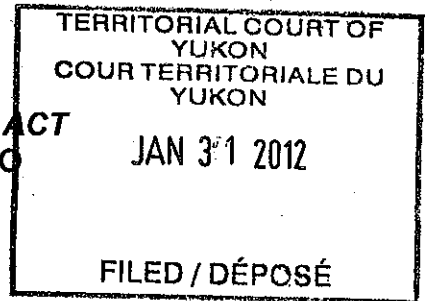


Citation: *Humphrey v. Faulds and Schramek*, 2012 YKTC 12

Date: 20120131  
Docket: 11-T0055  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before: His Honour Chief Judge Cozens

**IN THE MATTER OF THE LANDLORD AND TENANT ACT**  
**R.S.Y. 2002, C. 131 AND AMENDMENTS THERETO**



**BETWEEN:**

**ADAM HUMPHREY**

**LANDLORD**

**AND:**

**RYAN FAULDS AND NONA SCHRAMEK**

**TENANTS**

Appearances:  
Graham Lang  
Kyle Carruthers

Counsel for the Landlord  
Counsel for the Tenants

### **REASONS FOR JUDGMENT**

[1] This decision is the second in the context of an ongoing dispute between Mr. Humphrey, the landlord, and his tenants, Mr. Faulds and Ms. Schramek. The application before me, which was filed on November 22, 2011 pursuant to the *Landlord and Tenant Act*, RSY 2002, c. 131, follows an August 26, 2011 decision from this court in a separate but related application (*Humphrey v. Faulds and Schramek*, 2011 YKTC 60).

[2] Mr. Humphrey again seeks to terminate the tenancy of Mr. Faulds and Ms. Schramek, however the contentious preliminary issue that I must deal with is whether this court has jurisdiction to adjudicate the matter, given that the parties have a 'lease-to-own' agreement and, as well as being landlord and tenants, also consider themselves to be vendor and purchasers. For ease of reference, the parties shall be referred to herein as landlord and tenants.

[3] The Territorial Court has no inherent jurisdiction and derives its authority from statute. It is accepted by the parties that the Court's civil jurisdiction is narrowly circumscribed.

[4] For the reasons that follow, I have decided that it is appropriate for the Territorial Court to exercise jurisdiction over the tenancy portion of the agreement between the parties.

### **Background**

[5] On August 24, 2009, the parties entered into a "Contract of Purchase and Sale (Lease-to-Own)" for a residential property on 12<sup>th</sup> Avenue in Whitehorse ("the Contract"). Although the Contract is a single document, it is divided into two main Parts; Part 1 is titled "Contract for Purchase and Sale" and Part 2 is titled "Tenancy Agreement". There are some recitals at the beginning of the Contract about the intentions of the parties and the financial arrangements, and an attached Schedule A that incorporates terms relevant to both the purchase and sale contract and the tenancy agreement. A copy of the Contract is attached as Appendix A to this judgment.

[6] Mr. Faulds and Ms. Schramek moved into the property on September 1, 2009. As per the recitals at the beginning of the Contract, they provided a non-refundable deposit of \$10,000.00 that, on completion of the sale, becomes a contribution towards the purchase price of \$400,000.00 for the property. In addition, they have been paying "Monthly Rent", as defined in Part II of the Contract in the amount of \$2,750.00, of which \$500.00 is to be set aside by the landlord as a further contribution to the non-refundable deposit.

[7] Pursuant to Part 1 of the Contract, the anticipated closing date for the sale of the property is September 1, 2012, with the option of a one-time extension to September 1, 2013. The tenants also have the ability to pay the balance of the purchase price at any time prior to the closing date. I understand that they have been applying for financing but have yet to secure a mortgage.

[8] With respect to the tenancy arrangements, the Contract specifies that the tenants are currently on a month-to-month tenancy that ends on the closing date. The landlord is able to terminate the tenancy in advance of the closing date if the tenants are in breach of the Tenancy Agreement. The Tenancy Agreement requires that the tenants ensure the payment of heat, electrical, phone and cable bills, maintain the property in good repair, and that they do not undertake any renovations without permission of the landlord. Pursuant to s. 8 of the Schedule, the tenants cannot assign the Agreement or sublet the property without written permission from the landlord. It is this last condition that forms the basis of Mr. Humphrey's present application.

