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Builders Lien Basics II: Tenants, Deemed Authorization, and Notices of Interest

A builder's ability to protect its interest in work on a property by registering a lien on title can be complicated where that work is done not at the request of the owner, but at the request of a tenant. In balancing the parties' competing rights, the Builders Lien Act *permits an owner to disclaim any responsibility for work it did not request. In the case of an unregistered lease, a builder may lose the chance to protect its interest with a lien entirely.*

Recall from the previous instalment of "Builders Lien Basics" (film rights still available) two points: (1) that a lien is not an obligation imposed against a person but rather an interest attached to property itself, and (2) that a builders lien protects contractors against being unpaid for their work by an individual or entity that may have no other assets besides the improved property once the work has been completed.

A sticky issue arises when it comes to work performed not at the request of a property's owner, but at the request of a tenant. Section 3 (1) of the *Builders Lien Act*[1] provides that "an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner". So long as the owner knows that work is being carried out on its property and has not taken certain steps to disclaim responsibility, the owner will be accountable for the value added to its property. This is the case even though the owner may not necessarily retain the value, such as where a departing tenant takes away fixtures that were installed on the tenant's direction.

Section 199 of the *Land Title Act*[2] serves to prevent registration of "an instrument purporting to create a charge by way of a submortgage or other subcharge of any kind… unless the charge on which the submortgage or subcharge depends has first been registered". For our purposes, what this means is that a claim of lien (the "subcharge") cannot be filed against a tenant's leasehold interest unless the lease (the "charge on which the… subcharge depends") is registered on title to the property in the land title office. A lease is not required at law to be registered to be enforceable. In the case of an unregistered lease, a builders lien is typically registered against the ownership interest in the property, since there is no other distinct lesser interest to which it can attach.

For landlords, their defence against such a lien lies in s. 3(2) of the *Builders Lien Act*, which

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permits them to file a "notice of interest" on title, defined in s. 1 to mean:

> a notice in the prescribed form warning other persons that the owner's interest in the land described in the notice is not bound by a lien claimed under this Act in respect of an improvement on the land unless that improvement is undertaken at the express request of the owner.[3]

The effect is to prevent the registration of a lien on title for work performed at the request of a tenant. However, landlords must be careful to file a notice of interest before any work starts on an improvement, as the notice does not operate retroactively. They may wish to do so early, even before they ever take on a tenant, just in case they forget about their potential liability for work completed with their prior knowledge at some later time.[4]

The British Columbia Law Institute, in its report on the *Builders Lien Act*, noted the difficulties that unregistered leases can cause to both builders and landlords, but could not agree on a particular solution to the problem.[5] Creating an exception to s. 199 of the *Land Title Act* to allow a builders lien to be registered on an owner's title but only as to the tenant's (unregistered) interest, would protect a builder's interest[6] at the expense of an owner. Even though the owner took the necessary steps to protect itself by filing a notice of interest, its title to the property would be burdened by a charge that might make purchasers and lenders leery.[7]

The apparent prejudice to the owner may be somewhat overblown. While authorizing registration of liens against unregistered leasehold interests would muddle the title system generally, purchasers and lenders would surely learn to recognize that the lien would be irrelevant to the good title of the owner who had also filed a notice of interest. However, without introducing such a change of such consequent to the logic of the Torrens land title system (registered title under which is supposed to be a true and *sufficient* reflection of the actual title), a builder does have other options to protect itself. A builder can, for instance, simply refuse to perform work for a tenant except with the owner's explicit authorization, thereby pushing the burden onto the tenant to satisfy the owner that the builder will be paid as due.

As it stands now, in the absence of such an exception, a property owner has a measure of protection when it comes to work done at its tenant's request. In the common situation where a tenant's lease is unregistered, provided that the landlord has filed a notice of interest, the builder claiming a lien will be left in the cold, while the landlord may ultimately reap the benefit of work done to its property once the lease has ended.[8] It remains to be seen whether changes will be enacted in future, such that the tenant's unregistered interest may constitute a discrete target for a lien.

Stay tuned for the next instalment of "Builders Lien Basics", where we will take up the issue in *Kwee*[9] and discuss whether the benefit to a landlord of s. 3(1) of the *Builders Lien Act* is negated by a requirement that a tenant carry out certain work stipulated within a lease.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

1 R.S.B.C. 1997, c. 45.

2 R.S.B.C. 1996, c. 250.

3 *Supra*, note 1.

4 Or the landlord encounters a situation such as the one in *Libero Canada Corporation v. Kwee,* 2013 BCSC 1297 [Kwee], where the plaintiff contractor alleged that its work was, in fact, performed at the request of the landlord, since under the tenant's lease agreement, the tenant agreed to "carry out all work necessary to complete the Premises" for the use (badminton courts) to which the tenant and landlord acknowledged the property would be put. Unfortunately, it appears that this interesting allegation was not tested by the Court.

5 See British Columbia Law Institute, *Report on the Builders Lien Act,* British Columbia Law Institute, 2020 CanLIIDocs 2347, <https://canlii.ca/t/sx28> at 46-48.

6 Insofar as it would presumably allow greater application of s. 31(3) of the *Builders Lien Act*, which provides that a leasehold interest – which could then include an unregistered leasehold – may be sold by order of the court, resulting in the assignment of the lease to the purchaser.

7 *Supra*, note 5 at 47.

8 Conceptually, anyway. In many cases, the work will not be truly valuable to the owner, such as where the next tenant will want new or different improvements.

9 *Supra,* note 4.

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