STATEMENTS OF THE CASE

What are statements of the case

4.1 (1) A statement of the case is set out in a claim, a defence or a reply

(2) The purpose of statements of the case is to:

(a) set out the facts of what happened between the parties, as each party sees them; and

(b) show the areas where the parties agree; and

(c) show the areas where the parties disagree (called the "issues between the parties") that need to be decided by the court.

[4.1.1] Importance of statements of the case Statements of the case (formerly called "pleadings") play a critical role in civil procedure and are not merely a formality: *Farrell v Secretary for Defence* [1980] 1 All ER 166 at 173; [1980] 1 WLR 172 at 179; *Pulham v Dare* [1982] VR 648 at 653. It is a fundamental principle of the law that a party knows what allegations are made against him with precision so that he can decide how to respond to them: *Roqara v Takau* [2001] VUCA 15; CAC 5 of 2001. The parties are confined by their statements of the case: *Blay v Pollard & Morris* [1930] 1 KB 628 at 634; [1930] All ER 609 at 612; *Waghorn v Wimpey* [1970] 1 All ER 474 at 479; [1969] 1 WLR 1764 at 1771. The court is also confined by the statements of the case and may not decide issues not raised by them: *Banbury v Bank of Montreal* [1918] AC 626 at 659; [1918-9] All ER 1 at 7; *Bell v Lever Bros* [1932] AC 161 at 216; [1931] All ER 1 at 27; *Esso v Southport Corp* [1956] AC 218 at 238-9; [1955] 3 All ER 864 at 868-9; [1956] 2 WLR 81 at 86-7; *Qualcast v Haynes* [1959] AC 743 at 758; [1959] 2 All ER 38 at 44; [1959] 2 WLR 510 at 518; *Water Board v Moustakas* (1988) 180 CLR 491 at 496; 62 ALJR 209 at 211-2; 77 ALR 193 at 197. Statements of the case also define the scope of admissible evidence.

[4.1.2] History Part 4 adopts much of the substance of the system of pleading which first appeared in the First Schedule to the Judicature Act 1875 (UK) and the purpose has little changed since then: "The whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay" (*Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 per Jessel MR). Statements of the case also fulfill the underlying requirement of natural justice that each party be given fair and proper notice of the other side's case: *Palmer v Guadagin* [1906] 2 Ch 494 at 497; *Esso v Southport Corp* [1956] AC 218 at 238-9; [1955] 3 All ER 864 at 868-9; [1956] 2 WLR 81 at 86-7; *Qualcast v Haynes* [1959] AC 743 at 758; [1959] 2 All ER 38 at 44; [1959] 2 WLR 510 at 518; *Roqara v Takau* [2001] VUCA 15; CAC 5 of 2001; *Telecom Vanuatu v Minister for Infrastructure* [2005] VUSC; CC 205 of 2005.

Content of statements of the case

E *RSC* O18r7(1)
E *CPR* r16.2(1)(a), 16.4(1)

4.2 (1) Each statement of the case must:

[4.2.1] Striking out statements of the case There is an inherent jurisdiction (supported by the broad terms of ss.28(1)(b) and 65(1), *Judicial Services and Courts* [Cap 270] and rr.1.2 and 1.7) to strike out a statement of the case which does not disclose a reasonable claim or defence (cf *Malas v David* [2008] VUSC 56; CC 3 of 2008 at [5] – which denies any jurisdiction to strike out a defence and which, it is respectfully submitted, is clearly wrong) or where it is frivolous or vexatious: *Jack v Bertaux* [2000] VUSC 21; CC 81 of 1999; *Ebbage v Ebbage* [2001] VUCA 7; CAC 7 of 2001 at [27]; *Kalses v Le Manganese de Vate Ltd* [2005] VUCA 2; CAC 34 of 2003; *Noel v Champagne Beach Working Committee* [2006] VUCA 18; CAC 24 of 2006; *Iririki Island Holdings v Ascension Ltd* [2007] VUCA 13; CAC 35 of 2007 at [17]. The discretion is to be exercised sparingly and only in clear cases: *Jack v Bertaux* [2000] VUSC 21; CC 81 of 1999; *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15; CAC 7 of

