 2018, the Landlord and the Tenant received noise complaints from tenants of a residential condominium near the Premises. The complaints centered on noise outside the Premises in early mornings. Sometimes neighbours called the police, who attended, but the police did not lay charges or issue any warnings to the Tenant.

[6] The Landlord also had its own complaints about the Tenant relating to garbage being left outside the Premises, a cheque being returned for insufficient funds, and a contractor not being paid. In each of those cases the Tenant resolved the issue promptly. The Landlord does not rely on any of those complaints as grounds for termination of the Lease.

[7] On May 1, 2018, the Landlord entered the premises and changed the locks, purporting to terminate the Lease.

[8] The Landlord relies on two alleged breaches as justification for its termination of the Lease:

- excessive noise; and
- operation of the Premises as a nightclub.

[9] In the Landlord's submission, those were breaches of the noise prohibitions and permitted use in the Lease and they were also breaches of the municipal noise bylaw and zoning bylaw, respectively. The Lease includes a requirement that the Tenant comply with municipal bylaws, so a breach of a bylaw would be a breach of the Lease.

[10] The Tenant denies breaching the Lease and claims loss of use of leasehold improvements or loss of income, together with lost inventory and storage costs. The Landlord argues that the Tenant did not suffer any loss of profits and that the storage costs are unreasonable.

2. Noise

[11] Between September 2017 and January 2018, the Landlord and the Tenant received several complaints about late night or early morning noise outside the Premises. The complaints came from a few tenants of a nearby residential building. In an email dated January 7, 2018, responding to the last of those complaints, the Landlord's principal, Anton Morgulis, wrote:

> We have been monitoring and reviewing all Video surveillance at our plaza over the past months and concluded that the claims of disturbance and uncleanliness is not correct, and that Impero is acting appropriate and by all rules stipulated by law.

[12] Mr. Morgulis copied the Tenant's principal, Eden Tesfatsion on that email.

[13] On April 29, 2018, Mr. Morgulis received another email, which reads:

> Dear Mr. Morgulis,
>
> I am sending you a link for your consideration.

> The following link will take you to a video – filmed early in the morning of April 29 – which shows noise and disturbance caused by miscreant patrons of your Columbia Plaza tenant "Impero Restaurant and Lounge":
>
> https://youtu.be/LB3LqtOPVAY
>
> I have copied this email to a few other Columbia Plaza tenants for their consideration and to heighten awareness of our mutual neighbour's (i.e. "Impero Restaurant and Lounge") apparent lack of respect and concern for our neighbourhood.
>
> Respectfully,
>
> Vadym Olijnyk

[14] Mr. Morgulis forwarded Mr. Olijnyk's email to Ms. Tesfatsion on April 29, 2018, with the following comment:

> Hello Eden.
>
> Here is the email I just received
>
> Please follow up with us regarding this email
>
> Thank you

[15] On May 1, 2018, Anton Morgulis's son, Giordano Morgulis, came to the Premises with a locksmith and changed the locks. He told Ms. Tesfatsion, who was working in the Premises when he arrived, that the Lease had been terminated. This was the first notice to the Tenant that the Landlord was purporting to terminate the Lease. Later that day Anton Morgulis emailed Ms. Tesfatsion a default and termination notice.

[16] Vadym Olijnyk and his mother, Orysia Olijnyk, live in the residential complex near the Premises. They each testified in this trial and a video Ms. Olijnyk recorded in the early morning of April 29, 2018, was entered as an exhibit.

[17] The video shows noisy people and cars outside the Premises. The sounds include revving engines, car horns, yelling, swearing and screaming. The predominant sounds are voices and revving engines. If there is music, it is faint compared to the other sounds. No booming bass is audible on the video. The video shows people wandering around, including some people who approach the building from which the video was taken. One person holds a large balloon in the shape of the number 18, as one might see at a birthday party. People are visible coming out of the Premises. It is not possible to determine if all the people shown in the video came from the Premises. It is also not possible to discern whether all the noise in the video was made by the people and vehicles shown in the video, but it is reasonable to infer that at least some of it was.

[18] Ms. Olijnyk testified that the video shows what went on most weekends in the late evening and early morning outside the Premises between September 2017 and April 2018. She said she could hear shouting, loud music and feel booming bass vibrations in her bedroom.

However, loud music and booming bass sounds are not audible in the video entered as an exhibit at trial.

[19] Ms. Olijnyk has never been inside the Premises. She concluded that the booming bass she heard came from the Premises based on her belief that nothing else was going on anywhere at the time and based on previous occasions when she walked toward the Premises and could hear music coming from the Premises.

[20] Ms. Olijnyk testified to people drinking outside from bottles taken from the trunks of cars in the parking lot between the building housing the premises and the residential building where she lives. Booming bass could have come from a vehicle parked in that lot or from other buildings and vehicles nearby. Ms. Oliynyk conceded in cross-examination that she did not know whether the people making noise were associated with the Premises because she knows nothing about the operations of the Impero Restaurant and Lounge.

