

STARTING PROCEEDINGS

Kinds of proceedings

2.1 These Rules provide for the following types of civil proceedings:

- (a) claims; and
- (a) applications made during a proceeding.

[2.1.1] Petitions and Constitutional Proceedings not covered Petitions and Constitutional proceedings are not covered, except to the extent of r.1.3, *ConPR* and r.1.3 *EPR*.

[2.1.2] Meaning of “proceeding” The word “proceeding” is very wide and includes everything occurring from the moment the court’s jurisdiction is first invoked until final judgment is enforced or performed: *Poyser v Minors* (1881) 7 QBD 329 at 334; *Re Shoesmith* [1938] 2 KB 637 at 648, 652.

How to start a proceeding

E *CPR* r.7.2(1)

2.2 A proceeding is started by filing a claim.

[2.2.1] Jurisdiction invoked by filing, not service The jurisdiction of the court is invoked once a claim is filed and without regard to whether it is served in accordance with Part 5, subject of course to r.5.3(2).

[2.2.2] Meaning of “claim” The word “claim” is not defined and seems to include both general law claims and claims for judicial review. The provision of different forms to commence each such claim (see Forms 5 and 32) suggests that different and separate originating processes must be commenced. There does not seem to be a definitive published ruling on this subject, however in *Telecom Vanuatu v Minister for Public Utilities* CC 205 of 2005 (unpublished remarks of 20 February 2006 and 3 April 2006) Treston J doubted whether a claim for breach of contract could be mingled with judicial review.

[2.2.3] State Proceedings Proceedings against the State will not be competent unless prior notice is given in accordance with s.6, *State Proceedings Act*, 2007.

Where to start a proceeding - Supreme Court

2.3 A proceeding in the Supreme Court is started by filing a claim in an office of the Supreme Court anywhere in Vanuatu.

[2.3.1] Location of offices Offices of the Supreme Court of Vanuatu are presently located at: Port Vila (Efate), Luganville (Espiritu Santo), Lakatoro (Malekula) and Lenakel (Tanna).

[2.3.2] Forum non conveniens As to *forum non conveniens* see *Naylor v Kilham* [1999] VUSC 11; CC 54 of 1998.

Where to start a proceeding - Magistrates Court

2.4 A proceeding in the Magistrates Court is started by filing a claim in the office of the Magistrates Court in the district where:

[2.4.1] Location of offices Offices of the Magistrates Court are presently located at: Port Vila (Efate), Luganville (Espiritu Santo), Norsup (Malekula), Saratamata (Ambae) and Lenakel (Tanna).

- (a) the claimant or defendant lives; or

- [2.4.2] Meaning of “lives” The former English provision used the word “dwells” instead of “lives” but the authorities may nevertheless provide some guidance. It was held that “dwells” refers to a place of permanent rather than temporary abode, although an individual may have more than one dwelling at a time: *Bailey v Bryant* (1858) 1 E & E 340 at 345; 120 ER 936 at 939. Gaol may not be such a place (*Dunstan v Paterson* (1858) 5 CB (NS) 267 at 278; 141 ER 106 at 111) nor are merely temporary lodgings (*MacDougall v Patterson* (1851) 11 CB 755 at 795; 138 ER 672 at 678) unless no other more permanent residence is maintained (*Alexander v Jones* [1866] LR 1 Exch 133 at 136-7). If the defendant is a company, the place where its principal business is conducted ought to be taken as the place at which it lives: *Taylor v Crowland* (1855) 11 Exch 1 at 3; 156 ER 720 at 721; *National Bank of New Zealand v Dalgety* [1922] NZLR 636.

(b) the actions that led to the proceeding happened; or

- [2.4.3] Determination of location where actions happened Determining where the actions leading to the proceedings occurred may present difficulties. It is sometimes the case that the actions in question occurred in more than one place: see generally *Clarke Bros v Knowles* [1918] 1 KB 128; [1916-17] All ER Rep 604 (contract entered into by post).

(c) the property the subject of the claim is located.

- [2.4.4] Court is a single court It is clear from Part 3, *Judicial Services and Courts* [Cap 270], that the Magistrates Court is a single court with jurisdiction throughout the whole of Vanuatu. Accordingly, a claimant may commence proceedings in any district according to its interpretation of the requirements of paragraphs (a) – (c) and the choice is valid unless and until an order under r.2.5(1) is made.

Change of district - Magistrate

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2.5 (1) A Magistrate may change the district where a proceeding is dealt with if he or she is satisfied that the matter can be more conveniently or fairly dealt with in another district.

