

## **CHAPTER 4- LEGAL PROCEDURE**

### **Criminal Prosecution**

As stated in the Criminal Procedure Code, the general direction and control over criminal prosecutions and proceedings in Brunei Darussalam is under the responsibility of the Attorney General who is also the Public Prosecutor. His Majesty may also from time to time appoint Deputy Public Prosecutors who will be under the general control and direction of the Public Prosecutor. Deputy Public Prosecutors are conferred the powers under the Criminal Procedure Code as are delegated to them by the Public Prosecutor.

The Public Prosecutor may also by notification in the *Government Gazette* delegate all or any of his powers vested to him under the Criminal Procedure Code to any Deputy Public Prosecutor. Thus the exercise of these powers by the Deputy Public Prosecutor would be treated as if they had been exercised by the Public Prosecutor so long as Public Prosecutor does not revoke the delegation.

The Criminal Procedure Code also specifically states that every criminal prosecution and every inquiry can also be conducted by some other person expressly authorized in writing by the Public Prosecutor or His Majesty the Sultan. In those cases, a police officer or an officer of a Government Department in relation to minor cases and cases that is relevant to that particular Government Department, such as the Customs Department, the Immigration Department, the Narcotics Control Bureau and the Anti-Corruptions Bureau who do have their own prosecuting officers also conduct criminal prosecution for their relevant cases.

### **Criminal Procedure**

#### ***Investigations***

The Police are given powers to search a property and in doing so they are required to prepare a list of the things that have been seized and this document is to be signed by the officer in charge of the search and seizure. The owner of the property being searched must be present at the time the search is conducted.<sup>1</sup>

The police officer during the investigation stage can also take a written statement from a witness or a suspect and the person being interviewed is required to answer all questions posed to him in relation to the case being investigated on. The police officer is required to repeat the statement back to the person being questioned and he must thereafter sign the statement.<sup>2</sup> All statements made can be used as evidence if the person questioned becomes a witness during proceedings thereafter.<sup>3</sup>

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<sup>1</sup> Section 69 of the Criminal Procedure Code

<sup>2</sup> Section 116 of the Criminal Procedure Code

<sup>3</sup> Section 117 of the Criminal Procedure Code

When interviewing a potential defendant, the police officer is always required to read out the defendant's rights to him after the charge is explained to him. The Courts only accept voluntarily made statements whether or not the contents of the statement are true. There is no right of silence in Brunei Darussalam as the Courts may as a consequence treat silence as a detrimental factor for the defendant.

Once a suspect is arrested, he shall be placed in remand or released on bail. If the remand is ordered by the Magistrate, the defendant cannot be remanded for more than 15 days. On the other hand, if it was ordered by the High Court, there is no time limit.<sup>4</sup>

### ***Pre-Trial Procedure***

With the exception of some offences that would need the prior sanction of the Public Prosecutor or the official complaint of a concerned public servant, a Judge or magistrate may take cognizance of an offence upon receiving a complaint launched by a complainant<sup>5</sup>, upon his own knowledge or suspicion that an such offence has been committed or when any person who is in custody without process, has been brought before him for committing an offence that the Judge or magistrate has jurisdiction to inquire into or try.<sup>6</sup>

Once the Judge or magistrate takes cognizance of the offence and is satisfied that there is sufficient ground for proceeding, he will either issue a summons for the accused to attend court or if it is in relation to an offence that requires a warrant to be issued first, he would then issue the warrant in the first instance and also issue a summons that specifies the accused to appear at a certain time before him or some other Judge or magistrate having jurisdiction over the case.<sup>7</sup>

### ***Preliminary Inquiries***

Preliminary inquiries are always held for offences against the State, murder or any offence which carries a death penalty.<sup>8</sup>

Preliminary Inquiries are generally held for a magistrate to determine whether there is sufficient evidence to commit the case for trial in the High Court (filtration). Other cases like trafficking of drugs and rape cases go straight to the High Court without any preliminary inquiries. All other cases are generally tried summarily in the Magistrate Court.

At a preliminary inquiry, the Prosecutor will present its case and set out all the evidence, including examining witnesses, in support of its case to the Magistrate. The defendant is allowed to cross examine the witnesses who can then also be re-examined by the Prosecutor. If the magistrate, after hearing all the evidence, feels that there are insufficient grounds for committing the accused, he could either discharge him or he can

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<sup>4</sup> Section 223 of the Criminal Procedure Code

<sup>5</sup> Section 133 of the Criminal Procedure Code

<sup>6</sup> Section 131 of the Criminal Procedure Code

<sup>7</sup> Section 136 of the Criminal Procedure Code

<sup>8</sup> Section 138 of the Criminal Procedure Code

still order that the defendant be tried before himself or before some other magistrate. In the latter case, he will consequently frame a charge and call upon the defendant to plead to those charges.<sup>9</sup> However if the magistrate finds that there are sufficient grounds for committing him for trial, he shall then commit the accused for trial before the High Court.<sup>10</sup>

If the accused is committed to trial to High Court, the magistrate will give the accused the opportunity to give a list of witnesses he wishes to be summoned to give evidence for his trial. The final list of witnesses shall be included in the record of the magistrate.<sup>11</sup>

