

# SHATILA BT CHE SAAD v M MISNAN BIN ALANG & ANOR

CaseAnalysis  
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## Shatila bt Che Saad v M Misnan bin Alang & Anor [2021] MLJU 1622

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

FAIZAH JAMALUDIN J

SAMAN PEMULA NO BA-24NCvC-1281-10/2020

30 August 2021

*Mohd Nizam Yahya (A Baskaran & Co) for the plaintiff.  
Muhammad Zahir Sanjay bin Abdullah (Muhammad Zahir) for the defendants.*

### Faizah Jamaludin J:

GROUND OF JUDGMENTA. Introduction

[1] This is an application by the Plaintiff for vacant possession of the property known as Unit C-1-12, Block C, Pangsapuri Seri Perantau, Pesiaran Sireh Junjung / KS4, 42000 Pelabuhan Kalang, Selangor Darul Ehsan (“the Property”) from the Defendants.

[2] The facts in this case are not in dispute.

[3] The Plaintiff was the successful bidder of the Property at an auction on 26.11.2018 held by Ambank (M) Berhad (formerly known as AmFinance Berhad) (“Ambank”) who is the assignee of the Property pursuant to a Composite Loan Agreement and Assignment and Power of Attorney both dated 07.10.2003 (“CLAA”) between the Defendants and Ambank

[4] The Defendants had purchased the Property from Perbadanan Kemajuan Negeri Selangor (“PKNS”) pursuant to a Sale and Purchase Agreement dated 28.08.2003 between the Defendants and PKNS (“the Principal SPA”). They had absolutely assigned their rights, title, interest, and benefits in the Property to Ambank pursuant to the CLAA as security for the loan facilities granted by Ambank in favour of the Defendants to finance their purchase of the Property.

[5] The Defendants subsequently defaulted in their loan repayments to Ambank in breach of the CLAA.

[6] Following the Defendants’ breach of the CLAA, Ambank pursuant to the rights, title and interests in the Property assigned to it under the CLAA, auctioned off the Property on 26.11.2018.

[7] The Plaintiff after successfully bidding for the property at the auction on 26.11.2018, signed the Declaration of Sale (*Perisytiharan Jualan*) on the same day and executed the Deed of Assignment with Ambank on 27.08.2019 (“DOA”) to transfer the ownership interest in the Property from Ambank to her.

[8] Ambank, as the absolute beneficial owner of the Property under the CLAA, pursuant to the DOA, in consideration of the purchase price of RM70,000.00 (which receipt it had acknowledged in the DOA) had assigned all its rights, title, interests and benefits in and over the Property to the Plaintiff and the Plaintiff accepted the assignment of the Property from Ambank.

[9] The Defendants, although informed of the Plaintiff’s purchase of the Property and served by her solicitors a

formal Notice of Eviction and Delivery of Vacant Possession (*Notis Pengusiran dan Serahan Milikan Kosong*) dated 20.09.2020, have to date, refused to vacate the Property and to deliver vacant possession of the Property to the Plaintiff.

[10] On 11.10.2020, the Plaintiff filed the originating summons in Enc. 1 (“OS”) seeking vacant possession of the property. In the OS, the Plaintiff sought for a declaration that she is the owner of the Property; that the Defendants are occupying the Property without her licence or consent; that the Defendants are to vacate the Property and deliver vacant possession to her within 14 days from the date of this Court’s order; that the Defendants are restrained from using or occupying the Property without the Plaintiff’s consent. She also sought for the costs of this action and compensation from the Defendants for her loss of use of the Property.

[11] At the conclusion of the hearing of Enc. 1, this Court allowed the Plaintiff’s application.

[12] The full grounds for this Court’s decision is set out in this Judgment.

#### B. Defendants’ Preliminary Objection

[13] In their affidavit in reply, the Defendants do not deny that they had defaulted in their loan repayments to Ambank, in breach of the CLAA. However, they raised a preliminary objection and several issues of law, which objection and issues were submitted by the learned counsel for the Defendants to this Court during the hearing of Enc. 1.

