

## **Vacant Possession\***

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It is a fundamental principle of a lease that a tenant receive possession of its premises. Most offers to lease and leases provide that upon commencement of the term "vacant" possession be delivered to the Tenant. Who could believe that vacant possession could be the subject matter of a dispute?

The recent Ontario Superior Court of Justice decision of *Ramatol Corporation v. Chairtex Inc.* addressed this very issue and examined whether a landlord had met its obligation to provide vacant possession and, failing which, whether the tenant was bound by the terms of its offer to lease.

The terms of the offer provided that the premises were to be leased in an "as is" condition, subject to the landlord removing all materials from the premises prior to the commencement of the term. Further, the parties agreed by way of a schedule to the offer that certain equipment was to remain within the premises after the commencement date.

However, despite the landlord's specific obligation to do so, several significant pieces of equipment remained in the premises and occupied a substantial portion of the tenant's premises. Specifically, two spray booths, which were not itemized on the schedule to the offer to remain in the premises, were not removed by the landlord. The tenant had no use for either of the two spray booths and the location of one of the spray booths specifically interfered with the installation of the tenant's trade fixtures.

A dispute emerged between the parties as the tenant refused to pay rent until the landlord fulfilled its obligation to remove the spray booths in accordance with the offer. The impasse continued over the next few months as the parties made several attempts to resolve the matter, however an agreement could not be reached. Finally, five months after the commencement date, the landlord advised the tenant that it were in breach of the offer for its failure to pay rent and that the landlord would be sending a bailiff to the premises to change the locks.

The landlord then commenced an action against the tenant for outstanding rental arrears, to which the tenant counterclaimed for its own damages on the basis that the landlord failed to provide vacant possession.

In reaching its decision the Court analysed the underlying principle of "vacant possession" and determined that "vacant possession" was not only the right of a tenant to possession of its premises at law, but also included a tenant's right to actual and unimpeded physical enjoyment of its premises with the power, in fact, to exercise its right. The existence of a physical impediment which substantially interferes with a tenant's enjoyment of its premises, to which the tenant had not consented, is no different than the impediment caused to a tenant by the presence of a trespasser.

The Court ultimately held that the impediment caused to the tenant by the presence of the spray booths was of such a quality and nature to substantially interfere with the tenant's enjoyment of its premises and, therefore, "vacant possession" had not been provided. The Court also agreed that the tenant had not occupied the premises although the tenant had accepted a key and placed trucks and material on the premises.

The facts of the *Ramatol* decision lead to an easy determination by the Court, however the decision creates a slippery slope. A particular fixture or piece of equipment which does not interfere with a tenant's enjoyment in one case may substantially interfere with a different tenant's enjoyment in another. The landlord and tenant are both wise to clearly define the condition of a leased premises as well as itemize and distinguish between the equipment and fixtures that are to be removed from the premises from those that are to remain.