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Article

*209 The Scope of Order 89 of the Rules of Court 2012

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Abstract

The law permits and safeguards ownership of landed properties. With such ownership comes the usual boons and banes. The bane happens when a third party usurps possession of the landed property. Fortunately, when that happens the law provides recourse to the owner of the landed property concern to evict such “unwelcome guests”. One such legal recourse is by way of summary proceedings under Order 89 of the Rules of Court 2012 (“Order 89”). This article intends to explore the scope of applicability of Order 89 as a legal means to regain possession of landed properties occupied by unwanted third parties.

Introduction

Order 89 was created to allow landowners the benefit of summary proceeding to regain possession of their landed property, akin to Order 14 of the same Rules, in the event it is occupied by “unwelcome guests”. The scenarios of such occupation may vary depending on the factual matrix. For example, the entry and occupation may have been completely unknown to the landowner, in which case, the occupier will be a trespasser. In another, the entry and occupation may have been with the consent of the predecessor-in-title, namely a gratuitous licensee per se but not the current owner. Also, it is possible that even though the initial entry was without permission but having knowledge, the owner might have expressly or impliedly acquiesced to the presence of the occupier. To remove such unwanted third parties, the owner of the landed property has no choice but to resort to legal proceedings as the remedy of self-help (chasing them out like common criminals) can have unwanted dire consequences. One such legal avenue open to the owner of the landed property is to apply under Order 89.

Order 89 r 1 reads as follows:

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.

*210 It is clearly stated that the proceedings may be brought by originating summons which means that the matter can be disposed of by affidavit evidence rather than the need to take it viva voce which would normally be a protracted and costly affair. Of course, such an affidavit in support of the originating summons must comply with the requirements of Order 89 r 3 and of course Order 41 r 4.

It is clearly stated in the said Order that this summary proceeding cannot be resorted to against tenants who are holding over after the termination of tenancy. Also, the landlord is no more entitled to the remedy of self-help, that is physical eviction of the tenants, with effect from January 31, 1992 with the amendment to the Specific Relief Act 1950 by adding s 7(2) whereby it is mandated that eviction proceedings by landlords must be initiated in court. The landlord can commence an ordinary action for vacant possession. This was clearly stated by his Lordship Gopal Sri Ram JCA in the case of Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v Abdul Johari b Abdul Rahman [1995] 1 AMR 759 (" Cheow Chew Khoon ") as follows:

That Order is not meant to be, and, should not be, used for the recovery of property occupied by tenants whose tenancies have come to an end. The words in parentheses appearing in the first Rule of that Order makes this abundantly clear. The summary jurisdiction that the Order has created is not a substitute for the ordinary action for vacant possession and should not be permitted to be so used.

Origin and objective of Order 89

Order 89 is modelled on Order 113 of the Rules of the Supreme Court 1965 ("Order 113") and is in pari materia with its predecessor, the Rules of the High Court 1980. The scenario where Order 113 r 1 would be applicable (would also in all likelihood apply to an application under Order 89), can be found in the commentary in the 1988 White Book (Vol. 1) at p 1470 as cited in the Supreme Court case of Bohari Taib & Ors v Pengarah Tanah & Galian Selangor [1991] 1 CLJ (Rep) 48; [1990] 2 MLRA 107 (" Bohari Taib ") as follows:

For the particular circumstances and remedy described in r. 1, this Order provides a somewhat exceptional procedure, which is an amalgam of other procedures, e.g., procedure by ex parte originating summons, default procedures and the procedure for summary judgement under O. 14. Its machinery is summary, simple and speedy, i.e., 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 wrongful 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 res without there being any other party but the plaintiff.

*211 The same view was expressed by His Lordship Gopal Sri Ram JCA in Cheow Chew Khoon :

For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the Rules Committee passed Order 89.

Although modelled on Order 113 of the Rules of the Supreme Court 1965, his Lordship Gopal Sri Ram JCA in Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor [1996] 2 AMR 1799 (" Shaheen bte Abu Bakar ") cautioned against “slavish adherence” to English precedents and stated that:

In my judgment, it would be quite wrong for our courts to apply, without question or qualification, the views expressed by English judges or commentators, however eminent, to cases that arise before them under a parallel provision of written law without addressing the circumstances that prevail in this country. Especially is this so in cases involving the practice and procedure of our courts, where the approach that we adopt may be at variance with that followed by courts in England.

