***** FOR PUBLICATION *****

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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SUSAN KIEHM, Respondent/Plaintiff-Appellee,

vs.

IAN ADAMS, Petitioner/Defendant-Appellant,

and

DOES 1-10, Defendants.

NO. 25411

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 02-101KN)

DECEMBER 30, 2005

MOON, C.J., LEVINSON, NAKAYAMA, AND DUFFY, JJ.;
AND ACOBA, J., DISSENTING

OPINION OF THE COURT BY DUFFY, J.

On June 15, 2004, this court granted the application of Petitioner/Defendant-Appellant Ian Adams (Adams) for a writ of certiorari to review the published opinion of the Intermediate Court of Appeals (ICA) in Kiehm v. Adams, No. 25411, slip op. (App. Apr. 30, 2004).[1] Therein, the ICA vacated the August 21, 2002 judgment and August 29, 2002 writ of ejectment of the District Court of the Third Circuit (the court)[2] entered against Adams with respect to the property of Respondent/Plaintiff-

[1] Chief Judge James S. Burns authored the opinion, joined by Associate Judge Corinne K.A. Watanabe. Associate Judge John S.W. Lim filed a dissenting opinion.

[2] The Honorable Joseph P. Florendo presided.

Appellee Susan Kiehm (Kiehm) located in Kailua-Kona, Hawai'i. Slip op. at 18. We now reverse the ICA's decision and affirm the judgment of the court.[3]

I. BACKGROUND

A. Facts

The following background is drawn from the court's undisputed findings of fact and from evidence adduced at trial. Kiehm is the owner and landlord of the subject property, a single family residence. In or around January 2000, Tammy Ayau entered into a oral month-to-month agreement with Kiehm to rent the residence for $1,000 per month.

In or about November 2000, Adams, Ayau's boyfriend at the time, moved into the residence and paid $500 per month to Ayau toward the rent. Ayau explained that she "had to find a roommate because [she] couldn't afford the $1,000 a month," but that she did not "sublet or assign [her] lease [with Kiehm] to [Adams]." Adams testified that he had no written or oral rental agreement with Kiehm. He added, however, that he did have an "agreement with [Ayau]," although he did not elaborate on the type of agreement. During the time Ayau and Adams lived in the residence, Ayau directly deposited both her and Adams' rent into Kiehm's bank account at First Hawaiian Bank.

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[3] This court reviews writs of certiorari for "(1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of such errors or inconsistencies dictating the need for further appeal." Hawai'i Revised Statutes (HRS) § 602-59(b) (Supp. 2004).

Ayau recounted that on January 15, 2002, she delivered a letter to Adams notifying him that "he had to be out by February 28th, 2002," and that "there [wa]s someone else moving in on the 1st of April." Adams testified that Ayau often told him and wrote letters to him to move out, but "after the first twenty of them, [he] just started throwing them away. [He] wouldn't even read them." He added, "[Ayau] was constantly threatening to throw me out if I didn't do what she wanted me to do. . . . [The rental arrangement] was very unsecure [sic], you know." Adams further related that he had not seen Ayau's January 15, 2002 letter prior to the trial.

According to the court's undisputed finding of fact no. 7, "[Kiehm] and Ayau's month to month tenancy was terminated by oral agreement effective March 31, 2002." Ayau testified that she moved out at some unspecified time prior to March 31, 2002. After the end of the rental agreement between Ayau and Kiehm, Adams refused to move out. Kiehm and Adams both testified that on March 28, 2002, Kiehm told him to vacate the premises, but he refused to leave.

Ayau stopped the utility and cable service for the property at the end of the rental agreement. Kiehm then instructed the electric and cable company not to allow Adams or anyone else to restart service without a written rental agreement. Kiehm also stopped water service after the end of the rental agreement and instructed the water company not to allow

Adams or anyone else to reinstate service without a written rental agreement.

B. Procedural History

Kiehm filed suit against Adams on April 19, 2002 alleging that Adams was a trespasser and that he had no agreement to be on the premises. Kiehm asked the court for a judgment giving her possession of the property, damages equal to one month's rent, and a writ of possession directing a sheriff or police officer to (1) eject Adams from the property and all persons in possession of the property through Adams, (2) remove all personal belongings of Adams or any other person from the property, and (3) put Kiehm in possession of the property.

