

**TAN KIAW v. GAN CHYE KHOON: A DISTINCTION
BETWEEN A 'TENANCY' AND A 'TENANCY
EXEMPT FROM REGISTRATION'?**

The facts in *Tan Kiaw v. Gan Chye Khoon*¹ were fairly straightforward. The appellant in this case granted a three-year tenancy to two persons, Taplil bin Ithnain and Lim Ah Lek, who were partners of a rubber dealers business trading under the style of Hwa Mah Trading Co. The respondent in this action subsequently joined this partnership. Upon the expiry of the tenancy agreement, the appellant served a notice to quit on both Taplil and Lim. A writ of possession was subsequently obtained. The respondent sought a declaration that he was the tenant of the premises. The gist of the respondent's contention was that the appellant had, by receiving rent from him (the respondent) and also by his knowledge of the fact of possession by him, accepted the respondent as his tenant. The learned Judicial Commissioner held that the respondent was a tenant of the appellant and that the appellant was estopped from denying the respondent's tenancy.

The case went on appeal to the Federal Court. At the hearing of the appeal, the respondent did not pursue the contention there was a tenancy existing between Syarikat Hwa Mah Trading and the appellant, or that the appellant had accepted the respondent as tenant. Instead, the respondent relied on sub-section (2) of section 225 of the National Land Code 1965, for the proposition that when Lim and Taplil entered into the tenancy agreement with the appellant, they must be presumed to have done so as trustees of the respondent. Sub-section (2) of section 225 provides that no lease or tenancy may be granted to two or more persons or bodies otherwise than as trustees or representatives. The Federal Court,² in a judgment delivered by George Seah F.J., rejected this argument on the ground that the word 'tenancy' in sub-section (2) of section 225 meant a 'tenancy in excess of three years' and therefore, since the tenancy in question here was for a term of three years only, the section did not apply. Hence, Lim and Taplil could not be presumed to have entered into the tenancy as trustees of the respondent. The Federal Court assumed quite erroneously, it is submitted, that there was a distinction between a 'tenancy' and a 'tenancy exempt from registration'. This assumption seemed to be based on the fact that there is no definition of the word 'tenancy' under section 5 of the National Land Code 1965 whilst on the other hand, a 'tenancy exempt from registration' is defined as having the meaning assigned to it by sub-section

¹[1983] 2 MLJ 109

²Comprising of Salleh Abas C.J., Wan Suleiman & George Seah F.JJ.

(1) of section 213. The sub-section provides that a 'tenancy exempt from registration' means a 'tenancy or sub-tenancy for a term not exceeding three years'. Hence, according to the Federal Court, 'it seems to follow that the words "lease" or "tenancy" in sub-section (2) of section 225 means [sic] "a registered lease" or "a tenancy in excess of three years"'.³

With respect, it is submitted that the decision of the Federal Court is neither borne out by nor is it consistent with the provisions of the Code for two reasons. First, there is no distinction between a 'tenancy' and a 'tenancy exempt from registration' under the Code. In any system of registration of titles, it is trite law that title or interest in land passes or vest only upon registration and not before. Hence, in the case of a lease under the National Land Code, the interest of the lessee vests only upon the registration of the lease, whether or not possession has taken effect.⁴ However, the law does not require that all leases be registered before they can take effect. For practical reasons, short-term leases are normally exempted from the process of registration in most Torrens jurisdiction. Likewise under the National Land Code, where tenancies or sub-tenancies granted for terms not exceeding three years are, by virtue of sub-section (2) of section 213, dealings not capable of being, or required to be, registered. Such tenancies are, by virtue of sub-section (2) of section 223, tenancies exempt from registration. What this means is that the creation of tenancy is not dependent on registration; it may be granted orally or by way of a written instrument in any form whatsoever.⁵ It is to be observed that the words 'exempt from registration' merely denote the intention of the Legislature to exclude short-term letting of land from the burden of registration.⁶ They do not have magical effect of rendering a 'tenancy exempt from registration' different from a 'tenancy'. There is therefore no distinction between a tenancy and a tenancy exempt from registration as both these terms refer to one and the same thing, that is, a letting of land under the Code for a period not exceeding three years.

Secondly, every lease granted under the Code shall, by virtue of sub-section (2) of section 221, be for a term exceeding three years and, as stated earlier, must be registered before it can vest in the lessee any interest in the leased land. A 'tenancy in excess of three years' is hence a 'lease' under the Code and not a 'tenancy' as stated by the Federal Court. It is not clear, however, what the Federal Court meant when it referred to a 'tenancy' as a 'tenancy in excess of three years'. Was the Federal Court referring to a form of letting of land as distinct from a lease or a tenancy exempt from registration? Or was the Federal Court using the words 'lease' and 'tenancy' interchangeably? If so, then it is submitted with respect, that the Federal

³*Ibid.*, at 112.

⁴National Land Code 1965 sub-section (1) of section 227.

⁵Sub-section (2) of section 223

⁶See Explanatory Statement to the National Land Code 1965

Court had ignored or overlooked the intention of the Legislature to distinguish between a lease and a tenancy for purposes of registration. On the other hand, if it were the former, what, for instance, is the mode of creation as far as such a tenancy is concerned? Whilst the Code expressly provides for the creation of a 'lease' and a 'tenancy exempt from registration' there are no provisions in this respect for a 'tenancy in excess of three years'. Does it constitute a dealing capable of being registered under the Code? The Code appears to provide only for the registration of transfers, leases, charges and easements.⁷ This would seem to suggest that a 'tenancy in excess of three years' is not a registrable dealing, that is, it is a dealing capable of being created by means other than registration. This conclusion is however not only inconsistent with the provisions of the Code but goes quite against the system of registration of titles. The Federal Court's decision on this point is thus unsatisfactory and leaves a number of questions unanswered.

From the above, it is therefore submitted, with respect, that the Federal Court had wrongly interpreted the word 'tenancy' in sub-section (2) of section 225, and that the word in fact refers to a 'tenancy exempt from registration' and not to a lease or any other form of letting of land.

The respondent tried to argue too that he should have been served with a notice to quit and should have been made a party to the proceedings when action for vacant possession was taken. The Federal Court, after finding that the respondent was not a tenant of the appellant and nor were Lim and Taplil holding as trustees in respect of the tenancy for the respondent, unhesitatingly held that there was no legal basis for the notice to be served on the respondent. But the Court added that the respondent could have however applied to be a party to the proceedings under Order 8 rule 10 of the Subordinate Court Rules 1980. Rule 10 provides *inter alia* that the Court may at any stage of the proceedings in an action for possession of immovable property order any person not a party to the action who is in possession of the immovable property to be added as a defendant. As the respondent failed to do so, he could not now object to the appellant's application for recovery of possession.

Khaw Lake Tee*

*Lecturer, Faculty of Law,
University of Malaya.

⁷National Land Code 1965 sub-section (1) of section 205 and sub-section (1) of section 206.