Of course, if a view of the law that we take on a particular subject is similar to that expressed in an English case, it would be quite proper to cite that decision as authority for the proposition stated. But there should be no slavish adherence to English precedent.

The locus standi to commence proceeding under Order 89

It was decided by the Court of Appeal in the case of Shaheen bte Abu Bakar that locus standi to commence proceedings under Order 89 is based upon the right to possession of the landed property and not necessarily limited to the registered owner since rule 3(a) of Order 89 merely requires the applicant to show “his interest in the land” in question. To quote his Lordship Gopal Sri Ram JCA from Shaheen bte Abu Bakar :

In my judgment, the test of standing that is to be applied in cases under Order 89 is one based upon a right to possession.

Although in normal circumstances the registered owner might also be endowed with the right of possession however, in appropriate cases multiple parties might be entitled to possession and have the right to apply as it happened in Shaheen bte Abu Bakar . Therefore, a careful examination of the facts is needed to ascertain in whom resides the right of possession. It was also stated obiter that if the registered owner had wholly divested his right of possession to the land in question, then that other person would have the locus standi to commence the action under Order 89, such as *212 where the registered proprietor has placed such power in the hands of a tenant of the land in question.

Ousting of Order 89 proceedings

After referring to the decision of the Supreme Court in Bohari Taib his Lordship Gopal Sri Ram JCA surmised in Shaheen bte Abu Bakar that the two elements that oust the operation of Order 89 are as follows:

(1)

The initial entry upon the land must be lawful, and

(2)

The existence of any express or implied consent or license on the part of the owner pursuant to which the occupation continued.

If the occupier can establish in respect of the second element that there are triable issues, which is a question of fact, then the summary jurisdiction is ousted.

The commonly accepted view of the applicability of Order 89

The commonly accepted view is that Order 89 is meant to be used to evict bare squatters or squatters simpliciter who have no rights whatsoever, legal or equitable or even a license or consent to occupy the landed property in the first place. This is supported by the fact the originating summons in Form 8A does provide for action to be commence against persons unknown in occupation of the land, which is an action in rem. His Lordship Mohd Azmi SCJ in Bohari Taib explained the applicability of the Order as follows:

… this order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e., where 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 licence or consent and without any right, title or interest thereto.

Such a case is the case of Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang @ Tham Sow Seng & 2 Ors [2001] 2 AMR 1492 where the squatters failed to show there were any triable issues. Factually, the plaintiffs were the registered owners of a piece of land previously owned by the Perak State Government. The plaintiffs commenced summary proceedings against the first and second defendants and other occupiers on the grounds that they have been living on the land without licence, consent or agreement of the plaintiffs and/or their predecessors, the Perak State Government. The plaintiffs managed to obtain default judgment against the second and third defendants but the first defendant resisted the application, inter alia on the grounds that he had applied for a housing lot on the lot upon which his house had stood since 1976 to the State Authority and that he had been paying the assessment rates for the same to the Majlis Perbandaran Taiping (MPT) since 1984. A copy of the application form as well as copies of receipts in respect of the payments *213 made were adduced in evidence by the first defendant. His Lordship VT Singham JC held that:

The fact that the first defendant had submitted an application to the State Authority for the lot clearly showed that he had not obtained the authority or consent of the State Authority to live in or occupy the lot and was therefore in occupation of the same as an illegal squatter notwithstanding the fact that he had constructed a house thereon and had paid assessment rates to the MPT. The plaintiffs being the registered owners of the lot are entitled, and have every right to evict the first defendant by summary procedure. The first defendant being an illegal squatter, has no protection in law or in equity to enable him to claim a right to live in, or continue to live in or occupy the lot. The erecting of a building unlawfully on the lot and the occupation of the same, is not sufficient to create any right or equity against the rightful owner thereof who is protected by title.

Unless the first defendant is able to show that he had obtained the express or implied permission, consent or agreement of the plaintiffs, or their predecessors in title or the State Authority to live or continue to live on the said lot, the fact that he had applied to the said authority for the lot does not ipso facto give him a right to the occupancy thereof.