Adams counterclaimed on May 14, 2002 alleging that Kiehm (1) substantially interfered with his use of the property, (2) engaged in unfair or deceptive acts or practices in violation of Hawai'i Revised Statutes (HRS) § 480-2 (1993 & Supp. 2002),[4] (3) maliciously threatened to evict him illegally by stopping his utility service, and (4) failed to disclose the identity of her designated agent for the property pursuant to HRS § 521-43(f) (1993). Adams sought money damages, attorneys' fees and costs, and further relief as the court deemed just and proper.

The case went to trial on June 4, 2002. At the conclusion of the trial, Kiehm argued that the evidence showed

[4] HRS § 480-2, entitled "Unfair competition, practices, declared unlawful," provides, in relevant part, that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

that Adams had at most a "permission to remain on the property [from Ayau] -- not [a] landlord-tenant agreement [with Kiehm]." The court asked for supplemental briefs regarding "whether or not the landlord is liable to a sublessee under a sub-lease contract," and scheduled a post-trial hearing on that issue for June 25, 2002.

After hearing argument from the parties at the post-trial hearing, the court orally ruled in favor of Kiehm, finding that Adams was a trespasser once the Kiehm-Ayau oral lease terminated. The court entered its findings of fact (findings) and conclusions of law (conclusions) on August 21, 2002. The relevant findings were as follows:

> 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.
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> 5. In approximately November 2000, . . . Ayau entered into an agreement with [Adams] to rent part of the residence for $500 per month.
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> 6. [Kiehm] was landlord and . . . Ayau was the tenant.
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> 7. [Kiehm] and Ayau's month to month tenancy was terminated by oral agreement effective March 31, 2002.
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> 8. Ayau notified Adams that their agreement would end at that time.
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> 9. . . . Ayau received cash from [Adams] and deposited the rent into [Kiehm's] bank account.
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> 10. After termination of the tenancy, [Adams] refused to move out.
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> 11. There was no agreement between [Kiehm] and [Adams].
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> 12. . . . Ayau directed termination of the electric utility and cable service on termination of her tenancy.

[Kiehm] then instructed the electric and cable companies not to allow [Adams] or anyone else without a written rental agreement to turn on the utilities in their name.

13. The water service terminated for nonpayment after termination of the lease. [Kiehm] then instructed the water company not to allow [Adams] or anyone else without a written rental agreement to turn on the water in their name.

14. There were no written agreements between . . . Ayau, [Kiehm], or [Adams].

The relevant conclusions were 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].

7. [Adams] is not entitled to damages against [Kiehm] for unfair and deceptive trade practices.

. . . .

9. [Adams] is trespassing on the property owned by [Kiehm].

10. [Kiehm] is entitled to a judgment and a writ of ejectment against [Adams].

11. [Kiehm] is entitled to judgment in her favor on all [Adams'] counterclaims.

12. [Kiehm] is entitled to judgment against [Adams] for damages of $1000 per month from April 1, 2002 through and including June 25, 2002 (with per diem damages at the rate of $32.87 for those days in June).

13. [Kiehm] is entitled to her costs and service fees.

14. [Adams] is not entitled to damages against [Kiehm] for [Kiehm's] failure to disclose a local agent.

15. [Kiehm] is not entitled to punitive damages.

Final judgment and the writ of ejectment were entered against Adams on August 21 and 29, 2002, respectively.

On September 20, 2002, Adams filed a notice of appeal from the judgment and the writ. On appeal, Adams challenged findings no. 8 and 11 (to the extent they were conclusions of law) and conclusions no. 3, 5, 6, 7, 9, 10, 11, 12, 13, and 14. Specifically, Adams argued 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 Residential Landlord Tenant Code (hereinafter, the Code), and that Adams "is a month-to-month tenant under [HRS] § 521-22[;]"[5] (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)[6]

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[5] HRS § 521-22 (1993), 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.)

