

## A CONCEPTUAL STUDY ON LANDLORD AND TENANT LAW IN PENINSULAR MALAYSIA: A FOCUS ON PRIVATE RESIDENTIAL TENANCY

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### Abstract

Unlike other jurisdictions such as the UK, Australia, New Zealand and Canada, Malaysia does not have a legislation that deals specifically with landlords and tenants. A tenancy agreement can be concluded either orally or in writing. As such, the rights and obligations of both parties depend on the terms and conditions of the contract entered by them. The problem would arise if both landlord and tenant are not equal in footing in terms of bargaining power. Hence, their rights either as a landlord or a tenant may not be well-protected. There is no specific law dealing with rent control and other related matters that lead to tenancy disputes. These include issues on security and rental deposit, quality and safety of the rented house, termination, eviction, and a mechanism for dispute settlement. While provisions on tenancies and leases can be found in the National Land Code 1965, Contracts Act 1950, Distress Act 1951, and Specific Relief Act 1950, the existing legislation remains rather vague and deals with the issue in piecemeal. The question thus arises whether a comprehensive law in a single statute is really needed to regulate landlords and tenants in Peninsular Malaysia. Adopting the qualitative research methodology, this conceptual paper focuses on the relationship between a landlord and a tenant in a private residential tenancy. The objectives of this paper are to identify the key legal issues in a landlord and tenant relationship in this sector and to examine the adequacy of the existing legal framework. The reported cases on landlord and tenant may become evidence as to the need for a specific landlord and tenant law in Peninsular Malaysia, in particular, for private residential tenancy. The best practices from Scotland are taken as a reference, whenever necessary. The study found that based on laws and practices in these two jurisdictions, it is very significant to have a specific law to regulate the relationship between landlord and tenant in private residential tenancy in order to protect the interest of all parties involved.

**Keywords:** *Landlord and tenant, housing, contract, common law, private residential tenancy.*

### 1.0 INTRODUCTION

While other commonwealth countries like New Zealand<sup>1</sup>, Australia<sup>2</sup> and Canada have already introduced a distinct statutory framework to regulate the leases and tenancies that involve landlord-tenant relationship, Peninsular

Malaysia<sup>3</sup> is still purely governed by the law of contract and common law in the area. There are two types of residential tenancy, namely residential tenancy in the public and private sector.

<sup>1</sup> For instance Residential Tenancies Act 1986.

<sup>2</sup> For instance; Residential Tenancies Act 1987, (NSW), Residential Tenancies Act 1997, (Victoria), Residential Tenancies Act 1994 (Queensland), Residential Tenancies Act 1995 (South Australia), Residential Tenancies Act 1987 (Western Australia), Residential Tenancies Act 1997 (Tasmania).

<sup>3</sup> Discussions in this paper are based on the position in Peninsular Malaysia only even though the position of landlord and tenant in the other two Borneo States, Sabah and Sarawak, are similar. Thus, any recommendations with respect to Peninsular Malaysia may be applicable in Sabah and Sarawak too but it shall involve a different regulatory and administrative framework.

Residential tenancy in the public sector refers to a residential tenancy scheme offered by government agencies. Those agencies may include the Ministry of Housing and Local Government (“MHLG”) where this is done through Projek Perumahan Rakyat Disewa Dasar Baru (Public Housing Project (Rent) New Policy, Projek Perumahan Rakyat Bersepadu (Public Integrated Housing Project) and residential tenancy that is offered by local authorities like City Hall of Kuala Lumpur and City Hall of Ipoh.<sup>4</sup> Public residential tenancy may also be offered by the Prime Minister Department through government quarters scheme. There is a standard form of tenancy agreement for public residential tenancy with a very minimal rental fee. All the terms and conditions of the tenancy agreement in this sector are pre-determined. This public residential tenancy is only available to certain qualified people who fulfill certain criteria set up by the said government agencies.

Private residential tenancy is any tenancy that is created between an individual landlord and a tenant. As there is no legal restriction on house purchase, except for low-cost houses<sup>5</sup> or purchase by a foreign citizen<sup>6</sup>, there are many individuals who purchase houses for investment who then become landlords in private residential tenancy. Unlike in the United Kingdom, it is not really common in Malaysia that cooperative societies or associations purchase houses and rent them out to their members or others as a source of income for the organisation. Thus, residential tenancy landlords in Malaysia may not include cooperative societies or associations.