[21] Ms. Olijnyk was argumentative and evasive in cross-examination. She admitted that Ms. Tesfatsion obtained a restraining order against her in May 2018. Her son, Vadym Olijnyk, testified that this was a six-month mutual without prejudice restraining order. While being questioned about the restraining order Ms. Olijnyk laughed, slouched in her chair and shook her head. Ms. Olijnyk's apparent animus against Ms. Tesfatsion and her business casts doubt on the credibility of Ms. Olijnyk's evidence, particularly her claim that she walked near the Premises late at night and heard music coming from inside.

[22] Vadym Olijnyk also testified to noisy weekends with people shouting, car engines revving, and rhythmic bass sounds and music coming from the Premises. He did not say how he knew the music came from the Premises. Mr. Olijnyk was only inside the Premises once, when he went as far as the entrance foyer late one night to investigate the noise. He said it had to stop and Ms. Tesfatsion said he should open his mind. He felt threatened or intimidated by the group of people with Ms. Tesfatsion, so he did not go further into the Premises. Mr. Olijnyk did not testify that he heard music or noise inside the Premises the one time he was inside.

[23] Mr. Olijnyk also testified that he went outside near the rear entrance of the Premises several times late at night and saw and heard people there making noise, but he did not testify that he heard music or noise coming from the Premises on those occasions.

[24] Mr. Olijnyk admitted to threatening to close Tenant's business. Like his mother, he was argumentative in cross-examination.

[25] Giordano Morgulis testified that people working in a neighboring clothing store complained about noise coming from the Premises, but the owner of that clothing store testified and said nothing about noise. Her evidence related to garbage including bottles left around the building, but those are not things relied upon by the Landlord to justify its purported termination of the Lease.

[26] Neither Anton Morgulis nor Giordano Morgulis was ever at Premises after 10 pm. Neither personally observed noise inside or outside the Premises late at night.

[27] The only witnesses who testified from direct knowledge were Vadym Olijnyk and Orysia Olijnyk. Their evidence, including the video, establishes noise outside the Premises, but does not establish that noise or vibrations came from inside the Premises. Their evidence that noise and vibrations came from inside the Premises is not credible because it is not specific regarding how they determined the origin of the sounds and because they each bear an animus toward the Tenant.

[28] The best evidence is the video, which records shouting, screaming, honking and revving outside the Premises, but does not record any music, booming bass or vibrations.

[29] I conclude that Tenant's patrons regularly made noise on the street outside the Premises late at night and early in the morning on weekends. Any noise coming from inside the Premises was minimal.

3. The Tenant's Use of the Premises

[30] Ms. Tesfatsion testified that the Tenant opened for business in August 2017 with an opening party including a DJ, which was attended by approximately 75 people. In the beginning, the business was open at 8:30 or 9:00 am to serve juices and would stay open until midnight on Sunday, and Tuesday through Thursday. It would stay open until 2:00 am or 3:00 am on Friday and Saturday, with alcohol served until 1:00 or 1:30 am.

[31] On Saturdays, the Tenant would still open at 8:30 or 9:00 am but would sometimes close in the afternoon for cleaning before reopening for dinner in the evening.

[32] In approximately February 2018 the opening hours on Tuesdays and Fridays changed to opening at 1 pm.

[33] The business was closed all day on Mondays.

[34] The Tenant's liquor license permitted it to serve alcohol from 10 am to 2 am each day with consumption until 3 am and required that minors be prohibited from the premises from 10 pm to 3 am each day. Ms. Tesfatsion testified that the Tenant complied with the requirement to prohibit minors from 10 pm on each day.

[35] In August 2017 Ms. Tesfatsion posted on social media announcing the opening of her business. The posts include photographs of food and of people sitting before tables with food and beverages on them. The text refers to traditional food and a dinner buffet on Tuesdays from 6:30 to closing. Those posts include an announcement of an opening party on August 19 with a DJ.

[36] Photographs of the inside of the Premises show food, people sitting eating and drinking at tables, people serving themselves from a buffet of food, and bottles of alcohol. They also show the Premises with no people but set up with tables and chairs and hookah pipes. Images of the front and back entrances show awnings that read:

> Impero Restaurant and Lounge Eritrean-Ethiopian & Vegan Cuisine

[37] The evidence includes advertisement for events inside the Premises. Many of these advertisements were done by someone known as DJ Clint, who was introduced to Ms. Tesfatsion

by Giordano Morgulis. Those advertisements were made without Ms. Tesfatsion's knowledge and once she became aware of them, she ended DJ Clint's involvement in events in the Premises. The dates and event titles in the DJ Clint advertisements are:

