

## IT IS REASONABLE TO WITHHOLD CONSENT UNTIL A DEFAULT IS CURED

One of the essential characteristics of ownership of real property is that it is alienable. Unlike a contractual interest, a general feature of real property is that it can be transferred to a new ownership. As a result, a tenant under a commercial lease is always free to assign its lease or sublet its premises, **unless the lease provides otherwise**. This explains why commercial leases commonly outline that the tenant is not permitted to assign the lease or sublet the premises. Often, the clause stipulates that the prohibition applies unless the tenant obtains the landlord's consent. Some provincial statutes decree that in case of a consent requirement, absent express wording to the contrary, the landlord's consent is not to be unreasonably withheld.

In a recent Ontario Court of Appeal (the "ONCA") decision, *Tabriz Persian Cuisine v. Highrise Property Group Inc.*, a landlord's refusal to consider consenting to an assignment until the tenant had satisfied certain conditions was front-and-center.

### Facts

The Tenant operated a restaurant business under a Lease, and tried to assign its Lease on three separate occasions. Each time, the Landlord refused to give its consent. The Lease required that the Landlord's consent not be unreasonably withheld or delayed.

Without the Landlord's consent, a patio had been built by the Tenant on the common area of the property. The Landlord had repeatedly asked the Tenant to remove the patio, but the Tenant refused. The patio did not comply with the Lease and had become the subject of a lawsuit brought by the Tenant against the Landlord.

On the Tenant's third request for consent to assign the Lease, the Landlord stated that it would not consider the request until the Tenant removed the patio *and discontinued the lawsuit*. As a result, the Tenant sued the Landlord once again – this time for damages.

### Lower Court

The lower Court held that the Tenant failed to show that the Landlord acted unreasonably in withholding its consent. It found that the Landlord was reasonable in withholding consent because the patio had been installed without the Landlord's consent, and the Landlord was simply asking the Tenant to restore the premises before it left. It concluded that "[i]t is not reasonable to expect the [Landlord] to consent to an assignment of lease in circumstances that are going to perpetuate the patio problem that has plagued the parties for years."

However, the lower Court also held that it was unreasonable for the Landlord to withhold its consent until the Tenant discontinued the patio lawsuit. It saw this as an attempt by the Landlord to "use its greater bargaining power to secure a dismissal of the action in which the plaintiff may be asserting legitimate rights [and] it's not connected to the request to assign the lease."

Nevertheless, the lower Court viewed the matter holistically and concluded that the collateral purpose (of seeking to discontinue the patio lawsuit in exchange for the Landlord's consent to the assignment) did not render the Landlord's refusal unreasonable. It held that, "a reasonable basis to refuse consent saves a co-existing tainted purpose."

## The Court of Appeal

The Tenant appealed to the Ontario Court of Appeal (“ONCA”).

It argued that there was no term in the Lease stating that the Landlord could withhold consent because the Tenant was in breach of the Lease. The Court found that the Lease clause outlining various reasons to withhold consent was not exhaustive.

The ONCA held that a refusal is **unreasonable** if it is designed to achieve a collateral purpose that is wholly unconnected with the bargain made between the parties. It also concluded that reasonableness must be determined by considering the commercial realities of the marketplace and the economic impact of the transfer on the Landlord. In this case, the Landlord’s insistence that the Tenant rectify its breach by removing the patio and restoring the integrity of the premises was entirely consistent with the terms of the Lease and not “wholly unconnected.”

As for the discontinuation of the patio lawsuit, the ONCA agreed that the

Landlord’s refusal to consent on this basis was indeed an unreasonable collateral purpose, yet not one that “infected” the otherwise reasonable condition requiring the removal of the patio. It concurred with the lower Court and held that “a reasonable person could have withheld consent on the basis that the [Tenant] had not properly restored the property to the condition required by the lease, as it had promised to do.”

## Takeaways

Where a landlord’s primary reason for withholding consent is reasonable, the imposition of other unreasonable conditions may not undermine the reasonable reason. In *Tabriz*, the Landlord’s primary focus throughout the dispute was the removal of the patio and, in the Court’s estimation, was a reasonable basis for withholding consent. Although the Landlord’s insistence on discontinuing the patio lawsuit was a collateral purpose and therefore unreasonable, the requirement did not displace or undo the primary and legitimate ground for the Landlord’s withholding of consent.

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