

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

I believe that in conformance with the Residential Landlord Tenant Code (the Code), (1) rental agreements existed between Respondent/Plaintiff-Appellee Susan Kiehm (Kiehm) and Tammy Ayau (Ayau) as well as between Ayau and Petitioner/Defendant-Appellant Ian Adams, and, thus, (2) Adams was a sublessee of Ayau. In my view, the majority's holding that Adams was a licensee cannot be sustained under the Code's provisions. The majority acknowledges the broad definition of "rental agreement" in Hawai'i Revised Statutes (HRS) § 521-8, but chooses to focus on the language of HRS § 521-3(b) which refers to "right[s], remed[ies] and obligation[s] arising out of [rental agreements that are] not provided for" under HRS chapter 521, the Residential Landlord Tenant Code. See majority opinion at 13.

From this the majority concludes that the Code "contemplates tenancies or arrangements other than leaseholds" and is "supplemented by the common law." Majority opinion at 13. The majority then applies the common law, concluding that Adams is not a sublessee. Majority opinion at 17-18. But the Code at HRS § 521-3 instructs, in part, that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity, including the law relative to . . . real property, . . . supplement its provisions." (Emphases added.)

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The broad language of HRS § 521-8 states that "[r]ental agreement' means all agreements, written or oral, which establish or modify the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit and premises." (Emphasis added.) On its face this definition encompasses the arrangement between Ayau and Adams. Hence, as to this arrangement, as discussed herein, the Code does displace "principles of law and equity including the law relative to . . . real property." Inasmuch as the Code displaces such principles, the common law by way of licenses or otherwise cannot "supplement" the Code provisions as the majority proposes.

The majority's reasoning requires, in my view, a departure from the plain and unambiguous language of the Code and calls into question its application in future cases. With all due respect, the majority's approach is not countenanced by the Code, raised by the parties, or considered by the court or the ICA. If any hardship for the landlord is perceived in the specific circumstances of this case, the command of the Code is plain: that tenants may sublet their premises and, thus, the protections of the Code are afforded to a sublessee, unless the landlord requires that its consent to a sublease be given. See HRS § 521-37 (1993), infra. By its decision, the majority deprives sublessees of the Code's express protections. For the reasons stated herein, I would reverse the April 4, 2004 majority

opinion of the Intermediate Court of Appeals (the ICA), vacate the August 21, 2002 judgment and August 29, 2002 writ of ejectment and remand the case to the district court of the third circuit (the court) in accordance with the discussion infra.

I.

As the ICA stated, the Code applies in this case. HRS § 521-6 (1993) provides that "[t]his chapter applies to rights, remedies, and obligations of the parties to any residential rental agreement where made of a dwelling unit within this State." HRS § 521-3 (1993) states, in part that

(b) Every legal right, remedy, and obligation arising out of a rental agreement not provided for in this chapter shall be regulated and determined under chapter 666 [Landlord and Tenant], and in the case of conflict between any provision of this chapter [(HRS chapter 521)] and a provision of chapter 666, this chapter shall control.

(Emphasis added.) HRS § 521-8 (1993), entitled "Definitions," provides in relevant part that:

"Landlord" means the owner, lessor, sublessor, assigns or successors in interest of the dwelling unit or the building of which it is a part and in addition means any agent of the landlord.

.....  
"Tenant" means any person who occupies a dwelling unit for dwelling purposes under a rental agreement.

(Emphases added.) HRS § 521-22 provides in part that in the absence of an agreement in writing, a tenancy shall be month to month. HRS § 521-37 (1993), entitled "Subleases and assignments," provides in relevant part that unless otherwise agreed to, a tenant may sublet the dwelling unit without the landlord's consent:

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(a) Unless otherwise agreed to in a written rental agreement and except as otherwise provided in this section, the tenant may sublet the tenant's dwelling unit or assign the rental agreement to another without the landlord's consent.

(c) A written rental agreement may provide that the tenant's right to sublet the tenant's dwelling unit or assign the rental agreement is subject to the consent of the landlord.

(Emphases added.)

With respect to termination of a rental agreement, HRS § 521-71(e) states, in part, as follows:

Whenever the term of the rental agreement expires, whether by passage of time, by mutual agreement, by the giving of notice as provided in subsection (a), (b), (c), or (d) or by the exercise by the landlord of a right to terminate given under this chapter, if the tenant continues in possession after the date of termination without the landlord's consent, the tenant shall be liable[.]

(Emphasis added.)

II.

For convenience, the relevant findings of fact (findings) of the court are reiterated here:

3. [Kiehm] agreed to rent the residence to . . . Ayau for \$1000 per month on a month to month tenancy approximately two and one-half years ago. This was an oral agreement.

4. . . . Ayau agreed to pay electric and cable. [Kiehm] agreed to pay for water service.