Once the accused has been committed for trial, the committing magistrate shall then send the original record and all the relevant documents, weapons (if any) or any other thing which is to be produced in evidence to the Court the accused is committed to. A list of all the exhibits is also forwarded with the record. The record will specifically contain the following information<sup>12</sup>:

- i) the serial number of the case;
- ii) the date of the commission of the offence;
- iii) the date of the complaint, if any;
- iv) the name, age, sex, residence, if known, and nationality (or race) of the accused;
- v) the offence complained of and the offence proved, and the value of the property, if any, in respect of which the offence has been committed;
- vi) the date of the summons or warrant and of the return day of the summons, if any, or on which the accused was first arrested;
- vii) the date on which the accused first appeared or was brought before a magistrate;
- viii) the name and title of the officer or other person conducting the prosecution;
- ix) the date of making each adjournment or postponement, if any, and the date to which such adjournment or postponement was made and the grounds for making the same;
- x) the date on which the proceedings terminated;
- xi) the order made;
- xii) the depositions;
- xiii) the statement, if any, of the accused;
- xiv) the charge; and
- xv) the list of witnesses as provided by the accused.

The law also allows for committal without the consideration of evidence. This method is referred to as paper committal and is done through the submission of written statements only.<sup>13</sup> Hence a written statement can be substituted for oral evidence and it would have

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<sup>9</sup> Section 141 of the Criminal Procedure Code

<sup>10</sup> Section 144 of the Criminal Procedure Code

<sup>11</sup> Section 145 of the Criminal Procedure Code

<sup>12</sup> Section 147 of the Criminal Procedure Code

<sup>13</sup> Section 151A and 151B of the Criminal Procedure Code

a similar effect to be admissible under the Evidence Act. It must however satisfy the following conditions:

- a) the statement must be signed by the person who made it;
- b) the statement must contain a declaration by that person that the information he has written is true to the best of his knowledge and belief;
- c) a copy of the statement must be given to each of the other parties to the proceedings not less than 7 days before the statement is tendered in evidence;
- d) none of the other parties objects to the statement being tendered in evidence.

#### *Bail applications*<sup>14</sup>

The defendant or his counsel may also apply for bail (whilst investigations are still being carried out) before a magistrate, High Court Judge or Intermediate Court Judge, depending on the seriousness of the case. In deciding to grant that application, the magistrate will consider two opposing factors.<sup>15</sup> On one hand, the Court must remember that the accused is innocent only until proved otherwise. However, the Court shall also take into consideration that the interests of justice will be perverted if the accused absconds or tampers with the witnesses.

At present, all magistrates have the power to grant bail for all type of cases by virtue of their appointments as Registrars of the Supreme Court. However, in practice, bail applications in serious cases that are triable in the High Court or Intermediate Court will be remitted to either court for such applications to be heard. These particular points will be taken into account on deciding whether or not the defendant should be released on bail:

- i) Is the offence bailable or non bailable under Schedule 1 of the Criminal Procedure Code? However, the Court still has discretion to grant bail for non-bailable offences;
- ii) The nature and gravity of the offence;
- iii) The number of charges;
- iv) The likelihood of the accused absconding;
- v) The previous record of the accused;
- vi) Strength of evidence; and
- vii) Other relevant factors like the age and health of the accused.

The usual conditions attached to bail are cash bail, the duty to report to the nearest police station at a prescribed number of times a week, the assurance that the accused will not tamper with witnesses and to not approach certain places, to surrender his passport and other travel documents and to remain indoors between certain hours.

#### *Pre-Trial Review*

Sometimes, a pre-trial review is also held by the High Court Judge prior to the trial. There is no legislative requirement for this and hence is not mandatory but in practice is usually held for High Court and Intermediate Court cases where the Judge will go

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<sup>14</sup> Sections 346-353 of the Criminal Procedure Code

<sup>15</sup> Public Prosecutor V Haji Sadikin (2000) JCB Vol. 1 349

through the relevant documents such as the list of witnesses, list of exhibits and agreed facts (if any) with both the prosecution and the defence.

### *Withdrawal of Charges*

At any time before a judgment is entered, charges against the defendant and all evidence against him may be discharged. If the discharge is one not amounting to an acquittal, this would mean that prosecution can be made at another time based on the same factors.<sup>16</sup> The power to withdraw a charge only lies with the prosecution. The person who reported the offence and initiated the prosecution cannot withdraw his claim once a police report or a statement has been prepared.

### ***Trial Procedure***

Chapter XIX of the Criminal Procedure Code governs the procedure for trials in Brunei Darussalam.

When the defendant first appears before the Court, the charge containing the particulars to the offence or offences he is accused of shall be read out and explained to him and he shall then be asked to enter his plea, guilty or not guilty. If the accused pleads guilty, the plea will be recorded and he may be convicted thereon. However, the Judge would first need to hear the complainant and other evidence first as it considers necessary and he would also make sure the defendant truly understands the nature and consequences of his plea and intends to admit, without qualification, the offence or offences alleged against him.