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<sup>4</sup> A.Nor Aini Salleh et.al, (2011). Tenant Satisfaction in Public Housing and its Relationship with Rent Arrears: Majlis Bandaraya Ipoh, Perak, Malaysia. *International Journal of Trade, Economics and Finance* Volume 2, Number 1, February.

<sup>5</sup> Azlinor Sufian. (2012). Equitable Distribution of Low-Cost Houses in Malaysia: Constraints and Challenges. *International Journal of Economics and Management*. Vol. 5 Issue No. 1, June, pp.

<sup>6</sup>Awang, Adibah. (1993) .The Law and Policies with Regard to Foreign Purchase of Land in the Country with Special Reference to Johor. *The Surveyor* , 28 (2).

Private residential tenancy can be a formal or informal tenancy. Formal private residential tenancy is a tenancy that is endorsed on the title according to the requirement of section 213 of the National Land Code 1965. It is also known as Tenancy Exempt from Registration (“TER”) in which the law exempts the tenancy from being registered but it may be endorsed on the title. The law does not require the tenancy agreement to be made as a written contract, rather it may be just an oral agreement. Nevertheless, if the parties intend to endorse the tenancy, the agreement must be in a written form since the supporting document that must be submitted together with an application for tenancy endorsement is the tenancy agreement itself.

Informal residential tenancy is a tenancy that is created orally and this may be a common practice for residential tenancy in suburb areas. If the term or duration of the oral tenancy is not clearly stipulated, then, the issue of tenancy coupled with equity will be relevant.

This paper focuses on the private residential tenancy where if compared to the public residential tenancy, the former is not controlled and monitored by any agency. It is based on the freedom of contract where there could be possibility of imbalanced bargaining power between a landlord and a tenant and there is no special redressing mechanism to resolve the grievances that may arise due to a contractual relationship between them. In this context, therefore, the development of laws and practices in Scotland may be referred to as a benchmark for private residential tenancy in Malaysia.

## 2.0 RESEARCH BACKGROUND AND ISSUES

In Malaysia, the issues on residential tenancy fall neither within the ambit of housing law nor consumer law<sup>7</sup>. Instead, it is treated as part of contract law because it is well-understood that the contract between a landlord and a tenant will create rights and obligations between these parties. Consequently, if there is any dispute arising from a contractual relationship, a civil suit may be commenced in the ordinary civil court where they can claim for damages. However, the processes and procedures for a civil suit before the ordinary court involve time and money of the parties, either the landlord or the tenant. Similarly, since the contract is created based on the principle of freedom of contract, it may create a problem when the parties are not equal in bargaining power. For instance, in negotiating certain terms and conditions of a tenancy agreement, a tenant who is desperately in need of renting an accommodation, may have to agree on a condition imposed by a landlord even if such condition is unreasonable. Albeit the said contract may be challenged later, through a civil suit on the ground of being unconscionable, it may involve court procedure.

Similarly, a landlord also has a problem of evicting a tenant who refuses to vacate the premise after the expiry period of tenancy. Even though a landlord may seek an injunction from the court<sup>8</sup> and claims for trespassing against a tenant, the order may not easily be given as it may become a contentious matter. Consequently, the procedure may take a longer period to complete. Alternatively, a landlord may seek an order from the court to evict a tenant and to repossess his property.<sup>9</sup> But, this

must be done with a procedure, otherwise, a landlord's action will become illegal. For instance, in the case of *Dr. Harjit Singh v. Suhaimi bin Samat & Anor*,<sup>10</sup> the court held that the act of the landlord locking the tenant out of the premise is illegal. This is because the landlord has failed to comply with the requirement of section 7 of Specific Relief Act 1950 which provides that it is mandatory for a landlord to obtain a court order before repossessing the property from a tenant.

A landlord also may recover the unpaid rent (if there is any) and this is to be done by way of writ of distress where the movable properties of the tenant shall be seized and sold to cover the rental arrears.<sup>11</sup> However, it is quite unfortunate that the distress action does not automatically terminate the tenancy contract and, thus, a landlord may have a problem when a tenant defaults again. In other words, a repeated action for writ of distress may have to be taken. The tenant may contest the action and this may cause a further incurrence of cost, lengthy procedure and, consequently, is time-consuming. These are among the grievances facing a landlord when a private residential tenancy is purely governed by the Contract Act 1957. In absence of a specific court or a tribunal to resolve landlord and tenant disputes, the complaints have to be filed before an ordinary civil court, in particular, a session court.

