

A **Maxwell John Gray (as administrator/trustee for the estate of
Cory John Gray, deceased) v Lim Siew Shun**

B HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO
BA-24NCVC-230-08 OF 2017
AZIMAH OMAR J
17 MAY 2018

C *Civil Procedure — Summary possession of land — Order for — O 89 of the
Rules of Court 2012 — Defendant refused to deliver vacant possession of house to
D plaintiff as executor and administrator of deceased's estate — Plaintiff sought for
order of summary possession of land — Whether defendant and her child entitled
to stay and remain in house — Whether child entitled to deceased's estate by virtue
of the will — Whether defendant contributed to purchase of house — Whether
plaintiff entitled for order under O 89 of the Rules of Court 2012 — Whether
there was triable issue — Rules of Court 2012 O 89*

E *Family Law — Marriage — Customary marriage — Defendant refused to
deliver vacant possession of house to plaintiff as executor and administrator of
deceased's estate — Defendant claimed to be deceased's wife by way of customary
F marriage — Whether customary marriage registered and solemnised under the
Law Reform (Marriage and Divorce) Act 1976 — Whether there was valid
marriage — Whether defendant entitled to benefit from deceased's estate
— Whether child was legitimate child — Whether child entitled to deceased's
estate — Law Reform (Marriage and Divorce) Act 1976*

G The plaintiff was the executor of the estate of Cory John Gray ('the deceased')
whereas the defendant was the wife of the deceased by way of a customary
marriage. The deceased had passed away leaving a will dated 4 August 2010.
Vide a grant of probate granted by the High Court of New Zealand, the
plaintiff was appointed as the administrator of the deceased's estate. The said
H grant of probate was later resealed by the High Court of Kuala Lumpur on
24 July 2013. The plaintiff as the administrator and executor of the estate of the
deceased had intended to sell a house owned by the deceased but the defendant
had refused to accede to the plaintiff's request for vacant possession of the said
house. Consequently, the plaintiff filed this originating summons seeking for
I an order of summary vacant possession of the said house pursuant to O 89 of
the Rules of Court 2012 ('the ROC') ('encl 1'). In resisting encl 1, the
defendant submitted that both the defendant and her child were entitled to
remain and stay in the said house because she was the wife of the deceased and
the child was the deceased's biological son. The defendant also submitted that

the child was entitled to the deceased's estate by virtue of cl 3 of the said will. Further, the defendant submitted that she had contributed to the purchase of the said house as the initial deposit of the said house amounting to RM13,440 was paid by her. In this regard, the plaintiff contended that in the sale and purchase agreement ('the SPA') of the house, the purchaser was the deceased alone and the defendant was not a party to the SPA's transaction.

A

B

Held, allowing encl 1 with costs of RM5,000:

- (1) The legal position of the requirement of solemnisation and registration of a marriage under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') to create a legal and binding matrimonial relationship between a man and wife is unequivocally clear. It was not disputed that the customary marriage claimed by the defendant was never solemnised and registered under the LRA. Based on the above findings, the court concluded that there was no valid marriage between the defendant and the deceased. Thus, the defendant could not claim that she was entitled to benefit from the deceased's estate. In addition, since the customary marriage was not recognised by law, hence, the child was born out of wedlock and was an illegitimate child. Therefore, the child did not have any rights to the deceased's estate (see paras 33–34, 36, 45 & 48).
- (2) The documents produced by the defendant did not support her case. In the offer to purchase adduced by the defendant, the vendor was not the same vendor as in the SPA. The defendant's personal cheque of RM13,440 did not support cl 2 of the offer to purchase as the amount to be paid on the date of the execution of the offer to purchase must be 10% of the purchase price ie RM44,800 and not RM13,440. Further, the official receipt issued by Low, Sunita & Ngoi to the defendant as acknowledgment of payment of RM13,440 by the defendant did not refer to the said house. The court found that the assertion of payment of the initial deposit towards the purchase of the said house by the defendant was a bare and baseless assertion (see paras 43–44).
- (3) The will was executed more than two years after the customary marriage took place and after the child was born. If the deceased had intended to include the defendant's name and her son, the deceased would have included their name in the said will. But this did not happen. Further, although the word 'children' was used in the said will, the material fact remained that there was no valid and legal marriage between the defendant and the deceased. Hence, the child was born out of wedlock and for all intent and purpose an illegitimate child (see paras 51–52).
- (4) Based on the above reasons, the court concluded that there were indeed no triable issues raised by the defendant to deny the plaintiff's right for an order under O 89 of the ROC (see para 53).