[14] The Defendants’ preliminary objection to the Plaintiff’s OS is that the OS is defective and should be struck out because the Plaintiff’s affidavit in support was affirmed one day before the filing date of the OS.

[15] The same preliminary objection had been raised by the defendant in *S Vigneswaran M Sanasee v Maju Institute of Educational Development (MIED)* [2010] 7 CLJ 240; [2010] MLJU 428; [2010] AMEJ 0090 (“**Vigneswaran v MIED**”). Mah Weng Kwai JC (as he then was) dismissed the preliminary objection and held that the affidavit that was affirmed one day before the originating summons in that case was filed, was properly filed. His Lordship gave a whole host of reasons in his judgment as to why he disagreed with the defendant’s preliminary objection, which reasons are reproduced below:

“

- (a) I wholly disagree with the contention of counsel for the defendant and his reliance on the rationale in the decision in *Arab Malaysian Finance Bhd (supra)* [*Arab Malaysian Finance Bhd v Serajudin Mohd Ismail & Anor* [1999] 6 CLJ 405].
- (b) There is nothing in O. 41 RHC which requires an affidavit to be filed after an application which sets out the cause or matter has been filed.
- (c) O. 41 r. 9(2) RHC merely states that every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not indorsed may not be filed or used without the leave of the court. The rule does not prohibit the swearing of an affidavit before an application is filed.
- (d) In most cases, for practical reasons (and almost without exception), affidavits are invariably affirmed before an application is filed. In reality affidavits are usually affirmed a day or just before an application with the affidavit in support are filed in court.
- (e) The procedure in *Arab Malaysian Finance Bhd (supra)* is honoured more in its non-compliance. To comply with the decision, a party intending to file an application with an affidavit in support would have to go to court, file the application, await a case number to be given to the application by the court clerk at the registration counter, then have the affidavit in support affirmed by the deponent in the presence of a commissioner for oaths before returning to the registration counter to file the affidavit that has just been affirmed. This unnecessary procedure will cause untold inconvenience to litigants for no real or perceived benefit. Invariably what is required in *Arab Malaysian Finance Bhd (supra)* is never followed.
- (f) There is absolutely no prejudice caused to a defendant who is served with an application together with an affidavit in support which was affirmed earlier, whether by a day or a week, before the application was filed. I do not see how such a situation can be disadvantageous to the defendant.

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- (g) Even assuming the court is wrong in not agreeing with *Arab Malaysian Finance Bhd (supra)*, the court can without hesitation rely on O. 2 r. 1(1) RHC to regard the non-compliance as an irregularity which shall not nullify the proceedings before the court.
- (h) The court can also rely on O. 1A RHC and shall have regard to the justice of the case and not only to the technical non-compliance of the rules.
- (i) Importantly, counsel for the defendant has chosen to ignore a host of decisions delivered after *Arab Malaysian Finance Bhd (supra)* wherein the learned judges have for good reasons, disagreed with the decision of RK Nathan J in *Arab Malaysian Finance Bhd*. I need only refer to the cases of:
- (i) *Hong Kong Bank Malaysia Bhd v. Nor Harizan Mohd Ali* [1999] 6 CLJ 466 per Azhar bin Hj Ma'ah J (now JCA);
  - (ii) *Yang Lak Man v. Yang Paw Man* [1999] 7 CLJ 131 per Mohd Hishamuddin bin Mohd Yunus J (now JCA);
  - (iii) *Standard Chartered Bank Malaysia Bhd v. Arivalagan Krishnan & Anor* [2001] 4 CLJ 168 per Low Hop Bing J (now JCA) and
  - (iv) *Bank Utama (Malaysia) Bhd v. Chai Koh Shon & Sons Sdn Bhd* [2003] 1 CLJ 264 per Sulaiman Daud J (now JCA).