[6] HRS § 521-71(a) (1993) 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

(continued...)

before his month-to-month tenancy may be terminated[,]" and (d) "Kiehm failed to provide adequate notice to terminate Adams's tenancy[;]" (4) Adams is entitled to damages because "Kiehm willfully caused Adams to go without water and electricity for eight days" in "violation[] of HRS § 521-74.5 [(1993);]"[7] and (5) the "[c]ourt should have imposed a fine" against Kiehm for her failure to disclose a local agent to Adams as authorized by HRS § 521-67 [(1993)].[8]

In response, Kiehm contended that (1) Adams had no agreement with Kiehm when the Kiehm/Ayau month-to-month tenancy terminated on March 28, 2002; (2) Kiehm was entitled to evict and eject Adams under HRS § 666-1 (1993)[9] as a trespasser; (3) Adams'

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[6](...continued)

> 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.

(Emphasis added.)

[7] HRS § 521-74.5, entitled "Recovery of possession limited[,]" provides, in relevant part, that "[t]he landlord shall not recover or take possession of a dwelling unit by the wilful interruption or diminution of running water, hot water, or electric, gas, or other essential service to the tenant contrary to the rental agreement or section 521-42, except in case of abandonment or surrender."

[8] HRS § 521-67, entitled "Tenant's remedy for failure by landlord to disclose[,]" provides that "[i]f the landlord fails to comply with any disclosure requirement specified in section 521-43 within ten days after proper demand therefor by the tenant, the landlord shall be liable to the tenant for $100 plus reasonable attorney's fees."

[9] HRS § 666-1, entitled "Summary possession on termination or forfeiture of lease," states:

> Whenever any lessee or tenant of any lands or tenements, or any person holding under the lessee or tenant, holds possession of lands or tenements without right, after the termination of the tenancy, either by passage of time or by reason of any forfeiture, under the conditions or covenants in a lease, or, if a tenant by parol, by a notice to quit of

(continued...)

claims were properly dismissed inasmuch as Adams had no rights against Kiehm under the Code; and (4) Adams' sole recourse under the Code, if any, would have been against Ayau, but he failed to raise a claim against her.

In his reply brief, Adams asserted that (1) assuming HRS § 666-1 applied, Kiehm failed to give him the ten days' prior notice required to evict him; (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);[10] and (3) Kiehm's factual statements and references to the transcript of proceedings are so replete with errors that bad faith is suggested.

On April 30, 2004, the ICA issued a published opinion[11] in which the majority assumed without discussion that Adams was a sublessee of Ayau[12] and ruled that Adams' rights as a tenant

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[9](...continued)
at least ten days, the person entitled to the premises may be restored to the possession thereof in manner hereinafter provided.

(Emphasis added.)

[10] See supra note 6.

[11] 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.

[12] The ICA dissent, however, concluded that there was no sublease and maintained that the lower court's decision should be affirmed on that basis. Slip op., Dissent at 1.

depended on whether the primary lease between Ayau and Kiehm had been surrendered or terminated. Slip op. at 14. The ICA reasoned that if Ayau had surrendered her lease prior to completion of a term, then Adams would have become the direct tenant of Kiehm entitled to possession; if, however, Ayau and Kiehm had agreed to terminate the lease as provided for by the Code, then the rights of the sublessee Adams would have been extinguished. Slip op. at 10-14. The ICA thus vacated the judgment, the writ of ejectment, and the court's conclusions no. 4, 5, 6, 7, 9, 10, 11, 12, 13, and 14, and remanded the case with instructions to the court to determine whether Kiehm and Ayau agreed to terminate their month-to-month rental agreement twenty-nine or more days prior to the agreed termination date, explaining that "[i]f the answer is yes, [(the oral agreement occurred twenty-nine or more days prior to the agreed termination date,)] the facts present a termination" and "[i]f the answer is no, [(the oral agreement occurred twenty-eight or less days prior to the agreed termination date,)] the facts present a surrender." Id. at 14.