C

D

E

F

G

H

I

A [Bahasa Malaysia summary]

Plaintif adalah pelaksana harta pusaka Cory John Grey ('si mati') manakala defendan adalah isteri si mati dengan cara perkahwinan adat. Si mati telah meninggal dunia meninggalkan wasiat bertarikh 4 Ogos 2010. Melalui geran probet yang diberikan oleh Mahkamah Tinggi New Zealand, plaintif telah dilantik sebagai pentadbir harta pusaka si mati. Geran probet tersebut kemudiannya dimeterai semula oleh Mahkamah Tinggi Kuala Lumpur pada 24 Julai 2013. Plaintif sebagai pentadbir dan pelaksana harta pusaka si mati telah berhasrat untuk menjual rumah yang dimiliki oleh si mati tetapi defendan enggan bersetuju dengan permintaan plaintif untuk pemilikan kosong rumah tersebut. Oleh itu, plaintif memfailkan saman pemula ini yang memohon perintah terus pemilikan kosong rumah tersebut menurut A 89 Kaedah-Kaedah Mahkamah 2012 ('Kaedah') ('lampiran 1'). Dalam menentang lampiran 1, defendan mengemukakan bahawa kedua-dua defendan dan anaknya berhak untuk berada dan tinggal di rumah tersebut kerana beliau adalah isteri si mati dan anak itu adalah anak kandung si mati. Defendan juga mengemukakan bahawa anak itu berhak kepada harta pusaka si mati berdasarkan klausa 3 dari wasiat tersebut. Selanjutnya, defendan mengemukakan bahawa beliau telah menyumbang kepada pembelian rumah tersebut sebagai deposit awal rumah tersebut berjumlah RM13,440 yang dibayar olehnya. Dalam hal ini, plaintif berpendapat bahawa dalam perjanjian jual beli ('PJB') rumah itu, pembeli adalah si mati sahaja dan defendan bukanlah pihak kepada transaksi PJB.

F Diputuskan, membenarkan lampiran 1 dengan kos sebanyak RM5,000:

- G** (1) Kedudukan undang-undang tentang keperluan upacara dan pendaftaran perkahwinan di bawah Akta Membaharui Undang-Undang (Perkahwinan and Perceraian) 1976 ('Akta') untuk mewujudkan hubungan perkahwinan yang sah dan terikat antara seorang lelaki dan isteri adalah jelas. Ia tidak dipertikaikan bahawa perkahwinan adat yang dituntut oleh defendan tidak pernah diupacarakan dan didaftarkan di bawah Akta. Berdasarkan penemuan di atas, mahkamah menyimpulkan bahawa tidak ada perkahwinan yang sah antara defendan dan si mati. Oleh itu, defendan tidak dapat menuntut bahawa beliau berhak mendapat faedah daripada harta pusaka si mati. Di samping itu, oleh kerana perkahwinan adat tidak diiktiraf oleh undang-undang, maka anak itu dilahirkan di luar nikah dan merupakan anak yang tidak sah. Oleh itu, anak itu tidak mempunyai hak terhadap harta pusaka si mati (lihat perenggan 33–34, 36, 45 & 48).
- I** (2) Dokumen yang dibawa oleh defendan tidak menyokong kes beliau. Dalam tawaran untuk membeli yang dikemukakan oleh defendan, vendor itu bukan penjual yang sama seperti di dalam PJB. Cek peribadi defendan sebanyak RM13,440 tidak menyokong klausa 2 tawaran untuk

- membeli kerana amaun yang dibayar pada tarikh pelaksanaan tawaran untuk pembelian mestilah 10% daripada harga belian iaitu RM44,800 dan bukan RM13,440. Selanjutnya, resit rasmi yang dikeluarkan oleh Low, Sunita & Ngoi kepada defendan sebagai pengakuan pembayaran sebanyak RM13,440 oleh defendan tidak merujuk kepada rumah tersebut. Mahkamah mendapati bahawa penegasan pembayaran deposit awal ke arah pembelian rumah tersebut oleh defendan adalah penegasan kosong dan tidak berasas (lihat perenggan 43–44). A
- (3) Wasiat itu telah dilaksanakan lebih dari dua tahun selepas perkahwinan adat berlaku dan selepas anak itu dilahirkan. Sekiranya si mati bercadang untuk memasukkan nama defendan dan anaknya, si mati akan memasukkan nama mereka dalam wasiat tersebut. Tetapi ini tidak berlaku. Selanjutnya, walaupun perkataan ‘anak-anak’ digunakan dalam wasiat tersebut, fakta material tetap tidak ada perkahwinan yang sah di antara defendan dan si mati. Oleh itu, anak itu dilahirkan luar nikah dan untuk semua niat dan tujuan anak tidak sah taraf (lihat perenggan 51–52). B
- (4) Berdasarkan alasan di atas, mahkamah menyimpulkan bahawa tiada masalah yang dapat dibangkitkan oleh defendan untuk menafikan hak plaintif untuk suatu perintah di bawah A 89 Kaedah (lihat perenggan 53). C
- D
- E

Notes

- For a case on order for summary possession of land, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 10657. F
- For cases on customary marriage, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4626–4630.

