

In the Court of Appeal of Alberta

Citation: Xemex Contracting Inc v Aspen Properties (Northland Place) Ltd, 2025 ABCA 49

Date: 20250213
Docket: 2301-0259AC
Registry: Calgary

Between:

Xemex Contracting Inc.

Appellant

- and -

Aspen Properties (Northland Place) Ltd.

Respondent

The Court:

**The Honourable Justice Michelle Crighton
The Honourable Justice Dawn Pentelchuk
The Honourable Justice Alice Woolley**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice R.A. Neufeld
Dated the 12th day of October, 2023
(2023 ABKB 577, Docket: 2201 01829)

Memorandum of Judgment

The Court:

Overview

[1] This appeal considers the validity of a lien that the appellant Xemex Contracting Inc (Xemex) filed against the fee simple interest of the respondent landlord Aspen Properties (Northland Place) Ltd (Aspen). Aspen’s tenant Koor Energy Ltd (Koor) hired Xemex to renovate Koor’s leasehold space. After Koor stopped paying its invoices, Xemex registered liens against Aspen’s and Koor’s interests, and obtained two judgments against Koor totalling \$263,242.10 plus costs. Xemex’s recovery efforts against Koor have been fruitless. It now looks to Aspen for payment of its invoices.

[2] The validity of Xemex’s lien against Aspen’s fee simple interest depends on whether Aspen is an “owner” within the meaning of ss 1(j) and 6(1) of the *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 (the *Act*).¹ Section 6(1) sets out when a person has a lien on the estate or interest of an “owner” and s 1(j) defines “owner” as:

a person having an estate or interest in land at whose request, express or implied,
and

- (i) on whose credit,
- (ii) on whose behalf,
- (iii) with whose privity and consent, or
- (iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material[.]

[3] At first instance, the applications judge found that Aspen was an owner. Aspen held an estate or interest in land, actively participated in the construction, and received a direct benefit from the leasehold improvements. Aspen appealed.

[4] The chambers judge allowed Aspen’s appeal and declared the lien invalid. Like the applications judge, the chambers judge found that Aspen had an interest in land and, because of its active participation in the leasehold improvements, had impliedly requested the work. The chambers judge found, however, that Aspen was not an “owner” because it had not received any

¹ Formerly the *Builders’ Lien Act*, RSA 2000, c B-7. The wording of s 6(1) and the definition of “owner” in s 1(j) did not change.

direct benefit from the improvements: *Xemex Contracting Inc v Koor Energy Ltd*, 2023 ABKB 577.

[5] On appeal to this Court, Xemex argues that the chambers judge erred in finding that Aspen received no direct benefit from the improvements, given the specific provisions of the lease agreement. Xemex also argues that the chambers judge failed to address its alternative argument that Xemex did the work with Aspen's privity and consent.

[6] The appeal is dismissed for the following reasons.

Object of the Act

[7] In the broadest sense, the object of the *Act* is to prevent owners of land from receiving the benefit of buildings constructed on or improvements made to land without paying for them. When a fee simple owner contracts directly with a contractor or supplier, the statute imposes a holdback obligation on the owner for the benefit of lien claimants. If the owner complies with this obligation and liens are registered, the liens will be discharged and the owner's obligation satisfied. It is a decidedly more nuanced situation where a *tenant* has contracted for leasehold improvements and the landlord has no contractual obligation to pay the contractor.

[8] The case law reveals no bright lines as to when a landlord who holds fee simple title will be an "owner" and vulnerable, through the filing of a valid lien, to paying for the leasehold improvements the tenant contracted for.

Aspen Actively Participated and therefore Impliedly Requested the Work

[9] The definition of "owner" in s 1(j) of the *Act* has three components: *Gypsum Drywall (Northern) Ltd v Coyes*, 1988 ABCA 58 (*sub nom Royal Trust Corp of Canada v Bengert Construction Ltd*) at para 13. First, to be an owner, a person must have an interest in the land. Second, the person must have expressly or impliedly requested that the work be done or material furnished for an improvement on the land. Third, the work must have been done, or material furnished, on the person's credit, on their behalf, with their privity and consent, or for their direct benefit.

[10] There is no dispute that Aspen satisfies the first two components. This appeal concerns the third.

[11] Although the chambers judge's finding on the second component is not challenged on appeal, it is nonetheless helpful to review the evidence the chambers judge relied on in finding that Aspen actively participated in the leasehold improvements and thus impliedly requested the work. The authorities indicate that there is often overlap in the salient considerations informing whether there was a "request" and whether the work was for the landlord's "direct benefit".