[9] In his application, Mr. Humphrey claims that Mr. Faulds and Ms. Schramek have re-sublet the basement apartment on the property without advising him and without seeking his written permission per s. 8 of the Schedule. He says that this is a substantial breach of the tenancy agreement and is accordingly seeking an order terminating the tenancy under s. 93 of the *Landlord and Tenant Act*.

[10] The tenants acknowledge that they have been renting the basement apartment but take the position that Mr. Humphrey knew and implicitly consented to their subletting until earlier this year. In an affidavit filed by Mr. Faulds, the tenants allege that Mr. Humphrey is "attempting to use any excuse available to get out of the Long Term Contract of Purchase and Sale". The merits of these positions will obviously have to be determined at a trial. As noted, the issue I am presently concerned with is whether, as the Territorial Court, I have jurisdiction to make a determination about the tenancy, given that it is part of a document that also sets out the terms of an agreement of purchase and sale.

**Positions of the parties on the jurisdictional issue**

[11] At my request, the parties provided written submissions on this issue and, with counsel, attended court to make oral submissions.

***The landlord***

[12] Mr. Humphrey, the applicant, takes the position that the Court has the jurisdiction to adjudicate this case. He says that the issue he is raising is squarely within the

statutory jurisdiction set out by ss. 93(1)(a) and 96(3) of the *Landlord and Tenant Act*, SY 2002, c. 131 ("the *LTA*"). These sections read as follows:

*Termination for substantial breach of agreement*

93(1) Despite paragraph 86(1)(c) and sections 89, 90, and 91, if a tenant commits a substantial breach of their tenancy agreement, the landlord may

- (a) apply to a judge for an order terminating the tenancy; or
- (b) terminate the tenancy by giving 14 days written notice of termination to the tenant, stating the effective date of the termination and the details of the alleged substantial breach.

- (2) In subsection (1), "substantial breach" includes
- (a) a breach of a responsibility of the tenant set out in subsection 76(2); or
  - (b) a series of breaches of a residential tenancy agreement, the cumulative effect of which is substantial.

...

*Applications under this Part*

96(1) An application in respect of any matter in which an application is authorized under this Part shall be made to a judge and shall state the grounds on which the application is made and may be started by a request to a judge or a clerk of the court for an appointment of a time and place for the hearing of the application.

2) The judge or clerk of the court who receives a request for an appointment under subsection (1) shall appoint a time and place for the hearing and the applicant shall serve a notice of the appointment and a copy of the application to the other parties to the tenancy agreement at least three days, exclusive of holidays and Saturdays, before the day appointed.

(3) If a judge is satisfied, on the application, that a tenancy agreement is terminated, the judge may issue a warrant in the prescribed form to a sheriff or peace officer of the place in which the residential premises are situated, commanding them, within a period therein named, to enter into the premises and give possession of the premises to the landlord, and may, in any case, make any other order as considered appropriate in the circumstances.

Section 101 of the *LTA* defines "judge" for the purpose of Part 4 ('Residential Tenancies') as including either a judge of the Supreme Court or the Territorial Court.

[13] Counsel for Mr. Humphrey submits that it would be expedient for me to resolve the tenancy issue, and that any issue, incidental or otherwise, that may arise about the contract of purchase and sale can be brought as a separate action in Supreme Court. Although he denies that a decision on the tenancy will affect either of the parties' interest in land, he submits that, even if it did, despite any incidental effects, I would still have jurisdiction on the tenancy aspect of the dispute. He also points out that the express denial of jurisdiction over actions in which an interest in land comes into question appears only in the *Small Claims Court Act*, RSY 2002, c. 204 (s. 2(2)(a)), and does not affect the Territorial Court's jurisdiction in a matter under the *LTA*.

[14] Finally, counsel says that the intention of the parties was to create two separate and severable agreements, and that this is clear from the wording of the contract.

***The tenants***

[15] The tenants' lawyer submits that the law is not clear on whether the Territorial Court has jurisdiction to adjudicate on this contract, but he points to s. 100 of the *LTA* as supporting this court's ability to assume jurisdiction over matters that consider an interest in land. This section says:

***Action for the recovery of land***

100 If an application is made under section 96 and the judge finds cause, the judge may order that the question of right, if any appears, be tried as in an ordinary action for the recovery of land.