Cases referred to

- Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343; [1991] 1 CLJ Rep 48; [1991] 1 CLJ 647, SC (refd) G
- Bukit Lenang Development Sdn Bhd v Penduduk-penduduk yang menduduki atas tanah HS (D) 151079–HS(D)151601, Mukim Plentong, Daerah Johor Bahru* [1999] 6 MLJ 25; [1999] 8 CLJ 54, HC (refd) H
- Cahaya Ideal (M) Sdn Bhd v Orang2 yg mengenali diri sbg 'Ponga' (Poongavanam all Vadivelu) & Ors* [1999] MLJU 125; [1999] 3 CLJ 257, HC (refd)
- Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, SC (refd)
- Eso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740, HC (refd) I
- Lee Beng Lai & Ors v Tetuan Tokoyaki Property Sdn Bhd* [2002] 3 MLJ 287; [2002] 3 CLJ 365, CA (refd)
- Shirley Kathreyn Yap v Malcolm Thwaites* [2016] 5 MLJ 602, FC (refd)

- A *Sivanes all Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273, CA (refd)
Tan Siew Sen & Ors v Nick Abu Dusuki bin Hj Abu Hassan & Anor [2016] 4 MLJ 602, CA (refd)
B *Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors* [2016] 7 MLJ 628; [2016] 1 CLJ 336, HC (refd)

Legislation referred to

- C Law Reform (Marriage and Divorce) Act 1976 ss 5(4), 22(4), 27, Part III
Legitimacy Act 1960 s 3
Rules of Court 2012 O 89
Rules of the Supreme Court [UK] O 113
D *KW Lai (Nabila Izahar with him) (KW Lai & Partners) for the plaintiff.*
Not represented for the defendant.

Azimah Omar J:

INTRODUCTION

- E [1] Vide this originating summons (encl 1), the plaintiff sought for an order of summary vacant possession of a property namely; a house with an address of No 43, Jalan PU 9/3, Taman Puchong Utama, 47100 Puchong, Selangor ('the said house') pursuant to O 89 of the Rules of Court 2012 ('the ROC 2012').
F [2] In support of his application, the plaintiff had filed the following affidavits:
G (a) the plaintiff's affidavit in support affirmed by Maxwell John Gray on 31 July 2017 (encl 2);
(b) the plaintiff's affidavit in reply to the defendant's affidavit in opposing the plaintiff's application affirmed by Maxwell John Gray on 20 October 2017 (encl 7); and
H (c) the plaintiff's affidavit in reply affirmed by Maxwell John Gray on 18 December 2017 (encl 13).
I [3] In opposing the plaintiff's application, the defendant had filed the following affidavits:
(a) the defendant's affidavit in reply affirmed by Lim Siew Shun on 26 May 2017 (encl 5); and
(b) the defendant's affidavit in reply affirmed by Lim Siew Shun on 13 November 2017 (encl 10).

[4] This court must mention that the defendant here is not represented by any solicitor. She represented herself in this action. A

BACKGROUND FACTS

[5] The background facts which have led to the filing of encl 1 by the plaintiff are as follows: B

- (a) the plaintiff (Maxwell John Gray) is the executor of the estate of Cory John Gray ('the deceased'). The plaintiff is the father of the deceased. The deceased was a New Zealand national and had passed away in Kuala Lumpur, Malaysia on 25 February 2013, leaving a will dated 4 August 2010 ('the said will') behind; C
- (b) in the said will (exh 'MJG1'), the deceased had appointed his sister (Rachel Teresa) and his father to be his executors and trustees; D
- (c) vide a grant of probate granted by the High Court of New Zealand dated 17 April 2013, the plaintiff was appointed as the administrator of the deceased's estates;
- (d) the grant of probate granted by the High Court of New Zealand was later resealed by the High Court of Kuala Lumpur on 24 July 2013; E
- (e) the said house was purchased by the deceased during his lifetime and is now part of the estate of deceased. The repayment of the loan financing the purchase of the said house is paid out of the deceased's estate; F
- (f) as the said house is depleting and as the installment payments become unaffordable, the plaintiff being administrator of the deceased's estate had intended to sell the said house;
- (g) it is the plaintiff's contention that the said house is currently occupied by the defendant (Lim Siew Shun) and her young child, Zack Cory Lim (the child) without the plaintiff's consent; G
- (h) as the plaintiff is now desirous to sell the said house, the plaintiff had repeatedly requested and demanded the defendant to leave the house and deliver to the plaintiff vacant possession of the said house; and H
- (i) despite the numerous requests and demands, the defendant had refused to accede to the plaintiff's request for vacant possession of the said house, hence this application was filed. I