5. In approximately November 2000, . . . Ayau entered into an agreement with [Adams] to rent part of the residence for \$500 per month.

6. [Kiehm] was landlord and . . . Ayau was the tenant.

7. [Kiehm] and Ayau's month to month tenancy was terminated by oral agreement effective March 31, 2002.

8. Ayau notified Adams that their agreement would end at that time.

9. . . . Ayau received cash from [Adams] and deposited the rent into [Kiehm's] bank account.

10. After termination of the tenancy, [Adams] refused to move out.

11. There was no agreement between [Kiehm] and [Adams].

(Emphasis added.)

The relevant conclusions of law (conclusions) of the court are as follows:

1. A sublease is a transfer of part of the leasehold term or premises.
2. There is no privity between landlord and sublessee.
3. [Kiehm] and [Adams] had no agreement.
4. A landlord has no rights against a sublessee, and a sublessee has no rights against a landlord arising out of a landlord/tenant relationship.
5. When the month to month lease terminates, the sublease terminates.
6. [Adams] was not entitled to possession upon termination of the lease between Ayau and [Kiehm].
9. [Adams] is trespassing on the property owned by [Kiehm].
10. [Kiehm] is entitled to a judgment and a writ of ejectment against [Adams].

(Emphases added.) Judgment and the writ of ejectment was filed against Adams as aforesaid.

### III.

Based on the provisions set forth previously, the Code broadly applies to "any residential rental agreement where made of a dwelling unit." HRS § 521-6 (emphasis added). Under undisputed finding no. 3, Kiehm and Ayau had such an "agreement" inasmuch as Ayau "rent[ed] the residence . . . for \$1000 per month on a month to month tenancy." Similarly, undisputed finding no. 5 indicates Ayau and Adams also had such an "agreement" because Adams "rent[ed] part of the residence for \$500 per month." (Emphasis added.) Thus, the Kiehm/Ayau agreement constituted a "rental agreement" for Ayau to "occupy" the property owned by Kiehm as a "dwelling unit." Under the provisions of the Code, then, the Ayau/Adams agreement also constituted a "rental agreement" for Adams to "occupy" the

property being rented by Ayau, i.e., the property owned by Kiehm.

Kiehm, as "owner . . . of the "dwelling unit" pursuant to HRS § 521-8, was the "landlord" of Ayau. Because Ayau "occupie[d the] dwelling unit for dwelling purposes under a rental agreement," she was a "tenant" of Kiehm pursuant to HRS § 521-8. Inasmuch as Ayau had a rental agreement with Adams that allowed Adams to occupy the same unit, under the Code provisions Ayau was a "sublessor . . . of the dwelling unit" and, therefore, a "landlord" pursuant to HRS § 521-8 with respect to Adams. It follows that Adams was a "tenant" because he "occupie[d] a dwelling unit, [Kiehm's property] for dwelling purposes under a rental agreement[, the Ayau/Adams rental agreement]." HRS § 521-8.

#### IV.

There being no finding that there was "[a] written rental agreement . . . provid[ing] that the tenant's [(Ayau's)] right to sublet the tenant's dwelling unit" was "subject to the consent of the landlord [(Kiehm)]," HRS § 521-37(c), under the express provision of the Code, Ayau could "sublet the tenant's [(Ayau's)] dwelling unit . . . to another without the landlord's [(Kiehm's)] consent." HRS § 521-71(a) (emphasis added). As the court concluded in unchallenged conclusion no. 1, "[a] sublease is a transfer of part of the leasehold term or premises." See also Merriam Webster's Collegiate Dictionary 1172 (10<sup>th</sup> ed. 1993) ("Sublet" is "to lease or rent all or part of a leased or rented property."); Black's Law Dictionary 1425 (6th ed. 1990) (defining

sublease as including a "[t]ransaction whereby tenant grants interests in leased premises less than his own"). Because Ayau had "sublet" or "rent[ed] . . . part of [the] rented property [(Kiehm's property)]" to Adams, see undisputed finding no. 5, Adams became a sublessee of Ayau.<sup>1</sup> Hence, under the comprehensive definition of "rental agreement" in HRS § 521-8, there is no basis for supplementing the Code with common law concerning "licensing" in this case.<sup>2</sup>

V.

The majority reaches its decision without respect to the foregoing undisputed findings and without declaring the findings to be clearly erroneous or unchallenged conclusion no. 1 wrong. Yet, by virtue of these findings, the arrangements were plainly "rental agreement[s]," and the Code applied pursuant to HRS § 521-6. Indeed, the majority's test for a licensee arrangement is inapposite.

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<sup>1</sup> According to the ICA, HRS § 666-1 "recognizes that a sublessee (subtenant) is a 'person holding under the lessee or tenant[.]' [The Code] . . . did not alter that subordinate relationship." Slip op. at 9 (emphasis added). The plain language of the Code would seem dispositive of Adams' sublessee status.