[16] However, regardless of whether this court has jurisdiction, the tenants are in favour of having the matter heard in Supreme Court. Counsel points to the unavailability of equitable remedies in this court and suggests that appropriate relief might require a consideration of the tenants' equitable interests, given that they have made payments towards the anticipated purchase of the property. In support of this argument, he has filed *Gosine v. Hepas*, 2008 ABQB 321, in which Veit J. found that equity applies to the situation created by a rent-to-own agreement, as it is somewhat analogous to the situation of an owner in foreclosure.

## **Analysis**

### ***Statutory jurisdiction***

[17] Section 4 of the *Territorial Court Act*, RSY 2002, c. 217 states: "Except when otherwise provided by statute, the court has no jurisdiction over civil matters". Clearly, the *LTA* gives the court jurisdiction over residential tenancies. I am satisfied, though, that the court does not have jurisdiction over agreements of purchase and sale, regardless of s. 100 of the *LTA*.

[18] The *LTA* contemplates that concurrent jurisdiction over residential tenancies lies with both the Supreme and Territorial courts. However, while the Supreme Court has jurisdiction, inherent or otherwise, to deal with the sale and recovery of land, there is no statute that explicitly grants this jurisdiction to the Territorial Court. I interpret s. 100 of the *LTA* as recognizing that some tenancy disputes may properly be tried as an action for the recovery of land, but it does not say that they may be so tried in the Territorial

Court. In my view, absent a clearer statutory grant of jurisdiction to this court, only a superior court judge can find cause and make an order under s. 100.

***The lease-to-own agreement***

[19] Although I appreciate Veit J.'s decision in *Gosine v. Hepas, supra*, this issue has been more thoroughly considered in *Palmer v. Ampersand Investments Ltd. et al.*, (1984) 47 O.R. (2d) 275 (H.C.), aff'd (1986) 54 O.R. (2d) 339 (C.A.).

[20] In *Palmer*, the plaintiff tenant had signed an application to lease a house for a 19-month period from February 1, 1979 to August 31, 1980. One of the terms of the agreement was that he could exercise an option to buy "at any time during term of lease for \$50,000". The tenancy agreement was renewed until August 31, 1981, and when the end of the second tenancy term was coming up, the plaintiff sought to take up the option to purchase. The landlord denied that the option had been extended with the tenancy agreement, forcing the court to examine the relationship the two agreements had to one another. Relying on older British and Canadian authority, Krever J. found that they were two distinct agreements, despite being contained in the same document:

I begin with the recognition of the proposition that a lease or an agreement which, along with possession by the tenant, creates the tenancy and an option to purchase, even though found in the same physical document, are two separate agreements notwithstanding that the option, to be valid, does not require separate consideration.



[21] In support of this proposition, Kreyer J. quoted at length from an English Court of Appeal case, *Sherwood v. Tucker*, [1924] 2 Ch. 440, including the following quote from Pollock M.R.:

There is a clear distinction between the two things. The first is the demise of the premises by the landlord to the tenant, and although it is to be found in an agreement, or in a lease signed and executed by the parties, still the option is a separate and independent contract whereby a chance is given to the tenant, under the conditions imposed, to purchase the freehold of the premises which are demised to him, and that that option is an independent contract is sufficiently indicated in one or two cases which have been cited to us

[22] In *Palmer*, the extension of the tenancy did not mean an extension of the option. Although this was a different context, and in some ways the reverse of the situation here, the same principles apply.

[23] While it is possible to draft a contract that ties the terms of the option to the terms of the tenancy in such a way that the termination of one means the termination of the other, I do not find that this is the case here: see e.g. *Rafael v. Crystal*, [1966] 2 O.R. 733 (H.C.) per Gale C.J.O.

[24] The Contract for Purchase and Sale portion of the Contract sets out a definite closing date of September 1, 2012, subject to a one-time extension to September 1, 2013. There is nothing in the Tenancy Agreement portion or the Schedule that affects this. In fact, clause 15 of the Contract anticipates the possibility that the tenancy will be terminated before the closing date on event of a breach of the tenancy agreement. It does not purport to alter the terms of the sale of the property.

