

Small claims court's procedure for small claims business dispute

By : Assistant Professor DR Abdul Rani Bin Kamarudin

Ahmad Ibrahim Kuliyah of Laws

International Islamic University, Malaysia

Advocate & Solicitors, Malaya (non-practising)

Pegum Syarie, Kuala Lumpur & Negeri Sembilan (non-practising)

ABSTRACT

Often than not, a person with a cause of action involving a small amount probably finds it even costly to pursue his or her cause of action than abandoning such cause of action. The cost involving in bringing the case to court, the involving court's papers which to a layman are difficult to draft and prepare, and further, the need to have an advocate and solicitor would accumulatively mean that it is not worth the trouble to pursue the matter since it has become 'too costly'. It is best and cheaper to simply rely on diplomacy, patient and luck in getting the money due and owing from the scrupulous guy. Though, justice that is delayed is as good as justice is being denied, but in this case, justice is not simply delayed, instead, is not seen to be done. The purpose of procedural law has always been to serve the ends of justice rather than to defeat a person's substantive rights based on technicalities unless the omission in the procedures are those that are so fundamental as to cause a miscarriage of justice. Thus, this paper attempts to look at how a plaintiff can pursue his cause of action in court where the amount is small at nominal costs, making it

worth the trouble to take the matter to court against the defendant. Accordingly, it will discuss the procedures involve when making such a claim in the light of the Malaysian Subordinate Court Rules 1980.

INTRODUCTION

There has been of late the realization that the cost of litigation in court has been unreasonable high with the result that even a plaintiff with a good cause of action finds it unaffordable, very hesitant to be drawn in, in a long drawn out battle with the defendant. The situation is made worse if the amount one intends to claim is very nominal so much so that it is no longer worth to pursue the trivial amount, and no lawyers may even want to take the case as it is no longer feasible for them considering their legal fees. There must, therefore, be a more simple and quick procedures without much fuss where one can pursue his claim or grievance, and considering the trivial sum, at nominal or negligible cost. In this regard, there are for examples, tribunals such as the Consumer Claim Tribunal established in 1999 for a claim of an amount of up to Malaysian Ringgit RM 10,000¹, and

¹ See section 85 and 98(1) Consumer Protection Act 1999.

the Homebuyer Claim Tribunal established in 2002 for a claim of up to RM 25,000 per cause of action². These tribunals can cut down formalities, and where trial is conciliatory in nature rather than adversarial. This is also evident under Industrial Relations Act 1967 in cases where a workman who feels that he has been dismissed without just cause or excuse, may make a representation under section 20 of the Act. At the conciliation stage (not the trial stage) before the Industrial Relations Officer, no lawyer is permitted to represent the workman and the employer. Similarly is the case under the tribunal for homebuyer claim under the new section 16B of the Housing Development (Control and Licensing) Act 1966 is to some extent a panacea to aggrieved buyers wishing for a cheap, speedy or easy-peasy claim proceeding, and lawyers are not allowed except where there is dire necessity or expedient to do so.³ Both the Homebuyers Claim Tribunal and the Consumers Claim Tribunals stipulate that the tribunal should give an award within sixty days from the commencement of the trial. The purpose of existence of tribunals is obvious, to cut down the crap in terms of procedures and evidence. This paper, however, focus on the Small Claims Court Procedures as provided by Order 54 (Small Claims Procedure)⁴ of the Subordinate Court Rules 1980 made by the Subordinate Court Rules Committee⁵ in

the exercise of its power under section 4 of the Subordinate Courts Rules Act 1955.

SUBORDINATE COURTS

The Subordinate Courts which comprise of the Session Courts, the 1st and 2nd Class Magistrates', and not the least the Penghulu court are established under section 3 of the Subordinate Courts Act 1948. The Courts relevant with regard to small amount of claim is the 1st and 2nd Class Magistrates whose respective civil jurisdictions are where the amount in dispute or value of the subject matter do not exceed Malaysian Ringgit 25,000⁶ and 3,000⁷. The Penghulu (Village Chief) Court too is in a way a small claim court since it may hear and determine original proceedings of a civil nature in which the plaintiff seeks to recover a debt or liquidated demand in money, with or without interest, not exceeding Malaysian Ringgit RM50. However, in the case of the Penghulu Courts, the parties to the dispute have to be persons of an Asian race speaking and understanding the Malay Language⁸. These Courts are relevant as Order 54 rule 2 of the Subordinate Court Rules 1980 (hereinafter referred simply as 'SCR 1980') provides that the amount in dispute or the value of the subject matter of the claim must not exceed Malaysian Ringgit RM5,000⁹, a sum very much lower compared to the Homebuyers Claim Tribunal and the Consumers Claim Tribunal. Off course, the amount of up to