In all the above cases, it was held that the RHC do not expressly or by implication require that an affidavit in support should only be affirmed after the filing of the originating cause or matter. Low Hop Bing J (now JCA) went on to say that in view of the filing and extraction procedure practiced in the court registry, it will be inconvenient and impractical for the affidavit to be affirmed on or after the date of the filing of the originating summons.

It is unfortunate that counsel for the defendant saw it fit to raise the preliminary objection which, in light of the above cited cases, rendered it frivolous and without merit.

- (j) The affirmation by the plaintiff in encl. 2 before the filing of the originating summons is not detrimental to the defendant in any way and has not occasioned any miscarriage of justice."

**[16]** Like the defendant's counsel in *Vigneswaran v MIED*, the Defendants' counsel in this instant case also chose to rely on the High Court's decision in *Arab Malaysian Finance Bhd v Serajudin Mohd Ismail & Anor* [1999] 6 CLJ 405; [1998] MLJU 253; [2000] 7 MLJ 613 ("**Arab Malaysian Finance**"). He also chose not bring to this Court's attention to the many cases after **Arab Malaysian Finance** that disagreed with the decision reached in the said case.

**[17]** Affirming an affidavit in support a day before the filing of an originating summons is not a non-compliance of the rules of Court. There is nothing in the Order 41 of the ROC that requires an affidavit to be affirmed or filed after the application which sets out the cause or matter has been filed.

**[18]** Even if there was such a rule, Order 2 rule 3 of the ROC prohibits preliminary objections for non-compliance of the rules, unless there has been "*a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both*". Order 2 rule of the ROC reads:

**"3. Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)**

A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both."

**[19]** The Defendants in this case have not shown that they have suffered a substantial miscarriage of justice or prejudice by the fact that the Plaintiff's affidavit in support of her OS is affirmed a day earlier.

**[20]** I agree with the view expressed by Low Hop Beng JCA (as he then was) in *Standard Chartered Malaysia Berhad v Arivalagan Krishnan & Anor* [2001] 4 CLJ 168; [2001] MLJU 379; [2001] AMEJ 0303, that it would be

inconvenient and impractical for the affidavit to be affirmed on or after the date on which the originating summons had been filed and extracted. His Lordship said:

“By way of a practical illustration, when an originating summons is to be filed in court, the originating summons and the affidavit in support thereof are invariably prepared together and the affidavit in support is normally affirmed first and then filed, as a matter of practical convenience, together with the originating summons. The originating summons would then be registered with a case number with the necessary code for the purposes of the payment of praecipe. Thereafter, possibly a few days or exceptionally few weeks later, depending on the volume and pressure of work at the registry of the court the originating summons would be sealed and finally it is signed by the registrar of the court, to be extracted by the law firm filing it. **It would be inconvenient or impractical for the affidavit to be affirmed on or after the date on which originating summons has been filed and extracted, as it would mean filing the originating summons first, obtain the extract copy with the case number and then file the affidavit in support. That possibly is the reason why O. 41 r. 1(1) does not make any reference to the case number or serial number but merely the title.** In the circumstances, I hold that the affidavits filed by the plaintiff herein are not defective and therefore admissible.

[Emphasis added]

[21]Echoing the words expressed by Mah Weng Kwai JC (as he then was) in **Vigneswaran v. MIED** (supra), it is indeed unfortunate that learned counsel for the Defendants saw it fit to raise the preliminary objection which, in light of the above cited cases and the rules in the ROC, renders the objection frivolous and without merit.

[22]The Defendant’s preliminary objection is, accordingly, dismissed.  
C. Analysis of the Plaintiff’s Substantive Application

[23]The Plaintiff had purchased the Property through an auction held by Ambank following the Defendants’ default of the CLAA in failing and/or defaulting in their loan repayments to Ambank.

[24]In objecting to the Plaintiff’s application, the Defendants’ counsel did not raise the fact that the Defendants had not denied that they had defaulted in their loan repayments and that they had absolutely assigned their rights, title, interest, and benefits in the Property to Ambank pursuant to the CLAA as security for the loan facilities granted in favour of the Defendants to finance their purchase of the Property.