2004; *Noel v Champagne Beach Working Committee* [2006] VUCA 18; CAC 24 of 2006 (applying *Electricity Corporation Ltd* v *Geotherm Energy Ltd* [1992] 2 NZLR 641 at 645); *Iririki Island Holdings v Ascension* [2007] VUCA 13; CAC 35 of 2007 at [19]. The test as to whether there is disclosed a reasonable cause of action may be substantially identical to the test for establishing a serious question to be tried in an application for an injunction: *Iririki Island Holdings v Ascension* [2007] VUSC 69; CC 70 of 2007 at [2] (reversed on appeal, but not as to this point). The court does not evaluate conflicts in the evidence but proceeds on the basis that every fact alleged in the statement of the case being attacked might be proved: *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15; CAC 7 of 2004; *Iririki Island Holdings v Ascension* [2007] VUCA 13; CAC 35 of 2007 at [19]; *Newman v Ah Tong* [2007] VUSC 102; CC 41 of 2007 at [5]. It is possible for the court to have recourse to evidence in determining an application to strike out under the inherent jurisdiction, however, the necessity of such course will usually militate against such an application: *Ebbage v Ebbage* [2001] VUCA 7; CAC 7 of 2001 at [30], [31]. Unless the statement of the case is irremediable, the usual order will be to strike out the statement of the case with leave to re-plead: *Kalomtak Wiwi Family v Minister of Lands* [2004] VUSC 47; CC 14 of 2004; *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316. If a party intends to defend a strike-out application with an offer to amend the statement of the case, then a draft of the proposed amendment should be put forward for argument: *CED Distributors (1988) Ltd v Computer Logic Ltd* (1991) 4 PRNZ 35. If the statement of the case is irremediable, the claim itself may be struck out: *Ake v Vanuatu Livestock Development Co* [2007] VUSC 47; CC 20 of 2007 at [4] – [7]. Some leniency is likely to be shown to unrepresented litigants: *Newman v Ah Tong* [2007] VUSC 102; CC 41 of 2007 at [14]; *Republic of Vanuatu v Bohn* [2008] VUCA 6; Const AC 3 of 2008.

[4.2.2] Costs Costs will usually follow the event. Parties faced with a strike-out application should consider their vulnerability and, if appropriate meeting it with an offer to amend in order to guard against costs orders: See for example the reasoning in *Blake v Erakor Island Resort* [2008] VUSC 49; CompCas 1 of 2007 at [7].

E *RSC* O18r7(1)
E *CPR* r16.2(1)(a), 16.4(1)(a)

(a) be as brief as the nature of the case permits; and

[4.2.3] Requirement to be brief Statements of the case must be as concise as possible, but also should be clear and definite: *Re Parton* (1882) 45 LT 755; 30 WR 287. See generally *Hill v Hart Davis* (1884) 26 Ch D 470.

[4.2.4] What not to include Unecessary material or allegations should be excluded, such as citations from statutes, names of cases or propositions of law. Neither is it generally necessary to refer to the other side's prayer for relief, particulars, assertions of law, admissions or to facts raised only against other parties. The material substance of conversations, contracts, documents, statutes, etc should be pleaded rather than reproducing them verbatim (see *Darbyshire v Leigh* [1896] 1 QB 554 at 559; *Eade v Jacobs* (1877) 3 Ex D 335 at 337; [1874-80] All ER 1714 at 1715), unless the actual words are necessary to the cause of action (such as in defamation).

E *RSC* O18r7(1)
E *CPR* r16.4(1)(a)

(b) set out all the relevant facts on which the party relies, but not the evidence to prove them; and

[4.2.5] Meaning of "relevant facts" The general rule is that all facts necessary to put the other parties on their guard and tell them what case they have to meet at trial (*Phillipps v Phillipps* (1878) 4 QBD 127 at 139) and every fact necessary to complete the cause of action (*Bruce v Odhams* [1936] 1 KB 697 at 715; [1936] 1 All ER 287 at 296; *Re Dependable Upholstery* [1936] 3 All ER 741 at 745) must be stated.

[4.2.6] Test of relevance Whether a particular fact is relevant depends on the substantive law, the remedies sought and upon whom the onus of proof of particular matters rests. Accordingly, it is not possible to identify a firm rule in every case. Matters of corporate status (*Moldex v Recon* [1948] VLR 59 at 60; [1948] 1 ALR 115), standing (*Bridgetown/Greenbushes Friends of the Forest v Executive Director of the Dept of Conservation* (1997) 18 WAR 126 at 132**;** *Kathleen Investments v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 140, 146, 158; 16 ALR 535 at 551, 556, 566), capacity, etc should always be stated. It is not necessary to state matters which are not relevant at the particular time even if they are likely to become relevant: *Gates v Jacobs* [1920] 1 Ch 567 at 570 (performance of condition precedent); *Young v Queensland Trustees* (1956) 99 CLR 560 at 566 (prior demand for payment); *Australian Iron & Steel v Hoogland* (1962) 108 CLR 471 at 488; [1962] ALR 842 at 853; 35 ALJR 489 at 495-6 (acton within limitation period); *Rassam v Budge* [1893] 1 QB 571 at 576 (allegations not yet made).

[4.2.7] Distinction between facts and evidence This distinction between facts and the evidence to prove them is sometimes blurred. Generally speaking, when a particular state of facts gives rise to a cause of action, it is enough to allege those facts simply without setting out all the subordinate facts and the means of proving them: *Williams v Wilcox* (1838) 8 A & E 314 at 331; 112 ER 857 at 863; [1835-42] All ER 25 at 27; *Re Dependable Upholstery* [1936] 3 All ER 741 at 745; *East West Airlines v Commonwealth* (1983) 49 ALR 323 at 326; 57 ALJR 783 at 784. However, a fact which is both evidence and a fact to be proved as an element of the cause of action must be alleged: *Blake v Albion* (1876) 45 LJQB 663 at 666; 4 CPD 94; 27 WR 321; 40 LT 211.