Undated	Afro Beats Fridays
Undated	Trap Saturday Valentine Party
December 8, 2017	Afro Beats XO Fridays
January 27, 2018	Trap Saturday
February 2, 2018	Afrobeat Friday
February 16, 2018	Afrobeat Fridays
February 16, 2018	CNDO & TDK Canada Tour
March 2, 2018	Afro Beat Fridays

[38] There are also two advertisements in evidence created by Ms. Tesfatsion:

August 19, 2017	The All White Affair Official Grand Opening Party
April 28, 2018	Bad & Boujee

[39] Anton and Giordano Morgulis testified to being at the Premises from time to time, but they were never in the Premises late in the evening. They each ate a meal in the Premises during the day. They each testified to finding the Premises closed during what they considered ordinary business hours. All that they know about the operation of the Premises in the late evening, and early morning came from what they were told by others and what they saw on videos recorded by others, including the video entered into evidence in this trial.

[40] I find that the Tenant operated as a restaurant, lounge and hookah lounge during the day opening in the morning or the afternoon and staying open until midnight during the week and until 3 am on weekends. It served alcohol and prohibited minors after 10 pm. On weekends it hosted parties that continued until the early morning.

4. Lease Restrictions on Noise

[41] The relevant portions of the Lease are sections 4.1(d), 5.1(c) and (d), and 5.2; the definitions of "Centre", "Centre Lands" and "Premises" in Schedule C: and rules (d), (e), (g) and (i) in Schedule E.

[42] The Lease provides no rights for the Tenant to use any part of the building other than the Premises and, with the exception of section 4.1(d) and the rules and regulations, no obligations on the Tenant with respect to the use of any part of the Centre other than the Premises. In particular, the Tenant's obligations with respect to noise and compliance with bylaws restrict the Tenant's use in, of, or upon the Premises only.

[43] There is no covenant in the Lease restricting the Tenant's activities or its customers activities outside the Premises, in other parts of the building or on public roads and sidewalks.

5. Conclusion Regarding Breach of the Noise Restrictions in the Lease

[44] The Tenant's customers contributed to noise outside the Premises late at night and early in the morning on weekends. That was not a breach of the Lease because the Lease contains no prohibitions on noise by the Tenant's customers outside the Premises. Minimal or no noise or vibrations escaped from the Premises, so the Tenant did not breach the few noise restrictions in the Lease, specifically s. 5.1(c) of the Lease and rule (e).

6. Use Provisions in the Lease

[45] Section 1.1(j) of the Lease reads:

> Permitted Use of the Premises: The Tenant shall not use or occupy the Premises or any part thereof for any purposes other than the continuous operation of a Restaurant, Lounge and such other use(s) as may be first approved in writing by the Landlord.

[46] That wording does not require the Tenant to do anything; it prohibits the Tenant from operating anything other than certain things in the Premises. There is no evidence of any other uses approved by the Landlord, so section 1.1(j) of the Lease prohibits the Tenant from operating anything other than a restaurant or lounge. This means the Tenant may operate a restaurant or a lounge or both, but may not operate anything else.

[47] The Landlord does not argue that keeping the business closed on Mondays was a breach of the requirement for continuous operation.

[48] The entire agreement provisions in sections 10.19 and 10.20 of the Lease prevent the parties from arguing that they had a separate, collateral agreement regarding noise or the use of the Premises. Neither party made that argument.

[49] The Landlord submits that the Tenant breached section 1.1(j) of the Lease because the Tenant operated a "nightclub", rather than a "restaurant" or "lounge". None of those words is defined in the Lease. Some of them are defined in the City of Edmonton Zoning Bylaw, but the Lease does not incorporate the Zoning Bylaw or any of its definitions. There is also no evidence that the parties had the Zoning Bylaw or its definitions in mind when drafting the Lease. Consequently, the Zoning Bylaw is irrelevant to interpreting the Lease.

[50] The words “restaurant” and “lounge” are common words the ordinary meanings of which are: a place where a customer may sit and consume food and beverages ordered by the customer and provided by the proprietor. “Lounge” may have a broader meaning in some contexts, for example, an airport departures lounge, but in the context of a use provision in a commercial lease where the immediately preceding word is “restaurant”, “lounge" means a place where customers sit and order and consume food, drink or both. A large variety of operations come within the ordinary meanings of “restaurant” and “lounge” in this context, from fine dining room to dive bar, and many other variations. The Landlord and the Tenant chose broad language in the Lease, which covers a wide range of potential operations.

[51] In addition to the words of the contract, read as a whole, I must consider the surrounding circumstances known to both parties before they signed the lease: ***Sattva Capital Corp v Creston Moly Corp*** 2014 SCC 53. I had evidence from both parties about verbal communications before they signed the lease and I have the Tenant’s business plan and floor plan, provided to the Landlord before the Lease was signed.