[12] Aspen provided Koor with a tenant improvement allowance to renovate the leased premises. Aspen in turn provided Xemex with a document titled “Construction Manual 2021” setting out construction rules and regulations that Aspen expected Xemex to follow. No construction could commence without Aspen’s approval of demolition, architectural, mechanical, structural and electrical drawings; a valid building permit; and liability insurance. The Manual further directed that Aspen would appoint a Property Manager “who will guide and assist the Tenant throughout the construction and renovation and will act as a point of contact within the Landlord’s organization.”

[13] The chambers judge, at para 19, relied on the following evidence in finding that Aspen actively participated in the leasehold improvements:

- Aspen was entitled to, and in fact did, approve various aspects of the renovation plans;
- Aspen was actively involved in discussions with Xemex regarding “construction planning, kick-off and execution”;
- Aspen provided checklists for Xemex to follow to prevent construction delays and detailed procedures for ensuring that work done on the renovation would be integrated with existing building systems; and
- Aspen kept itself informed of change orders and invoicing matters.

The chambers judge determined that these factors were sufficient to find that Aspen had implicitly requested Xemex to perform the work, thus satisfying the second component of the definition of owner.

Aspen Did Not Directly Benefit from the Work

[14] The dispute in this Court concerns the chambers judge’s finding that the third component of the definition of owner was not met. The chambers judge concluded, at para 29, that there was no direct benefit to Aspen:

In this case, I am not satisfied that Aspen would receive any direct benefit from the work done by Xemex. Its uncontroverted evidence is that the renovation project was left in a state of disarray and was not complete; the design produced an office layout that would not be attractive to prospective tenants, and that to make the space available for marketing would cost considerable money (\$6.00- \$8.00 per sq foot). The benefit to Aspen’s residual interest in the demised premises was indirect, and of uncertain value.

[15] Whether or not Aspen received a “direct benefit” within the meaning of the *Act* is a question of mixed fact and law, reviewable for palpable and overriding error. Absent such an error, appellate intervention is not warranted: *Housen v Nikolaisen*, 2002 SCC 33 at para 36.

[16] In commercial leases, the landlord often provides the tenant with a leasehold improvement allowance. It is also typical that the landlord participates in these tenant improvements to some extent. A prudent landlord will ensure that the contemplated construction does not unduly disrupt the other tenants or jeopardize the integrity of the building structure. Thus, some degree of active participation will be the norm. This does not mean, however, that the leasehold improvements are for the landlord's direct benefit.

[17] In *Royal Bank of Canada v 1679775 Alberta Ltd*, 2019 ABQB 139 [*Royal Bank*], Graesser J considered the question of "direct benefit" in depth and this was the principal authority the parties relied upon.

[18] Graesser J considered, among other authorities, three earlier Supreme Court of Canada decisions in which the Court found valid liens: *Northern Electric Co Ltd v Manufacturers Life Ins Co*, [1977] 2 SCR 762 [*Northern Electric*]; *Hamilton (City) v Cipriani*, [1977] 1 SCR 169; and *Phoenix Assurance v Bird Construction*, [1984] 2 SCR 199. Graesser J considered *Northern Electric* the main binding precedent. In that case, a developer sold its land to the respondent, who then leased the land back to the developer for an 80-year term. The respondent was entitled to full possession on termination of the lease, as well as monthly rent and a share in the profits of the building to be constructed during the leasehold period. A majority of the Supreme Court found a direct benefit to the respondent.

[19] In his review of the authorities, Graesser J found no authority for the proposition that a landlord's reversionary right to improvements upon expiry or termination of a lease is, without more, a direct benefit to the landlord: paras 141, 149 and 154. Graesser J noted that, in the Supreme Court authorities in which valid liens were found, there were more "immediate" benefits to the landlord, such as the profit sharing during the term of the lease in *Northern Electric*. Graesser J concluded from this that "there must be some immediate benefit" to find a direct benefit and that a reversionary interest alone does not satisfy this requirement: paras 147 (emphasis in original) and 154. Graesser J held that, given its unique facts, this Court's decision in *Acera Developments Inc v Sterling Homes Ltd*, 2010 ABCA 198 [*Acera*], did not alter the law on this issue.