Another is the case of Shaheen bte Abu Bakar (consolidated and heard together with two similar appeals) where the State of Selangor was the owner of the land in question but pursuant to an application, the land was alienated to PKNS for development. PKNS entered into a joint venture agreement with a private company and a joint venture company called Punca Alam Sdn Bhd was incorporated. The land was alienated without vacant possession. Order 89 proceedings were commenced, pursuant to which 151 of the occupants vacated the land except for three who opposed it. To cut to the chase, the learned High Court judge made orders of possession against the three of them and aggrieved by it, they appealed to the Court of Appeal. The Court of Appeal proceeded to examine the facts of each case to determine if there were material facts which ousted the operation of Order 89 and to appreciate the examination of the said facts, I quote from the judgment in extenso as follows:

Let me take the case of Shaheen bt Abu Bakar, the first appellant.

Her evidence is that in 1982, her father, acting upon the encouragement of the Penghulu of Mukim Sungei Puluh, entered onto the land in question. In 1983, the father built a house on the land. In the following two years, her father and the other occupiers commenced fish farming. They received assistance from the Department of Agriculture and Fisheries, who no doubt were unaware, or at the very least unconcerned, with the legality of the father's occupation of the land in question. Shaheen goes on to say that in 1995, the father "gifted" the property to her. She says that the State constructed a Surau on the land with public funds, although I must say that *214 the document she relies upon – a voucher from the Petaling District Office – speaks, not of construction but of repairs and renovation done to an existing Surau.

These are then the circumstances upon which Shaheen relies to support her allegation that her initial entry upon the land and her continued occupation of the same. By no stretch of the imagination may a parallel be drawn between her case and that of Bohari (supra). There is, in the present case, no active encouragement of the kind that was found to exist in Bohari's case. No promise to issue title to her or her father was ever made by the State Government. Nor were there any acting on the part of the State Authority which may be capable of even remotely suggesting the existence of consent or a licence. Unfortunately for her, Shaheen and her father remain what they always were: squatters on state land.

The next case is that of the second appellant, Ho Choong Yee. This appellant came onto the land in 1980, when she purchased a house built on it. The vendor of the house, one Ho Yan, came onto the land in 1976. In her evidence, she goes on to say that she expended money in practically rebuilding the house and converting it into a permanent structure. In May 1987, she applied for a temporary occupation licence but was not issued with one. This is all that she has asserted in support of her case.

It is more than plain to me that the second appellant has established absolutely no basis for making the suggestion that she does: that her possession of the land is with the consent or by the licence of the State Government and PKNS. Her entry upon the land was illegal as is her continued occupation of it. As a squatter, it is not open to her to resist a summary application for possession. There is no suggestion that planning permission was ever obtained for the house she re-built. It is an illegal structure, as are no doubt the houses of the other appellants.

I now take the case of the third appellant, Lee Yat Yee. His case is that he went into possession of this land in 1969. He applied for a temporary occupation licence ("TOL") and was issued one, but in the name of his neighbour. In 1988, he had the TOL issued in his name. It expired in 1991 and has never been renewed since then. There is no suggestion by Mr Lee that the State Authority led him to believe that his TOL would be enlarged into a greater interest in the land. Neither is there any suggestion that, apart from the grant of the TOL, there was a definite promise to issue him with a title to that portion of the land he occupies.

So, the judge concluded as follows:

Based on the foregoing facts, I am unable to find any material from which the judge could have inferred either consent or a licence to occupy the land in question. Mr Lee, like the other appellants, is also a squatter with no rights whatsoever.