[52] The Landlord’s expert witness testified to his understanding of the word “lounge” in the context of a restaurant. That is not relevant to the interpretation of the Lease because it is not something that was known to the Landlord and the Tenant when they signed the Lease.

6.1. Pre-contractual Verbal Communications

[53] Ms. Tesfatsion’s evidence and Mr. Anton Morgulis’s evidence conflicts regarding what activities they discussed would take place in the Premises. Ms. Tesfatsion is adamant that she was clear in her communications with Mr. Morgulis that she intended to have a bar and restaurant which would serve Eritrean and Ethiopian vegan food, with a small dance floor and a separate room for hookah, with birthday parties and other events on weekends. Mr. Morgulis is equally adamant that he consistently told Ms. Tesfatsion he would not permit a bar or nightclub to operate in the Premises. Neither agreed with the other’s testimony on this point. Based on that evidence and their subsequent conflict regarding the late night and early morning activities at the Premises, I conclude that their verbal communication with each other before signing the Lease was not effective. Each of them did not understand what the other was trying to say.

[54] In addition to their evidence about what they told each other, they also each testified as to what they intended to agree to, in terms of acceptable and unacceptable activity in the Premises. Their subjective thoughts about that are irrelevant to an objective interpretation of the Lease: ***Remington Development Corporation v Canadian Pacific Railway Company*** 2025 ABCA 244 at para 47.

6.2. Business Plan

[55] In August 2016, well before the parties signed the Lease, Ms. Tesfatsion emailed Mr. Anton Morgulis her business plan, which uses the same words, “restaurant” and “lounge” as the Lease. The business plan contains a detailed description of the Tenant’s intended use of the

Premises. As it was shared by the Tenant with the Landlord before the Lease was signed, it is a useful aid to interpreting the Lease.

[56] The section of the business plan entitled “Executive Summary” includes that following:

> Impero Lounge will be located on 11807C 105 Ave, Edmonton, Alberta. The business will generate revenues through the sale of high quality Vegan, Ethiopian, Eritrean Cuisine, healthy non-alcoholic drinks, alcoholic drinks and hookah.
>
> …
>
> **Why Impero**
>
> - First Vegan Ethiopian, Eritrean Cuisine and lounge to offer variety of vegan food upon request
> - Offers low fat meals
> - Serve cleaner and healthier version of East African food
> - Great industry insights and knowledge
> - Address healthier lifestyle (vegan dishes + healthy juices
> - Allow great community connection where people can enjoy while eating high quality food
> - Live music on weekends

[57] The section of the business plan entitled “Products & Services” reads:

> Impero's primary services will promote a commitment of food and drink excellence. Impero will be a moderately priced restaurant that will offer low fat Vegan Ethiopian and Eritrean Cuisine. The restaurant will offer some vegan Italian meals to meet a variety of customer's needs.
>
> Impero will be open seven days a week. The restaurant anticipates on serving continuously through breakfast, lunch and dinner.
>
> Impero will host parties on the weekends and organize Jazz night with live music (East African music with a saxophone player).
>
> Impero has a completely vegan menu, with options for people that are gluten free, low fat and also offer healthy juices. There is nothing like us in the area, since they will have the most diverse vegan meal offerings. It will be a place for vegetarians, vegans and anyone else who wants to eat healthy low fat meals. They will offer many different kinds of foods like sandwiches, soup and salads. There will also be a bar for fresh juices as an addition to our clean healthy food and other non-alcoholic beverages.
>
> The restaurant and lounge is located behind the new brewery district which is a great way to bring in customers.

> There are tables and booths for the customers to eat at and a counter for them to order at. One of the great things about Impero is that they will try to accommodate everyone as best they can. A lot of people have celiac disease and can't eat gluten, so they also offer gluten free meals.
>
> Impero will also implement a new hookah lounge concept which will focus on a combination of Ethiopian and Eritrean customers over 18 years of age. This concept will offer a more adult alternative to hookah bars frequented by college-age customers.
>
> (underlining added)

[58] Given the reference in the Business Plan to hosting parties on the weekends and having a hookah lounge catering to customers over 18 years of age, I find that the objective meaning of "restaurant" and "lounge" in section 1.1(j) of the Lease was food and beverage service, including alcoholic beverages, that continued well after midnight. Furthermore, the Landlord and the Tenant should have anticipated that patrons leaving weekend parties in the Premises would sometimes be noisy outside.

6.3. Floor Plan

[59] The development permit application, dated October 31, 2016, includes a drawing of the Premises which shows seating for 16 people in the area labelled "DINING", seating for 10 people at the area labelled "BAR", seating for 75 people at tables in the area labelled "LOUNGE", seating for 13 people in the area labelled "VIP LOUNGE" and seating for 8 people in the area labelled "OUTDOOR PATIO". The seating shown in the drawing is for a total of 122 people. The drawing includes a line pointing to the wall between the bar and the lounge, labelled "FUTURE DJ PLACE [illegible] RECEPTACLES HERE".