THE DEFENDANT'S CONTENTIONS

[6] The defendant in resisting the plaintiff's application has raised the following contentions:

- A** (a) the defendant and the child are entitled to remain and stay in the said house as she was the wife of the deceased by way of a customary marriage which took place on 21 June 2008. The child is the deceased's biological son. Being the wife of the deceased and the son of the deceased, they are beneficiaries of the deceased's estate which includes the said house;
- B** (b) the defendant had contributed to the purchase of the said house as the initial deposit of the said house amounting to RM13,440 was paid by her. And thus, she has beneficial interest over the said house and she cannot simply be evicted from the said house by the plaintiff;
- C** (c) the child is entitled to the deceased's estate (including the said house) by virtue of the said will as cl 3 of the said will has provided that 'I GIVE all my personal chattels including motor vehicles equally for those my children who survive me'. The defendant contends that the word 'children' in cl 3 means more than one child. Since the deceased has only one child in his previous marriage, the word 'children' used in the said is meant to include the child. Therefore, the child is the beneficiary of the deceased's estate; and
- D** (d) the plaintiff's action to evict the defendant from the said house is a vexatious application with mala fide intention namely; to sell and dispose the said house for his own benefit.
- E**

THE PLAINTIFF'S REPLY

- F** [7] The plaintiff had strenuously refuted the defendant's contention that she is entitled to remain and stay in the said house with the child who was the biological son of the deceased.
- G** [8] It is the plaintiff's contention that neither the defendant nor the child has beneficial interest to the said house as the defendant and the deceased were never legally married in Malaysia or elsewhere.
- H** [9] According to the plaintiff, the defendant cannot claim to be the wife of the deceased as the purported marriage between the defendant and the deceased was purely customary and was never registered in accordance to the law of Malaysia or elsewhere.
- I** [10] It was submitted on behalf of the plaintiff that with the commencement of the Law Reform (Marriage and Divorce) Act 1976 on 1 March 1982, only civil marriage that are registered pursuant to this Act will be recognised. Thus, all customary or cultural marriages are not recognised by law save for all customary marriages solemnised before 1 March 1982.
- [11] To support his argument, the counsel for the plaintiff had referred this

court to s 5(4) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA 1976') which reads as follows: **A**

After the appointed date, no marriage under the law, religion, customs or usage may be solemnized except as provided in Part III.

And Part III of the Act sets out the terms and conditions of registration of marriages in Malaysia. **B**

[12] The counsel for the plaintiff had also submitted that s 22(4) of the LRA 1976 has made it clear that in order for a civil marriage to be recognised and be valid under the Malaysian law, it must be registered under the terms and conditions of registration set out under Part III of the LRA 1978. **C**

[13] Section 22(4) of the LRA 1976 reads as follows:

(4) Every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or a licence has been issued by the Registrar or Chief Minister or a statutory declaration under subsection (3) has been delivered to the Registrar or Assistant Registrar, as the case may be. **D**

[14] The counsel for the plaintiff had further submitted that s 27 of the LRA 1976 has made it mandatory for the marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date to be registered. **E**

[15] The counsel for the plaintiff had thus contended that since there was no valid and legal marriage between the deceased and the defendant, the defendant here has no rights whatsoever to occupy the said house. **F**

[16] To this contention, the counsel for the plaintiff had relied on the decision of the Federal Court in the case of *Shirley Kathreyn Yap v Malcolm Thwaites* [2016] 5 MLJ 602 which held that: **G**

Based on the above, we are of the view that there was no basis in law for the plaintiff, who was not married to the defendant, to claim an equitable interest in any of the defendant's properties acquired by the defendant during the period of their de facto relationship. This is especially so when there was no proof of any financial contribution but based solely on the de facto relationship. The trial judge and the Court of Appeal judges were in error in finding that an unmarried person, like the plaintiff co-habiting in a de facto husband and wife relationship with the defendant could claim an equitable interest in the properties that was not jointly purchased or jointly owned without proof of financial contribution. **H**
I

[17] Pertaining to the child's right over the deceased's estate, it was argued by the counsel for the plaintiff that since the customary marriage claimed by the defendant was never registered under the LRA 1976, the position of the child

A in so far as to the deceased's estate is clearly provided under s 3 of the Legitimacy Act 1960.

B [18] The plaintiff's counsel has also referred to s 3 of the Distribution Act 1958 which defines the word 'child' as a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952.

C [19] The plaintiff had thus contended that since there was no valid and legal marriage between the defendant and the deceased, the child was born out of wedlock and is for all intent and purpose an illegitimate child. The fact that the defendant and the deceased are biological parents of the child does not confer the child with any rights to benefit from the deceased's estate.