<sup>2</sup> The majority's assertion that a month to month tenancy is one where no lease is involved, majority opinion at 13 n.14, simply restates the Code's equivalent proposition that in the absence of a written agreement a tenancy shall be month to month, HRS § 521-22. On the other hand, the conclusion that the Code applies in this case is inclusive of the Code's recognition of subleases, see HRS § 521-37, the undisputed finding no. 5 that Adams rented part of the premises and unchallenged conclusion no. 1 to the effect that a sublease may be for a part of the premises, and that such a definition of a sublease comports with common understanding, Webster's Third New Int'l Dictionary at 1172, see also HRS § 1-14 (stating that words found in a law are to be given "their most known and usual signification" or their common signification "without attending so much to [their] literal and strictly grammatical construction"), and the "legal dictionary meaning of sublease," majority opinion at 13 n.14, Black's Law Dictionary at 1426.

A.

The majority states that the first test factor is whether "the grantee [has] the right to occupy a distinct and separate part of the premises (i.e., a definite parcel)[,]" majority opinion at 15, and that Adams did not have exclusive possession of the property, thus leading to the conclusion that he was a licensee, majority opinion at 16. However, as mentioned, under undisputed finding no.3, Kiehm and Ayau had such an "agreement" inasmuch as Ayau "rent[ed] the residence[.]" Similarly, undisputed finding no. 5 indicates Ayau and Adams also had such an "agreement" because the court found Adams "rent[ed] part of the residence for \$500 per month." (Emphasis added.) In conjunction with its findings the court concluded, as noted previously, that a sublease may be for a part of the premises. The court thus determined that Adams in effect "[had] the right to occupy a distinct and separate part of the premises." Majority opinion at 15.

As to the second factor, that "the grantee's right to possession [is] assignable," see majority opinion at 16, the record is simply devoid of any findings. Because none of the parties, the court, or the ICA considered the subject arrangement to be a license, at the very least this factor cannot be determined as a matter of law without a remand to the court to

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make appropriate findings.<sup>3</sup>

As to the third factor, the majority is incorrect in concluding that the agreement was not for a fixed term. Finding no. 3 stated that Ayau rented the premises from Kiehm on a month to month tenancy. According to finding no. 5, Ayau rented part of the same premises to Adams for \$500 a month. This indicates that Adams had a month to month tenancy. See supra note 2. In any event, HRS § 521-22 provides, in absence of a written agreement as to a term, that "the tenancy shall be month to month." (Emphasis added.) Hence, the Ayau/Adam agreement was fixed as a month to month tenancy.<sup>4</sup>

B.

The sources from which the majority derives its three-

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<sup>3</sup> The majority asserts the second factor was satisfied without declaring the court's finding no. 5 clearly erroneous. In doing so, it rests simply on its speculation "that Ayau never intended to or did cede exclusive possession or control of any part of the residence to Adams." Majority opinion at 17 n.19. This assertion is obviously subject to an opposing interpretation -- that because of the animosity between Ayau and Adams that Ayau did cede and Adams did assert possession of separate parts of the apartment. But such supposition either way is an inherently faulty course to follow which is why deference is given to findings of the trial court, i.e., that Ayau rented "a part of the residence" to Adams, and why on appeal our review is limited.

<sup>4</sup> Contrary to its imputation, it is the majority that "confuse[s]" the Code provisions and the rental agreement with respect to "the term of the agreement." Majority opinion at 17 n.19. As mentioned above, the court did make findings and rendered a conclusion indicating a month to month tenancy existed. See discussion, supra, and note 2. Assuming, arguendo, there is "no evidence in the record that the oral agreement between Ayau and Adams," majority opinion at 17 n.19, had a "fixed term," the Code imputes a "month to month" term under HRS § 521-22. The Code applies because, as the court in undisputed finding no. 5 found, "Ayau entered an agreement with Adams to rent[]" and therefore, the Code, i.e., HRS § 521-22, was not supplemented by the common law. Hence, the lack of a written agreement does not mean that there was no fixed term, as the majority declares in asserting that there was instead a license. Id. With all due respect, such a declaration can only be made by not considering the undisputed findings and unchallenged conclusions of the court.