[60] Ms. Tesfatsion and her architect, Stephanie Clancy, testified that Mr. Anton Morgulis had significant input into the design of the Premises. Mr. Anton Morgulis agrees that they sought his input as the design evolved. I find that both parties were aware of the floor plan attached to the development permit application, or something close to it, before they entered the Lease. It is part of the context in which the parties entered into the Lease. One would expect that a restaurant and lounge in which a majority of the seating is in the bar and lounge, and which contains a location for a DJ, would be open after midnight, at least on weekends.

7. Conclusion Regarding Breach of the Use Clause in the Lease

[61] I find that the Tenant operated a restaurant and lounge, within the objective meaning of those words in the Lease, in the context known to the parties before the Lease was executed, primarily the Tenant's business plan, but also the design of the premises, which was developed in consultation with the Landlord, which shows more seating in the lounge and bar than in the dining area.

[62] Holding events as described in the Tenant's advertisements, operating until 2 or 3 in the morning, and having patrons who contributed to noise outside the Premises after leaving the Premises, is consistent with operating a restaurant and lounge in this context.

[63] The Tenant may have operated a "nightclub" as defined in the City of Edmonton Zoning Bylaw, but that is irrelevant to the Tenant's compliance with the use clause in the Lease. Similarly, each party's subjective understanding and expectation about the use of the Premises are irrelevant.

[64] The Tenant's use of the Premises was not in breach of the Lease.

8. Noise Bylaw

[65] Section 5.1(d) of the Lease requires the Tenant to comply with municipal bylaws with respect to the Tenant's business in and upon the Premises. Nothing in the Lease requires the Tenant to comply with municipal bylaws outside the Premises.

[66] Anton Morgulis emailed Ms. Tesfatsion a copy of the City of Edmonton's Community Standards Bylaw on October 30, 2017. That bylaw sets upper limits for noise in residential and non-residential areas. Those limits are expressed in decibels measured at the property line.

[67] I have no evidence of decibel measurements of sounds in or outside the Premises. The evidence establishes that the noise at night near the Premises was created by people on the street, not by anything going on inside the Premises. I conclude that the Tenant did not breach the Community Standards Bylaw with respect to noise.

9. Zoning Bylaw

[68] Sections 5.1 and 23.1 of the City of Edmonton Zoning Bylaw No. 12800 require compliance with the development permit issued for a site.

[69] The development permit for the Premises, issued on November 3, 2016, describes the Scope of the Permit as:

> To change the use of a Warehouse Sales business to a Restaurant with an outdoor patio and maximum seating of 122, and to construct interior alterations. (Impero)

[70] Subsection 7.4 of the Zoning Bylaw defines "Restaurants", "Bars and Neighbourhood Pubs", and "Nightclubs". There is obvious overlap among those definitions. The critical distinction appears to be that the primary purpose of "Restaurants" is the sale of prepared foods and beverages, whereas the primary purpose of "Bars and Neighbourhood Pubs" and "Nightclubs" is the sale of alcoholic beverages. Another distinction is that minors are never prohibited from any portion of a restaurant at any time during its hours of operation, whereas minors may be prohibited during at least some of the hours of operation of a bar or neighbourhood pub.

[71] The Tenant's business plan projects that more than half of its revenue will come from meals, with the balance from beverages and hookah. Based on that, together with Ms.

Tesfatsion's testimony and the photographs in evidence, I conclude that the primary purpose of the Tenant's use of the Premises was the sale of food and beverages, with hookah being a secondary purpose. The primary purpose was not the sale of alcoholic beverages. The Tenant's business fell within the definition of "Restaurants", in accordance with the development permit, except for the fact that minors were prohibited after 10 pm, as required by the Tenant's liquor license.

[72] The definitions of "Restaurants", "Bars and Neighbourhood Pubs", and "Nightclubs" are in a section of the Zoning Bylaw entitled "Use Definitions", which begins with a section entitled "7.1 General" which includes the following:

> 3. The following guidelines shall be applied in interpreting the Use definitions:
>
> …
>
> b. where specific purposes or activities do not conform to any Use definition or generally conform to the wording of two or more Use definitions, the Development Officer may, at their discretion, deem that the purposes or activities conform to and are included in that Use which they consider to be the most appropriate. In such a case, the Use shall be considered a Discretionary Use, whether or not the Use is listed as a Permitted Use or Discretionary Use within the applicable Zone; and
>
> (underlining added)

[73] Subsection 7.1(3)(b) is important. Where two or more definitions apply, the development officer may deem that all of the purposes or activities at the site conform to the use they consider to be most appropriate.