It is quite common that those who have a tenancy problem, either as a tenant or as a landlord, must refer or lodge the complaint to the consumer association such as the Federation of Malaysian Consumer Association (commonly known as FOMCA) and the Consumers Association of Penang (commonly

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<sup>7</sup> In Australia, the law on residential tenancy falls within the ambit of consumer law and, as such, provisions on dispute settlement become an important component in the statutes regulating the residential tenancy.

<sup>8</sup> Order 89 of Rules of High Court 1980. .

<sup>9</sup> Section 4 and 7 Specific Relief Act 1950. See S. 7(2) of the 1950 Act imposes a pre-condition of

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obtaining a court order before the defendant can recover possession of the property.

<sup>10</sup> [1995] 1 LNS 62.

<sup>11</sup> Section 5 of Distress Act 1951.

known as CAP), before pursuing the case before a court. Thus, from this perspective, one may consider that issues on landlord and tenant come under the purview of consumer protection area. Nonetheless, in terms of legal protection in Malaysia, landlord and tenant dispute may not be brought before the Consumer Tribunal established under the Consumer Protection Act 1999 because it is clearly stated in the Act that it is not applicable to matters related to land or interest in land where renting of housing is related to interest in land.<sup>12</sup> Again, a landlord and tenant dispute has to be brought before an ordinary court and no official alternate dispute resolution mechanism is available for them.

All tenancy agreements should contain all elements that are necessary to exist in formatting a valid contract as governed by the Malaysian Contract Act 1950. The agreement normally contains clauses on security deposit, rent, repairs, renewal and termination. Under the Evidence Act 1950, a tenant is estopped from denying the proprietorship of a landlord irrespective of whether such a tenancy is created verbally or written.<sup>13</sup> However, since the agreement is not uniform, the terms and conditions on these clauses vary. It is quite common also that a tenancy is created through an oral contract only. In this situation, the rights and obligations of a landlord and a tenant are governed by the common law duties. In this respect, a tenancy is governed by the principle of equity known as “Three E’s Principle”, namely expenses, encouragement, and expectation.

Sometimes, a tenant can be in possession of a land or a premise based on the encouragement of a landlord. The tenant, relying on the encouragement, spends his money to improve the land with an expectation of being able to remain on the land arising from that encouragement. If in such a case, the landlord serves a notice to quit to the tenant, the latter may, under the common law, plead the doctrine of tenancy coupled with equity and seek to set aside the notice. From a tenant’s perspective,

this principle would be the best argument for him. Consequently, a landlord will not be in an easy position to evict or to claim vacant possession from a tenant irrespective of whether or not he (landlord) is the registered proprietor of the tenanted house. For instance, in *Lee Lian Law v Chew In Hai & 2 Ors*,<sup>14</sup> the landlord was caught with the principle of equity where it was held by the court that it is now trite law that although the notice to quit is clear and unambiguous in its terms, it may not operate per se to terminate the appellant’s tenancy, and that if the appellant could prove to the satisfaction of the Court that he had a tenancy coupled with equity, then the Court would come to his aid.<sup>15</sup>

Earlier than this case, in *Mok Deng Chee v Yap See Hoi & Ors*<sup>16</sup>, a dispute arose as to the demolition by the appellant/tenant of a house built by a previous ground tenant of the previous land owner. The house was sold to the appellant’s father who had paid rent to the previous land owner and the appellant had continued paying rent to the respondent in this case. When the appellant demolished the original house and put up a new one, the respondent objected by sending a letter through the respondent’s solicitor asking the appellant to demolish the new house. After negotiations between the parties, it was agreed that the appellant would pay \$1500 as “tea money” to the respondent and that a tenancy agreement would be drawn up. The appellant refused to sign the agreement and the respondent served a notice to quit on the appellant. The Federal Court held that the original house had been built with the encouragement and approval of the previous landowner and that the expenditure involved in the construction was raised in favour of the tenant.

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<sup>12</sup> Section 2(1)(d) of Consumer Protection Act 1999.

<sup>13</sup> Section 116 of Evidence Act 1950.

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<sup>14</sup> [1994] 2 CLJ 525.