[25]Instead, he raises a legal argument that since sections 2 and section 3 of the Financial Services Act 2013 does not expressly state that a bank can give vacant possession to a property, Ambank cannot give vacant possession to the Property to the Plaintiff and the Plaintiff’s application should for this reason be dismissed.

[26]With respect to learned counsel for the Defendants, the Plaintiff is not seeking vacant possession from Ambank. Clause 15 of the Conditions of Sale in the Declaration of Sales states that the purchaser after payment of the total purchase price shall at its own costs and expenses take possession of the Property without any obligation of the part of Ambank to give vacant possession. Being the successful bidder of the Property in the auction and having paid the total purchase price for the Property, the Plaintiff is seeking an order through this Court proceedings for vacant possession of the Property since the Defendants are refusing to vacate the Property despite service of the Notice of Eviction and Delivery of Vacant Possession.

[27]As for Ambank, pursuant to section 2 and 3 of the Financial Services Act 2013, Ambank may carry on “banking business”, which includes “the business of the provision of finance”. As the finance was provided by Ambank to the Defendants for the purchase of the Property in 2003, the governing legislation was the Banking and Financial Institutions Act 1989 (“BAFIA”). Section 2 of BAFIA defines “banking business” to include “the business of the provision of finance”. As a bank licensed under BAFIA to carry on banking business, Ambank may, among others, provide finance.

[28]The CLAA was entered between Ambank and the Defendants as security for the finance provided by Ambank to the Defendants for their purchase of the Property from PKNS under the Principal SPA. It is not disputed that the Defendants had absolutely assigned their rights, title, interest, and benefits in the Property to Ambank under the CLAA. Ambank’s right to auction the Property is a right it derived as the assignee under the CLAA.

[29]As was succinctly put by the Court of Appeal in *CIMB Islamic Bank Bhd v Khairuddin Abu Hassan* [2021] 4 CLJ 375; [2021] 2 MLJ 155, in its judgment issued on 03.02.2021 (few months before this Court’s decision in this case),

“the property basically belongs to the appellant [bank] until full payment is made by the respondent [borrower] for the facility he obtained from the former.”

[30] Additionally, in *Ruzain Zainudin & Anor v. RHB Bank Bhd* [2011] 1 LNS 1196; [2012] 3 MLJ 401 the Shah Alam High Court held that “..... under the deed of assignment, the defendant [bank] was entitled to proceed to auction off the property in the event of a default, and this had clearly occurred in this case.”

[31] The Defendants on the other hand, do not have any rights, title, interest, and benefits in the Property at the time the Property was auctioned by Ambank. They had absolutely assigned their rights, title, interest, and benefits in the Property under the Principal SPA to Ambank pursuant to the CLAA.

[32] The Court of Appeal in **CIMB Islamic Bank Bhd v Khairuddin Abu Hassan** (supra) held through the deed of assignment between a borrower and a bank, the borrower would have absolutely assigned its rights to the property to the bank from which it obtained the loan facilities for the purchase of the property. Abu Bakar Jais JCA said:

“[63] It is also most important to note that the property is absolutely assigned to the appellant. Meaning that the appellant has absolute discretion in dealing with the property as it deems necessary. The property basically belongs to the appellant until full payment is made by the respondent for the facility he obtained from the former. Once there is default on the repayments of the facility, a bank could immediately act because of the assignment. This is how a bank works in respect of its customers who are provided banking facilities. And this is quite basic for any borrower to be aware of. It has become common knowledge this is how banks operate to bind parties owing money to them because of the facilities granted. Thus, having absolute discretion to deal with the property because of the assignment, there is absolutely no requirement whatsoever for the appellant to notify the respondent regarding the proclamation. In fact, because of the absolute assignment, no notices and demands need to be further given as indicated in the case of *Ruzain Zainudin & Anor v. RHB Bank Bhd* [2011] 1 LNS 1196; [2012] 3 MLJ 401 where it is said as follows:

Based on the finding above that the defendant was entitled to proceed based on the deed of assignment, the court finds that the issues raised by the plaintiffs as regards whether the defendant should have issued a letter of demand, a notice of termination or a notis penamatan to be a non-starter. It is the court’s finding that there under the deed of assignment, the defendant was entitled to proceed to auction off the property in the event of a default, and this had clearly occurred in this case.