On May 11, 2004, Adams filed a motion for reconsideration, which the ICA denied on May 13, 2004. On June 14, 2004, Adams made application to this court for a writ of certiorari, arguing that the ICA gravely erred "in concluding that an oral agreement between a residential landlord and tenant to end their month-to-month lease 29 days or more later results

in a 'termination.'" (Emphasis in original.) While agreeing with the ICA's use of the surrender-termination distinction and the consequences of its application to the instant case, Adams asserts that "the Opinion incorrectly concludes that the distinction between a 'surrender' and a 'termination' depends only on whether or not the oral agreement was made at least 29 days before the ending of the lease, . . . disregarding the written notice requirement . . . ." We granted Adams' application on June 15, 2004, and now reverse the ICA's opinion, but not for the reasons advanced by Adams.

II. STANDARD OF REVIEW

"A trial court's conclusions of law are reviewed de novo, under the right/wrong standard of review." Child Support Enforcement Agency v. Roe, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001) (quoting State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000)) (internal brackets and quotation marks omitted). It is well settled, however, that the appellate court may affirm a lower court's decision on any ground in the record supporting affirmance, even if not cited by the lower court.[13] See State v. Ross, 89 Hawai'i 371, 378 n.4, 974 P.2d 11, 18 n.4 (1998) ("An appellate court may affirm a judgment of the lower court on any

[13] The Dissent suggests that Kiehm's failure to argue that Adams was a licensee prevents this court from so holding. Dissent at 2. We disagree. As noted above, the appellate court may affirm the lower court's decision on any ground supported in the record. Here, the record supports the conclusion that judgment was properly granted in Kiehm's favor on another ground (i.e., that Adams was a licensee).

ground in the record that supports affirmance.") (internal quotation marks and citation omitted).

III. DISCUSSION

As the ICA dissent notes, "[t]he foundation of the [ICA's] majority opinion is the determination that a sublease . . . relationship existed between Ayau and Adams." Slip op., Dissent at 1. It is undisputed that Adams was a roommate of Ayau by agreement between those two parties, and was therefore a tenant as defined by the Code. See HRS § 521-8 (1993) (defining "tenant" as any occupant under a rental agreement and "rental agreement" as any agreement concerning the use or occupancy of a dwelling). However, it does not necessarily follow from that fact that the type of Adams' tenancy was a leasehold, as the ICA majority would have it. To the contrary, the Code and the common law of this jurisdiction compel the conclusion that Adams was not a (sub)lessee of Kiehm or Ayau, but instead a licensee of Ayau, as the ICA dissent suggests. Accordingly, we hold, for the reasons set forth below, that Adams, as the holder of a license revocable at will, became a trespasser as of the time at which the licensor Ayau's interest in the property ceased on March 31, 2002.

A. The Relationship Between Ayau and Adams Was a License, Not a Sublease.

First, while it is true that HRS § 521-8 defines "rental agreement" extremely broadly, the Code also notes that it does not provide for all legal rights or obligations arising out

of a rental agreement. HRS § 521-3(b) (1993). The logical conclusion to be drawn from the broad definition of "rental agreement" when juxtaposed against the Code's acknowledgment of rental agreements giving rise to rights not covered by the Code is that the Code contemplates tenancies or arrangements other than leaseholds. Indeed, the Code specifically states that it is supplemented by the common law. See HRS § 521-3(a) (1993) ("Unless displaced by the particular provisions of [the Code], the principles of law and equity, including the law relative to . . . real property, . . . supplement [the Code's] provisions."). As set forth below, the common law of landlord and tenant provides for tenancies other than leaseholds, including licenses, and the Code has not displaced that law with respect to the tenancy found in the instant case.[14]