[74] The Tenant applied for a development permit for a change in use to "Restaurants" with a drawing attached to the application showing seating for 24 in the dining and patio areas and seating for 98 in the areas labelled bar, lounge and private lounge, and which showed a location for a DJ. Based on the drawing, the applicable use could have been "Restaurants", "Bars and Neighbourhood Pubs" or, possibly, "Nightclubs" as those terms are defined in the Zoning Bylaw. The proposed use was a mixture. The development officer approved the application and issued a permit for use as "Restaurants". The development officer had the discretion to choose from among overlapping definitions, which it appears they did. The effect of that was to deem the uses that went beyond "Restaurants", as defined in the bylaw, to conform to that use.

[75] Ms. Clancy testified that the development permit application was accompanied by several drawings. There is no evidence that anything else accompanied the development permit application. In particular, it appears that the development officer did not have the business plan or the evidence I have heard and seen in this trial of the actual use of the Premises. On the

evidence before me, the Tenant's use of the premises falls mostly within the "Restaurants" use. The fact that minors were not permitted in the Premises after 10 pm is non-conforming with that use, as it is defined, but a development officer has the discretion to deem that to be conforming, pursuant to subsection 7.1(3)(b) of the bylaw.

[76] On May 9, 2018, eighteen months after the development permit was issued and more than a week after the Landlord had changed the locks, a violation notice was issued by the City of Edmonton. Ms. Tesfatsion testified she did not receive this notice prior to the commencement of this litigation. The first and last paragraphs of the violation notice read:

> An inspection of the above noted property by this Department revealed that a Bar and Neighbourhood Pub Use (Impero Restaurant and Lounge) is operating. Indicating factors that a Bar and Neighbourhood Pub has been developed include: the development restricts minors during some hours of operation. According to our records no development permit has been issued for the Bar and Neighbourhood Pub Use.
>
> …
>
> You must obtain a development permit for the Bar and Neighbourhood Pub Use or cease the operation of this use. If this notice is not complied with by June 8, 2018, the City of Edmonton may issue fines and/or pursue enforcement under the provisions of the Municipal Government Act, R.S.A. 2000. Fines for this offence start at $1000.00.

[77] The author of the violation notice, Justin Young, did not testify in this trial.

[78] Ms. Clancy testified that the May 9, 2018, violation notice was "really odd", given the discussion she and Ms. Tesfatsion had with City officials, including Mr. Young, on May 7, 2018. The gist of that meeting is described in a May 9, 2018, email from Ms. Clancy to Paul Adams, a City of Edmonton planner, as follows:

> I just wanted to follow up with our phone chat yesterday, and previous meeting on Monday May 7.
>
> Our objective is to align Impero's business practices with the appropriate business license description and zoning bylaw requirements.
>
> As we discussed at the meeting and with your follow up phone call, Eden would be permitted to split her current business into 2 permits. Her front area could be the restaurant allowing minors during all operating times, with an occupancy of 22 patrons.
>
> The rear portion, the bar/lounge area would be licensed as a local Bar/Pub with a maximum occupancy of 100 patrons.
>
> These 2 together maintain her current maximum of 122 occupants.

> This is a good solution for Impero and we really appreciate your quick response in this matter.
>
> However, as I explained on the phone, Impero is currently dealing with some unusual lease and legal issues with the Building's landlord, so we are not certain at this time how Impero will proceed.
>
> I am sure Eden will remedy all the business licensing, etc. as soon as these other matters are resolved.

[79] Mr. Adams replied in an email dated May 22, 2018, as follows:

> This was our conversation, and what I believe we could continue with.
>
> Did you have any further information on the Landlord situation?

[80] Ms. Tesfatsion testified regarding the May 7, 2018, meeting. Her evidence was consistent with Ms. Clancy's evidence, but less specific. No one else who was present at that meeting testified. In particular, Mr. Young did not testify.

[81] The Landlord submits that the May 9, 2018, violation notice is evidence that the Tenant was in breach of the City Zoning Bylaw, and consequently in breach of the Lease.

[82] My conclusion from this evidence is that the City changed its mind about including the Tenant's actual use of the Premises within the definition of "Restaurants". The development officer who issued the development permit had the discretion to do so and obviously did, because the drawing the Tenant submitted with its development permit application showed the configuration of the premises as it was built and used. Assuming the City had the authority to change its mind on this point, it appears from the evidence that it did not do so until May 9, 2018, when the violation notice was issued. On May 1, 2018, the Tenant had a valid development permit for use as a Restaurant, including any other uses that had been implicitly included.

[83] The Tenant did not breach the Zoning Bylaw prior to the Landlord changing the locks on May 1, 2018.

10. Landlord's Right to Terminate

[84] Section 6.1 of the Lease entitles the Landlord to terminate the Lease if the Tenant breaches any of its obligations under the Lease. There are notice provisions in that section, but adequate notice is not in issue in this case. The issue is whether the Tenant committed a breach.