*215 In contrast to the above, is the case of Bohari Taib where the applicant/respondent failed in their Order 89 application because the occupants were under a legitimate expectation of receiving from the State Authority title to their portion of the land. In Bohari Taib , the originating summons was filed by the respondent to recover state land from the appellants and six others in Sabak Bernam on the grounds of absence of license or consent to occupy as they wanted to alienate the land to Felcra. At the same time two of the appellants had initiated declaratory proceedings against the respondent on the grounds that they been in occupation of land for a long time and carried out farming activities and are entitled in law and equity to possession of the land. The learned judge not only summarily granted the order as per the originating summons but also called forth and ordered that the two declaratory proceedings be struck out. On appeal to the Supreme Court, the appellants' contention was that their forefathers were the pioneer settlers of the land in dispute. But between 1971 and 1976, the appellants alleged that they and the others did make applications to the state authority for titles to the said land. There was some evidence by affidavit and documentary exhibits to show that on or about September 4, 1980, the Selangor State Executive Council, no doubt acting under the National Land Code, had approved the alienation of the said land to the appellants and the other selected settlers, and on November 1, 1980, one Dato' Haji Kamarulzaman bin Haji Ahmad, the then member of State Executive Council had personally confirmed the approval and assured them that they would be given

titles to the said land .

Based on the aforesaid the court ruled that there “are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence viva voce is required not only on the alleged consent of the respondent to the appellants’ occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s 42 of the National Land Code”.

In the same case, the court referred to the case of Mohd Rawi bin Yaacob v Federal Land Development Authority (SCCA No. 02-311 of 1989) decided by another panel of the court, (Abdul Hamid LP, Gunn Chit Tuan SCJ and Mohd Jemuri SCJ) which had in allowing an appeal held that where the entry to the land is lawful, and where there are triable issues, Order 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

From the above cases it is clear that one cannot assume the existence of consent from the act of occupation and subsequent conduct on the land per se but there must be some form of positive conduct on the part of the owner of the land to suggest or imply the existence of consent to occupy. Such consent need not necessarily come from the registered owner in situations where the registered proprietor has placed such power in the hands of some other person, for example, a tenant of the land in question. In such a case, the *216 consent or licence granted by that other person may bind the registered proprietor and so render the occupation by the occupier lawful.

Order 89 and gratuitous licensees

Before exploring whether Order 89 can be used against a gratuitous licensee we need to understand who is such a licensee. This was explained by his Lordship Syed Agil Barakbah J in Yeap Cheng Hock v Kajima-Taisei Joint Venture [1973] 1 MLJ 230 as follows:

At common law a licensee is one who is lawfully on the premises, in the sense that he is not a trespasser, but does not come within the description of an invitee because he does not enter on business which concerns the occupier. He is there with the permission of the occupier given as a matter of grace or pleasure and not as a matter of business. “Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees. The law does not take account of the worldly advantage which the host may remotely have in view.” (See Charlesworth on Negligence (4 th Ed) at p 207 paragraph 438 and Latham v Johnson [1913] 1 KB 398 at 410 per Hamilton LJ.)

The position or status of a gratuitous or bare licensee was set out by his Lordship Choor Singh J in the case of Wee Kang Whye & Anor v Lee Woon Tong [1974] 1 MLJ 7 ("Wee Kang Whye") as follows:

Such a bare licence without any contractual term in favour of the licensee can be revoked at the will of the licensor. See Winter Garden Theatre Ltd v Millennium Productions Ltd [1948] AC 173. Under the circumstances of this case the defendant had no legal right to remain on the plaintiff’s land after he was requested to move out. … In my judgment the defendant became a trespasser when he refused to move out after due notice.

In Wee Kang Whye the defendant was permitted to occupy the plaintiffs’ land and to build a temporary structure on it on condition that he had to vacate the place without any compensation when required to do so. The plaintiffs agreed to sell the property with vacant possession and offered the defendant $5,000 as compensation for him to move out. The defendant apparently agreed to accept $5,000 and to vacate the hut but subsequently changed his mind and refused to move out. The plaintiffs thereupon brought an action for possession. It was held that the plaintiffs had granted the defendant a temporary gratuitous license which they were entitled to revoke at will.

Can such a bare or gratuitous licensee, notwithstanding his entry was lawful due to the presence of consent be evicted under Order 89? If possible, it seems to go against the first of the “two elements” identified in Shaheen bte Abu Bakar as ousting the operation of Order 89. Despite the apparent conflict can Order 89 be used to evict gratuitous license? In fact, if one looks at Order 89, there is no express mention that it is applicable only to squatters although there are certain indicia to that effect. Also, the success or failure of an Order 89 application in respect of squatters depends on whether there are *217 triable issues in respect of the presence or absence of consent to occupy. In that sense, once the consent given to a gratuitous license is revoked and the person becomes a trespasser, there are no triable issues to oust the jurisdiction of Order 89. The only other question being whether the wordings of Order 89 would permit its applicability to gratuitous licensees. In answer to that, let’s turn to the case of Toh Kheng Heng & Anor v Ahmad Fauzi bin Mohd Taufek

[1994] 1 MLJ 356 ("Toh Kheng Heng").