prong test for distinguishing a lease from a license also have questionable application. The majority bases its conclusion on definitions not found in the Code. Kapiolani Park Preservation Soc'y v. City & County of Honolulu, 69 Haw. 569, 570-71, 751 P.2d 1022, 1024 (1988), involved an agreement to erect a restaurant on land subject to a charitable trust. The majority applies a test used in a case involving a commercial lease to the instant case, one involving a residential lease. Bush v. Watson, 81 Hawai'i 474, 918 P.2d 1130 (1996), is similarly distinguishable. Bush involved a challenge to third party agreements "whereby the lessee of an agricultural homestead allows a stranger to the lease to use his or her land for farming or pastoral purposes" under the Hawaiian Homes Commission Act. Id. at 476-77, 918 P.2d at 1132-33. Again, the source of the majority's test involves a commercial, agricultural arrangement, as opposed to a residential one. While involving a residential arrangement, Harkins v. Win Corp., 771 A.2d 1025 (D.C. 2001), arose in the context of a rooming hotel in which occupants rented individual rooms. In McCandless v. John II Estate, Ltd., 11 Haw. 777 (1899), a rental agreement existed whereby land used for the pasturing of cows and heifers was to be leased to the Oahu Sugar Co. to remove water. The majority's reliance on these cases is misplaced as they are factually distinguishable and not based on a landlord-tenant

residential code.<sup>5</sup>

C.

The majority decides that "there is case law in this jurisdiction on point," majority opinion at 15 n.16, referring to its statement that "[a]t common law, a roommate is not considered a sublessee. See Brewer v. Chase, 3 Haw. 127, 149 (1869)[.]" Majority opinion at 15. With all due respect the statement assumes the answer to what is in issue, for the question is whether Adams was a "roommate" as the majority asserts, or a sublessee as the court and the ICA decided, and as the Code, in my opinion, plainly indicates.

Moreover, Brewer does not appear remotely relevant. In that case, the plaintiff and the defendant entered into a lease under which the defendant occupied the plaintiff's building. The lease contained a provision that the defendant could not "sub-let or transfer any of the privileges of this instrument to any other party." Id. at 129. The defendant opened a drug store in the

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<sup>5</sup> The majority cites to additional cases contending that "the lease-license distinction is equally applicable in a residential context." Majority opinion at 15 n.17. These cases, like the ones underlying the majority's three factor test, are distinguishable. In 445/86 Owners Corp. v. Haydon, 751 N.Y.S.2d 456, 457 (2002), the mother-in-law of a tenant/shareholder living alone in a cooperative apartment subject to restrictions on who could live in the unit was considered a licensee. In Har Holding Co. v. Feinberg, 697 N.Y.S.2d 903, 904 (1999), the defendant had originally lived in a rent-stabilized apartment with two tenants, but then resided there as a sole occupant for eleven years. This scenario, coupled with the fact that the landlord had refused to place the defendant's name on the lease led to that court's conclusion that the defendant was a licensee. Id. Finally, in Schell v. Schell, 169 P.2d 654, 654-55 (Cal. Dist. Ct. App. 1946), a couple was denied a divorce, but the wife retaining possession of the family home, converted the home into a partial rooming house. Id. at 655. In reaching its conclusion that the roomers or lodgers were licensees and not tenants, that court noted that "[h]ousing conditions during the war period[,] and expenses of caring for "minor children" had prompted her "to take in a few roomers[.]" Id. at 656.

building. Id. at 130. The defendant allowed a Dr. McGrew to occupy two rooms in the building, which Dr. McGrew used to see patients. Id. Dr. McGrew testified that he occupied two rooms in the building "not exclusively," and that the defendant occupied the two rooms with him. Id. He further indicated that there was no written agreement as to his use of the two rooms. Id. Dr. McGrew did not pay the defendant any rent for the use of the building, but rather referred his patients to defendant for their medication. Id. This court held that the defendant did not breach the lease by allowing Dr. McGrew to occupy the building with him in this way. However, it was not held that Dr. McGrew was a licensee. Rather, this court characterized Dr. McGrew as a "lodger," and not as a licensee. Id. at 140.

The majority's reliance on Brewer for its proposition that "[a]t common law, a roommate is not considered a sublessee," majority opinion at 14, is, at the least, misplaced. Brewer is inapposite because it involved a business arrangement between a doctor and a pharmacist in which no rent was paid, no term involved, and in which there was an express prohibition against subletting.<sup>6</sup> Brewer is not a licensee case and does not support the majority's ultimate conclusion that Adams was a licensee. Majority opinion at 17-18.

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<sup>6</sup> Under the Code, of course, a tenant may sublease its premises in the absence of a written consent requirement. HRS § 521-37.

VI.

A.