Where the defendant pleads not guilty, a trial will be held and witnesses would be called to give evidence. At the start of the trial, the prosecution will first open the case by stating briefly the nature of the offence charged and disclosing the evidence, including the appearance of witnesses, by which he proposed to prove guilt of the defendant. The burden of proof lies with the prosecution beyond reasonable doubt. If the defendant is not represented by counsel, (there is no legal aid in Brunei Darussalam with the exception of cases carrying a death penalty where the defendant will be provided a defence counsel) the Court will assist the defendant in the cross examination of witnesses.

At the close of the prosecution's case, the Court will lay down the choices for the defendant, either to give his own evidence or maintain his silence. Usually, if they choose to keep silent, and where the evidence against him is strong, a conviction will be given. However, if he decides to give his own evidence, he will then in turn open his case by stating the facts or law on which he intends to rely and make whatever comments in response to the evidence put forward by the prosecution. Before summing up his case, he would then be called upon to enter his defence and then produce his own evidence which may include witnesses that are examined on his behalf. The prosecution will then have the right of reply on the whole case.<sup>17</sup>

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<sup>16</sup> Section 186 of the Criminal Procedure Code

<sup>17</sup> Section 184 of the Criminal Procedure Code

At the end of the trial, if the Court finds the defendant not guilty, the Court shall record an order of acquittal. If the Court finds otherwise or if the defendant entered a plea of guilty, the Court shall pass sentence in accordance with the law.<sup>18</sup>

### *Sentencing*

The types of sentences in Brunei Darussalam are:

i) Death Penalty: The most serious punishment in Brunei Darussalam is the death penalty. In sentencing hearings dealing with the death penalty, there must be 2 judges present and both these judges must agree with the sentencing decision. Death penalties are not imposed on pregnant women who would get life imprisonment instead.

ii) Life imprisonment: The defendant will be imprisoned for as long as he shall live.

iii) Whipping: There is also whipping in Brunei Darussalam, usually a maximum of 24 whips for an adult and a maximum of 18 whips for a defendant below the age of 18.<sup>19</sup> Women, men above 50 years old and those that are imposed the death penalty are exempted from whipping.<sup>20</sup>

iv) Fines: Fines are imposed according to the relevant written law. If that does not exist, the court will decide on the appropriate amount.

v) Pay compensation: On top of the above punishments, the Court can order the defendant to pay compensation if it is satisfied that the defendant can afford to pay such amount imposed. He will be imposed imprisonment or further imprisonment on default of payment.<sup>21</sup>

### ***Post-Trial Procedure (Appeals)***

If an appeal is made from the Magistrates Court, the appeal will be heard by the High Court. Any party can make an appeal against a judgment or sentence, be it the prosecution or the defendant. Appeals made from the High Court are heard by the Court of Appeal and these are governed by the Criminal Procedure Code (Criminal Appeal Rules) 2002. A person shall commence his appeal by sending a notice of appeal to the Registrar within 14 days of the judgment or sentence made. He can at any time abandon his appeal after serving his notice of appeal by giving notice of abandonment to the Registrar. His appeal should then be dismissed.

## **Civil Procedure**

Civil proceedings are usually private matters between parties that relates to breach of contracts or for compensation. The civil procedure in Brunei Darussalam is governed by the Supreme Court Rules for the High Court and the Magistrates' Court Rules (Civil

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<sup>18</sup> Section 181 of the Criminal Procedure Code

<sup>19</sup> Section 257 of the Criminal Procedure Code

<sup>20</sup> Section 258 of the Criminal Procedure Code

<sup>21</sup> Section 382 of the Criminal Procedure Code

Procedure and Civil Appeals Procedure) for the Magistrate Courts. These rules mainly prescribe regulations for types of action, procedure, process, addresses and forms.

## **Procedure in the Magistrate Court**

### ***Introduction***

Civil proceedings in the Magistrate Court would include a civil action, an order for payment of any sum or money or an order for doing or abstaining from doing any act or thing not enforceable through a mere fine or by imprisonment. All civil proceedings heard by the Magistrate Court are dealt with summarily.<sup>22</sup>

### ***Pre-hearing procedure***

A person who wishes to institute civil proceedings in the Magistrate Court would need to register a written statement to the Clerk of the Court to be included in the Civil Cause Book. This written statement is often referred to as the “plaint” and it shall state the names and last known place of residence of the parties and also include a statement on the substance of the action intended to be brought. Upon doing so, he is also required to pay a prescribed fee to the Court. The magistrate has discretion to refuse the plaint if it appears that there is no cause of action. They would naturally refuse the plaint if the matter is outside their jurisdiction. Any person dissatisfied with the magistrate’s decision in refusing his plaint is allowed to appeal against that decision as if it was an order of the magistrate.<sup>23</sup>

Once the magistrate registers the plaint, it shall next issue a summons for the defendant requiring him to attend before him at a certain time but normally not more than 7 days after the summons have been served on him. The defendant will also be required to file his written statement of defence in answer to the plaint against him.<sup>24</sup> However, if he decides to admit the claim wholly or partially, he can then sign a statement admitting the amount of the claim or part of the amount of the claim entered against him. If this is the case, the Clerk of the Court shall send a notice regarding this admission to the plaintiff who is then required to prove the aforesaid claim. The magistrate shall then upon proof of the signature of the party enter judgment for the admitted claim.<sup>25</sup>