D [20] The plaintiff further contended that the defendant's occupation in the said house is clearly without the plaintiff's permission and/or consent. Thereto, the defendant is a trespasser and the plaintiff is obviously entitled to an O 89 of the ROC 2012 summary vacant possession order.

E [21] The plaintiff has also contended that as executor of the deceased's estate, the plaintiff holds the ultimate power to deal with the deceased's estate in accordance to the wishes of the deceased. Unless there are restrictions provided by the deceased in his will, the plaintiff shall have the unchallenged power and right to sell and dispose any or part of the property belonging to the deceased's estate.

THE LAW

G [22] The principles governing the court's power in granting an order for summary vacant possession pursuant to O 89 of the ROC 2012 is well established and settled.

H [23] Order 89 of the ROC 2012 provides as follows:

Proceedings to be brought by Originating Summons (O 89 r 1)

I Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

[24] In the case of *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, the court held that:

The summary procedure under O 89 is governed by the same principles as those under O 14 of the RHC 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespass that a summary order can be made under O 89. The learned judicial commissioner did not seem to address his mind sufficiently to the importance of determining the existence or absence of triable issues. It is unfortunate that the learned judicial commissioner did not give due consideration to the Federal Court decision of *Leong Yoong v Lee Sem Yoong* (cited to him in argument) where it was held that where reliance is placed on the provision of the Act to avoid eviction by landlord, *all that the tenant has to do is to show that he is a protected tenant under the Act.* In the circumstances, the application by originating summons although remedied by the learned judicial commissioner to one under O 89 of the RHC should be dismissed as there are triable issues of fact and law, and as such the application for vacant possession ought to have been commenced by writ.

A

B

C

[25] In the case of *Cahaya Ideal (M) Sdn Bhd v Orang2 yg mengenali diri sbg 'Ponga' (Poongavanam all Vadivelu) & Ors* [1999] MLJU 125; [1999] 3 CLJ 257 it was held that:

D

Once the plaintiff proved its title and intention to regain possession, it was for the defendants to prove that they could set out a title or a right to possession inconsistent with the plaintiff's ownership. The burden would be on the defendants to show that they had the right to occupy the land on a balance of probabilities.

E

[26] The Court of Appeal in the case of *Lee Beng Lai & Ors v Tetuan Tokoyaki Property Sdn Bhd* [2002] 3 MLJ 287; [2002] 3 CLJ 365 held that:

The learned judge found that on the undisputed facts the plaintiff is the registered owner of the said land and the defendants did not have any proof that they had been given the permission or licence by the plaintiff or the owner of the land (ie, the State) prior to the plaintiff's occupation of the said property and that it was proper and appropriate for the High Court to make the order under O 89 of the RHC to evict the defendants as they were no serious issues.

F

G

[27] In the case of *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343; [1991] 1 CLJ Rep 48; [1991] 1 CLJ 647, Mr GS Nijar, the counsel for the appellants has reminded the Federal Court that O 89 is a reproduction of English O 113. The counsel has then referred to the following commentary in the *1988 White Book* (Vol 1) at pp 1470-1:

H

For the particular circumstances and remedy described in r 1, this order provides a somewhat exceptional procedure, which is an amalgam of other procedures, eg, procedure by ex parte originating summons, default procedures and the procedure for summary judgment under O 14. Its machinery is summary, simple and speedy, ie, it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the respondent

I

- A without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O 13 and O 14, this order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, ie, there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without license or consent and without any right, title or interest thereto.
- B

[28] In *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89; [1994] 1 CLJ 313, the Supreme Court further clarified on the approach to O 89 of the ROC 2012 in the context of tenants who were holding over in the following terms:

C

... it does not follow in this case that the court is relieved from its duty to consider the further question of whether the tenants are trespassers pure and simple for which the summary procedure under O 89 has been specifically introduced or whether they are tenants holding over either from the previous or present landlords after the termination of the tenancy.

D

[29] In the case of *Bukit Lenang Development Sdn Bhd v Penduduk-penduduk yang menduduki atas tanah HS (D) 151079–HS(D)151601, Mukim Plentong, Daerah Johor Bahru* [1999] 6 MLJ 25; [1999] 8 CLJ 54, Zainun Ali J (as Her Ladyship then was), inter alia, held that:

E

From *Bristol's* case it is evident that O 89 (equivalent to the English SC O 113) applies to a person who has entered into possession of land with a licence from the previous owner but has since remained in occupation without a licence from the present owner and the previous owner cannot possibly have given an effective license to that person to remain in occupation of the land after the previous owner had parted with that land in favor of the present owner.