² See section 16M(1) & 16(N)(2). For a discussion on Homebuyer Claim Tribunal, see (i) Tribunal Tuntutan Pembeli Rumah: Satu Mekanisme Penyelesaian Pertikaian Alternatif Dan Perbandingannya Dengan Islam (Homebuyer Claim Tribunal: An Alternative Dispute Settlement Mechanism and its Comparison with Islam) by Rahmah Ismail & Ruziah Markom - Lecturer, Law Faculty, National University of Malaysia, Bangi, Selangor (ii) A Tribunal for House Purchaser in the Revamped Housing Development (control and Licensing) Act 1966 by Associate Professor Samsar Kamar Bin Abdul Latif, Lecturer, Law Faculty, International Islamic University, Malaysia.

³ Section 16U Housing Development (Control and Licensing) Act 1966; See also section 108 Consumer Protection Act 1999.

⁴ Subordinate cases are probably reported if there is an appeal made against the decision. Thus, small claim cases are not to be found in legal journal. See, however, the unreported case of Chelvarai a/l Erulandy v Kumar a/l Kanniah, case no. 77-11-2004-1 (Small Claims Procedure) in the Magistrate Court in Georgetown, Pulau Penang. It was a case where the Plaintiff sued the Defendant for the sum of RM 1,000 due and owing to him as holder of the cheque issued and payable to the Plaintiff by the Defendant. The cheque, however, bounced due to insufficient money in the Defendant's account.

⁵ Its members consist of those in the legal fraternity such as Judges, Attorney-General and lawyers - see section 3 of the Subordinate Courts Rules Act 1955.

⁶ See section 90 of the Subordinate Courts Act 1948.

⁷ See section 92 of the Subordinate Courts Act 1948.

⁸ See section 94 of the Subordinate Courts Act 1948.

⁹ See the Subordinate Courts (Amendments) (No.3) Rules 1990 (PU (A) 460/ 90 s 5(b) - it was RM 3000 previously and confined only to a claim for the recovery of a debt or liquidated demand in money, and known then as 'Proceedings in Second Class Magistrates' Courts'. The Subordinate Courts Amendment Rules 1993 (PU (A) 193/93) section 10, the amount was increased to RM 5,000 and also included a any-claims other than a debt such as damages so long as the cumulative sum is not exceeding RM 5,000; See also Order 54 rule 12 SCR 1980.

Ringgit RM5000¹⁰ is by now, it is submitted, archaic and should be increased, if I may suggest, to up to Ringgit Malaysia RM15,000.

PROCEDURE FOR COMMENCING PROCEEDING

As in all cause actions arising under any contract, the limitation period to bring an action has to be done within six years¹¹ or the cause of action is time-barred. This must, however, be pleaded in the pleadings. The plaintiff (must be an individual person¹²) when he takes up his cause of action against the defendant (is not defined, and thus not limited to an individual person, and can be any legal entity such as a Company) must state in Form 164 the amount and particulars of his claim¹³, signed or thumbprinted by the plaintiff personally¹⁴. 4 copies of Form 164 must be filed in the Registry, and paying the prescribed fees (Malaysian Ringgit RM 10.00¹⁵): One copy is to be kept by the court with the three remaining returned to the plaintiff with the Court's seal so that the disputants will have their respective copy. If there are more than two defendants, then 5 copies of Form 164 should be filed in the registry, though; this is not stated in the Order. In other words, 4 copies is the requisite minimum. The Form 164 is not valid unless it has been duly perfected with the seal of the Court.¹⁶ Form 164 is essentially an originating summon against the defendant. Service of the Form 164 with the Court's seal to the defendant can then be done by way of personal service or by prepaid registered post addressed to the defendant's last known address.¹⁷ If it is done by personal service, it is prudent of the plaintiff to get an