The defendant will then pay into Court the sum of money in full satisfaction of the claim against him together with the costs incurred by the plaintiff up to the time of such payment and this payment should then be notified to the plaintiff. This payment shall then be paid out to the plaintiff without further delay.<sup>26</sup>

A plaintiff may also apply for the magistrate to make a judgment when no defence or counterclaim has been filed. Once satisfied that the plaint was served on the defendant and yet he did not appear in Court, the Court can then enter judgment for the plaintiff

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<sup>22</sup> Rule 3 of the Magistrates’ Court (Civil Procedure) Rules 2001

<sup>23</sup> Rule 13 of the Magistrates’ Court (Civil Procedure) Rules 2001

<sup>24</sup> Rule 14 of the Magistrates’ Court (Civil Procedure) Rules 2001

<sup>25</sup> Rule 38 of the Magistrates’ Court (Civil Procedure) Rules 2001

<sup>26</sup> Rule 40 of the Magistrates’ Court (Civil Procedure) Rules 2001

with costs. If the defendant manages to file a defence or counterclaim before judgment has been entered, then a judgment in default cannot be made by the Court.<sup>27</sup>

### ***Procedure at hearing***<sup>28</sup>

All hearings in the Magistrate Court are heard in public but the magistrate may still decide to hear the matter in the presence of the parties only. The persons permitted to address the Court in a civil proceeding are any party to the proceedings, any advocate and solicitor qualified and admitted under the Legal Profession Act and also any person permitted by the magistrate if he is satisfied that that person is not appearing for fee or reward.

If both the plaintiff and defendant are present at the hearing, the plaint would first be read out to the defendant who will then be required to make his defence. On hearing his defence, the magistrate shall then proceed with the case. During the hearing, the magistrate shall take into consideration any question of law raised, legal submissions made and the substance of the oral evidence given. The party on whom the burden of proof lies shall commence the case before the magistrate. Once he has closed his case, his opponent may adduce his own evidence. If he does not choose to do so, the initiating party shall address the magistrate for the second time and will sum up his evidence. The opponent is then given his right to reply. When the initiating party has concluded his case, the opponent can decide to call his own witnesses and he is free to open his own case, calls his own witnesses and in the end sums up not only on his own evidence but also on his own case. The initiating party will in turn have the right to reply to his opponent.<sup>29</sup>

On the conclusion of the hearing, the magistrate can deliver judgment either at the same or at a subsequent sitting. A certified copy of the judgment can also be delivered to the parties upon payment of a prescribed fee to the court.

However, in the case where only the defendant appears in court either on the day of the hearing or at any continuation the case, the claim or case shall be struck out by the magistrate but excluding any counter-claims that may have been made by the defendant against the plaintiff. But if the defendant admits to the cause of action, the magistrate may then proceed to give judgment, with or without costs, as if the plaintiff were present. Where there has been a counter claim, the magistrate, if satisfied that the counter claim has been served on the plaintiff, may proceed to hear the defendant's case and may give judgment on the evidence adduced by the defendant or may postpone the hearing on the counter claim. Such postponement will be notified to the plaintiff. The magistrate may also award costs to the defendant when the plaintiff fails to appear.

Where the defendant is the party that has failed to appear in court, the magistrate once satisfied with the proof of service on the defendant and that the defendant lacks sufficient excuse for his non attendance, can determine the case and enter judgment. That judgment

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<sup>27</sup> Rule 41 of the Magistrates' Court (Civil Procedure) Rules 2001

<sup>28</sup> Part VIII of the Magistrates' Court (Civil Procedure) Rules 2001

<sup>29</sup> Rule 61 of the Magistrates' Court (Civil Procedure) Rules 2001



shall be as valid as if both parties had appeared before him. Otherwise, the magistrate can still adjourn the hearing to a convenient date to allow more time for the defendant.

### ***Appeals***

Any civil appeals are governed by the Magistrates' Courts (Civil Appeal) Rules 2001. Every notice of appeal will be lodged in the magistrates court within a month of the decision appealed from was made and shall be served on all other parties affected by the appeal.<sup>30</sup>

The contents of the notice of appeal should include the reference number of the proceedings, names of parties, date of decision appealed, grounds of appeal and be accompanied by a certified copy of the decision appealed against.<sup>31</sup>

Appeals shall be heard by one Judge of the High Court who may reserve for the consideration of the Court of Appeal any question of law which may arise on the hearing of such an appeal.<sup>32</sup>

The Registrar will notify the parties the date and time of the appeal hearing. If the appellant fails to appear at the appeal hearing, the case shall then be struck out and the decision shall be affirmed. If the respondent appeared at that appeal where the appellant failed to do so, the appellant shall be ordered to pay the costs of the appeal. But if the respondent did not appear, the High Court will need to consequently decide on the costs of the appeal.<sup>33</sup>

However if the appellant appears and whether or not the respondent appears, the High Court shall proceed with the hearing and determination of the case and shall thereafter give judgment according to the merits of the case. During the hearing, the appellant is not allowed to argue on any other points that are separate from the reasons for appeal and those set forth in his notice of appeal. But the Judge may allow amendments to the notice of appeal if he feels that there are actually other grounds than was not mentioned that should be included and also if he feels that the statement of grounds of appeal is defective.<sup>34</sup>

Once the Judge decides on the appeal, the High Court shall certify the judgment made and notify it to the magistrates' court. The magistrates' court will then act upon the judgment either by making such orders that are necessary and amending its own records in accordance with the judgment. The magistrate shall then have the same jurisdiction and power to enforce the High Court's judgment as if he himself made it.

