

LEASES AND TENANCIES

“Lease” as defined in Section 5 of the National Land Code refers to a registered lease or sub-lease of alienated land.

Under Section 221(1) of the Code a proprietor of any alienated land may grant leases of the whole or any part thereof subject to the provisions of Section 225 and Section 226.

Section 225 refers to, inter alia, any restriction to which the land in question is for the time being subject in which event it would be necessary for the proprietor to obtain the written consent of the relevant authority before the lease may be presented for registration at the land registry pursuant to Section 292 of the Code.

If the land, lease or sub-lease is subject to a charge, Section 226 requires the proprietor or sub-lessor to obtain the written consent of the chargee to be signified in the relevant Memorandum of Lease or Sub-lease.

Every lease granted pursuant to Section 221 by the proprietor shall be for a term exceeding three (3) years. This also applies to a sub-lease under Section 222.

The maximum term of the lease as provided under Section 221(3) shall be –

- (a) ninety-nine (99) years if it relates to the whole of the land, and
- (b) thirty (30) years if it relates to a part thereof.

“Land” as defined under Section 5 of the Code would include any building thereon and Section 228A further clarifies that reference to a part of any alienated land includes a reference to a part of any building on such land.

(In view of Section 228A aforesaid it would appear that a parcel proprietor under the Strata Titles Act 1985 may not grant leases exceeding thirty (30) years in duration).

Before a lease or sub-lease may be registered under the Code, the instrument must be in the statutory form i.e. Form 15A (lease) or Form 15B (sub-lease) and need to satisfy the conditions set out in Section 301 and Section 301A. (It should be noted that a proprietor of alienated land under leasehold title is deemed to be the proprietor of such land within the definition of Section 5 of the Code and should be described as such in the Memorandum of Lease.)

A proprietor or lessee is also empowered pursuant to Section 223 to grant tenancies not exceeding three (3) years defined under Section 213 as “tenancy exempt from registration”.

Such tenancies may be granted in writing or orally as provided by Section 213(2)(a).

The phrase “tenancy exempt from registration” appears to be a misnomer as it is stipulated under Section 213(2)(b) that such transaction is not required to be nor be capable of registration under the Code.

It may be argued that a tenancy agreement for a period exceeding three (3) years is void.

With respect, it is submitted that such agreement may be void as a lease but is enforceable in equity as an agreement for a lease (*Margaret Chua v. Ho Siew Kiew & Ors* (1961)MLJ 173).

It should also be noted that under Section 225(2) no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives (There is a similar restriction in respect of charges under Section 241(4) of the Code).

Although a tenancy exempt from registration may not be registered as stated in Section 213(2)(b), a tenant may protect his rights thereunder by applying for endorsement of his claim pursuant to the provisions of Section 316 of the Code.

A lease or sub-lease may be surrendered in accordance with Section 239 with the consent of the lessor or sub-lessor vide Form 15C and, where applicable, the consent of the existing chargee.

Where a lease or sub-lease has been determined by expiry of the term, the lessor or sub-lessor may also apply vide Form 18A for the cancellation of the memorial of registration of the lease or sub-lease in accordance with Section 313 of the Code.

Prior to forfeiting a lease, sub-lease or tenancy exempt from registration in accordance with Section 234, it is necessary to serve a written notice pursuant to Section 235 requiring the lessee sub-lessee or tenant to remedy the breach within a reasonable time.

It is submitted with respect that the provisions of Section 235 may be capable of being abused if strictly applied as it would appear to require the lessor sub-lessor or landlord to issue the statutory notice each time the rent is in arrears thereby allowing a lessee, sub-lessee or tenant who is consistently late in payment of the rent to delay payment until receipt of the statutory notice.

It is hereby argued that Section 235 should not be applicable to tenancies that are not protected by endorsement under Section 316 should the tenant be in default of his fundamental obligation under the tenancy i.e. to pay rent.

As the late Tun Suffian has aptly put in *Chop Soon Hoe v. Tan Kee* (1976) 1 MLJ at page 173 – “I do not think that it is the intention of the legislature to enable a tenant to thumb his nose at his landlord in this way”.

In practice, unless the prospective lessee is willing to pay an attractive rent and is of strong financial standing, a proprietor is seldom inclined to grant a lease as the existence of a lease is an encumbrance on his title.

Consequently, the creation of tenancies is far more common than leases and even in the case of tenancies the practice of applying for endorsement in accordance with Section 316 would be carried out in limited cases only e.g. where the tenant is a financial institution with option to renew the tenancy for a further term or terms.