

Chapter 6

CIVIL LITIGATION

Civil litigation in Malaysia and practice is governed by the:

- (i) Subordinate Court Rules 1980 – for matters tried at the Magistrates and Sessions courts.
- (ii) Rules of the High Court 1980 – for matters before the High Courts of Malaysia.
- (iii) Rules of the Court of Appeal 1994 – for matters before the Court of Appeal of Malaysia.
- (iv) Rules of the Federal Court 1995 – for matters before the Federal Court of Malaysia.
- (v) The Court of Judicature Act 1964.
- (vi) The Civil Law Act 1956.

The common form of civil litigation pertains to:

- (i) commercial matters;
- (ii) hire purchase;
- (iii) matrimonial matters including divorce, custody and maintenance,
- (iv) administration of estate including granting of probate of wills and letters of administration;
- (v) bankruptcy;
- (vi) insurance; and
- (vii) other civil claims including recovery of payment for goods sold and delivered.

1. ORIGINATING PROCESS OF CIVIL LITIGATION

There are 4 types of originating process, namely, by:

- (i) Writs
- (ii) Originating Summons
- (iii) Originating Notices of Motions
- (iv) Petitions

The party making the Claim (who is the plaintiff) chooses which form of process to use and the relevant documents are then filed in the proper division of the court.

Previously the writ was valid for a period of 12 months by which time it has to be served on the other party, (the defendant) but by virtue of a recent amendment, the writ is only valid for 6 months but can be extended twice for a period of 6 months each.

The major source of procedure are found in the Rules of the High Court 1980, Rules of the Court of Appeal 1994, Rules of the Federal Court 1995 and the Courts of Judicature Act 1964 (CJA) and for matters before the Magistrates and Sessions Courts, the source for procedure to be found in the Subordinate Court Rules 1980. Other forms of legislation with regard to procedure that are adopted in Civil Litigation include the Civil Law Act 1956 and the Evidence Act 1950.

In order to bring a civil proceeding in the court, there must be a "cause of action" which means simply that the plaintiff has to prove his action before an order or judgment can be given in his favour.

The plaintiff's claim must disclose a "cause of action" so as to enable the court to proceed to adjudicate the actionable dispute. of action" , the court cannot provide any remedy.

The party in addition to the "cause of action" must also have locus standi. If the party has no locus standi, the court will also dismiss the action *inlimine*.

Generally, actions filed on contracts or on torts have to be brought within 6 years from the date on which the "cause of action" arose under the Limitation Act 1963.

In the case of dependency claims, a claim for loss of support by the dependent relative shall be brought within 3 years after the death of the deceased under the Civil Law Act 1956.

Where a writ has been issued by the court and served on the defendant, the

defendant is required to enter an appearance in the action and defend it by a solicitor or in person.

In the case of an action where the defendant is a body corporate then the action can only be defended by a solicitor for the defendant.

An appearance is normally filed by way of a memorandum in a specific form as provided under the Rules of the High Court 1980 or the Subordinate Court Rules 1980 as the case may be. If he does not enter into an appearance it may mean that he does not wish to defend the “cause of action” in which case the plaintiff can apply to the court for a judgment-in-default.

2. JUDGMENT-IN-DEFAULT

A writ is normally indorsed with a statement of claim and failure to enter into appearance may result in the plaintiff proceeding to enter judgment-in-default against the defendant.

Ordinarily where a defendant has filed an appearance and also a statement of defence subsequent to other procedures of filing of documents in support, the matter would be set for trial.

3. SUMMARY JUDGMENT

Where a statement of claim has been served on the defendant and the defendant has entered a appearance and where there is no defence to the plaintiff’s claim, the plaintiff may apply to the court for judgment against the defendant.

An application for summary judgment is made by way of a summons supported by an affidavit verifying the facts on which the claim is made. The defendant in such a case may then apply to defend with the leave of the court in respect of the claim.

The defendant may also in filing a defence to a writ served on him file a counter-claim as against the plaintiff.

The court can also give directions as regards further conduct of the action. This process of summary judgment is made under Order 14 of the Rules of the High Court 1980 or Order 26A of the Subordinate Court Rules 1980.

The court may upon application of a party or on its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceeding where (a) such a question is suitable for determination without the full trial of an action or (b) such determination will finally determine the entire cause or matter or any claim or issue therein. Upon such determination the court may discuss the cause or matter or make such order or judgment as it thinks fit

4. PLEADINGS

Pleadings are statements in writing filed by each party to an action giving such details that are necessary. It is a cardinal rule that parties are bound by the pleadings and are not allowed to adduce facts, which they had not pleaded.

The objectives of the pleadings are: -

- (i) to define with clarity and precision the issue in dispute;
- (ii) to require each party to give fair and proper notice to its opponent in order to enable him to prepare his case; and
- (iii) to inform the court the issues which are required to be determined by the court

A vital issue not raised in the pleadings would not be allowed to be argued if so decided by the court.

Law is not pleaded. It must only contain material facts on which the party pleading relies for this claim on defence.

5. CLOSE OF PLEADINGS

Pleadings in an action are deemed to be closed at the expiration of 14 days after the service of the defence. However, if there is a reply or a defence to the counter-claim, pleadings are deemed to be closed after 14 days of the service of the reply or defence to the counter-claim

6. SETTING ASIDE JUDGMENT IN DEFAULT OF DEFENCE

Judgment in default of defence is judgment given to the plaintiff without the court hearing the merits of the plaintiff's claim.

Upon the application of the defendant, the court has an absolute discretion to set aside the judgment.

Further, the court may set aside or vary the judgment on the application of either party.

7. STRIKING OUT PLEADINGS

The court may at any stage of the proceedings order to be struck out or amended any matter in any pleadings, which is found by the court to be an abuse of the process of the court.

The Magistrates Court and Sessions Court fall under the Subordinate Court System of Malaysia.

8. PRE-TRIAL CASE MANAGEMENT

Pre-trial case management refers to action begun by writ. The plaintiff shall not later than 14 days after the close of pleadings cause to be issued a notice from the court requiring the parties to the action to attend before the judge. Failure to attend by the plaintiff may entail in the court issuing a notice to the plaintiff to show cause why the action should not be struck out.

The judge has absolute discretion to make any order as meets the ends of justice including striking out the action or any defence or counter-claim.

The judge can at the pre-trial case management give such direction as to the future conduct of the action to ensure its just, expeditious and economical disposal.

9. SECURITY FOR COSTS

Security for Costs is a situation where it appears that the plaintiff is ordinarily resident out of the court's jurisdiction or where the plaintiff is suing for some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so.