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<sup>30</sup> Rule 4 of the Magistrates' Court (Civil Appeals Procedure) Rules 2001

<sup>31</sup> Rule 5 of the Magistrates' Court (Civil Appeals Procedure) Rules 2001

<sup>32</sup> Rule 11 of the Magistrates' Court (Civil Appeals Procedure) Rules 2001

<sup>33</sup> Rule 12 and 13 of the Magistrates' Court (Civil Appeals Procedure) Rules 2001

<sup>34</sup> Rule 15 of the Magistrates' Court (Civil Appeals Procedure) Rules 2001

## **Procedure in the High Court**

### ***Introduction***

High Court Proceedings are initiated by writ, originating summons, originating motion or petition.<sup>35</sup>

There are certain proceedings that **must** be initiated by a writ and these are those relating to claims for relief or remedy for any tort (other than trespass to land), relating to an allegation of fraud, claims for damages for breach of duty (whether duty exists by virtue of a contract or of a provision made by any written law), claims for breach of promise of marriage and also relating to infringement of a patent.

Any applications that are made to a High Court Judge under any written law must be initiated by originating summons. There are also some proceedings that may be begun either by writ or by originating summons where the plaintiff can choose which is more appropriate for him. Such proceedings include those where the sole or principal question at issue is the construction of any written law, of any instrument made under any written law or of any deed, will contract or other document and also where there is unlikely to be any substantial dispute of fact in those proceedings.

### ***Pre-hearing procedure***

#### *Writ of Summons*

All writs prior to them being issued must be indorsed with a statement of the nature of the claim made or the relief or remedy required in the action begun or a statement of the amount claimed in respect of a debt demand. It should also state that further proceedings will be stayed if the defendant pays the amount claimed to the plaintiff or the Court within a certain time limit. The Plaintiff upon presenting a writ for sealing and to be served must leave with the Registrar the original writ along with as many copies of it to be served on the defendant or defendants. The Registrar shall then assign a serial number to the writ and shall sign, seal and date the writ which shall deem the writ to be issued.<sup>36</sup>

#### *Originating Summons*

An originating summons must include the questions the plaintiff seeks the determination or direction of the High Court or a concise statement of the relief or remedy claimed in the proceedings with sufficient particulars to identify the cause or causes of action in respect of that claim. Similar to the process in writ of summons, the Registrar will assign a serial number to the originating summons and it will be signed, sealed and dated and thereupon issued.<sup>37</sup>

#### *Originating Motion and Petition*

No originating motion can be made *ex parte* and without previous notice to the affected parties. However if the Court is satisfied that there will be a delay in proceedings, it may make an order *ex parte* on terms such as costs or otherwise. (Any affected party may

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<sup>35</sup> Order 5 of the Supreme Court Rules

<sup>36</sup> Order 6 of the Supreme Court Rules

<sup>37</sup> Order 7 of the Supreme Court Rules

apply to the Court to set that order aside). The notice of a motion must include a concise statement of the nature of the claim made or the relief or remedy required. The plaintiff can serve a notice of motion on the defendant together with the writ of summons or originating summons or at any time after service of such writ or summons whether or not the defendant has entered on appearance in the action.<sup>38</sup>

Petitions must also include a concise statement on the nature of the claim sought and the names of the persons the petition should be served with. The petition should be served on the defendant not less than 7 days before the day the Registrar has fixed to be the day and time for the hearing of the petition.<sup>39</sup>

Similar to writ of summons and originating summons, originating motion and petitions shall also be assigned by the Registrar a serial number and be signed, sealed and dated before it is deemed to be issued.

#### *Service of Process*<sup>40</sup>

All writs, originating summons to which an appearance by the defendant is required, an originating summons, notices of originating motion and petitions must be served personally on each defendant.

A plaintiff must serve a statement of claim to the defendant either when the writ or notice of writ is served on the defendant or at any time after the service of the writ or notice of writ but it must be before the expiration of 14 days after the defendant enters an appearance. Thereafter, the defendant who has entered an appearance and intends to defend himself must serve a defence on the plaintiff not more than 14 days either after the time that has been limited for him to appear or after the statement of claim is served on him, whichever is the later. Next, the plaintiff who has been served the defence must serve a reply back to the defendant. If the plaintiff was also served a counter claim from the defendant and he intends to defend it, should also serve a defence on the defendant along with the reply. In each of the pleadings served, they must contain a statement setting out summarily the material facts on which the party pleading relies for his claim or defence.<sup>41</sup> In particular, he must plead specifically what his claim is in relation to, for instance, performance, release, statutes of limitation, fraud or any fact showing illegality and stat that the opposite party cannot claim or defend on it. This information must always be included to avoid taking the opposite party by surprise.