<sup>15</sup> The acceptance of equity also is found in the case of *Low Seng v IKIP Education Sdn Bhd* [2010] 7 MLJ 232.

<sup>16</sup> [1981] 2 MLJ 321.

Later, in *Sen Loon Heng v Zabon@Zaitun bt Sulaiman*<sup>17</sup>, the appellants were purchasers and descendants of those who were renting a portion of the respondent's land. The respondent had allowed the appellants to build four houses on the land. The appellants had continued paying monthly rental to the respondent and no written agreement existed as to the tenancy. Through a written notice, the respondent had requested the appellants to deliver vacant possession of the land to its original position. The Federal Court in this case followed the decision in *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, that a tenancy coupled with equity cannot be terminated by a bare notice to quit.

The issues on private residential tenancy above are discussed from the land law or property law perspective. In contrast, in Scotland and most of the text books on landlord and tenant in UK, the rights and obligations of a landlord and a tenant are dealt with under the purview of housing law. The issues on landlord and tenant in Scotland are basically confined to rent, eviction, repairs, and succession. Each and every issue is dealt with under the Housing Act 1988, that has been amended from time to time, as well as other related statutes. One of the examples is that the right to have a fair rent is provided by Rent (Scotland) Act 1984. Another example is the detailed prescriptions on the duties of a landlord whereby he provides a habitable and tenantable property and he is under a duty to give and maintain the subject's lease in good conditions throughout the tenancy period.<sup>18</sup> Similarly, the duties of a tenant are also properly put in the statute such as not to make a false or fraudulent representation in order to obtain a tenancy. If this occurs, the tenancy may be reduced.<sup>19</sup> These duties of landlord and tenant are actually the duties that are imported from the common law but it has been incorporated into the statutory provision.

Apart from a clear stipulation of rights and obligations, the statute also clearly prohibits any

contract that does not conform to the provisions of the statute. The statute also states that any tenancy agreement which purports to shift the responsibility from a landlord to a tenant in relation to repairing standard is prohibited.<sup>20</sup> If the agreement is to have a clause that the responsibility for repairing standard is to be shifted to the tenant, an express consent of the sheriff must be obtained.<sup>21</sup>

It is therefore observed that, in Scotland, private residential tenancy is dealt with under the context of housing law. It is quite significant to have this kind of changes in the Malaysian legal landscape as the recognition of law on landlord and tenant as part of housing law may give a different impact on the manner it is treated by the government. This is because housing is well accepted to be part of the basic needs for all human beings and, thus, the government, based on either the political agenda or not, will have to make a full effort in supporting programmes that provide for the establishment or development of housing or any form of mechanism to provide accommodation, which may include creation of tenancy.

It is acknowledged that there are sets of statutes that relate to housing and provision by the Government of Malaysia for the programmes that involve settlement (and housing) and financial assistance to acquire housing that have been introduced in Peninsular Malaysia since its independence. Those acts are Land Development Act 1956 (revised - 1991), Federal Housing Act 1965 (Revised 1989), Control of Rent Act 1966 (Revised 1988) Repealed by Control of Rent (Repeal) Act 1997, Housing Trust Act 1960 (Revised 1970), Land (Group Settlement Areas) Act 1960 (Revised 1994), Housing Development (Control and

Licensing) Act 1966, Housing Loans Fund Act 1971 (Repealed by the Housing Trust (Dissolution) Act 1976, Housing Loans Fund Act 1971 (Repealed by the Housing Trust (Dissolution) Act 1976, Strata Title

<sup>17</sup> [1996] 1 CLJ 775.

<sup>18</sup> Section 14 HAS 2006.

<sup>19</sup> In public sector housing, in such a situation a property may be repossess.

<sup>20</sup> Section 17 Housing (Scotland) Act 2006.

<sup>21</sup> Section 18 Housing (Scotland) Act 2006.

Act 1986, Workers' Minimum Standard of Housing and Amenities Act 1990, Building and Common Properties (Management and Maintenance) 2007 and Perumahan Rakyat 1Malaysia Act 2011. These statutes are *inter alia* relevant for the implementation of government policies towards providing accommodation to its population either through participation of the government agencies or private sector. However, none of these statutes relate to the residential tenancy in general and private residential tenancy in particular.