[33] The Federal Court in *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1; [2015] 3 AMR 301 held:

“The absolute assignment, therefore, is in relation to a transfer of the legal right of the chose in action from the appellant to the bank as assigned therein within the meaning of s. 4(3) of the Civil Law Act 1956. It follows that when the bank exercised its power of sale under the LACA [Loan Agreement Cum Assignment] to dispose of its rights by way of a further assignment, it only involves a transfer of a legal right to the chose in action to the purchaser. In the absence of any statutes or express provisions in the assignment restricting the disposal of such rights, the bank is entitled to exercise its powers of sale and to have its rights to the chose in action transferred. Such powers and rights, in our view, are not extinguished by reason of the issuance of the issue document of title to the land.”

[34] At the time the Property was auctioned by Ambank and purchased by the Plaintiff, the strata title for the Property had not been issued. But even if the title had been issued, as held by the Federal Court in **Damai Freight** (supra) the powers and rights of Ambank as the assignee to exercise its powers of sale under the CLAA and to have its rights to the Property transferred shall not be extinguished by reason of the issuance of the strata title to the Property.

[35] Ambank had entered into the DOA with the Plaintiff on 27.08.2019, whereby Ambank as the absolute beneficial owner under the CLAA of the Property agreed to assign all its rights, titles, interest and benefits in and over the Property under the Principal SPA to the Plaintiff and the Plaintiff had agreed to accept the assignment of the Property subject to the terms and conditions of the Principal SPA and the Deed of Assignment.

[36] Clause 1 and 2 of the DOA between Ambank and the Plaintiff reads:

“1. In consideration of the sum of RINGGIT MALAYSIA SEVENTY THOUSAND (RM70,000) only paid by the Assignee to the Assignor as full price for the Property (the receipt of which the Assignor hereby acknowledge) **the Assignor hereby**

**assigns transfers and convey absolutely to the Assignee all his rights title interest and benefit in and to the Property under the Principal SPA together with the full benefit granted** and all stipulations subject to the terms and conditions express or implied therein contained and all remedies for enforcing the same and subject to all restriction in interest and conditions of title express or implied in the Title to be issued and upon the terms and conditions herein contained.

2. The parties hereby expressly agree and confirm severally with each other that subject only to the express terms and modification therein this Deed of Assignment contained, **the Assignee shall assume all and sundry the obligations and liabilities and shall be entitled to whatsoever rights title interest and benefit imposed upon or vested in the Assignor by under and pursuant to the Principal SPA as fully and effectively as if the Assignee had been party to the said agreement in place of the Assignor from the date of this Deed of Assignment** and each of the parties hereto severally covenant and undertakes to do all acts and execute all instrument necessary or expedient for the purpose of effecting the stipulations hereinbefore expressed.”

[Emphasis added]

[37]It is evident from the terms of clauses 1 and 2 of the DOA that Ambank in consideration of the purchase price of RM70,000 paid to it by the Plaintiff, had assigned to the Plaintiff all its rights, title, interests and benefits in and to the Property under the Principal SPA that was entered between PKNS and the Defendants, which the Defendants had assigned to Ambank under the CLAA. Additionally, under the DOA, the Plaintiff assumes all the obligations and liabilities and shall be entitled to whatsoever rights title interest and benefit imposed upon or vested in Ambank by, under and pursuant to the Principal SPA.

[38]Accordingly, pursuant the terms of the DOA the Plaintiff is entitled to all the rights, title, interests and benefits in the Property, which had been assigned by the Defendants to Ambank under the CLAA. Included in the rights, title , interests and benefits in the Property assigned to the Plaintiff is the right to vacant possession of the Property.