[85] For the reasons set out above, the Tenant did not breach the noise restrictions or the use clause of the Lease and did not breach the Community Standards Bylaw or the Zoning Bylaw; it committed none of the alleged breaches upon which the Landlord relies. Consequently, the Landlord had no right to terminate the Lease and its reentry into the Premises and change of the locks on May 1, 2018, was a breach of the Landlord's covenant of quiet enjoyment (section 10.1 of the Lease).

11. Damages

[86] A displaced tenant is entitled to damages that put the tenant in the position it would have been in had the landlord not breached the lease, which is necessarily a speculative exercise for the court: ***Haack v Martin*** [1927] SCR 413. A tenant will often not be able to prove specific future losses; that is not fatal to its claim: ***Dewberry Financial Limited v Weishaar*** 2009 ABQB 692 at para 82.

11.1. Improvements or Profits

[87] A tenant is entitled to the greater of two calculations of damages: either its loss of use of leasehold improvements it paid for, or its loss of profits for the balance of the term: ***M & M Fashions Ltd. v Blackbeard's Restaurant Ltd.*** (1986) 68 AR 37 at para 83.

[88] The Tenant submits that it spent $654,034.56 on improvements to the Premises. The Landlord takes issue with four items claimed by the Tenant: drapes, a development permit, a building permit and lighting. I agree that those things are not leasehold improvements. The drapes and the lighting are either trade fixtures or non-fixtures, both of which the Tenant could have removed. The development permit and the building permit are initial costs of setting up the Tenant's business in the Premises. Excluding those amounts, the Tenant's total expenditure on leasehold improvements was $639,647.17.

[89] In ***M & M Fashions*** the Court found that the tenant did not sustain any loss of profits, so it awarded an amount for loss of use of leasehold improvements. The award was based in part on the value of the leasehold improvements shown in the tenant's records, which included depreciation of 20% per year, in the context of a 5-year lease. That is consistent with the approach suggested by the Landlord in this case, which is to award a percentage of the Tenant's cost of leasehold improvements in proportion to the remaining term of the Lease. The Lease term was from October 3, 2016, to October 31, 2021, a total of 1,855 days. As of May 1, 2018, 576 days had run, leaving 1,279 days left in the term, or 68.949%. The value of the Tenant's loss of use of the leasehold improvements is 68.949% of their cost to the Tenant, or $441,029.

[90] The Landlord submits that the Tenant's leasehold improvements claim should also be reduced for the possibility that the Tenant would have ceased business before the end of the term of the Lease. No such adjustment was made in ***M & M Fashions***, where the Court found that the restaurant would probably not have survived long enough to earn a profit. In my view, such an adjustment is not appropriate on this head of damages because it compensates for an immediate loss of capital, not future income. The Tenant made an initial investment of $639,647.17 in leasehold improvements, which was an asset held by the Tenant with a declining value over the term of the Lease. When the Landlord breached its covenant of quiet enjoyment on May 1, 2018, the remaining value in that asset was $441,029. That was an immediate loss suffered by the Tenant on that day, which is not subject to any adjustment for possible future events.

[91] The Tenant claims a much larger loss of profits, totaling $972,453, supported by the report and testimony of its expert, Zouheir Toutah. However, Mr. Toutah's calculations are

based on several unrealistic assumptions, which are not supported in the evidence. First, he anticipated revenue growth for every trimester from May 1, 2018, to the end of the Lease term, even though the Tenant's revenue dropped between the last trimester in 2017 and the first trimester in 2018. Second, he estimated that revenue growth would have continued in 2020 and 2021, making no adjustment for the disruption caused by the COVID-19 pandemic. Third, he made no adjustment for any contingencies, such as the possibility the Tenant would have ceased operations before the end of the term, as the three different restaurants that occupied the Premises after May 1, 2018, did. Fourth, he estimated that the Tenant's cost of goods would be 19.4% of revenue, which is what the Tenant's tax returns show it was in 2018, but this ignores the cost of goods of 55.8% of revenue shown in the tax returns for 2017. An estimate somewhere between those two figures would be more realistic. The Landlord's expert, Kelly Gordon, testified that cost of goods of 30% of revenue is normal in the restaurant industry. That would be a more realistic estimate.

[92] The Landlord's expert, Kelly Gordon, testified that the Tenant was never profitable and never would have become profitable. He notes the high failure rate and low profitability of restaurants in general, and the severe impact on restaurants of the COVID-19 pandemic in 2020 and 2021. He also notes the Tenant's lack of records for the period when it was in business. There are no audited financial statements, no general ledger, no payroll records, and no records of other input costs such as food, beverages and hookah. The only financial records are the Tenant's 2017 and 2018 tax returns, which Mr. Toutah used as a basis for his estimates. Mr. Gordon also notes several expenses are missing or unrealistically low the Tenant's tax returns and consequently in Mr. Toutah's projections.