In Scotland, housing law refers to matters related to ownership of housing or occupancy by way of tenancy. It encompasses a very wide scope of law in which it is based on the recognition of rights to housing as part of human rights through the enforcement of Human Right Act 1998. It is observed that housing policy is changed through statutory intervention. That is why there are various statutes that have been introduced from time to time in Scotland.<sup>22</sup>

Those statutes *inter alia* are relevant to planning, building control, health and welfare law that are under the jurisdiction of local authorities. Among housing and residential tenancy related statutes that are currently enforced in Scotland are Housing (Scotland) Act 1988, 2001, 2004, 2006, 2010, Homelessness (Scotland) Act 2003, Anti Social Behaviour (Scotland) Act 2004 and Tenants' Rights Etc (Scotland) Act 1980. The tenancy in housing is further divided into two, namely public and private rented housing, whereby landlord and tenant relationship in these two sectors is regulated by various statutes and regulations. For instance, Rent (Scotland) Act 1984, Housing and Planning Act 1986, Private Rented Housing Panel Regulations 2010, Housing Act (Scotland) 2006 and Landlord and Tenant Act, Private Rented Housing (Scotland) Act 2011 cater for this role.

In summary, compared to Malaysia, the law on landlord and tenant or private residential tenancy in Scotland is set up based on different footings in which it is based on the housing law whereby

the rights to housing are recognised through the enforcement of Human Right Act 1996. On the other hand, the law on residential tenancy in Malaysia is treated as a private relationship between landlord and tenant and, thus, is purely based on contract or common law.

The current trend in Peninsular Malaysia shows that there is no indication that the private residential tenancy is to be regulated even with the introduction of the latest statute by the Malaysian Parliament, namely the Perumahan Rakyat 1Malaysia Act 2011 (hereinafter referred to as PR1MA). This newly enacted act has established PR1MA Corporation that is expected to provide a mechanism for providing housing to the middle-income groups either for sale or rent.<sup>23</sup> It is observed that the housing law in Peninsular Malaysia is developing but it still does not put any effort to regulate the private residential tenancy.

### 3.0 METHODOLOGY

This article is written based on the analysis of the relevant statutory provisions, decided cases, and commentaries on the law and practices in Scotland and New South Wales, Australia. The approach of research is purely qualitative, involving conceptual discussions and legal analysis.

#### 3.1 Law Governing Private Residential Tenancy in Peninsular Malaysia

As discussed earlier, in Peninsular Malaysia, there is no specific law governing the landlord and tenant either for the public or private sector. The law on residential tenancy, either in the public or private sector, is scattered in various statutes, namely the National Land Code 1965 (hereinafter referred to as NLC) and Contracts Act 1950. The earliest law on landlord and tenant or matters related to rent in Peninsular

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<sup>22</sup> Among those statutes are Housing Act (Scotland) that is amended from time to time to implement the changes of policy on housing.

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<sup>23</sup> See Azlinor, Housing Development and PR1MA: Myth or Reality, *International Conference on Sustainable and Built Environment*, Sri Iskandar Perak, 16<sup>th</sup>-17<sup>th</sup> April 2012.

Malaysia is Rent Control Act 1966. It is an act inherited from England by which the rentals of all buildings that were built prior to the Second World War were controlled. This was to protect a tenant from being evicted. Nevertheless, very often, the Rent Control Act has been discussed in the context of urban conservation and heritage rather than from the perspective of rental or landlord and tenant.<sup>24</sup> The act was repealed and abolished in 2000.

A tenancy may be created either by a written document or by words of mouth for a duration of three years or less.<sup>25</sup> A tenancy with a period of more than three years is known as a lease and it has to be registered in order to get a recognized protection under the NLC.<sup>26</sup> These principles are supported by the courts' decisions in *Margaret Chua v Ho Swee Kiew & Ors*<sup>27</sup>, *Wan Salimah bte Wan Jaafar v Mahmood bin Omar*<sup>28</sup>, and *Yong Tong Hong v Siew Soon Wah & Ors*<sup>29</sup>. On the other hand, there is no requirement for a tenancy to be registered and it is known as tenancy exempt from registration. In order for a tenancy, to have a right that is recognized by the NLC, an endorsement must be made on the issue document of title.<sup>30</sup> For instance, in *Than Kok Leong v Low Kim Hai*<sup>31</sup>, the court had to consider whether or not a tenancy exempt from registration that had not been endorsed on the register document of title was binding on a subsequent purchaser. The plaintiff purchased a premise upon which the defendant was a tenant of the previous proprietor. One-and-a-half years later, the plaintiff gave the defendant a notice to quit the premise. The defendant refused to vacate the