It is possible for the plaintiff or the defendant to apply to the Court by summons for an order that the action be tried without pleadings or further pleadings. If the Court is satisfied that the issues in dispute can be defined without pleadings or further pleadings, then it shall direct the parties to prepare a statement of the issues in dispute or if the parties are unable to agree on such a statement, the Court may settle the statement itself.

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<sup>38</sup> Order 8 of the Supreme Court Rules

<sup>39</sup> Order 9 of the Supreme Court Rules

<sup>40</sup> Order 10 of the Supreme Court Rules

<sup>41</sup> Rule 6, Order 8 of the Supreme Court Rules

Cases involving libel, slander, breach of promise of marriage and allegations of fraud does not apply in this type of action.

Where the plaintiff fails to serve a statement of claim on the defendant, the defendant may, after the expiration of the period for him to appear apply for the Court to dismiss the action.<sup>42</sup> If the claim relates to a liquidated demand and if the defendant fails to serve a defence, then the plaintiff may enter a final judgment against the defendant for a sum not exceeding what is claimed in the writ and also for costs.

#### *Entering of appearance*

A defendant to an action that was begun by writ may appear in the action and defend the claim either by a solicitor or by himself. Where the defendant is a body corporate, they may not enter an appearance at the action and can only be defended by a solicitor. Entering an appearance entails completing the requisite documents, namely a memorandum of appearance and sending it along with a copy of it to the Registry.<sup>43</sup> A memorandum of appearance basically requests the Registry to enter an appearance for the defendant or defendants specified in the memorandum. It must specify the address of the defendant's place of residence or the business address if his solicitor.

Where the defendant fails to enter an appearance, the plaintiff may after the time limited for appearing has expired, enter final judgment against that defendant for a sum not exceeding the amount claimed by the writ and for costs and proceed with the action against other defendants, if there are any.<sup>44</sup> He may enter an interlocutory judgment in the case of claims for unliquidated damages.

#### *Preparing for trial<sup>45</sup>*

A cause or matter may be tried before a Judge or the Registrar of the Supreme Court. Notice of trial may be given by the plaintiff or the other party at any time after a reply has been delivered or after the time for delivery of a reply has expired. At least 14 days before the date for trial has been fixed, the defendant shall identify to the plaintiff those documents that are central to his case that he wishes to be included in the trial bundle. At least 2 days before the trial, the plaintiff shall have 2 bundles consisting of one copy of the following documents:

- a) witness statements that have been exchanged including expert's reports;
- b) the defendant's documents that he wishes to be included in the bundle; and
- c) a note agreed by the parties giving a summary of the issues involved, a summary of the propositions of law, the list of authorities to be cited and a chronology of relevant events.

A pre-trial conference may also be held at any time after the commencement of proceedings, and the Court may direct the parties to attend such a conference to discuss matters relating to the action.<sup>46</sup> Points to consider at this pre-trial conference would

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<sup>42</sup> Rule 1, Order 19

<sup>43</sup> Rule 1, Order 12

<sup>44</sup> Order 13

<sup>45</sup> Order 34

<sup>46</sup> Order 34A

include any possibility of settlement, the need for the parties to furnish the Court with further information as the Court would require and the Court can also give directions as it appears necessary or desirable for securing a just, expeditious and economic disposal of the action. The parties can agree to settle at any time during the pre-trial conference on all or some of the matters in dispute. The Court can then enter judgment and make an order to give effect to that settlement.

### ***Procedure at hearing***

At the trial, the Judge will first give directions as to which party may begin the proceedings and prescribe the orders of speeches at the trial. If the defendant decides not to adduce any evidence, the plaintiff may at the close of his case make a second speech closing his case and thereafter the defendant shall make a speech in closing his case. If the defendant does decide to adduce evidence, he may do so at the closing of the plaintiff's case. At the close of the defendant's case, the plaintiff may make a speech in reply. Rules on evidence are prescribed under Order 38 of the rules.

Where a judgment has been given for damages and there is no provision made by the judgment in how damages are to be assessed, then the damages shall be assessed by the Registrar.<sup>47</sup> The Court may also make an award of provisional damages if the plaintiff has made a claim for one.<sup>48</sup>

Every judgment after a hearing is delivered in open Court or in Chambers, either on the conclusion of the hearing or on a subsequent day of which such notice shall be given to the parties.<sup>49</sup> A Judge can also give judgment and his reasons, in writing at a later date by sending a copy of it to all parties to the proceedings. In this case, the original copy of the written judgment must be signed and filed. The proper officer of the Registrar must enter into the cause book a minute of every judgment or order given by the Court.

In the enforcement of a judgment for the payment of money (and not one for the payment of money into Court), it can be enforced through writ of seizure or sale, garnishee proceedings, charging orders, appointment of a receiver, and an order of committal.<sup>50</sup>

### ***To avoid hearing***

#### ***Payment into and out of court<sup>51</sup>***

In any action for a debt or damages, any defendant may pay into Court a sum of money as the plaintiff claims. Within 14 days of the payment, the plaintiff may accept the money in satisfaction of that cause of action by giving such notice to the defendant.