Because I believe there was a sublease between Ayau and Adams, I consider the relevant arguments on appeal. Adams contended in his opening brief that (1) "the [c]ourt should have held that there is a residential landlord-tenant relationship between Adams (as tenant) and Kiehm (as landlord) governed by [HRS chapter] 521[,]" [the Code], and that Adams "is a month-to-month tenant under [HRS] § 521-22";<sup>7</sup> (2) the court should have made "[a] specific finding . . . that Adams was not given the required notice to terminate his sublease with Ayau"; (3) Adams, and not Kiehm, is "entitled to possession" inasmuch as (a) "the voluntary termination of Ayau and Kiehm's lease does not terminat[e] Adams's sublease[,]" (b) by this "voluntary termination," Adams "bec[ame] the immediate tenant of Kiehm[,]" (c) "Adams is entitled to proper notice [from Kiehm] under [HRS] § 521-71(a)<sup>8</sup> before his month-to-month tenancy may be

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<sup>7</sup> HRS § 521-22, entitled "Term of rental agreement," provides, in relevant part, that "[t]he landlord and tenant may agree in writing to any period as the term of the rental agreement. In the absence of such agreement, the tenancy shall be month to month[.]" (Emphasis added.)

<sup>8</sup> HRS § 521-71(a) states as follows:

When the tenancy is month-to-month, the landlord may terminate the rental agreement by notifying the tenant, in writing, at least forty-five days in advance of the anticipated termination. When the landlord provides notification of termination, the tenant may vacate at any time within the last forty-five days of the period between the notification and the termination date, but the tenant shall notify the landlord of the date the tenant will vacate the dwelling unit and shall pay a prorated rent for that period of occupation.

(continued...)

terminated[,]” (d) “Kiehm failed to provide adequate notice to terminate Adams’s tenancy.”

In his reply brief, Adams asserted in part that (1) assuming HRS § 666-1 applied, Kiehm failed to give him the ten days prior notice required to evict him and (2) even if Kiehm had given proper notice under HRS § 666-1, she failed to give him sufficient notice under the Code and specifically HRS § 521-71(a).<sup>9</sup>

B.

On April 30, 2004, the ICA issued a published opinion remanding the case to the court.<sup>10</sup> With regard to the corresponding arguments in Adams’ opening brief, the ICA indicated as to (1) that the Code applied but “does not require a lessor/landlord or a lessee/tenant to give notice to a sublessee/subtenant when terminating (in contrast to surrendering)” the rental agreement between the lessor/landlord and the lessee/tenant, and “in the absence of a contract to the contrary . . . , all subleases . . . terminate when the lease[] agreement terminates (in contrast to when the lease[] agreement

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<sup>8</sup>(...continued)  
(Emphasis added.)

<sup>9</sup> See supra note 8.

<sup>10</sup> Previously, on October 8, 2003, the ICA issued a memorandum opinion affirming the August 21, 2002 judgment and the August 29, 2002 writ of ejectment. On October 15, 2003, Adams filed a motion for reconsideration. On October 22, 2003, the ICA issued an order granting Adams’ motion for reconsideration and vacating the October 8, 2003 memorandum opinion. On November 13, 2003, the ICA filed a second memorandum opinion, again affirming the court’s judgment and writ of ejectment. On November 25, 2003, Adams filed a motion for reconsideration. On December 3, 2003, the ICA issued an order granting reconsideration and vacating the ICA’s second memorandum opinion.

is surrendered)." Slip op. at 9-10. The ICA did not answer (2) directly but indicated Adams did not assert any claims against Ayau. With respect to (3)(a) and (b), the ICA related that under the common law, "[t]he surrender of a lease by [the] lessee to [the] lessor . . . will not . . . defeat the estate of the sublessee[,]" slip op. at 11, and further, that "Adams' rights as a subtenant . . . terminated upon the termination of Ayau's rights as a tenant[.]"<sup>11</sup> Id. at 14. In connection with 3(c), the ICA said that "Adams had no right to notice from Kiehm of the termination." Id.

As to Adams' assertion in his reply brief regarding HRS § 666-1, the ICA declared "Adams (1) was a 'person holding under the lessee or tenant, who held possession of lands . . . without right<sup>[12]</sup> . . . and (2) was not a 'tenant by parol' entitled to 'a notice to quit of at least ten days[.]'" Id. at 16 (brackets omitted).

VII.

A.

In my view, and as Adams argued, a specific finding by the court as to whether Ayau had given valid notice as landlord

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<sup>11</sup> The effect of the statement that Adams' rights as a tenant terminated upon Ayau's rights as a tenant is unclear, inasmuch as the ICA remanded the case to determine whether Adams was entitled to remain as a tenant of Kiehm's under the doctrine of surrender.

<sup>12</sup> In light of the ICA's order of remand, the effect of this statement by the ICA is unclear.

to terminate<sup>13</sup> the Ayau/Adams sublease should have been rendered by the court. For, as shown previously, under the Code, a lessee such as Ayau who sublets, is a sublessor and thus is deemed a landlord. HRS § 521-8. As indicated supra, Adams was a tenant of Ayau.