house and contended that his tenancy was a lease pursuant to an oral agreement made between him and the former landlord who granted him an oral lease for three years with an option to renew for another three years to be exercised by the tenant. The court considered section 213(3) of the National Land Code and held that the oral agreement between the defendant and the previous proprietor came under section 213 of the NLC and was a tenancy exempt from registration. It was also held that the tenancy was not binding on the plaintiff since there was no endorsement on the register document of title. Furthermore, under section 228(2) of the NLC, an option for renewal conferred by an oral tenancy is not enforceable.

Failure to register a lease or to make endorsement of a tenancy will leave the tenant to get protection under the law of contract only.<sup>32</sup> Similarly, a landlord may resort to the law of contract if a tenant failed to discharge his responsibilities to pay the rent.

In order to form a tenancy contract or a lease contract, all elements of a valid contract must be fulfilled, particularly an offer or a proposal.<sup>33</sup> The proposal must be made to a specific person. Alternatively, the proposal may also be addressed to the public acceptance.<sup>34</sup> A contract will exist when the offer is accepted by the other party. Section 2(d) of the Contracts states that when the person to whom a proposal is made signifies his assent thereto, the proposal is said to be accepted; a proposal, when accepted becomes a promise. Further, there must an intention.<sup>35</sup> The contract is valid if the parties in the agreement have the intention to create legal relations. In addition, the Contracts Act 1950 provides that an

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<sup>24</sup> See for e.g. No'aini Yusuf et al. (2007). Urban Conservation as a Development Strategy to Revitalize Real Estate Market: An Analysis of Property Transactions in Georgetown Penang. *Journal of Construction in Developing Countries*, 12(2):....

<sup>25</sup> Section 223 of the National Land Code 1965.

<sup>26</sup> Section 213(2)(a), Section 221 of the National Land Code 1965.

<sup>27</sup> (1961) MLJ 173.

<sup>28</sup> [1998] 5 MLJ 162.

<sup>29</sup> [1971] 2 MLJ 105.

<sup>30</sup> Section 316 of the NLC.

<sup>31</sup> [1983] 1 MLJ 187.

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<sup>32</sup> *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719

<sup>33</sup> Section 2(a) Contracts Act 1950

<sup>34</sup> Section 2(d) Contracts Act 1950

<sup>35</sup> Section 17(c) of Contracts Act 1950.

agreement made without consideration is void.<sup>36</sup> In order to constitute a valid contract, the parties in the contract should have the capacity to enter into a contract. Capacity here is referred to as age and mental state of a person at the time of creation of a contract. The Contract Act 1950 states that everybody is competent to contract who is of the age of majority according to the law to which he is subject, and who is of unsound mind, and is not disqualified from contracting by any law to which he is subject<sup>37</sup>. The Contracts Act 1950 provides that all agreements are contracts if they are made by free consent of parties who are competent to enter into a contract.<sup>38</sup> As far as private residential tenancy is concerned, it is very common that a tenancy or lease is created without having any official endorsement or registration. In other words, it is based on mutual trust and consent. However, as discussed earlier, a non-endorsement or a non-registration of tenancy and lease, respectively, will not bar a landlord or tenant from exercising their rights under the common law principle.

As there is no statutory control on the law on landlord and tenant or private residential tenancy, a landlord may put whatever terms in the tenancy agreement that may protect his interest. It is quite common that there are two types of deposit that a landlord may require a tenant to pay, namely security deposit and earnest deposit. Security deposit is normally a two or three month's rental and a deposit for utility for ½ month rental. This deposit shall be refunded at the end of tenancy period without interest and less any liabilities incurred by the tenant upon termination of tenancy. However, it is quite common that a tenant would normally consume the said deposit as the last two or three month's rental. This practice defeats the purpose

of putting a security deposit in a tenancy contract because a landlord has a right to hold the said deposit if there is any unpaid utility bills or to remedy any defects on the demised premise caused by a tenant. Another type of deposit is earnest deposit. This deposit is paid by a tenant to secure the said property whereby this is normally considered by a landlord as the first month's rental in advance.

