

"As is, where is" ~ What's that?



By Brian Madigan LL.B.

Everybody I know seems to understand just exactly what this means. I really don't have any idea, but "they" all seem to know. My only problem is that everyone seems to have a slightly different interpretation, and in the event of a problem, this certainly is not helpful.

In a commercial lease, the Landlord will not fix up the property until he has a new Tenant. So, if you're a Tenant looking for a good property, you will need to have a good imagination, otherwise, you're in trouble.

No sooner does the Landlord rip out all that expensive plumbing that goes with a dental office, when along comes another dentist who wants the same thing. That basically means that the Landlord will leave the dentist suite "intact" until the new Tenant signs an Offer.

Let's consider a quick scenario. Donald, the dentist rents 1,500 square feet from Larry the Landlord. He enters into occupancy on 1 June 2000. Larry runs some basic plumbing, but Donald pays for all the expensive fixturing. His business goes so well, that he needs to double the size of the space, since he is taking on a new partner. Larry has some space on an upper floor in the same building, and agrees to "permit" Donald to move.

Larry offers the space for rent. Along comes Bora, a lawyer, who agrees to take the space together with another 500 square feet.

Bora views the premises before Larry leaves. He thinks that this space will work. He inspects the plans and sends them to his space designer. He likes the space, inspects them one more time with the Landlord. He signs an Offer and negotiates for Larry to do some of the work. Larry agrees, and they agree on the balance of the terms of the lease.

One of the terms of the lease stated that Bora was to take over the premises in “as is, where is” condition.

One thing is certain, the premises were at some point in time to be static. But, at what time?

There are some possibilities here:

14 May ~ Bora’s first inspection date
15 May ~ Bora’s receipt of the plans date
16 May ~ Bora’s second inspection date
20 May ~ Bora’s meeting with the Landlord
22 May ~ Bora’s Offer submission date
23 May ~ Larry’s signback date
24 May ~ Bora’s and Larry’s actual agreement date
30 May ~ Bora’s right to enter and make changes date
14 June ~ Larry’s completion of work date
15 June ~ Bora’s right to occupancy for business purposes date
24 June ~ the commencement date mentioned in the Offer
15 July ~ the commencement date mentioned in the Lease
16 July ~ the commencement date in the Amended Lease
16 Sept ~ Bora’s first payment of the lease date (2 month’s free)

The problem is that work was undertaken by each of the parties for some reasonable period of time over several months. Donald’s contractors were there, Larry’s contractors were there, as were Bora’s.

Each day actually made a difference. There were daily changes to the premises. The **actual condition** can be quite important. You can appreciate that the condition could be quite relevant for a variety of reasons:

- 1) to know the start up condition,
- 2) to determine when the premises are available for Bora’s contractors,
- 3) to determine when Bora can use the premises for business,
- 4) to determine when the lease starts,
- 5) to determine when Bora must start paying rent,
- 6) to calculate the end of the lease term,
- 7) to determine the work that must be done the end of the lease term,
- 8) to determine the commencement of any renewal periods.

As a consequence of the lease arrangement coming to an end, Bora may have to restore the premises. But to what condition? Obviously, the correct answer is to the “as is, where is” condition.

However, what date do you use for this purpose? Also, how do you prove the condition on a specific date?

Let’s try to **document a good solution**:

- 1) inspect the premises on the specified date,
- 2) make notes,
- 3) get both parties to sign or initial,
- 4) get an independent third party to sign as well,
- 5) the third party could be an Architect, contractor, real estate agent,
- 6) take videos of the premises,
- 7) take photographs of the premises,
- 8) make sure both parties have copies,
- 9) make sure the third party also has a copy,
- 10) get the third party to agree to be an arbitrator,
- 11) if the other side is not co-operative, go through these steps yourself,
- 12) arrange for at least one independent third party.

Where do you get the third party? One of the best choices would be a “home inspector”. They are already in the business and know what to look for. They have an organized checklist and they will document their findings. If need be, at sometime in the future, they can be called upon to testify in Court concerning the condition of the premises on a particular date. And, that’s their business.

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