Because Ayau apparently attempted to give notice to Adams of termination of the sublease, she was required to adhere to the dictates applicable to landlords, i.e., the giving of forty-five days' notice to Adams pursuant to HRS § 521-71(a). Hence, if Ayau chose to give notice as allowed under HRS § 521-71(e) to end the sublease before the end of her lease with Kiehm, Ayau was required to give Adams forty-five days' written notice. Had she done this before Ayau's lease with Kiehm ended, Adams' sublease would have been properly terminated under one of the methods established in HRS § 521-71(e). Therefore, on remand, I would instruct the court to render a finding with respect to that matter.

In my view, the ICA erred, then, insofar as it indicated the Code does not require "a lessee . . . to give notice to [a] sublessee . . . when terminating (in contrast to surrendering) the lease . . . between the lessor . . . and the lessee." Slip op. at 9-10 (emphasis added). If termination is

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<sup>13</sup> The term "termination" is not defined in the Code. The plain meaning of "termination" is "[e]nd in time or existence; close; cessation; conclusion," Webster's Third New Int'l Dictionary 2359 (1961), and "[w]ith respect to a lease . . . , term refers to an ending, usually before the end of the anticipated term of the lease . . . , which termination may be by mutual agreement or may be by exercise of one party of one of his remedies due to the default of the other party." Blacks Law Dictionary 1471 (6<sup>th</sup> ed. 1990).

attempted or posited pursuant to HRS § 521-71(a) or (b), the Code controls, i.e., "displaces," the common law relative to real property, HRS § 521-3, and the notice provision in HRS § 521-71(a) must be complied with if chosen as the mode of termination.

B.

Adams maintains that the "oral agreement [by Kiehm and Ayau] to terminate the main lease was not legally enforceable" under HRS §§ 521-71(a) and (b) because a written agreement was statutorily required. In my view, to the extent the ICA indicated "oral" notice would be sufficient in this regard, it was incorrect. Both statutory provisions employ the word "may" in instructing that a landlord or tenant is authorized to terminate a month-to-month rental agreement by advance notice. The term "may" means to "have permission to." Merriam Webster's Collegiate Dictionary 719 (10<sup>th</sup> ed. 1993). Applying the ordinary meaning<sup>14</sup> of the term "may," HRS §§ 571(a) and (b) permit a landlord or a tenant to terminate a rental agreement in the manner prescribed in these statutory sections.

"May," however, does not modify the form in which notice to vacate must be given, i.e., "in writing." On their faces, HRS §§ 521-71(a) and (b) require that if the ending of the lease is to be achieved by way of subsection (a) or (b), notice

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<sup>14</sup> This court has stated that when the verb "may" is used in a statute, the legislature intended that the term used "should carry [its] . . . ordinary meaning[]." Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 149, 931 P.2d 580, 591 (1997) (quoting In re Fasi, 63 Haw. 624, 626-27, 634 P.2d 98, 101 (1981)) (citations omitted).

must be by writing. In light of the plain meaning to be given statutory language, the ICA's conclusion that "the tenant and the landlord, by oral or written agreement, may terminate their month-to-month rental agreement," slip op. at 13 (emphasis added), was wrong insofar as HRS § 521-71(b) mandates written notice of termination.

Adams, then, was correct to the extent he argued a writing is required under HRS §§ 521-71(a) and (b). However, I would add that because there was no privity of estate<sup>15</sup> or privity of contract<sup>16</sup> between Kiehm, the lessor, and Adams, the sublessee, see undisputed finding no. 2, Adams cannot legally raise an objection to the manner in which the month-to-month tenancy between Kiehm and Ayau was ended by them.

VIII.

Contrary to Adams' argument, HRS § 521-71(e) did not prohibit Kiehm and Ayau from ending a tenancy by a mutual agreement that was verbally expressed, as may have been accomplished by Kiehm and Ayau. Under the common law, landlords had the right to terminate a rental agreement without cause. See Sunset Mobile Home Park v. Parsons, 324 N.W.2d 452, 459 (Iowa 1982) (holding that an Iowa statute permitting termination

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<sup>15</sup> "Privity of estate" is "[m]utual or successive relation to the same right in property such as that which exists between lessor and lessee or their successors." Black's Law Dictionary 1199 (6<sup>th</sup> ed. 1990).

<sup>16</sup> "Privity of contract" is "[t]hat connection or relationship which exists between two or more contracting parties." Hunt v. First Ins. Co. of Hawai'i, 82 Hawai'i 363, 367, 922 P.2d 976, 980 (1996) (quoting Black's Law Dictionary 1199 (6<sup>th</sup> ed. 1990)).

without cause, as long as the lease was not cancelled solely for the purpose of making the space available for another tenant, did not abrogate the landlord's common law right to terminate without cause). However, as a general matter the Code sets out methods by which a tenancy may be terminated, see HRS § 521-71, and, hence, has displaced such a right with respect to rental agreements.<sup>17</sup>

To reiterate, termination by written notice via HRS §§ 521-71(a) and (b) is not the only way in which a tenancy may be ended. For HRS § 521-71(e) also indicates, among other methods, that a term may expire by "mutual agreement." There is no requirement in HRS § 521-71(e) that a mutual agreement to end a lease, as contrasted to termination by advance notice, can only be expressed in writing, and, thus, Kiehm and Ayau were not prohibited from orally agreeing to termination of their lease.