### 3.2 Private Residential Tenancy in Scotland

As mentioned earlier, Scotland has several sets of statute to govern the relationship between a landlord and a tenant. As such, there are a few aspects of practices in Scotland that may be referred to.

#### a. Private Rented Housing Panel ("PRHP")

A tenant has a right to apply to the PRHP for a determination that the landlord has failed to meet pertaining to the repairing duty.<sup>39</sup> However, a tenant must first notify a landlord that works are required to be carried out. This is a special provision that is only applicable for private rented housing. The statute specifically provides the procedure<sup>40</sup> for a tenant to channel his complaint to the PRHP. The PRHP has a power to make an enquiry to determine the complaint lodged by a tenant while also requiring the evidence to support the claim. The PRHP will make a decision and provides reasons for the decision. If a tenant fails to comply with the decision, then according to the repairing Standard Enforcement Order under s.2492) ("RSEO"), order may be issued against the landlord. If a landlord fails to comply, the committee may impose a rent relief order<sup>41</sup> in circumstances where the landlord refuses to repair and fails

<sup>36</sup> Section 26 of Contracts Act 1950.

<sup>37</sup> Section 11 of Contracts Act 1950.

<sup>38</sup> Section 10(1) of the Contracts Act 1950. Discussion on the application of these principles is made in the case of *Macon Works Trading Sdn Bhd v Phang Hon Chin* [1976] 2 MLJ 177, *TAC Construction & Trading v Bennes Engineering Bhd* [1999] 2 CLJ 117, *Ayer Hitam Tin Dredging Malaysia Sdn Bhd v YC Chin Enterprise Sdn Bhd* [1994] 2 MLJ 754.

<sup>39</sup> Schedule 2 Housing (Scotland) Act 2006.

<sup>40</sup> This procedure is contained in the Private Rented Housing Panel (Application and Determination) (Scotland) Regulations 2007. It came into force on 31<sup>st</sup> March 2010.

<sup>41</sup> Section 27 of Housing (Scotland) Act 2006.



to repair timeously. As far as nuisance is concerned, a tenant has an option to use Environmental Protection Act 1990 rather than PRHP mechanism to secure repairs to a rented house.<sup>42</sup>

*b. Private Landlord Registration*

The requirement for registration of landlord is provided in Part 8 of the Antisocial Behaviour etc (Scotland) Act 2004. It came into force on 30<sup>th</sup> April 2006. It provides for a three-year period of registration. There are two types of registration; (1) a person owning a property which he wishes to let out by providing detailed specifications of landlord and properties and, (2) a person wishing to rent out his property in future (through “buy to let” mortgage). The local authority is entrusted to prepare and maintain a register of landlords so that it is available for public inspection. Anyone who is interested in the status of registration may apply for details of a particular house, owner, and agent.<sup>43</sup> The registration is not required in the case of renting out to family members. There are special exemptions from the registration that are available. Those exempted are: (i) care home service; (ii) school care accommodation; (iii) independent health care service accommodation; (iv) secure accommodation service; (v) holiday lets where the house is main the residence of the landlord; (vi) occupancy under a life rent; (vii) transitory ownership; and (viii) property used for religious purpose.

What is interesting in the requirement of registration is that it will keep the proper records of the landlord, property and name and address of agent (if any). The purpose of registration is to ensure only “fit and proper person” to act as a private sector landlord.<sup>44</sup> The local authority will regard several criteria to be fit and proper person: where it has to consider whether the applicant or agent has omitted any offence involving fraud or other dishonesty or violence or drugs; whether an applicant has contravened

any provision of the law relating to housing law or landlord and tenant law; whether an applicant or his agent has committed any act in relation to anti-social behavior notices;<sup>45</sup> whether an applicant has contravened the letting code provided for in the Anti social Behaviour etc (Scotland) Act 2004;<sup>46</sup> whether or not the landlord is adopting good practices or seeking to exploit his position by referring to the terms of any agreement between the landlord and their agent; whether the landlord has practiced unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability in, or in connection with the carrying on any business.<sup>47</sup>

The local authority will gather the information on the applicant from the local newspaper reports in order to find out whether the applicant or agent is a fit or proper person. The registration may be removed from the register if the landlord is no longer a fit and proper person and notification shall be served on the landlord and agent as the case may be. The landlord concerned may make an appeal against non-registration or removal from registration. It is an offence to rent out an accommodation where the landlord is not registered by the local authority.<sup>48</sup> The rent penalty notice may be served on the landlord that no rent shall be payable until the landlord is registered.