[14] The Dissent relies upon the "plain meaning" of the term "sublet" as synonymous with "lease" or "rent" based on the definition found in Merriam Webster's Collegiate Dictionary and the general definition found in Black's Law Dictionary. Dissent at 6-7. We believe, however, that with respect to legal terms of art such as "lease" and "sublease," reliance on general definitions is misplaced. Rather, (assuming for the moment that there is a need to consult a dictionary in the first place) a more appropriate definition to consult would be a more specific one. The Dissent characterizes the Ayau-Adams "sublease" as a month-to-month tenancy, Dissent at 9, leading us to consult the definition in Black's Law Dictionary entitled "Month to month lease." Under that header, however, the dictionary states: "Tenancy where no lease is involved, rent being paid monthly." Black's Law Dictionary (6th ed. 1990) at 890 (emphasis added). In other words, the specific definition in this case suggests the opposite of what the Dissent contends; namely, the agreement between Ayau and Adams was not a lease in the legal sense. Ultimately, however, we believe there is no need to consult either a general or legal dictionary when there is case law in this jurisdiction on point. See the discussion immediately below of Brewer v. Chase, 3 Haw. 127 (1869); Kapiolani Park Preservation Society v. City and County of Honolulu [hereinafter, Kapiolani], 69 Haw. 569, 751 P.2d 1022 (1988); and Bush v. Watson, 81 Hawai'i 474, 918 P.2d 1130 (1996).

At common law, a roommate is not considered a sublessee.[15] See Brewer, 3 Haw. at 140 ("It was long since settled, that a covenant not to sub-let a tenement was not broken by taking lodgers[.]") (Citation omitted.). See also 49 Am. Jur. 2d Landlord and Tenant § 1167 (1995) ("Since a roomer or lodger is not a tenant in the strict legal sense, it has generally been held that the taking in of roomers or lodgers by a lessee does not constitute a violation of a covenant or provision against subletting."). Instead, the rule is "well settled that an agreement by a lessee with a third person for the permissive use by the latter of the leased premises . . . merely amounts to a license to use the property." Id. at § 1168 (citing cases) (emphasis added). In contrast to a lease, a license in the law of real property conveys no estate in land, is not assignable, and is revocable at the will of the licensor.[16] Kapiolani, 69 Haw. at 579, 751 P.2d at 1028-9; Bush v. Watson, 81 Hawai'i at 482-83 n.11, 918 P.2d at 1138-39 n.11.

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[15] We acknowledge that the Code defines "roomer" and "boarder." See HRS § 521-8 (defining roomers and boarders as tenants occupying dwelling units in a building in which the landlord resides and sharing one or more major facilities such as bathroom or kitchen). However, the Code's definition by its terms applies only to traditional boarding houses or other buildings with multiple discrete rooms; it does not address situations in which the landlord and tenant occupy the same dwelling unit. Thus section 521-8 is inapplicable on its face to the instant case and provides no basis for us to find that the Code displaces the common law principles governing roommate relationships.

[16] This court most recently defined a license with respect to real property in Bremer v. Weeks, 104 Hawai'i 43, 85 P.3d 150 (2004). There, we noted that a license "denotes an interest in land in the possession of another which (a) entitles the owner of the interest to a use of the land, and (b) arises from the consent of the one whose interest in the land used is affected thereby, and (c) is not incident to an estate in the land, and (d) is not an easement." Id. at 68 n.28, 85 P.3d at 175 n.28 (quoting Restatement of Property § 512 (1944)).

Having previously recognized the common-law distinction between leaseholds and licenses, this court has followed the rule that whether an agreement is a license or a lease depends on the intention of the parties as ascertained from the nature of the agreement.[17] Kapiolani, 69 Haw. at 578-9, 751 P.2d at 1028-29; Bush, 81 Hawai'i at 486, 918 P.2d at 1142. In Kapiolani and Bush, this court listed several factors that a court should consider in determining whether an agreement is a lease or a license:

(1) Most importantly, does the grantee have the right to occupy a distinct and separate part of the premises (i.e., a definite parcel)? Bush, 81 Hawai'i at 486, 918 P.2d at 1142 (citing 49 Am. Jur. 2d Landlord and Tenant § 1161); Kapiolani, 69 Haw. at 579, 751 P.2d at 1029; see also 49 Am. Jur. 2d Landlord and Tenant § 21 ("Exclusive possession of the leased premises is essential to the character of a lease . . . . There must be a conveyance of a definite space in order for a lease, rather, than a license, to exist; both the extension and the location of the space within the lessor's premises must be specified."); Harkins

