



This article discusses the process of how an individual or company can sue another individual or company. It also discusses how money judgments can be enforced.



A. INTRODUCTION

Your first step could, of course, be to make an appointment to see us. At a preliminary conference, usually for an hour, we will discuss the facts of your case and you could show us relevant documents. Towards the end of the meeting, we will give you our preliminary legal opinion and advise you on the likelihood of success in pursuing the case further. We will also advise you the estimate of the legal costs that will be incurred for commencing legal action.

FAQ (Frequently Asked Question): If I win in court, is it true that the defendant will pay for my legal costs?

ANSWER: This is partly true. The court may order the defendant to pay for your legal costs, but only the component known as party / party costs. The other component known as solicitor / client costs is still payable by you. A common ratio of legal costs is 60% party / party costs and 40% solicitor / client costs. Say, if \$10,000 legal fee is incurred, \$6,000 will be paid by the defendant and \$4,000 by yourself.

If you have a good and convincing case, a Letter of Demand / Grievance setting out your claim and the reasons for the claim will be sent to the person owing you the money. The letter will be drafted by us but may be printed on your letterhead and signed by you - for a softer approach. Otherwise, it will be printed on our letterhead and signed by us, as the lawyers acting for you.

Often the Letter of Demand / Grievance is very effective (particularly if it is sent by a lawyer). The debtor may respond by paying the full amount claimed, or by making contact with us or with you directly, to negotiate the matter.

We will be able to assist you in any negotiation. Where appropriate, we will prepare a set of Terms of Settlement which can be signed by all the parties concerned.

B. INSTITUTING PROCEEDINGS

If the Letter of Demand / Grievance is not effective, then we would prepare a Statement of Claim (or Statement of Liquidated Claim) for filing in the District Court.

FAQ: What is a liquidated claim?

ANSWER: Liquidated claim is a debt in which the amount of money to be paid by the defendant has been fixed or can be ascertained.

FAQ: When should I use an injunction?

ANSWER: If you think that damage will be done by the time your case goes to court (for instance the debtor will attempt to remove their assets from the jurisdiction so as to avoid their creditors), you might be able to get an injunction. Both the plaintiff and defendant will appear before a judge. A plaintiff creditor must be convinced of the defendant's intentions to transfer assets, as the creditor is required to give an undertaking as to damages. This means if any damage is caused to the debtor because of the freeze on their assets, whether directly or indirectly, and the creditor fails in the action for recovery, then the creditor will be liable to the debtor.

The Statement of Claim will be signed by us, on your behalf, and will be filed in the District Court. Service on the defendant of a sealed Statement of Claim will then be effected by our process server.

FAQ: What is service?

ANSWER: Service is the means by which the court ensures that the issue of the Statement of Claim comes to the attention of the defendant thereby giving a reasonable time to defend the action.

Immediately after service, we will receive an Affidavit of Service from our process server. This is proof that service has been formally effected.

Within the next 28 days (calculated from the service of the notice) the defendant may decide to pay the full amount claimed, or contact us, or you directly, to negotiate the matter. Again, we will assist you in any negotiation. If a set of Terms of Settlement is agreed upon between yourself and the defendant, we will then seek for the Terms of Settlement to be filed in the District Court and obtain a Judgment by Agreement. In this way, if any of the terms of settlement were to be breached by the defendant, the terms will be immediately enforceable without having to sue all over again.



C. UNDEFENDED MATTER

After the 28 days, if the defendant does not file a defence, it will be appropriate for us to make an Application for Order for Judgment. An affidavit (stating that you have not received any monies) will be prepared for your signature.

D. DEFENDED MATTER

If the defendant files a defence within the 28 days, we will consider their grounds and if appropriate will contact the defendant, on your behalf, to negotiate the matter.

If necessary, we will continue with the court case by fixing a date for court hearing.

E. PREPARING FOR COURT HEARING

The process by which the parties learn details about evidence held by the other side is known as discovery. It ensures that neither side is taken by surprise at the hearing, and generally speeds up the court process. Discovery can take the form of:

- listing relevant documents and describing their whereabouts;
- producing some documents for inspection and for use as evidence; or
- asking questions of the other side that need to be answered on oath (known as interrogatories).

Affidavits are then usually drawn up and 'exchanged' between the parties.

The basic procedure followed in a civil court case is:

- the plaintiff's lawyer opens the case by explaining what the case is about and what evidence will be called;
- the plaintiff's first witness is called. The plaintiff's lawyer will question the witness - this is known as the evidence in chief;
- the defendant's lawyer can cross-examine the plaintiff's witness. The purpose of this is to identify any defects in the evidence and in the witness' reliability;
- the plaintiff may be able to re-examine the witness to clarify points raised in the cross-examination;

- the defence calls witnesses and the questioning procedure is repeated;
- each side then summarises their case and the law;
- the judge comes to a decision "on the balance of probabilities". This means they must decide which version is most likely to be correct. (Note that in criminal cases it must be decided "against reasonable doubt" - this is a higher standard of proof.)

A plaintiff can actually seek a variety of orders. An award of damages is a sum of money paid to the plaintiff to compensate them for loss suffered. Damages may be available for cases such as breach of contract. Specific performance requires an obligation under a contract to be carried out. It is usually only granted where damages would be inadequate - that is, where the plaintiff has not actually suffered any loss. Specific performance is most commonly used in contracts for the sale of land.

F. ENFORCEMENT OF MONEY JUDGMENTS

In debt recovery matters, after obtaining judgment in your favour, we will arrange enforcement for the debt to be paid. Enforcing money judgments can be made in a number of ways. The methods include:

- enforcing by way of selling land;
- sending a Sheriff to confiscate personal items;
- garnishment; and
- appointing a Receiver.

Comasters Law Firm is able to act for either the plaintiff or the defendant in any legal action.

© Comasters 2001. Revised July 2008 **Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

CONTACT US

Jeffrey T Lee Principal Lawyer
Pauline A Beausoleil Senior Associate Lawyer
Valerie Cortes Senior Paralegal
Lauren Choy Paralegal
Carissa Widjaja Paralegal

Comasters Law Firm and Notary Public
Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia

T +612 9288 0300
F +612 9288 0399
E comasters@comasters.com.au
www.comasters.com.au