The landlord is responsible in respect of behavior of his tenant.<sup>49</sup> Through the ASB Notice, it may be served on the landlords whose tenants have been guilty of anti-social behavior. If the sheriff is satisfied that the landlord has not taken any timeous action pertaining to the matter specified in ASB Notice, the

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<sup>42</sup> Robson, p. 130.

<sup>43</sup> Section 88A of Housing (Scotland) Act 2006.

<sup>44</sup> Section 84(3) of Antisocial Behaviour etc (Scotland) Act 2004.

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<sup>45</sup> Section 87 of Antisocial Behaviour etc (Scotland) Act 2004.

<sup>46</sup> Section 92A of Antisocial Behaviour etc (Scotland) Act 2004.

<sup>47</sup> Section 85(2) of Antisocial Behaviour etc (Scotland) Act 2004.

<sup>48</sup> Section 93 Ibid.

<sup>49</sup> Part 7 ABSA

sheriff may issue an order that rental income is to be suspended and the landlord has committed an offence where the on summary conviction may be liable for certain penalty.

*c. Private rented housing committee (previously Rent Assessment Committee)*

This committee is specifically to determine the rent which it considers a house would let for in the open market by a willing landlord once the contractual tenancy has been terminated.<sup>50</sup>

However, there is no option for a tenant to have the rent considered during the term of the tenancy. There are certain matters to be ignored by the committee in determining the market rent of a house. That is, to ignore any improvements made by a tenant and the effect of any ill-treatment by a tenant in breach of the terms of the tenancy agreement.<sup>51</sup> The committee has a power to visit a property to see the condition of the property and to ascertain what works, if any, a tenant has carried out. Adjustments from the existing market rents will take into account into deductions to reflect matters integral to a property, such as an isolated location with no local amenities, schools or public transport as well as inadequate rural water supply and waste disposal system. The rent may be increased where the committee may consider improvements made on the house like rewiring. The Committee may also rely on their own investigation into rental levels in the area.

#### **4.0 ANALYSIS AND FINDINGS**

There are many grievances that are facing both landlord and tenant. A tenant is exposed to exploitation by a landlord and is not assured of terms of security of occupancy. Similarly, a landlord is deprived of his automatic right to recover rental arrears from a defaulting tenant. There are stringent procedures that have to be complied with. All those complaints from either a tenant or landlord have to be brought before an ordinary civil court since there is no special court or tribunal or any alternate dispute redressing mechanism specifically assigned to

the matters relating to landlord and tenant. Comparatively, issues on private residential tenancy are well-administered either by way of legal or administrative mechanism in Scotland in which a lesson must be taken from this jurisdiction. However, without a prejudice to law in Scotland, the private residential tenancy in Australia and New Zealand is also well-developed. In Australia (New South Wales) landlord and tenant issues fall within the consumer protection law and the dispute may be resolved by the Consumer Trading and Tenancy Tribunal. Similarly, in New Zealand, there is a special tribunal for landlord and tenant and the most distinct feature of New Zealand's law on landlord and tenant is that the existence of alternate dispute resolution mechanism before the dispute is brought before the tribunal.

#### **5.0 CONCLUSION**

It is observed that the landlord and tenant issues in Malaysia, whether or not it is for residential, are simply relying on the principle of common law and equity in absence of formal contract between them. There is nothing wrong in relying on this principle, however, if Malaysia is moving towards an easy justice to their people, certain proactive steps must be taken to regulate the relationship between a landlord and a tenant through a proper law, particularly relating to private residential tenancy. This is because there are many instances where a tenant would simply rely on the principle of Three E's as a shield and, thus, would deprive the landlord's right as the registered proprietor of the land. The existence of a statute capable of maintaining a balanced bargaining power between a landlord and a tenant provides a proper out-of-court dispute resolution and controls the landlords from exploiting the tenants as well as prevents the tenants from manipulating the issues of eviction from a tenanted property as against the human rights. The practice in the United Kingdom, in particular Scotland, may be taken as benchmark to improve our law on landlord and tenant, particularly on private residential tenancy.

<sup>50</sup> Section 25, Housing (Scotland) Act 1988.

<sup>51</sup> Section 25(2)(c) Housing (Scotland) Act 1988.

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