

CHOOSING THE RIGHT PATH: CONVERTING AN ORIGINATING SUMMONS INTO A WRIT

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INTRODUCTION

In Malaysian civil procedure, a civil claim may be commenced by Originating Summons (“OS”) or Writ of Summons (“Writ”), depending on the nature of the dispute. Where an OS later becomes unsuitable due to contested factual issues, can it be converted into a Writ?

Simple rule:

Legal issues with undisputed facts → OS

Serious factual disputes → Writ

WHAT IS AN ORIGINATING SUMMONS?

Under **Order 5 rule 3, Rules of Court 2012 (“ROC 2012”)**, an OS is suitable where:

- the case mainly involves legal questions;
- there is little or no factual dispute; and
- the matter can be decided through affidavits.

It is generally a simpler and faster procedure.

Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors (1971) 2 MLJ 30 - The Court held that where material facts are disputed and require examination and cross-examination of witnesses, the action should be commenced by Writ rather than OS

WHAT IS A WRIT OF SUMMONS?

Under **Order 5 rule 2 ROC 2012**, a Writ is appropriate where there are substantial factual disputes requiring:

- pleadings and discovery;
- oral evidence; and
- examination and cross-examination of witnesses.

Ng Wan Siew v Teoh Sin [1963] MLJ 103 where it concerned one of which substantial disputes of fact turned, and the Judge therefore said that this case ought not to have been commenced by OS but by Writ.

WHETHER CONVERSION OF OS TO WRIT IS ALLOWED?

Yes. Under **Order 28 rule 8 ROC 2012**, the Court may order that proceedings commenced by OS continue as though they had been commenced by Writ. Following conversion:

- the case will proceed according to Writ procedure;
- affidavits already filed may be treated as pleadings; and
- the parties may be permitted to amend or supplement those documents.

However, conversion is not automatic. It remains within the **Court’s discretion**.

WHEN THE COURT MAY ALLOW CONVERSION?

The Court will generally consider:

- whether the affidavits contain conflicting evidence;
- whether there are serious or substantial disputes of fact;
- whether oral evidence and cross-examination are required;
- whether the case can fairly be decided through affidavit evidence alone; and
- whether conversion would achieve a fair, speedy and cost-effective resolution.

In **Lau Choon Yeun (F) & Anor v Mak Chow Yon @ Ha Chai & Ors [2025] MLJU 826**, the case involved conflicting medical evidence and allegations of fraud and misconduct. The Court allowed the OS to be converted into a Writ because the issues required oral evidence and cross-examination and could not fairly be resolved through affidavits alone.

WHEN THE COURT MAY REFUSE CONVERSION?

The Court may refuse conversion if the case was clearly unsuitable for OS from the beginning and the party commencing the action ought to have known that substantial factual disputes existed.

In **Neoh Ah Yan v Ong Leng Choo & Anor [2008] 7 MLJ 151**, the Plaintiff claimed to be the deceased's lawful daughter and sought recognition as a beneficiary and co-administrator of the estate. The alleged marriage between the deceased and the Plaintiff's mother was seriously disputed.

The Court found that:

- substantial factual disputes existed from the outset;
- the OS procedure was inappropriate;
- conversion under Order 28 rule 8 should not be allowed; and
- the OS should be struck out, with liberty for the Plaintiff to commence a fresh action by Writ.

HOW CAN A PARTY APPLY FOR CONVERSION?

1. Oral application in Court

In **Husli @ Husly bin Mok v Jundar Realty Development Sdn Bhd & Anor [2014] 3 MLJ 496**, the Court of Appeal held that, due to conflicts in the evidence, the High Court ought to have allowed the oral application to convert the OS into a Writ action under Order 28 rule 8(1).

2. Formal written application

A party may file:

- a Notice of Application; and
- an Affidavit in Support explaining why conversion is necessary.

This procedure was used in **Kwan Boon Teck @ Kuan Boon Teck & Anor v Kuan Yok Foh [2020] MLJU 1914**.

KEY TAKEAWAY

An OS is suitable for straightforward cases that can be decided mainly on legal issues and affidavit evidence.

A Writ is more appropriate where substantial factual disputes require witnesses, oral evidence and cross-examination.

Although the Court may convert an OS into a Writ under Order 28 rule 8 of the ROC 2012, conversion is discretionary. If the case was clearly unsuitable for OS from the outset, the Court may instead strike out the OS and require the claimant to commence fresh proceedings by Writ.

REFERENCES

Rules of Court 2012

- Order 5 rule 2
- Order 5 rule 3
- Order 28 rule 8

CASES

- Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30.
- Ng Wan Siew v Teoh Sin [1963] MLJ 103.
- Lau Choon Yeun (F) & Anor v Mak Chow Yon @ Ha Chai & Ors [2025] MLJU 826.
- Neoh Ah Yan v Ong Leng Choo & Anor [2008] 7 MLJ 151.
- Husli @ Husly bin Mok v Jundar Realty Development Sdn Bhd & Anor [2014] 3 MLJ 496.
- Kwan Boon Teck @ Kuan Boon Teck & Anor v Kuan Yok Foh [2020] MLJU 1914.