[93] Both experts noted that the wages shown in the Tenant's income tax returns of $9,600 in 2017 and $10,000 in 2018 are unrealistic for a full-service restaurant, even for a four-month period in each case (August to December 2017 and January to April 2018). This is obvious, even without expert evidence. Those amounts would barely cover a single employee working an eight-hour day at minimum wage. The Tenant's business clearly required and had more employees than that. This casts doubt on all the figures in the tax returns and highlights the absence of any other financial records to support a loss of income calculation. Mr. Toutah used larger figures for wages in his projections. In Mr. Gordon's opinion, the wage figures used by Mr. Toutah are still unrealistically low.

[94] A very generous estimate of future profits, based on Mr. Toutah's calculations but with revenue levelling off in 2018 and 2019, dropping to break-even levels in 2020, due to COVID 19, and then recovering to 2019 levels in 2021, with cost of goods at 30% of revenue, results in the following:

Period	Revenue	Cost of goods	Operating expenses	Net income before taxes

2018 trimester 2	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2018 trimester 3	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2019 trimester 1	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2019 trimester 2	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2019 trimester 3	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2020				$0.00
2021 trimester 1	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2021 trimester 2	$220,452.00	$66,135.60	$98,792.00	$55,524.40
2021 trimester 3 (1/2 to Oct 31)	$110,226.00	$33,067.80	$49,396.00	$27,762.20
Total				$416,433.00

[95] That calculation does not account for the missing expenses identified by Mr. Gordon, and it assumes the Tenant would have broken even in 2020, when it is most likely the Tenant would have lost money due to the disruption of COVID-19. It also lacks any adjustment for the contingency that the restaurant would have shut down before completing the term of the Lease, as the three restaurants that followed it in the Premises did. It is not an accurate calculation of the Tenant's lost profits, but it is sufficient to satisfy me that the Tenant's lost profits did not exceed its loss of leasehold improvements. As the Tenant is entitled to the greater of those two amounts,

but not both, I award the Tenant $441,029 in damages for the loss of use of the leasehold improvements as of May 1, 2018.

11.2. Other Losses

[96] The Tenant also claims lost inventory and the cost of storing its fixtures and furniture it removed from the Premises in June 2018.

[97] The inventory claim is for spices purchased in either February or July 2017 at a cost of $2,760. There is no evidence of how much of those spices had been consumed by May 2018 and no evidence whether the Tenant took any of the spices when it left. This part of the claim has not been proven.

[98] The Tenant paid for storage of its furniture and trade fixtures removed from the Premises from June 2018 to October 2021. The total cost of that storage was $36,316.08. The Landlord submits it was unreasonable for the Tenant to continue to store those things for so long. I disagree. The Landlord's sudden eviction of the Tenant forced the Tenant to remove its property or have it taken or destroyed by the Landlord or the new tenant the Landlord had obtained. Putting the property in storage was reasonable. The Tenant then explored renting alternate space, which was also reasonable, but the Tenant was unable to find a landlord willing to rent the Tenant suitable space for its restaurant. At that point, absent other factors, it might have been reasonable for the Tenant to try to sell its restaurant equipment rather than continuing to store it. However, Ms. Tesfatsion began feeling unwell in 2018 and was diagnosed with cancer in 2019, which put her into survival mode. Since she is the driving force behind the Tenant, it is understandable that the Tenant made no moves to sell its property while Ms. Tesfatsion was dealing with her health challenges. Then COVID-19 hit in 2020, adding further uncertainty to the economy and likely making it the worst time to be trying to sell restaurant equipment. In all the circumstances, I find it was reasonable for the Tenant to store its property until October 2021. That expense was a result of the Landlord's breach of the Lease, so the Tenant is entitled to $36,316.08 in damages for this cost.

12. Conclusion

[99] The Tenant shall have judgment for loss of leasehold improvements in the amount of $441,029, plus pre-judgment interest from May 1, 2018, and judgment for storage costs in the amount of $36,316.08 plus pre-judgement interest from the dates those costs were incurred.

[100] If the parties have not agreed on costs by November 20, 2025, they may contact the Justice Seized Coordinator prior to December 20, 2025, to book a one hour or half day costs hearing before me.

Heard on the September 8 – 16, 2025, with supplemental written submissions received September 22 and October 1, 2025

Dated at the City of Edmonton, Alberta this 16th day of October 2025.

G.S. Dunlop
J.C.K.B.A.

Appearances:

Mr. Murray Engelking
Emery Jamieson LLP
for the Plaintiff

Mr. Iain Wallker and Mr. Kyle Hunter
Parlee McLaws LLP
for the Defendants