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<sup>47</sup> Rule 1, Order 37

<sup>48</sup> Rule 8, Order 37

<sup>49</sup> Rule 1, Order 42

<sup>50</sup> Further detail in Order 45

<sup>51</sup> Order 22

### *Offer to settle*<sup>52</sup>

Parties to any proceeding may also serve on any other person an offer to settle any one or more of the claim in the proceedings. These can be made at any time before the Court disposes of the matter.

### *Summary Judgment*<sup>53</sup>

A plaintiff can apply to the Court for a summary judgment against the defendant on the ground that that defendant has no defence to the claim included in the writ. Claims relating to libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage are excluded from this application.

Application for summary judgments must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates to is based on and it should also state the plaintiff's belief that there is no defence to that claim or no defence except as to the amount of any damages. Thereafter, the Court may dismiss the plaintiff's application especially where the defendant had satisfied the Court that there is still an issue or question in dispute which ought for some reason to be tried. On the other hand, the Court may also give such judgment for the plaintiff against the defendant on that claim.

### *Appeals*

Any appeal from a decision of a Registrar shall lie to a Judge in Chambers.<sup>54</sup> The appeal shall be brought by serving a notice on every other party to the proceedings to attend an appeal hearing before a Judge on a day specified in the notice. Appeals from a Judge shall lie to the Court of Appeal.

An appeal to the Court of Appeal shall be by way of rehearing and must be brought by a notice of appeal. Every notice of appeal must be filed and served within one month from the date when such order was pronounced (in the case of an appeal from a Judge in Chambers), from the date of refusal (in the case of an appeal against the refusal of an application), and in all other cases, from the date on which the judgment or order appealed against was pronounced.

### **Reciprocal enforcement of foreign judgments and foreign maintenance orders**

Brunei Darussalam also has in force a Maintenance Orders Reciprocal Enforcement Act<sup>55</sup> and a Reciprocal Enforcement of Foreign Judgments Act.<sup>56</sup> The Maintenance Orders Act basically provides for the enforcement in Brunei Darussalam any maintenance orders made in reciprocating countries listed in the Schedule and also for maintenance order made in Brunei Darussalam to be enforced in the listed reciprocating countries. To date, the reciprocating countries are Malaysia, Singapore, Australia and Hong Kong Special

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<sup>52</sup> Order 23

<sup>53</sup> Order 14

<sup>54</sup> Order 56

<sup>55</sup> CAP 175 of the Laws of Brunei

<sup>56</sup> CAP 176 of the Laws of Brunei

Administrative Region of the People's Republic of China. Maintenance orders are those that provide for the periodical payment of money towards the maintenance of any persons the person paying is liable to maintain.

The Foreign Judgments Act makes provision for the enforcement in Brunei Darussalam any judgments given in foreign countries listed in the Schedule who will in turn also enforce judgments given in Brunei Darussalam. Judgment in this case means a judgment or order given or made by a court in any civil proceedings, judgment in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party and an award in proceedings on arbitration.<sup>57</sup> The countries listed for the purposes of this Act as at now are only Malaysia and Singapore, through their respective High Courts.

## **LEGAL PROCEDURE IN THE SYARIAH COURTS**

With regards to procedure in general, the Syariah Courts Act (Chapter 184) has stated that every Syariah Court in Brunei Darussalam shall have and use where necessary a seal of such form and format as may be approved by the Majlis<sup>58</sup>. The language that shall be used in the Syariah Courts shall be the Malay language though it may allow the use of any other language in the interest of justice<sup>59</sup>. However, the courts may choose for all documents or records of proceedings to be written in jawi or rumi script<sup>60</sup>.

### ***Procedure in criminal proceedings***

In pre-trial procedure, section 69(1) of the Religious Council and Kadis Courts Act (Chapter 77) has laid down some guidelines concerning charge. A charge shall be framed by the prosecutor or by the Court and which shall contain sufficient particulars of the offence alleged. However in practice, during the initial stage of the case, the prosecutor would normally frame the charge, whereas at the closing of the prosecution's case, it would be up to the Court (at the stage of a prima facie) to frame or amend a charge if it thinks it is not appropriate with the charge by the prosecution based on the evidence given in Court<sup>61</sup>.

For procedure during trial, section 70 of the Religious Council and Kadis Court (Chapter 77) has outlined procedure for hearing. Section 70(1) of this Act says that any necessary sanction to prosecute shall be proved. This is in accordance with section 62 which mentioned that for any offence under section 182, 183, 185, 186, 187 or 190, no prosecution shall be instituted except by resolution of the Majlis Ugama Islam sanctioning such prosecution.

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<sup>57</sup> Section 2 of the Reciprocal Enforcement of Foreign Judgments Act

<sup>58</sup> Section 7(1) of the Syariah Courts Act (Chapter 184).

<sup>59</sup> Section 7(2)(a) Ibid.

<sup>60</sup> Section 7(2)(b) Ibid.

<sup>61</sup> Haji Sawas Haji Jebat, *Prosedur Perbicaraan Di Mahkamah Kadi*, Jurnal Undang-Undang Syariah Brunei Darussalam, Januari-Jun 2002 Jilid 2 Bil.2, p.35.