[25] As well, although separate consideration for each of the option and the tenancy contracts is not necessary in a rent-to-own agreement, the tenants here have nonetheless given separate consideration for the purchase and sale option and the tenancy agreement. The non-refundable initial deposit of \$10,000.00 and the subsequent non-refundable payments of \$500.00 per month are consideration that is linked only to the option to buy the property: per clause 7 of the Contract, it is not refundable in event of a failure to close. The tenants have given this monetary consideration in exchange for the landlord's foregoing his opportunity to sell the property during the three-to-four year term of the contract. This consideration is separate and distinct from the rent paid in the tenancy agreement.

[26] I find that the Tenancy Agreement was intended to be, and is, severable from the Contract for Purchase and Sale, and that the Territorial Court has the jurisdiction to hear the landlord's application to terminate the tenancy.

***Appropriate forum***

[27] The tenants' argument focused on the inability of the Territorial Court to grant an equitable remedy, should the tenants have acquired an equitable interest in the property.

[28] Although this argument is made less relevant to some extent by my finding that a termination of the tenancy agreement will not affect the option to purchase, I also find that I do not have the jurisdiction to decline jurisdiction over the tenancy dispute and order the matter into the Supreme Court.

[29] In the absence of any contractual or statutory barrier, the plaintiff has the right to choose his forum. Indeed, here, the landlord elected to be heard in Territorial Court, despite the concurrent jurisdiction of the Supreme Court.

[30] Although the *LTA* contemplates that either level of court can hear a matter, it does not consider the transference of a matter between courts once a venue has been chosen. While provincial and territorial courts do have the inherent or implied jurisdiction to control their own processes (see e.g. *R. v. Gunn*, 2003 ABQB 314), I find it is at best questionable whether I can order a claim be transferred.

[31] This Court certainly cannot require that the Supreme Court hear a matter: *J.A.R.-K. v. K.M.K.*, 2010 BCPC 98 at para. 12; *276101 Alberta Ltd. v. Westvillage Condominiums Ltd.*, 2009 ABPC 329 at para. 22. As well, authoritative caselaw suggests that even if the Territorial Court could rely on its implied jurisdiction to decline to hear a matter, it would only be in extremely narrow circumstances, see e.g. *Whitehorse (City) v. Cunning*, 2009 YKSC 48, paras. 26-28; *Shaugnessy v. Roth*, 2006 BCCA 547, paras. 41-46.

[32] In the circumstances, given the statutory grant of jurisdiction over landlord and tenant matters to the Territorial Court and, in light of the absence of any provisions in the *LTA* that contemplate the Court's ability to decline jurisdiction or transfer matters to

another Court, I find that the landlord's application to terminate the tenancy can be heard in the Territorial Court.



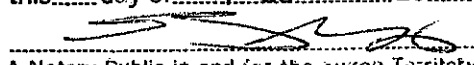
COZENS C.J.T.C

**CONTRACT OF PURCHASE AND SALE  
(LEASE-TO-OWN)**

DATE: August, 24, 2009

BETWEEN

ADAM HUMPHREY of  
24 Ketz Road, Whitehorse, Yukon Territory, Y1A 3V8

This is Exhibit "A" referred to in the affidavit of Adam Humphrey sworn before me at Whitehorse this 21 day of Nov 2009  
  
A Notary Public in and for the Yukon Territory

(the "Vendor")

AND

RYAN FAULDS and NONA SCHRAMEK of  
48 - 12<sup>th</sup> Avenue, Whitehorse, Yukon Territory Y1A 4J8

(the "Purchasers")

WHEREAS:

A. The Purchasers wish to purchase from the Vendor, and the Vendor wishes to sell to the Purchasers the following property:

Legal Address:

Lot: 270 Porter Creek, Plan 24796, Whitehorse, Yukon Territory

Civic Address:

48 - 12<sup>th</sup> Avenue, Whitehorse, Yukon Territory, Y1A 4J8

(hereinafter the "Property")

B. The Purchasers wish to lease the Property for a specified Term (as defined below) at a specific Monthly Rate (as defined below) prior to purchasing the Property. The Purchasers intend to take possession as of the Possession Date (as defined below) and pay rental income to the Vendor until the Closing Date (as defined below). The terms of the tenancy will be determined by Section II of this Agreement, while the Purchase and Sale shall be governed by Section I.