acknowledgement from the defendant, or the defendant's immediate family members. An affidavit of service need not be filed as that will be against the very purpose of small claims procedure to make the procedures simple and practical, more so when the litigants are mere laymen, and often than not, without lawyers to assist. This is fortified by the fact that service of the Summon by way of *prepaid registered post* to the defendant's last known address would be adequate - why then the need for affidavit of service when there is receipt from the postal service that the summon is posted by prepaid registered post? It should not, therefore, prevent the plaintiff from getting from the Court, a judgment in default of appearance or default, as the case may be, against the defendant.

The defendant who has been duly served with Form 164 may dispute the claim by filing¹⁸ in the court registry his defence in Form 165 in four copies within 14 days after service of the claim. The defence in Form 165 must contain particulars as to why he disputes the claim, and may also counterclaim. If the defendant counterclaims, he must state the amount and the counterclaim in the same Form. Like Form 165, Form 166 must be personally signed or thumbprinted by the Defendant, and is then to be served to the Plaintiff either by way of personal service or by prepaid registered post addressed of the Plaintiff's at the address mentioned in Form 164. The Plaintiff in turn may file a defence to the Defendant's counterclaim in Form 166, and then served the same to the Defendant.¹⁹ Order 54 rule 7 stipulates that no party in the dispute shall

¹⁰ Rules 1 to 15 of Order 54 were inserted by the Subordinate Courts (Amendment) Rules 1988 (PU (A) 67/88), Section 5.

¹¹ Limitation Act 1953.

¹² Order 54 rule 1 SCR 1980 - However, Form 164 item (1) instruction to the Plaintiff does include a Company as well as a Firm - could have been an oversight in the Form.

¹³ Order 54 rule 3 SCR 1980.

¹⁴ Order 54 rule 4(1) SCR 1980.

¹⁵ Form 164, item (6) on instructions to Plaintiff.

¹⁶ See Form 164, item (6) on Instructions to the Plaintiff.

¹⁷ Order 54 rule 5(2) SCR 1980.

¹⁸ Filing fees is also RM 10 - See Form 165 item (5) at the Instructions to the Defendant.

¹⁹ Order 54 rule 6 SCR 1980.

be represented by an advocate and solicitor except where the defendant is required by laws to be represented by an advocate and solicitor or such other authorized person. In the case of a Company, it is submitted that the authorized officer rather than an advocate should represent a Company as to have a lawyer is against the conciliation process the Court is required to adopt under this small claims procedure. Order 54 rule 7 should not, however, it is submitted, be construed to mean that an advocate and solicitor is precluded from preparing the originating papers and the pleadings for the parties. Form 164, the instructions to both the Plaintiff and the Defendant clearly allows them to consult a lawyer but at the hearing, they cannot be represented by a lawyer.

PLEADINGS

Judgment in default of defence may be given against the defendant in Form 168 if he fails to file his defence in Form 167 by the day of the hearing date, though the Court may in its discretion adjourn the hearing to enable the defendant to file his defence. Judgment may also be given against the absent Plaintiff in Form 169 such as striking out the claim, or judgment if there is a counterclaim, and costs.²⁰ Where the defendant in his statement of defence admits the claim, the judgment to be entered shall be in Form 170.²¹ A judgment obtained in default of appearance or defence, as the case may be, may be set aside by the aggrieved party in Form 171 on such terms as the Court thinks just. The application should be made within 21 days after the service via personal service or prepaid registered post of the judgment or order, not from the day judgment was made.

Service of the judgment whether via personal service or prepaid registered post has to be done by the Court,²² not the litigants in this instance.