Section 70(2) of the Act also stated that the accused shall be charged and if he pleads guilty he may be sentenced on such plea. Though it seems too simple, in practice however, the plea will only be accepted if it is made without any qualification and that the accused understood the charge made against him as well as consequences of the charge. In addition to that, section 175(1) of the Criminal Procedure Code (Chapter 7) is also practiced whereby a charge containing the particulars of the offence of which he is accused shall be framed and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried. And the court before recording the plea may hear the complainant and such other evidence as it considers necessary and shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him<sup>62</sup>.

If an accused claims trial or refuses to plead, the prosecutor shall outline the facts to be proved and the relevant law and shall then call his witnesses<sup>63</sup>. As laid down in section 70(4), each witness shall be examined by the party calling him<sup>64</sup> and this shall be called his examination-in-chief<sup>65</sup>; be cross-examined thereafter by the party opposing him, which shall be called his cross-examination<sup>66</sup> and, such cross-examination may be directed to credibility<sup>67</sup>. Each witness may thereafter be re-examined on matters arising out of cross-examination by the party calling him<sup>68</sup>, and such examination shall be called his re-examination<sup>69</sup>. Each witness have put to him at any time any question by the Court<sup>70</sup> and may have any further questions put to him or be recalled at any time, by leave of the Court<sup>71</sup>. For particulars on examination of witnesses and in ensuring the truth of syahadah syahid reference shall be made to the Syariah Courts Evidence Order, 2001<sup>72</sup>.

After hearing the witnesses for the prosecution the Court shall either dismiss the case or call on the accused for his defence<sup>73</sup>. This section is to be read together with section 177(1) of the Criminal Procedure Code (Chapter 7):

“If upon taking all evidence referred to in section 176 and making such examination (if any) of the accused under section 220 as the Court considers necessary it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Court may, subject to the provisions of section 186, record an order of acquittal.

If called on for his defence, the accused may address the Court and may then either give evidence or make a statement without being sworn or affirmed, in which case he shall not

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<sup>62</sup> Section 175(2) of the Criminal Procedure Code (Chapter 7).

<sup>63</sup> Section 70(3) of the Religious Council and Kadis Courts Act (Chapter 77).

<sup>64</sup> Section 70(4)(a) Ibid.

<sup>65</sup> Section 120(1) of the Syariah Courts Evidence Order, 2001(S 63/2001).

<sup>66</sup> Section 120(2) Ibid.

<sup>67</sup> Section 70(4)(b) of the Religious Council and Kadis Courts Act (Chapter 77).

<sup>68</sup> Section 70(4)(c) Ibid.

<sup>69</sup> Section 120(3) of the Syariah Courts Evidence Order, 2001(S 63/2001).

<sup>70</sup> Section 70(4)(d) of the Religious Council and Kadis Courts Act (Chapter 77).

<sup>71</sup> Section 70(4)(e) Ibid.

<sup>72</sup> Chapters IX and IV respectively, (S 63/2001)

<sup>73</sup> Section 70(5) of the Religious Council and Kadis Courts Act (Chapter 77).



be liable to be cross-examined, or may stand silent provided that if the accused gives evidence, he may be cross-examined, but not as to character or as to other offences not charged<sup>74</sup>.

In doing so the accused may then call his witnesses<sup>75</sup>. He may sum up his case<sup>76</sup>, and the prosecutor may reply generally<sup>77</sup>. As in any other Court, the Syariah Court, after considering the case shall then either convict or acquit the accused<sup>78</sup>. If the accused is convicted, the court may be informed of previous offences and shall have regard to any plea of leniency<sup>79</sup>. The Court shall then pass sentence according to law<sup>80</sup>.

One important section in the Religious Council and Kadis Courts Act (Chapter 77) relating to criminal procedure is section 78 where it says that in matters of practice and procedure not expressly provided for in this Act or any rules made thereunder, the Court shall have regard to the avoidance of injustice and the convenient dispatch of business and may in criminal proceedings have regard to the practice and procedure obtaining in the civil courts.

### ***Procedure in civil proceedings***

For civil proceedings, provisions used are as mentioned in the Religious Council and Kadis Courts Act (Chapter 77) in section 80 until section 93; section 95 and section 96. In practice, the Emergency (Islamic Family Law) Order, 1999 (S 12/2000) as well as relevant provisions being used in the civil courts are also applied. This is to ensure that justice is served especially for those matters not provided for in the Act or any rules thereunder. Section 96 of the Religious Council and Kadis Courts (Chapter 77) states that:

“In matters of practice and procedure, not expressly provided for in this Act or any rules made thereunder, the Court may adopt such procedure as may seem proper for the avoidance of injustice and the disposal of the matters in issue between the parties, and may in particular, but without prejudice to the generality of the foregoing, adopt the practice and procedure for the time being in force in the Magistrates’ Courts in civil proceedings.”

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<sup>74</sup> Section 70(6) Ibid.

<sup>75</sup> Section 70(7) Ibid.

<sup>76</sup> Section 70(8) Ibid.

<sup>77</sup> Section 70(9) Ibid.

<sup>78</sup> Section 70(10) Ibid.

<sup>79</sup> Section 70(11) Ibid.

<sup>80</sup> Section 70(12) Ibid..