[39]Counsel for the Defendants’ also argued that Ambank cannot transfer ownership of the Property to the Plaintiff because the power of attorney between Defendants and Ambank under the CLAA has not been revoked. I cannot find any merit to this argument because it is precisely for the reason that the power of attorney has not been revoked that Ambank as assignee and donee under the CLAA is able to transfer the rights, title, interest and benefit in the Property to the Plaintiff.

[40]Another argument put forward by the Defendants’ counsel is that as the Plaintiff did not prove that she had inspected the Property prior to the auction, the Plaintiff’s purchase of the Property is subject to the Defendants’ rights to the Property. He says that the Plaintiff is bound by the principle of *caveat emptor* (buyer beware) and cannot now seek to evict the Defendants from the Property. Defendant’s counsel argues that the Plaintiff has lost her rights to the Property and should not be allowed to enforce those rights.

[41]This Court is not persuaded by the Defendants’ counsel’s argument that the Plaintiff’s rights to the Property is subject to the Defendant’s rights. As discussed above, the Defendants’ do not have any rights title interest and/or benefits in the Property — they had absolutely assigned their rights, title, interest, and benefits in the Property to Ambank pursuant to the CLAA. Their right to stay on the Property is subject to them complying with the terms of the CLAA, which the Defendants do not deny they had breached in failing to make their loan repayments to Ambank. Since the Defendants do not have any rights in the Property, their counsel’s argument that the Plaintiff takes the Property subject to the Defendant’s rights to the Property is devoid of merit.

***Is section 7 of the Specific Relief Act 1950 limited to recovery of vacant possession of property from a tenant at the end of a tenancy?***

[42]Learned counsel for Defendants’ raised a further argument that the citation of Order 89 of the ROC and section 7 of the Specific Relief Act 1950 (“SRA”) in the intitlement of the Plaintiff’s OS renders the OS flawed and for this reason should be dismissed. He argues that vacant possession of the Property cannot be recovered from the Defendants under section 7 of the SPA or Order 89 of the ROC as the Defendants are the original purchasers of the Property, they are not tenants and do not need a licence or consent to occupy the Property.

[43]Section 7 of the SRA states:

- (1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

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- (2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.
- (3) In subsection (2) “occupier” means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

[44] Counsel for the Defendants contends that section 7 of the SRA applies only to tenancy situations where a landlord is trying to recover his property from a tenant at the end of a tenancy because section 7(1) starts with the phrase “subject to subsection (2)”.

[45] With respect to counsel for the Defendant, I am unable to agree with his interpretation. Section 7 of the SRA was amended by the Specific Relief (Amendment) Act 1992 (“the 1992 Amendment Act”) to include subsection 7(2) in order to protect tenants from the remedy of self-help under common law, which remedy allows landlords to forcefully evict tenants without an order of Court.

[46] The inclusion of subsection 7(2) of SRA by the 1992 Amendment Act to protect tenants from the remedy of self-help can be seen from Abdul Malik Ishak J’s judgment in *Er Eng Hong & Anor v New Kim Eng @ Neo Kim* [1999] MLJU 605; [2000] 1 CLJ 289, where he said:

“In Malaysia, the remedy of self help was alluded to by our courts in the following cases:

- (1) *Sidek Bin Haji Mohamad & Ors v The Government of the State of Perak & Ors* (1982) 1 MLJ 313 F.C.;
- (2) *Majlis Amanah Rakyat (MARA) v Tan Seek Hong & Ors* (1994) 2 AMR 1296 at 1302;
- (3) *Perumahan Farlim (Pg) Sdn Bhd & Ors v Cheng Hang Guan & Ors* (1989) 1 SCR 639; and
- (4) *Cahaya Ideal (M) Sdn Bhd v Orang-Orang Yang Menduduki Rumah Yang Ditanda Sebagai “A 3” Dan Didirikan Atas Sebahagian Tanah Yang Dipegang Di Bawah Hakmilik CT 2733 Lot 2103, Mukim Plentong, Daerah Johor Bahru, Negeri Johor* (1999) 1 CLJ 575.