MODE OF TRIAL:

ADVERSARIAL OR CONCILIATORY

The mode of trial tends to be conciliatory rather than adversarial as the Court shall where possible assist the parties to effect the settlement of a case by consent.²³ Consent Judgment shall be in Form 172.²⁴ Where the parties will not settle their matters by consent, the Court may proceed to hear the case and give a decision thereon, or may adjourn the hearing to another date for final disposal.²⁵ The Court (not the litigants as in the adversarial trial) when it hears the case, may ask the parties for further information (further and better particulars), and in particular for a short description of the claim and the defence, as the situations warrant, if such descriptions has not been adequately supplied already earlier.²⁶ This is important since the parties are layman with no legal training or expertise when drafting their pleadings. In other words, it is submitted, in small claims court, parties are not so much bound by their pleadings. The Court shall consider the documentary or other evidence, including affidavit evidence, tendered by the parties and in their presence, shall hear such oral evidence and argument, including written argument, as the parties may submit.²⁷ Form 164 (the Originating Summons) instructs the defendant to bring all witnesses, books and other papers to support his defence or counterclaim. Section 2 of the Evidence Act 1950 states that the Act 'shall apply to all judicial proceedings in or before

²⁰ Order 54 rule 8 SCR 1980.

²¹ Order 54 rule 9 SCR 1980.

²² Order 54 rule 10 & 11 SCR 1980.

²³ Order 54 rule 13(1) SCR 1980.

²⁴ Order 54 rule 13(2) SCR 1980.

²⁵ Order 54 rule 13(3) SCR 1980.

²⁶ Order 54 rule 14 (1) SCR 1980.

²⁷ Order 54 rule 14(2) SCR 1980.

any Court' and thus the Evidence Act 1950 is without doubt applicable to Small Claims Courts as these Courts are either the 2nd or 1st Class Magistrates' Courts. The Court role, it is submitted, is proactive than reactive.

Judgment obtained after a hearing shall be in Form 173.²⁸ The Court may in its discretion award costs to the winner (costs shall follow the event) not exceeding Malaysian Ringgit RM100. No costs for advocacy shall be allowed in proceedings under the Small Claims Court.²⁹

ENFORCEMENT OF JUDGMENTS AND ORDERS

The judgment creditor may file in Court a notice to show cause in Form 174 against the judgment debtor if there is non-compliance on the part of the judgment debtor. Service of the judgment is via personal service or prepaid registered post addressed to the defendant's last known address as required by Order 54 rule 5 (2). Within ten (10) days of its receipt the judgment debtor must comply by depositing cash or money order in the name of the judgment creditor, and in such a case, he need not appear in Court on the date stated in the notice. Otherwise, the judgment debtor must appear or faces arrest. This is akin to the procedure on Judgment Debtor Summons to examine how best the judgment can be enforced against him. Usually, a Judgment Debtor Summons procedure should be resorted to before choosing the modes of enforcing the judgments. However, the purpose of Form 174 is to some extent the same. After examination, a judgment debtor who fails to comply after receipt of the judgment of the Court faces an order for writ of seizure and sale (Form 78). The Court may also allow the judgment debtor more time to pay the

judgment debt amount or to pay by instalments, or order the judgment debtor to be committed to prison.³⁰

CONCLUSION

The fill in the blank format of the Forms (Form 164, 165 & 166) and given free of charge make things easy for the Plaintiff and the Defendant to simply put in writing (most probably handwriting) what they have to say. The Court through further and better particulars can also overcome any inadequacy in the pleadings unwittingly committed by the litigants with no extra costs imposed upon the defendants if that were to result in the amendments to their pleadings. Moreover, the process is conciliatory than adversarial and the Court is required where possible to assist the parties to effect the settlement of a case by consent. 'Assist' is to mean not only assisting the parties in getting their pleadings right, but should also mean that parties are constantly guided by the Magistrate all the way to judgment, enforcement and also in terms of what evidence is or is not admissible. Surely, one should not sue another person if one is not able to bring relevant evidence to proof his claim. To allow otherwise would be an injustice. Further, the nominal filing fees of only RM10 is by Malaysian Courts' standard, undisputedly too cheap to resist. A right that is too costly to pursue is useless. The costs and procedures have to be feasible. The Small Claims Court Procedures ensure that justice is expedited and not delayed, and equally important is, costly and fussy procedures cannot be allowed to defeat a substantive right. The added advantage of Small Claims Court over tribunals is that the rules of Evidence such as best evidence (original document) and thus there is transparency in decision making.

²⁸ Order 54 rule 13(3) SCR 1980.

²⁹ Order 54 rule 15 SCR 1980.

³⁰ Order 54 rule 16 SCR 1980.