[20] Lower courts have affirmed the principles set out in *Royal Bank*. For example, in *Synergy Projects (Destiny) Ltd v Destiny Bioscience Global Corp*, 2022 ABQB 384 [*Synergy*] at para 69, the court affirmed that a landlord's reversion does not qualify as a direct benefit. See also *1361556 Alberta Ltd v Ristorante Cosa Nostra Inc*, 2023 ABKB 590 at para 198. In *Balzer's Canada Inc v Atco Power Canada Ltd*, 2004 SKQB 104 [*Balzer's*] at para 21, the court held that, to constitute a direct benefit, the improvements "must benefit the landlord when the materials are supplied. It is not enough to have a possibility of benefit in the future." While not expressed in terms of "immediacy", the court in *Balzer's* affirms the view that a direct benefit is one that must crystallize when the work is done or, depending on the context, when the materials are supplied.

[21] We agree with the authorities, including *Royal Bank*, that establish that a landlord's reversionary interest in leasehold improvements on expiry or early termination of the lease does

not equate to a direct benefit. To find that a landlord enjoys a direct benefit simply by virtue of its reversionary interest casts too wide a net. In our view, *Acera* dealt with a different factual scenario and is consistent with this approach.

[22] We would not, however, foreclose the possibility that a direct benefit may be established in circumstances where the benefit to the landlord is not “immediate” in the sense of crystallizing at the moment the work is done. The Supreme Court authorities that Graesser J drew upon do not explicitly state, as a legal principle of general application, that a direct benefit must be “immediate”. Those cases are examples of factual scenarios where the requirements for a valid lien were met. Each case must be assessed on its particular facts in light of the standard set out in the *Act*, which is that the benefit must be “direct”.

[23] Xemex argues that, whether or not immediacy is required, the terms of the lease between Aspen and Koor *did* provide Aspen with an immediate benefit from the leasehold improvements, which militates in favour of finding a direct benefit. Xemex argues the chambers judge erred in finding Aspen’s right to be merely reversionary. The clause in the lease that Xemex relies upon reads:

All Leasehold Improvements in or upon the Premises shall immediately upon their placement be and become the Landlord’s property without compensation therefor to the Tenant. Except to the extent otherwise expressly agreed by the Landlord in writing, no Leasehold Improvements, trade fixtures, furniture or equipment shall be removed by the Tenant from the Premises either during or at the expiration or sooner termination of the Term except that:

- (a) the Tenant shall, prior to the end of the Term, remove such of the Leasehold Improvements and trade fixtures in the Premises, that were installed by the Tenant, as the Landlord shall require to be removed or pay to the Landlord the amount reasonably estimated by the Landlord for the cost of such removal plus 15% of such cost to compensate the Landlord for the administration of such work; and ...[.]

[24] In our view, this clause does not translate to a direct benefit to Aspen. The landlord’s immediate “ownership” of the leasehold improvements did not mean the landlord could utilize or enjoy them during the tenancy of the lease. The clause in the lease grants a legal interest, but no tangible benefit during the leasehold period. The improvements did not directly benefit Aspen because it could not utilize or enjoy them except upon the engagement of its reversionary rights.

[25] The difficulty with Xemex’s argument is this. While the lease provides that Aspen experiences immediate ownership of the improvements, it also stipulates that prior to the end of the lease term, the tenant shall remove any improvements and trade fixtures the tenant installed if the landlord so requires. This recognizes that leasehold improvements are not created equally, and some may compel no other action but to rip them out and start over. In other words, the lease terms

reflect a recognition that ownership of tenant improvements, even if immediate, is not necessarily a benefit to the landlord.

[26] Courts have declined to find a direct benefit where the landlord has to spend money to either complete the improvements or retrofit the premises for suitable future use. For example, in *Haas Homes Ltd v March Road Gym & Health Club Inc*, [2003] OJ No 2847, 2003 CanLII 8607 (ON SC) at para 17, the court declined to find a direct benefit to a landlord who incurred major expenses to fit the premises up for alternative use. In *Synergy* at paras 73-74, the court found no direct benefit in a situation where construction was only partially complete, and the estimated cost of completion was substantial. On the other hand, if an unpaid contractor can demonstrate that the landlord, through the leasehold improvements, has benefited from a “turn-key” space, this militates toward finding the landlord experienced a direct benefit.

[27] The leasehold improvements were not a direct benefit to Aspen. As the chambers judge noted at para 29, the uncontroverted evidence was that “the renovation project was left in a state of disarray and was not complete; the design produced an office layout that would not be attractive to prospective tenants, and that to make the space available for marketing would cost considerable money”. This factual finding is reviewable for palpable and overriding error. No such error has been demonstrated; accordingly, this ground of appeal is dismissed.