But a note of caution must be registered here. The amended section 7(2) of the Specific Relief Act, 1950 (Act 137) which came into force on January [1992 by Act A 811 would relegate the remedy of self-help into oblivion as the owner of the property can only seek to enforce his right to recover his property from the occupier by way of a court action. That section 7(2) of the Specific Relief Act, 1950 (Act 137) enacts as follows:

“When a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.”

[47] Subsection 7(2) was added to the SRA, by the 1992 Amendment Act, to extinguish a landlord’s right to recover possession of his property through the remedy of self-help. Subsection 7(2) expressly states that where a tenancy is determined or comes to an end but the occupier continues to remain in the property, the person entitled to the possession of the property “**shall not enforce his right to recover [the property] against the occupier otherwise than by proceedings in the court.**” Since the remedy of self-help is available at common law, consequential amendments had to be made to subsection 7(1) to make it subject subsection 7(2) so that a landlord or a person entitled to possession of the property at the end of a tenancy can no longer exercise the common law remedy of self-help but is obliged under subsection 7(2) to apply to Court to recover possession of his property. As Abdul Malik Ishak J remarked in *Er Eng Hong & Anor v New Kim Eng @ Neo Kim* (supra):

“The amended section 7(2) of the Specific Relief Act, 1950 (Act 137) which came into force on January [1992 by Act A 811 would relegate the remedy of self-help into oblivion as the owner of the property can only seek to enforce his right to recover his property from the occupier by way of a court action.”

[48] For this reason, this Court finds that Defendant’s counsel’s submission that section 7 is limited to possession by a landlord from his tenant at the end of a tenancy is incorrect.

***Is an OS for vacant possession flawed because section 7 of the Specific Relief Act 1950 and Order 89 of the ROC in stated in the intitulement of the OS?***

[49] Learned counsel for the Defendants further submits that the OS is flawed because the Plaintiff had cited Order 89 of the ROC in the intitulement of her OS and for this reason the OS should be dismissed. He argues that the issue of the Defendants occupying the Property without licence or consent does not arise because the Defendants were the original purchasers of the Property from PKNS.

[50] Order 89 of the ROC states:

**89. Summary proceedings for possession of land**

1. Proceedings to be brought by originating summons (O. 89 r. 1)

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.

[51] Order 7 rule 2 (1A) of the ROC requires every originating summons to state in its intitulement any provision of the ROC and any provision of the written law under which the Court is being moved. The Plaintiff in this instant case had complied with Order 7 rule 2(1A) of the ROC. In applying for vacant possession of the Property she stated in the intitulement of her OS, Order 89 of the ROC and section 7 of the SRA.

[52] The Court of Appeal in *Abad Arena Juara Sdn Bhd v Rajesh a/l Jaikishnan* [2019] 6 MLJ 607; [2019] 1 LNS 1426 ("**Abad Arena Juara**") held that "*to obtain vacant possession, the relevant Act and/or rules according to specific facts of each case may be s. 7 of the Specific Relief Act 1950 and/or O. 89 of the RC 2012 or other provisions of the law*". The Court of Appeal held the non-statement of section 7 of the SRA and Order 89 of the ROC in the intitulement of the originating summons was fatal to the respondent's application for vacant possession. The Court of Appeal held "*The Act or Rules were also not entitled. It was fatal and the court should not proceed with the hearing of the originating summons without appropriate intitulement unless the issue was not brought to the attention of the court.*"

[53] With respect, for the reasons above, I cannot accept the Defendants' submission that the Plaintiff's OS should be dismissed because section 7 of the SRA and Order 89 of the ROC **was stated** in the intitulement of the OS. The Court of Appeal in **Abad Arena Juara** (supra) held that an originating summons for vacant possession is flawed because section 7 of the SRA and order 89 of the ROC were **not stated** in the intitulement of the OS and not vice versa.