- [2.5.1] Change of district The ability to change the district for “convenience” or “fairness” would seem to contemplate not just the criteria mentioned in r.2.4 but also any other relevant matter (eg. location of witnesses, financial position of the parties, etc), apparently importing the common law notion of *forum non conveniens* as to which see generally *Spiliada Maritime Corporation v Cansulex* [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843.
- [2.5.2] Burden of proof In an application under this rule the burden will be upon the claimant: *Vitkovice v Komer* [1951] AC 869 at 883, 889; [1951] 2 All ER 334 at 340, 344.

(2) A defendant who wishes to object to the place where a proceeding is to be dealt with must state this in his or her response or defence.

- [2.5.3] Early objection to district It is suggested that a defendant ought to raise any objection at the earliest opportunity. It may be argued that the failure to take objection amounts to a waiver or that late objections should not be permitted in the interests of case management. See generally *Boyle v Sacker* (1888) 39 Ch D 249 at 252; *Pringle v Hales* [1925] 1 KB 573 at 581, 583.

Form of documents

2.6 (1) All documents filed in the Supreme Court must have the heading as set out in Form 1.

- (2) All documents filed in the Magistrates Court must have the heading as set out in Form 2.
- (3) All documents filed in a proceeding must:
 - (a) be typewritten or in neat legible handwriting; and
 - (b) show the number of the proceedings, if any; and
 - (c) have each page consecutively numbered; and
 - (d) be divided into consecutively numbered paragraphs, with each paragraph dealing with a separate matter; and
 - (e) show the address of the party's lawyer or, if the party is not represented by a lawyer, the party's address; and
 - (f) if these Rules require the document to be in a form in Schedule 3, be in that form.
- (4) A sworn statement must be in Form 3.

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- [2.6.2] Formal parts The formal parts of a sworn statement are not mere technicalities and lawyers should take care to ensure compliance. Having said that, there are a large number of older English authorities concerning technical defects which are probably now of limited persuasiveness in Vanuatu. See further Part 11 and *Oaths* [Cap 37]. Merely technical irregularities could be dealt with under r.18.10: See for example *Eastridge Ltd v Oceanic Life Ltd* (1997) 10 PRNZ 340.
- [2.6.3] Jurat The jurat must be completed by the Commissioner (or other qualified person) before whom the statement is sworn and irregularities in the jurat were traditionally viewed with seriousness. The jurat should never appear on a page by itself. Note that the jurat should be modified where the deponent is blind or illiterate or where the sworn statement has been translated: See generally *Chitty & Jacob's Queen's Bench Forms*, Chapter 36. For the duty of Commissioners see *Bourke v Davis* (1889) 44 Ch D 110 at 126. If the name of the person taking the sworn statement is not apparent from the signature, their full name should be written. Note that the jurat in Form 3 is slightly at variance with s.11(4) of the *Oaths Act* which requires the place of swearing to be included. It is suggested that the jurat in Form 3 be modified accordingly.
- [2.6.4] Affirmation instead of swearing Appropriate modifications to the form should also be made where the statement is affirmed rather than sworn, in accordance with s.9(1) of the *Oaths Act*.

Applications during a proceeding

- 2.7(1) A person may apply during a proceeding for an interlocutory order.
- (2) The application must:
 - (a) be signed by the person or the person's lawyer; and

- [2.7.1] Requirement of signature It is uncertain whether it is sufficient for a law clerk to sign the application (see *France v Dutton* [1891] 2 QB 208 at 211; *Fick & Fick v Assimakis* [1958] 1 WLR 1006 at 1009; [1958] 3 All ER 182 at 184) or a lawyer from the same firm as the lawyer representing the person (noting that the definition of "lawyer" in Part 20 is personal). As to the use of facsimile signatures see *R v Brentford Justices* [1975] QB 455 at 462-3; [1975] 2 WLR 506 at 511-2; [1975] 2 All ER 201 at 206-7.

(b) name as defendant anyone whose interests are affected by the order sought.

[2.7.2] Meaning of “anyone” The reference to “anyone” affected by the order sought seems wide enough to include even non-parties. Such an interpretation seems contrary to expectation and does not accord with either the definition of “defendant” in Part 20, the description of parties in Part 2 or the service requirements in Part 7. Accordingly, it is suggested that interlocutory applications ought to name only those defendants whose interests are affected. If it appears that another party ought to be added, the procedure to do so is contained in Part 3.

(3) Nothing in this Rule prevents:

(a) a party to a proceeding making an oral application during the proceeding; or

[2.7.3] See further r.7.2(1) which refers to making an oral application “at any stage of a proceeding”.

(b) the court making an order on an oral application.

[2.7.4] See further r.7.2(2) which provides that interlocutory applications must be made orally, “if practicable”.

Outline of proceedings

2.8 The flow charts in Schedule 4 give an outline of typical undefended and defended proceedings in the Magistrates Court and the Supreme Court, and the procedure for enforcing judgments.