F

[30] It was further held that:

G

So in simple terms, even if an entry is legal at the outset, (which is disputed by the plaintiff) the defendant's continued occupation may subsequently be suffused with illegality. The current and present owner may proceed by way of an originating summons to eject the trespassers.

[31] In the case of *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740, Idris Yusoff J held:

H

The law is settled that the summary proceedings for possession of the land can be employed in a situation where a person entitled to possession of the land claims possession of such land occupied by another person without his licence or consent or the licence or consent of any of his predecessor-in-title or in another situation where a person who has entered into occupation of the land with the licence or consent of the person entitled to possession of the land or any of his predecessor-in-title but remains in such occupation without licence or consent of the person entitled to possession or any predecessor-in-title of his. (Emphasis added.)

I

ANALYSIS AND THE COURT'S DECISION

A

[32] This court is reminded that the summary procedure under O 89 would not be available to the plaintiff if the defendant can sufficiently prove to this court of the existence of serious issues to be tried. It is trite that the summary procedure is intended to deal with the simple cases of trespassers or squatters pure and simple.

B

Beneficial right via customary marriage

[33] In the present case, the defendant had admitted that the marriage which took place between her and the deceased on 26 August 2008 was purely customary. It is not in dispute that the customary marriage claimed by the defendant was never solemnised and registered under the LRA 1976. That being the case, can the defendant now claim that she was the wife of the deceased and entitled to deceased's estate?

C

D

[34] The legal position of the requirement of solemnisation and registration of a marriage under the LRA 1976 to create a legal and binding matrimonial relationship between a man and wife is unequivocally clear. When the marriage is registered in accordance to the law (the LRA 1976), the marriage and matrimonial relationship is valid which then can give rise to matrimonial rights such as right to assets, right to maintenance, right to inherit, and right to estate.

E

[35] This legal position has been discussed, elaborated and ventilated by numerous authorities. Suffice for this court to refer to the cases cited by the counsel for the plaintiff:

F

- (a) *Sivanes all Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273, the Court of Appeal has held, inter alia:

G

I am of the view that the courts in this country not treat such a relationship. As in *Dennis v Mcdonald* [1981] 2 ALL ER 632 as a matrimonial relationship. *There must be a valid marriage under Malaysian law applicable to a couple before there can be any matrimonial relationship. In this country, a person is either marries or not married. There is nothing in between.* A marriage is either monogamous or polygamous. There is nothing in between. A Muslim marriage is polygamous. A non-Muslim marriage contracted after coming into force of the Law Reform (Marriage and Divorce) act is monogamous ...

H

I have no objection to the principle in *Dennis v Me Donald* [1981] 2 All ER 632 being applied in this case provided it is understood that, *I am in no way recognizing a live in relationship as a matrimonial relationship with rights and obligations provided bylaw to married couple*, no matter how many children they may have together. In other words, the principle in *Dennis v Me Donald* should not, in this country, be applied to unmarried couple. *If a couple chooses*

I

- A *not to get married as provided by our law, they should not be talking about a matrimonial relationship, matrimonial home, conjugal rights, matrimonial proceedings or division of matrimonial assets. Those terms are exclusively for lawfully married couples in accordance with our laws.* (Emphasis added.)
- B (b) *Tan Siew Sen & Ors v Nick Abu Dusuki bin Hj Abu Hassan & Anor* [2016] 4 MLJ 602. Paragraphs 41–44 and 51 of the Court of Appeal’s judgment reads:
- C [41] The spirit of the LRA dictates that before a woman can be recognised as a wife, she must undergo a marriage that is solemnised recognised as a wife, she must undergo a marriage that is solemnised in accordance with Part III of the LRA. That is a prerequisite for a woman to acquire the status of a wife (and a man the status of a husband) after the coming into force of the LRA. The argument that the LRA does not make registration compulsory flies in the face of section 5(4) which reads:
- D After the appointed date, no marriage under any law, religion, custom, or usage may be solemnized except as provided in Part III.
- E [42] The provision is clear and unambiguous and must be given its natural and ordinary meaning. It is not for us to invent fancy ambiguities as an excuse not to give effect to its plain meaning or twist and stretch the language beyond common sense: *Public Prosecutor v Sihabduin Hj Salleh & Anor* [1980] 2 MLJ 273; [1981] CLJ 39; [1981] CLJ Rep 82; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625; [1992] 4 CLJ 2094; [1992] 1 CLJ Rep 324; *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481; [1988] 1 LNS 3. Our duty is to give effect to the object of the provision, not to defeat it.
- F [43] Having regard to the clarity of language used in s 5(4), we are clear in our minds that the provision admits of only one construction, and that is, after 1 March 1982, all non-Muslim marriages must be solemnised in accordance with Part III of the LRA and not in accordance with any other marriage rites, except those covered by s 3(4). Any proposition to the contrary will rock the whole foundation of the Act, whose object in pith and substances is to regulate the solemnisation and registration of monogamous marriages.
- G [44] If a couple wishes to marry according to their own custom, the LRA does not stop them from doing so. In fact s 24 facilitates the solemnisation of such marriage. But an unregistered ceremonial marriage such as the one entered into between the late Low Chin Wee and the third appellant clearly is not a marriage that is solemnised in accordance with Part III of the LRA.
- H ...
- I [51] The truth is, Parliament never intended to invalidate valid but unregistered marriages that were solemnised before the coming into force of the LRA. Such marriages are valid not because of s 34 but because of s 4(1) and (2). Seen from this perspective, s 34 is a surplusage in that it purports to validate marriages that are already deemed to be valid.