C. The Purchaser will pay unto the Vendor the purchase price of FOUR HUNDRED THOUSAND (\$400,000.00) DOLLARS PAYABLE (the "Base Price") on the following terms:

- (i). a non-refundable deposit of TEN THOUSAND (\$10,000.00) DOLLARS payable in the form of cash or certified cheque to the Vendor within three business days of this Agreement being executed by both parties.
- (ii) upon the payment of the Monthly Rent (as defined below) the Vendor shall set aside FIVE HUNDRED (\$500.00) DOLLARS which, added together with the funds mentioned stated in paragraph C(i), shall constitute the non refundable deposit (together the "Deposit").

- (iii). the balance of the funds, being the Base Price less the variable Deposit and plus or minus any adjusted amounts contemplated by paragraph 5 below and subject to any variance required by Section 3 below, payable upon the Closing Date (as defined below).

(hereinafter the "Purchase Price")

### I. CONTRACT FOR PURCHASE AND SALE

**THE PURCHASER HEREBY OFFERS TO PURCHASE THE ABOVE-DESCRIBED PROPERTY FOR THE PURCHASE PRICE AND ON THE TERMS AND SUBJECT TO THE CONDITIONS SET FORTH BELOW.**

1. **INCLUDED ITEMS:** The Purchase Price includes any building, improvements, fixtures, chattels, refrigerators, stoves, washers, dryers, appurtenances and attachments and all TV antennae, satellite receiving stations, awnings, screen doors and windows, freezer, stove, washer, dryer, refrigerator curtain rods, tracks and valances, fixed mirrors, fixed carpeting, electric plumbing and heating fixtures and appurtenances and attachments thereto at the date of inspection, namely July 30, 2009 (the "Inspection Date")

**The Property and all included items will be in substantially the same conditions on the Possession Date as when viewed by the Purchaser on the Inspection Date.**

2. **COMPLETION.** Balance of cash payments to be made and the sale completed by September 1, 2012 (the "Closing Date"). This date is subject to a one time extension (the "Extension"), under which the Purchasers may, in writing, no less than one (1) month before September 1, 2012, supply notice to the Vendor that the sale shall be completed on September 1, 2013, which will then become the Closing Date. The Purchase may elect to pay the balance of the Purchase Price at any time prior to the Closing Date.
3. **EXTENSION.** Should the Purchasers choose to trigger the Extension, the Base Price shall be increased by FOUR (4.0%) Percent.
4. **POSSESSION.** The Purchasers are to have vacant possession of the property at 12:00 p.m. on September 1, 2009 (the "Possession Date").
5. **ADJUSTMENTS.** All adjustments with respect to rents, security deposit, taxes, utilities, licences, insurance and all other items normally adjusted between a vendor and a purchaser on the sale of a building in the Yukon Territory shall be made with respect to the above property as of the Closing Date (the "Adjustment Date"). The Purchaser shall receive all incomings and shall pay all outgoings for the Adjustment Date.
6. **FUEL.** The Vendor shall ensure the fuel tank is filled prior to the first day of the Term (as defined below) and shall bear that cost. As such there shall be no adjustment on the Closing Date for fuel.
7. **FAILURE TO CLOSE.** Should the Purchaser fail to close on the or by the Closing Date, the Vendor shall keep all funds that comprise the Deposit, as those funds are non-refundable upon payment. The Vendor, in exchange for the Deposit, will waive all legal remedies available against the Purchaser's in regards to the failure to close.
8. **WARRANTIES AND REPRESENTATIONS.** The Vendor gives the following warranties and representations in regards to the Property:
- a) To the best of the Vendor's knowledge they are not in breach of any federal, provincial, municipal or local law, regulation, order or ordinance concerning environmental, health or safety matters (collectively Laws) and the Property does not contain any material or substance which is prohibited, limited or regulated by any laws.