The Work was not Done with Aspen’s Privity and Consent

[28] Xemex argues that the chambers judge erred in failing to consider and give effect to its alternative argument that Aspen was an owner by virtue of the work being done with Aspen’s “privity and consent” within the meaning of s 1(j)(iii) of the *Act*. The parties agree that this issue was argued before the chambers judge, although it was not the focus of submissions. They also agree that his reasons do not expressly address privity and consent, but Aspen argues that a functional reading of the chambers judge’s reasons disclose that he considered and dismissed this argument.

[29] Given the chambers judge’s overall findings and the extent of the overlap between the factors to be considered under ss 1(j)(i)-(iv) of the *Act*, we are satisfied that the chambers judge’s decision can be taken as concluding that none of the four factors listed in the third component of the definition of owner was met. At any rate, we are not persuaded that Xemex did the work with Aspen’s privity and consent.

[30] The chambers judge found that Aspen impliedly requested that Xemex do the work. However, a finding of a request does not equate to a finding that there was privity and consent: *Royal Bank* at para 132. In *Marshall Brick Co v York Farmers Colonization Co*, 1917 CanLII 596 (SCC), 36 DLR 420 at 427, the Supreme Court of Canada affirmed that mere knowledge of, or mere consent to, the work being done is not sufficient to establish privity and consent. Something “in the nature of a direct dealing” is required, although it need not be direct contractual

relations: *Suss Woodcraft Ltd v Abbey Glen Property Corporation*, [1975] 5 WWR 57, 1975 CanLII 252 (AB KB) [*Suss Woodcraft*] at paras 17 and 19.

[31] Xemex argues there were direct contractual relations between it and Aspen. Specifically, Xemex refers to an agreement in which it assumed occupational health and safety liabilities, obligations and responsibilities arising in relation to the renovation work. Xemex agreed to indemnify Aspen for any costs arising in relation to this assignment and assumption.

[32] In addition to the agreement, Xemex argues that privity and consent arose from Aspen's involvement in the renovation project, which included Aspen imposing various requirements on Xemex.

[33] In response, Aspen argues that the work was not done with its privity and consent. Aspen submits it was acting in accordance with its duties and obligations, as a prudent landlord, to ensure a safe environment. It says it was not involved in the design, invoicing, payment, permits, or oversight of the renovation work. Aspen submits that its dealing with Xemex fell short of the standard set in *Suss Woodcraft*.

[34] In *Suss Woodcraft*, the Court found no privity and consent. The contractor provided the landlord with plans, which the landlord approved, as well as a copy of part of the contract between the contractor and the tenant. The contractor paid the landlord the cost of the building permit. The landlord's representatives expressed concern regularly, and gave instructions directly to the contractor, in respect of construction matters such as fireproofing.

[35] Similarly, in *Royal Bank*, the Court found no privity and consent in circumstances where developers approved plans and specifications but were otherwise not involved in improvements, other than by knowing about them and consenting to them.

[36] In our view, considering the relevant factors discussed in the authorities, privity and consent has not been established. There is no question that there were dealings between the parties and that Aspen had knowledge of, and consented to, the renovation work. However, Aspen's involvement did not rise to the level of establishing privity and consent. As the chambers judge found, Aspen's participation, while active, was all aimed to facilitate an orderly and safe construction program. It sought to ensure that construction did not unduly disrupt the operations of the building or jeopardize its integrity. Aspen was fulfilling its duties and requirements as landlord. Its conduct was consistent with that of the liened parties in *Suss Woodcraft* and *Royal Bank*, against whom no privity with the contractor was found.

[37] The assumption agreement does not, in our view, alter this conclusion. The agreement aligns with Aspen's overall aim, in overseeing the project, to ensure proper construction and deal with responsibility for health and safety matters. The assignment demonstrates distancing by Aspen from risk and responsibility rather than direct dealing.

Conclusion

[38] For these reasons, the appeal is dismissed.

Appeal heard on January 14, 2025

Memorandum filed at Calgary, Alberta
this 13th day of February, 2025

Authorized to sign for: Crighton J.A.

Pentelechuk J.A.

Woolley J.A.

Appearances:

S.T. Fitzgerald, KC
for the Appellant

S. Frazer

M.J.E. MacIsaac

S. Poletto (No appearance)
for the Respondent