[36] It is this court's judgment that there is no valid marriage between the defendant and the deceased. Thus, the defendant cannot now claim that she is entitled to benefit from the deceased's estate on the premise that she is the wife of the deceased. Nor does the child can claim the same.

A

Beneficial interest via payment of initial deposit

B

[37] To substantiate the contention that she had paid the initial deposit of RM13,440 for the said house, the defendant had produced the following four documents:

C

- (a) a sale and purchase agreement dated 12 August 2011 (SPA)(exh 'LSS2') entered between the deceased as the purchaser and Awaeang Anak Kwasin, the vendor (exh 'LSS3');
- (b) offer to purchase signed by the defendant and the vendor;
- (c) the defendant's personal Affin Bank cheque No 01199 amounting RM13,440 dated 26 May 2011 issued to a solicitor's firm Low, Sunita & Ngoi (exh 'LSS3'); and
- (d) an official receipt dated 30 May 2011 issued by Low, Sunita & Ngoi to the defendant (exh 'LSS3').

D

E

[38] The plaintiff had strongly refuted the defendant's claim that she had paid the initial deposit of RM13,440 for the said house. According to the plaintiff, the offer to purchase produced by the defendant was not payment of earnest deposit for the said house as the vendor in the SPA was Awaeang ak Kwasin, whereas the vendor in the offer to purchase was Cheong Tin Yien. The plaintiff had contended that in the SPA, the purchaser of the said house was the deceased alone. The defendant was not a party to SPA's transaction.

F

G

[39] The defendant in her explanation as to why only the deceased's name appearing in the SPA, had said that after the customary marriage took place, both the defendant and the deceased (as husband and wife) wanted to purchase the said house. However, at the time of the said purchase the defendant was not working, thus the bank had suggested to them that it would be easier to apply for a housing loan from the bank under one name that is the deceased's name.

H

[40] This court agrees with the counsel for the plaintiff that the explanation given by the defendant as to why her name did not appear in the said sale and purchase agreement does not seem to be a plausible reason. In fact, being a Malaysian compared to the deceased who was a foreigner, it would be very much easier for the defendant to obtain the loan than the deceased.

I

A [41] Be that as it may, even if she was not working, there is no restriction for her name to be registered as the co-owner of a property although she is not eligible for a bank loan. This court opines that if the deceased really wants the defendant to be the co-owner of the said house he can simply request the bank to make the defendant the co-owner of the said house, even though he is paying the loan. But this does not happened, thus this court agrees with the plaintiff that there was never any intention by the deceased for the said property to be jointly owned with the defendant.

C [42] The SPA dated 12 August 2011 clearly indicates that the said house was purchased solely by the deceased and the defendant was not a party to the transaction. There is no evidence adduced by the defendant to corroborate her statement that 'pihak bank mencadangkan bahawa lebih senang untuk meminjam pinjaman perumahan agar hanya nama si mati telah ditulis di atas perjanjian jual beli yang bertarikh 12.8.2011'.

D [43] Furthermore, upon this court's close perusal of exh 'LSS3', this court has no hesitation to conclude that all the documents produced by the defendant in exh 'LSS3' do not support or corroborate the defendant's story. This court says so on the following reasons:

- E (a) in the offer to purchase, the vendor is not the same vendor as in the SPA. The vendor in the offer to purchase was Cheong Tin Yew whereas the vendor who sold the said house to the deceased was Awaeng ak Kwasin;
- F (b) the defendant contradicted her story on why only the deceased's name appeared in the SPA. Supposedly, her name should also appear in the SPA because both she and the deceased wanted to purchase the said house. However, in the offer to purchase, only her name appeared as the purchaser but not the deceased;
- G (c) the defendant's personal cheque (Affin Bank cheque No 011991) of RM13,440 does not support cl 2 of the offer to purchase as the amount to be paid on the date of execution of the offer to purchase must be 10% of the purchase price. Since the purchase price indicated on the offer to purchase was RM448,000, the deposit must be paid is not RM13,440 but RM44,800;
- H (d) the defendant had paid and signed the offer to purchase on 26 May 2011, even before the vendor had agreed to sell to her because the vendor had only signed the offer to purchase on 1 June 2011;
- I (e) nowhere in the official receipt issued by Low, Sunita & Ngoi to the defendant as acknowledgement of payment of RM13,440 made by the defendant indicated that the official receipt was issued for the said house. What was written on the official receipt was simply 'earnest

deposit'. If at all, the official receipt was issued for initial deposit for the said house, the solicitor must have written it in the official receipt; and