- b) GST is not payable in respect to this transaction.
  - c) The Property has not been insulated with urea formaldehyde.
  - d) The Vendor is a resident of Canada.
9. **THERE ARE NO REPRESENTATIONS, WARRANTIES, GUARANTEES, PROMISES OR AGREEMENTS OTHER THAN THOSE SET OUT ABOVE, ALL OF WHICH WILL SURVIVE THE COMPLETION OF THE SALE.**
  10. **NOTICE:** Any notice, document or communication required or permitted to be given hereunder to the Purchaser shall be in writing and shall be deemed to have been duly given if delivered by hand to the Purchaser at **48 - 12<sup>th</sup> Avenue, Whitehorse, Yukon Territory, Y1A 4J8** and the Vendor at the address of **24 Ketz Road, Whitehorse, Yukon Territory, Y1A 3V8** or to such other address as either party may in writing advise. Any notice, documents or communication shall be deemed to have been given and received when delivered.
  11. **COSTS:** Each party shall pay their own legal fees. The Purchaser shall pay all fees in connection with the registration of the Transfer of Land and any mortgages.
  12. **EXISTING MORTGAGE DISCHARGE.** The Vendor gives consent to the Purchaser's solicitor to pay out, obtain and register discharges of any existing mortgage or financial encumbrance from the Purchaser Price paid unto the solicitor by the Purchaser.
  13. **FINANCING.** The Purchaser may wait to pay the Purchase Price to the Vendor until after the transfer of the Property has occurred and new mortgage documents have been lodged for registration in the appropriate Land Titles Office. The Purchaser confirms that the mortgage and transfer documents will be delivered to the appropriate Land Titles Office on the business day before the Closing Date.
  14. **AMENDMENTS.** Any amendments to this Agreement shall be made in writing and signed by all parties before coming into effect.

## II. TENANCY AGREEMENT

15. **TERM.** The lease of the Property, which includes and buildings and structures thereon, will be considered for the purposes of this Agreement a month-to-month tenancy beginning September 1, 2009, and ending on the Closing Date, with the understanding that the Vendor will not take action to terminate the tenancy of the Purchasers prior to the Closing Date unless the Purchasers are in breach of any of the terms of this Agreement.
16. **MONTHLY RENT.** During the Term the Purchasers shall pay unto the Vendor on the first day of each month **TWO THOUSAND SEVEN HUNDRED AND FIFTY (\$2,750.00) DOLLARS** (the "Monthly Rent"), and shall continue until the end of the Term.
17. **SECURITY DEPOSIT.** Nil.
18. **VENDOR'S RESPONSIBILITIES.** The Vendor shall ensure that any property tax, home-owners insurance and City of Whitehorse Utilities are paid. The vendor shall be responsible for all major repairs to the Property (those repairs associated with structural integrity or the safety of the Property).
19. **PURCHASERS' RESPONSIBILITIES.** The Purchasers shall ensure heat, electrical, phone, cable are paid promptly. It is the Purchasers' choice and responsibility to pay for any renter's insurance. Further the Purchasers shall maintain the Property in good repair, act in accordance with all Federal, Territorial and Municipal laws and pay for any minor repairs (those repairs associated with normal wear and tear) required during the Term. The Purchasers shall also not make any renovations to the Property, nor the home upon the Property, without the written





## SCHEDULE A

## THE FOLLOWING PARAGRAPHS FORM PART OF THIS CONTRACT

1. Free and clear of all encumbrances except restrictive covenants, reservations and exceptions in the original grant from the Crown, easements in favour of utilities and public authorities and except as set out herein.
2. All buildings on the Property and all other items included in the purchase and sale will be and remain at the risk of the Vendor until 12:01 a.m. on the Closing Date. After that time, the Property and all included items will be at the risk of the Purchaser.
3. The Agreement may be signed in counterparts and be delivered via electronic means or facsimile.
4. This offer and the Agreement which will result from its acceptance shall be governed by and construed in accordance with the laws of the jurisdiction in which the Property is located.
5. Closing of the purchase and sale shall proceed to completion on the basis of reasonable undertakings settled between the solicitors for the Vendor and the Purchaser. Failing such agreement, tender of documents or money in the form of a certified cheque, bank draft or solicitor's trust cheque may be made at the Land Titles Office for the Yukon Land Registration District on the Closing Date at the hour of 10 o'clock in the forenoon.
6. Time shall be of the essence hereof, and unless the balance of the cash payment is paid and such format agreement to pay the balance as may be necessary is entered into on or before the Closing Date the Vendor may at the Vendor's option cancel this agreement, and in such event the amount paid by the Purchaser shall be absolutely forfeited to the Vendor on account of damages, without prejudice to the Vendor's other remedies.
7. Any items left on the Property will be deemed to be included in the purchase price unless otherwise provided herein.
8. The Purchasers may not assign this Agreement, nor may they sublet the Property, without written permission from the Vendor, such permission which may be unreasonably withheld.