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<sup>17</sup> As the ICA in the main indicated, under the common law the general rule was that "[a] subtenant has no greater rights against a landlord than the tenant, and the termination of a primary lease terminates the sublease." Nat'l Shawmut Bank of Boston v. Correale Min. Corp., 140 F. Supp. 180, 184 (D.C. W.Va. 1956) (deciding that termination of the primary lease operated to terminate the sublease where the primary lease was subject to forfeiture and the lessee agreed to surrender to the landlord). Given the landlord's right to terminate without cause at common law, such an action by the landlord would operate to terminate both the lessee and sublessee's lease. As the court in Wehrle v. Landsman, 92 A.2d 525, 528 (N.J. Super. Ct. Law Div. 1952), affirmed, "anything which defeats the tenants' estate will defeat the subtenant's estate."

Moreover, in the event of a breach of the lease, "[w]hile it is true that a tenant cannot voluntarily surrender a lease to the prejudice of a subtenant, '[w]hen an unexpired lease has become subject to forfeiture and the lessee, under pressure from the landlord, surrenders to him possession of the leased premises, the surrender is not voluntary in the sense which would prevent it affecting the rights of a sublessee.'" Nat'l Shawmut Bank of Boston, 140 F. Supp. at 184. However, whether these common law principles have been displaced by specific rights, if any, retained by a sublessee in cases other than a surrender, see discussion infra, may require resort to provisions of the Code that have not been raised here.

IX.

The ICA apparently applied HRS § 521-71(b) and assumed that if Ayau, as a tenant, ended the Kiehm/Ayau agreement with twenty-nine or more days notice to Kiehm, then such "facts present[ed] a termination" as opposed to a "surrender" of the Kiehm/Ayau agreement. Slip op. at 14. But it is not evident from the record and the court made no finding of whether expiration of the Kiehm/Ayau lease came about, for example, by mutual agreement or, as the ICA posited, by Ayau giving notice as prescribed in HRS § 521-71(b). Indeed, the court determined in finding no. 7 that "[Kiehm] and Ayau's month to month tenancy was terminated by oral agreement effective March 31, 2002." (Emphasis added.)

Under one reading, this finding implies there was mutual agreement as to the end date of the lease rather than written notice from Ayau to Kiehm to end the lease under HRS § 521-71(b) as the ICA proposed. The distinction may be significant because, contrary to the ICA's statement in its remand order, under HRS § 521-71(e) no requirement of advance notice attaches to the ending of a lease by "mutual agreement." Thus, the ICA also erred in requiring findings be made on remand only with respect to HRS § 521-71(b), in the absence of foundational facts establishing that that subsection applied.

I therefore would instruct the court to determine upon remand the method by which the Kiehm/Ayau agreement was terminated under HRS § 521-71(e). For, as HRS § 521-71(e)

instructs, "expir[ation]" of the lease may take place by various means, including by mutual agreement. If advance notice by Ayau to Kiehm as allowed by HRS § 521-71(b) was not the method employed to end the Kiehm/Ayau lease, then the determination by the court on remand of whether twenty-nine days had elapsed before the end of the lease, as the ICA required, would not be relevant to a disposition of the case.

X.

Assuming that Ayau failed to give forty-five days notice to Adams to vacate under the sublease, the issue for purposes of determining whether there was a surrender is when the Kiehm/Ayau agreement began. The ICA referred to the legal dictionary meaning of "surrender," which necessitates a determination of whether the tenant "voluntarily g[a]ve up possession of the premises prior to the full term of the lease and the landlord accepted . . . with [the] intent that the lease be terminated."<sup>18</sup> Slip op. at 10-11. Because the Code is silent as to the sublessee's status in the situation where the lessee gives up possession before the term of the lease ends and the lessor accepts, the Code does not displace the common law as to a "surrender."

Under the common law, "[t]he general rule is that the rights of a subtenant cannot be affected by a voluntary surrender

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<sup>18</sup> The term "surrender" is employed in HRS § 521-74.5 relating to a landlord's recovery of a dwelling unit but does not otherwise appear to be discussed in the Code.