- (f) the official receipt issued by Low, Sunita & Ngoi does not refer to the said house. The SPA of the said house was only executed on *12 August 2011*, but the official receipt bore a reference 'Our reference LSN/C/SPA/7931/11/05 (Pc/JL)'. Considering the date of the SPA is *12 August 2011*, thus as at 30 May 2011, there has yet to be any SPA executed in respect of the said house.

[44] It is this court's finding that the assertion of payment of the initial deposit towards the purchase of the said house by the defendant is a bare and baseless assertion.

Right of the child (Zac Lim Gray) to the deceased's estate as the deceased's biological son

[45] This court has earlier found there was no valid and legal marriage between the deceased and the defendant. In other words, the customary marriage claimed by the defendant was not recognised by law. Hence, the child was born out of wedlock and is an illegitimate child and cannot fall within the definition of 'legitimated person' in the Legitimacy Act 1960 which provides as follows:

Interpretation

'legitimated person' means a person legitimated by this Act or by any of the written laws repealed by this Act, that is to say —

- (a) the Legitimacy Enactment of the Federated Malay States [Cap. 69];
- (b) the Legitimacy Enactment of the State of Johore [En. 19 of 1936]; and
- (c) the Legitimacy Ordinance of the Straits Settlements [Cap. 85];

[46] Further, s 3 of the Legitimacy Act 1960 provides as follows:

3 Conditions of application of Act

(1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnized and registered in accordance with —

- (a) the Civil Marriage Ordinance 1952 [Ord. No. 44 of 1952]*, or the Christian Marriage Ordinance 1956 [Ord. No. 33 of 1956]*;
- (b) the Christian Marriage Ordinance [Cap. 24]* or the Marriage Ordinance 1959 [Ord. No. 14 of 1959]*, of Sabah; or
- (c) the Church and Civil Marriage Ordinance [Cap. 92]* of Sarawak, or any Enactment or Ordinance repealed by any of the said Ordinances.

A [47] In the case of *Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors* [2016] 7 MLJ 628; [2016] 1 CLJ 336 the High Court held, inter alia, as follows:

B As shown in exh Y1 of encl 2 the information specified therein, the plaintiff's biological father is a Malaysian citizen and his mother is an Indonesian citizen.

C As the plaintiff had not made any averment pertaining to the status of his parent's marriage and or provided evidence that both his biological parents had been legally married and or provided evidence that the provision of s 3 of Act 60 had been satisfied the plaintiff is deemed to be an illegitimate person under the law. (Emphasis added.)

[48] Hence, as the child is an illegitimate child, he does not have any rights to the deceased's estate.

D *Right of the child (Zac Lim Gray) to the deceased's estate by virtue of the said will*

E [49] The defendant in her futile attempt to resist eviction from the said house had used the child as munition. The defendant had relied on the word 'children' used in the said will and contended that the word 'children' in the said will must be read to include the child.

F [50] This court agrees with the submission by the counsel for the plaintiff that if the deceased really intended to name both the defendant and the child (Zac Lim Gray) the beneficiaries of the estate, they will be named in the will as the will was executed after the purported customary marriage between the deceased and the defendant (which purportedly was held on 21 June 2008) and after the birth of the child on 14 November 2008.

G [51] Clearly, the said will was executed on 4 August 2010 more than two years after the customary marriage took place and after the child was born. If the deceased had intended to include the defendant's name and her son, the deceased would have included their name in the said will. But this did not happen.

H [52] Furthermore, this court finds that although the word 'children' is used in the said will, the material fact remains that there is no valid and legal marriage between the defendant and the deceased. Hence, the child was born out of wedlock and is for all intent and purpose an illegitimate child.

I [53] Based on the aforementioned reasons, it is this court's judgment that there are indeed no triable issues raised by the defendant to deny the plaintiff's right for an order under O 89 of the ROC 2012.

[54] Accordingly, the plaintiff's application in encl 1 is allowed with costs of RM5,000 to the plaintiff. A

Enclosure 1 allowed with costs of RM5,000.

Reported by Dzulqarnain Ab Fatar B

C

D

E

F

G

H

I