In the case of Toh Kheng Heng , after perusing the facts of the case, his Lordship Selventhiranathan JC held as follows:

The defendant himself did not seek to confer or claim any higher status as to his occupation of the land than as a licensee. He was a gratuitous licensee and in that capacity his license to occupy the land was properly terminated when the notice to quit was served on him: see Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221. Thereafter he became a trespasser on the land and the plaintiffs were entitled to apply under Order 89 for his eviction.

His Lordship stated further as follows:

Even if the defendant was allowed to occupy the land by the plaintiffs' predecessor-in-title and subsequently by the plaintiffs themselves, the defendant was only a gratuitous licensee and the consent of the predecessor-in-title or that of the plaintiffs to his occupation of the land did not have the effect of conferring upon him any rights in equity. He was a sojourner on the land at the will of the plaintiffs. Upon the issue of the notice to quit on November 24, 1992 and its crystallisation two months later, the defendant ceased having any right to remain on the land, his licence to occupy the land having been lawfully terminated upon the expiry of the notice to quit.

Therefore, the law is clear that, even if the initial entry was by consent of the previous or the current owner of the landed property (in other words not a trespasser), such consent per se does not confer any rights, not even in equity and merely confers the status of a gratuitous or bare licensee. Such being the case once the consent is revoked and the "licensee" refuses to vacate, can the owner of the landed property resort to the summary proceedings under Order 89 to evict the trespasser?

His Lordship answered in the affirmative by relying on two English authorities and I quote in extenso from the two said cases as his Lordship had done to appreciate fully the reasoning therein:

In Bristol Corporation v Persons Unknown [1974] 1 All ER 593, Pennycuick VC interpreted the equivalent English Order 113 r 1 of the Rules of the Supreme Court as follows at p 595 of the report:

"Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who entered into occupation of *218 the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word 'or' and if the rule did not cover the second state of affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words 'or remained' would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered but did not remain in occupation of the land."

The Court of Appeal of England had occasion to consider Pennycuick VC's interpretation of the said rule in Greater London Council v Jenkins [1975] 1 All ER 354. Lord Diplock had this to say at p 356 of the report:

"Pennycuick VC pointed out that it is clear beyond a peradventure that this order applies to cases where a person who is alleged to be a trespasser was previously on the premises by licence. In the course of his judgment in that case Pennycuick VC did suggest that the judge or the court had a discretion whether to permit this summary procedure to be used in cases where there had been, as in this case clearly, a licence to occupy originally. For my part, I am unable to see that the court has any discretion to prevent a plaintiff using this procedure where the circumstances are those described in the rule. So, while agreeing, as I do, with Pennycuick VC's construction of the rule, I personally would disagree that the court has any discretion to prevent the use of this procedure where circumstances are such as to bring them within its terms."

The applicability of Order 89 to evict licensees whose consent has been revoked stems from the words "or remained". The use of the disjunctive word "or" envisages two different scenarios, namely the words "who entered into (without license)" being applicable to squatters and "remained in occupation (without license)" being applicable to persons like the gratuitous licensee after the consent is revoked.

In granting the order for possession against the licensee, his Lordship stated as follows:

In my view this was a clear case where Order 89 was applicable and, in the words of Lord Diplock, I had no discretion “to prevent the use of this procedure where circumstances are such as to bring them within its terms”.

Conclusion

The purpose of procedural law is to facilitate the attainment of justice based on substantive law. There is no dispute that Order 89 was created to give owners of landed property a “summary, simple and speedy” method of regaining possession of their landed property from unknown squatters. However there is no reason why it should be so confined when the wordings of Order 89 permitits usage against other “unwelcomed guests” such as gratuitous licensees if the interest of justice so dictates.

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