[54] This Court finds that the fact the Defendants were the original purchasers of the Property does not make the OS flawed and should be dismissed. In fact, the contrary is true — based on the Court of Appeal's decision in **Abad Arena Juara** (supra), if the Plaintiff had not stated section 7 of the SRA and Order 89 of the ROC in the intitulement of her OS, the OS would be flawed.

[55] Furthermore, based on the facts of this case, even if it was inaccurate for the Plaintiff to state Section 7 of the SRA and Order 89 of the ROC in the intitulement of the OS, under Order 2 rule 1(1) of the ROC, this Court may regard the inclusion of the said Act and Rule to the intitulement of the Plaintiff's OS as an irregularity which shall not nullify the OS.

[56] Additionally, under Order 1A of the ROC, this Court having regard to the overriding interest of justice has the discretion not to dismiss the Plaintiff's application by reason of the law and rules stated in the intitulement of the OS.

[57] The Defendants have not shown how they have suffered a serious miscarriage of justice or serious prejudice as a result of section 7 of the SRA and Order 89 of the ROC being stated in the intitulement of the OS. Whereas, it would cause the Plaintiff a serious miscarriage of justice and utmost prejudice if this Court were to dismiss her application on the grounds that section 7 of the SRA and Order 89 of the ROC were stated in the intitulement of her OS, particularly so taking into account the Court of Appeal's decision in **Abad Arena Juara** (supra) that it would be fatal to her OS if she did not state both the said Act and Rule in the intitulement of the OS.



[58] Accordingly, for these reasons, based on the rules in the ROC and having regard to the overriding interest of justice, this Court shall not dismiss the Plaintiff's OS solely by reason of section 7 of the SRA and Order 89 of the ROC being stated in the intitulement of the OS.

[59] Another argument raised by the Defendant's counsel is that it would be wrong for this Court to grant the declarations sought for by the Plaintiff because "*the Plaintiff had not proven as to how the ownership pass [sic] to the Plaintiff when the Plaintiff had purchased the property under the auction with full knowledge of the existence of the Defendants on the property*". With respect to the Defendants' counsel, his argument that the Plaintiff had not shown how ownership passed to her is without basis. The passing of the rights, title, interest in the Property from Ambank to the Plaintiff is clear for all to see from clauses 1 and 2 of the DOA.

***Is there evidential basis for the grant of the declaration prayed for in this OS?***

[60] It is trite that a Court shall only grant a declaration where there is an evidential basis to do so.

[61] In this instant case, for the reasons above, this Court finds that there is strong evidence to support the grant of the declaration sought by the Plaintiff. The Plaintiff has proven on a balance of probabilities that she has purchased the Property at the auction; that she had paid the purchase price of RM70,000 to Ambank — a fact which Ambank had expressly acknowledged receipt of in the Deed of Assignment; and that Ambank had assigned to her all the rights, benefits, title and interest in the Property pursuant to the DOA.

D. Decision

[62] Accordingly, for the reasons above, this Court makes the following Orders:

- (1) A declaration that the Plaintiff is the owner of the Property;
- (2) A declaration that the Defendants and any other persons are occupying the Property without the Plaintiff's licence or consent;
- (3) The Defendants and any other persons occupying the Property are ordered to vacate the Property and to deliver vacant possession of the Property in a safe and reasonable manner to the Plaintiff within 14 days from the date of this Order;
- (4) The Defendants and any other persons occupying the Property are prohibited by themselves and/or their agents or representatives from using, occupying and/or dealing with the Property without the Plaintiff's consent;
- (5) The Plaintiff is given leave to apply for any consequential orders as necessary to enforce this Judgment/Order;
- (6) Damages suffered by the Plaintiff as a result of her loss of use of the Property is to be assessed by this Court and paid by the Defendants to the Plaintiff;
- (7) The Defendants are to pay the Plaintiff costs in the sum of RM5,000.