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of the master lease." Northridge Hosp. Found. v. Pic 'N' Save No. 9 Inc., 187 Cal. App. 3d 1088, 1094-95 (Cal. App. 2d Dist. 1986). Similarly, in Duane Reade v. I.G. Second Generation Partners, L.P., 280 A.D.2d 410, 411 (N.Y.A.D. 2001), that court recognized "the undisputed principle that a sublessor's voluntary surrender of the main lease does not impair the sublessee's rights but transforms the sublessee into the landlord's immediate tenant."

Hence, "[i]t seems to be universally held by the courts that the rights of [a] subtenant will not be destroyed or impaired by a surrender of the main lease." Byrd v. Peterson, 186 P.2d 955, 958 (Ariz. 1947). For, "[i]t would be unconscionable where the express terms of a sublease have not been violated to allow the landlord and lessee to terminate the original lease by their mutual consent over the protest of the subtenant." Id. See Goldberg v. Tri-States Theater Corp., 126 F.2d 26, 32 (8th Cir. 1942) (holding that the surrender of a lease by a lessee to his or her lessor, after a sublease, will not be permitted to operate so as to defeat the estate of the sublessee).

XI.

But the court made no finding as to when a monthly period commenced under the Kiehm/Ayau month-to-month tenancy. In accordance with the common law definition of "surrender," the beginning date of a monthly term must be established to ascertain whether Ayau as "the tenant voluntarily [gave] up possession of

the premises prior to the full term of the lease." Slip op. at 10 (emphasis added). Whether the Kiehm/Ayau lease was terminated by Ayau's advance notice to Kiehm as the ICA assumed, or was ended by mutual agreement,<sup>19</sup> it should be determined whether the undisputed end date of March 31 coincided with the end of a monthly term as designated under the Kiehm/Ayau month-to-month tenancy. If it did, then the Kiehm/Ayau lease must be deemed to have expired at the end of the term. In that event, Ayau would not have given up possession before the term of the lease had ended, and, hence, no surrender would have occurred. If a surrender did not occur, Adams retained no right to remain on the premises.

On the other hand, if the date upon which the agreement to end the Kiehm/Ayau lease did not coincide with the end of a monthly term as designated under the tenancy, then Ayau would have relinquished the premises prior to a full term of the lease ending. In such a case, a "surrender" under the common law would have occurred and Adams would have recourse under the common law. In the absence of a finding as to the date of the month at which the monthly term began under the Kiehm/Ayau month-to-month

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<sup>19</sup> Because a mutual agreement to end a lease before the term ends is in effect a surrender, the rights of the sublessee are the same as when there is a surrender. See Arrington v. Loveless, 486 S.W.2d 604, 606 (Tex. Civ. App. 1972) ("A surrender of a lease, as that term is used in the law of landlord and tenants, is the yielding up by the tenant of the leasehold estate to the landlord so that the leasehold estate comes to an end by the mutual agreement of the landlord and tenant." (Emphasis added.)); Powell v. Jones, 98 N.E. 646, 647 (Ind. App. 1912) ("To relieve [the lessee] from liability for rent during the term of the lease, it must appear that there was a surrender of said lease, a mutual agreement between the parties that it should cease to be binding upon them." (Emphases added.)).

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tenancy, it cannot be established whether a surrender took place under these facts.<sup>20</sup>

XII.

Therefore, I would vacate the August 21, 2002 judgment and August 29, 2002 writ of ejectment and remand the case with instructions to the court to enter appropriate findings and conclusions, determining (1) whether Ayau gave sufficient notice pursuant to HRS § 521-71(a) to Adams to terminate the Ayau/Adams sublease before the end of the Kiehm/Ayau lease and if not, (2) the method by which the end of the Kiehm/Ayau term was effected pursuant to HRS § 521-71(e), (3) whether the Code requirements of the particular mode of expiration were satisfied, (4) the date of the month on which the monthly term under the Kiehm/Ayau term began, (5) whether the undisputed March 31, 2002 end date of the Kiehm/Ayau tenancy coincided with the end of a monthly term under the said tenancy or not, and (6) all claims and defenses as may be affected by such findings and conclusions.



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<sup>20</sup> As to the conclusions challenged, I would (1) affirm conclusion no. 1 and no. 3 as correct on their faces and (2) vacate conclusions nos. 5, 6, 7, 9, 10, 11, 12, 13, and 14 as dependent upon the matters to be decided on remand. As to finding no. 11, I would affirm, inasmuch as there was no evidence of an express agreement made between Kiehm and Adams. As to finding no. 8, I believe the phrase "at that time" is ambiguous and on remand must be clarified by the court. See Forbes v. Hawaii Culinary Corp., 85 Hawai'i 501, 503, 946 P.2d 609, 611 (remanding and instructing the court to clarify its findings). Finally, because HRS chapter 666 applies only if the Code is silent with respect to any "right, remedy and obligation," HRS § 521-3, it is not evident whether HRS chapter 666 would apply pending the outcome of the case on remand.