[17] The Dissent attempts to distinguish case law cited by the majority both within this jurisdiction (i.e., Kapiolani and Bush) and without (i.e., Harkins) as being factually distinguishable in that those cases dealt with non-residential scenarios. Dissent at 9-10. A review of cases from other jurisdictions persuades us, however, that the lease-license distinction is equally applicable in a residential context. See 445/86 Owners Corp. v. Haydon, 751 N.Y.S.2d 456, 457 (N.Y.A.D. 1st Dept. 2002) (at-will occupancy of apartment constitutes license rather than sublease); Har Holding Co. v. Feinberg, 697 N.Y.S.2d 903, 904 (N.Y. Sup. 1999) (finding that roommate who remained in the apartment after lessee tenants had vacated was a licensee not entitled to possession as against the landlord); Schell v. Schell, 169 P.2d 654, 656 (Cal. App. 4 1946) (lodgers in the home of another are licensees rather than lessees).

v. Win Corp., 771 A.2d 1025, 1027 (D.C. 2001) (essential distinction between roomers and tenants is whether the occupant has exclusive possession or control of the premises);

(2) Is the grantee's right to possession assignable (suggesting a lease) or is it a personal privilege (suggesting a license)? Kapiolani, 69 Haw. at 579, 751 P.2d at 1029; see also 49 Am. Jur. 2d § 21 (same); and

(3) Is the agreement for a fixed term (suggesting a lease)? Kapiolani, 69 Haw. at 579, 751 P.2d at 1029; see also McCandless v. John Ii Estate, 11 Haw. 777, 788-89 (1899) (same); 49 Am. Jur. 2d § 21 (same).

A consideration of these factors in the instant case leads to the conclusion that the agreement between Ayau and Adams was a license, not a sublease. First and foremost, as a roommate, Adams did not have exclusive possession of the property; rather, he shared possession with Ayau.[18] With respect to the second factor, although there is no written agreement or other direct evidence regarding the transferability of Adams' right to use the property, the circumstantial evidence (e.g.,

[18] As indicated above, it is in this area that a roommate arrangement is most clearly distinguishable from a (sub)lease. In the typical sublease scenario, the sublessor is absent for some period less than the full term of the lease, and thus transfers possession and her interest for that period to the sublessee. In contrast, a licensor does not cede exclusive possession or transfer her interest, but instead shares possession. See American Jewish Theater v. Roundabout Theatre Co., Inc., 610 N.Y.S.2d 256, 257 (N.Y.A.D. 1st Dept. 1994) ("The nature of the transfer of absolute control and possession is what differentiates a lease from a license or any other arrangement dealing with property rights."); Roberts v. Lynn Ice Co., 73 N.E. 523, 524 (Mass. 1905) (question of whether an agreement concerning use of real property is a lease or a license depends on whether the agreement cedes exclusive possession from one party to the other). See generally 49 Am. Jur.2d § 21 (discussing distinction between lease and license).

previous romantic relationship; Ayau's testimony that she did not intend to sublease) leads us to conclude that Adams did not have the unilateral right to assign his interest in the residence (i.e., Ayau did not grant Adams a right to bring in an additional roommate or a new roommate to replace him) and thus his privilege to use the property was personal. Third, the agreement between Ayau and Adams was not for a fixed term. Because each of these factors points toward the existence of a license,[19] we hold that the agreement between Ayau and Adams constituted a license

[19] The Dissent's argument that the application of the Kapiolani and Bush factors here yields the conclusion that the agreement was a (sub)lease is unpersuasive. Dissent at 7-9. First, there is no support in the record for the proposition that Adams had an agreement with Ayau for exclusive possession of a distinct part of the residence. Even assuming that the district court's finding that Adams "rent[ed] part of the residence" can be taken to imply that the "part" was distinct, there is no evidence, direct or circumstantial, that Adams had exclusive possession of such part (i.e., that Ayau was not allowed to go into his room or part). Rather, the evidence (i.e., prior romantic relationship; Ayau's constant threats to throw Adams out; Ayau's statement that no sublease was intended) shows that Ayau never intended to or did cede exclusive possession or control of any part of the residence to Adams. As set forth above, the same evidence also supports the conclusion that Adams' license was not assignable.

Also, the Dissent appears to confuse the provisions of the Code with the nature of the rental agreement when considering the term of the agreement. Dissent at 9. There is no evidence in the record that the oral agreement between Ayau and Adams was intended to have any fixed term -- that Adams paid $500 per month for his license does not make it a fixed-term agreement any more than a year-to-year license to erect a sign prevents the licensor from removing the sign and cancelling the license at its discretion. See Baseball Publishing Co. v. Bruton, 18 N.E.2d 362, 364 (Mass. 1938) (holding on those facts that "[t]he revocation of a license may constitute a breach of contract, and give rise to an action for damages. But it is nonetheless effective to deprive the licensee of all justification for entering or remaining upon the land.") (Citations omitted.). Although the Dissent is correct in noting that, by operation of law, section 521-22 of the Code specifies that the term of a tenancy is month-to-month where no other period is specified, Dissent at 9, and thus termination by the landlord in the instant case may have required forty-five days' advance written notice under section 521-71(a) of the Code, Dissent at 16, that suggests only that the Code has displaced the common law with respect to the termination of licensing agreements (a possibility which we recognize, but dismiss as not pertinent to this case, see infra note 21), see Dissent at 16, not the essential nature of the agreements as licenses.

revocable at will rather than a sublease.[20]

B. Adams Became a Trespasser When the Right to Possession of His Licensor Ayau Terminated.

From this point, the analysis is straightforward. First, a license is revocable at the will of the licensor. See Bush, 81 Hawai'i at 487, 918 P.2d at 1143 (key feature of a license is that it is revocable at the will of the licensor) (citing 2 R. Powell and P. Rohan, Powell on Real Property § 34.25 at 34-298 through 34-301 (1995)). Second, a license cannot continue to exist after the licensor's own interest in the land has been extinguished. Cf. McCandless, 11 Haw. at 789 (license is automatically revoked by sale of the land and ceases upon the death of either party). Here, evidence was adduced to show that Ayau gave notice to Adams both of her intent to revoke the Ayau-Adams agreement and of the impending termination of the Ayau-Kiehm agreement.[21] Moreover, it was the undisputed finding of the court that the Ayau-Kiehm lease agreement did in fact terminate on March 31, 2002. Accordingly, Adams' license

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[20] This is not to say, however, that a roommate may never be a (sub)lessee or that parties are not free to contract out of the default common-law rules regarding notice and termination. We hold only that on these facts, and in the absence of any oral or written agreements with Ayau or Kiehm to the contrary, Adams was the holder of a license revocable at will.

[21] To the extent that the Code has displaced the common law regarding termination of licenses and Adams did not receive adequate notice of termination from Ayau, that would give Adams a claim only against his licensor/landlord, Ayau. On the other hand, Adams would have no claim against Kiehm because she was not initially a party to a rental agreement with Adams and never became party thereto because the doctrine of surrender is inapplicable to licenses in that, as set forth above, a license is terminated when the licensor's right is extinguished and even improper termination does not give the licensee a right to remain on the property. Accordingly, we need not consider the issue further herein.

terminated no later than March 31, 2002, the last day of the licensor Ayau's interest in the property. As of April 1, 2002, therefore, Adams was a trespasser without right to possession. As such, he was not entitled to any notice to vacate from Kiehm; rather, it was Kiehm who was entitled to summary possession, ejectment, or other remedy to remove Adams.[22] Therefore, the judgment of the court was correct and the ICA erred in concluding otherwise.

IV. CONCLUSION

For the foregoing reasons, the ICA's April 30, 2004 opinion is reversed and the August 21, 2002 final judgment and August 29, 2002 writ of ejectment of the court are affirmed.

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for petitioner/defendant-
appellant on the writ

[22] We agree with the ICA majority's application of HRS § 666-1 to the instant facts, slip op. at 16, and hold that Adams was a "person holding under the lessee or tenant [i.e., Ayau]," not a "tenant [of Kiehm] by parol" entitled to ten days' notice to quit from Kiehm.