E *RSC* O18r11

(c) identify any statute or principle of law on which the party relies, but not contain the legal arguments about it; and

[4.2.8] How and when to identify statute or principle of law It is often necessary for a party to refer to a particular law or body of law inferentially by characterizing conduct, for example, that certain action was "in breach of contract" or "negligent" or a "trespass" or contrary to a particular statutory provision, etc: *Chief Morris Mariwota v Estate of Kai* [2008] VUSC 17; CC 190 of 2006 at [8]. In such cases, the underlying facts giving rise to the cause of action must be pleaded. Where, however, a party merely states that certain conduct is "wrongful" or "unlawful" or that a party is "legally liable", such non-specific conclusions of law are meaningless and should be regarded as merely argument: see for example *Day v Brownrigg* (1878) 10 Ch D 294 at 302; *Middlesex County Council v Nathan* [1937] 2 KB 272 at 281; [1937] 3 All ER 283 at 288. It is not the intention of the rules that statements of the case descend to arguments, reasons, theories, etc.

[4.2.9] Whole case to be brought forward Parties must bring forward their whole case at one time or they may be estopped from raising further matters based on the same facts in subsequent proceedings: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(d) if the party is relying on custom law, state the custom law.

[4.2.10] How to state custom law A matter of custom law should be regarded as a fact which ought to be pleaded, as would a matter of foreign law (as to which see *Aschberg, Hopwood & Crew v Casa Musicale* [1971] 1 All ER 577 at 580; [1971] 1 WLR 173 at 178). Accordingly, the party relying on custom law should specifically raise it and give full particulars of the precise law, its provenance, applicability, etc (see by analogy *Regie National de Usines Renault SA v Zhang* (2002) 210 CLR 491 at [68]; 187 ALR 1; 76 ALJR 551).

E *RSC* O18r15
E *CPR* r16.2(1)(b), 16.4(1)(b)-(d)

(2) If the statement of the case is set out in a claim or a counterclaim, it must also set out the remedies or orders sought

[4.2.11] Prayer for relief Forms 5 and 6 omit this requirement. The "prayer for relief" usually reads "AND THE CLAIMANT CLAIMS:" or "AND THE DEFENDANT COUNTERCLAIMS:" followed by separate paragraphs stating the relief sought and (where applicable) against which party.

[4.2.12] Relief must be sought against each defendant At least one form of relief must be sought against each defendant: *Belmont Finance v Williams Furniture* [1979] Ch 250 at 269; [1979] 1 All ER 118 at 131; [1978] 3 WLR 712 at 730.

[4.2.13] Alternative but not inconsistent relief may be claimed A party may claim more than one form of relief or alternative forms of relief but may not seek relief which is inconsistent with the facts that party has stated: *Cargill v Bower* (1878) 10 Ch D 502 at 517; *Ciavarella v Balmer* (1983) 153 CLR 438 at 449; 48 ALR 407 at 415; 57 ALJR 632 at 636. Nothing prevents a party from setting up two sets of inconsistent facts and claiming relief under them in the alternative: *Bagot v Easton* (1877) 7 Ch D 1 at 8.

[4.2.14] Prayer for "costs", etc superfluous It is not strictly necessary to seek "costs" or "general" or "other" relief because the court is always entitled to grant such relief to which it is shown the party is entitled on the facts as found: *Cargill v Bower* (1878) 10 Ch D 502 at 517; *Wicks v Bennett* (1921) 30 CLR 80 at 100; *Rawson v Hobbs* (1961) 107 CLR 466 at 485; *Farrow Finance Co v Farrow Properties* [1999] 1 VR 584 at 635.

Claim

4.3 (1) A claim must:

E *CPR* r7.4(1)(a)

(a) contain a statement of the case; and

[4.3.1] Location of insertion of statement of the case This is to be inserted in Forms 5 and 6 where the form requires the claimant to "set out details of claim in numbered paragraphs".

(b) set out the address that is to be the claimant's address for service of documents; and

[4.3.2] Proper address for service Unless the claim is filed by the claimant's lawyer, the claimant's residence should be the address for service. If an address is absent, the court should not accept the claim. The requirement of an address deters fraudulent or mischievous claims and enables the defendant to know where to seek to enforce costs orders, etc. See further r.15.19.

(c) for the Supreme Court, be in Form 5; and

(d) for the Magistrates Court, be in Form 6; and

E *CPR* r7.8(1)

(e) have with it a Response Form.

[4.3.3] Meaning of "response form" There is no definition of "Response Form". This is generally regarded as a reference to a blank Form 7.

Response

4.4 (1) The defendant must file and serve a response within the period required by Rule 4.13:

[4.4.1] Response within 14 days Rule 4.13(1)(a) provides that the response must be filed and served within 14 days of the date of service of the claim.

(2) The response must:

(a) set out the address that is to be the defendant's address for service; and

[4.4.2] Meaning of "address for service" This subrule differs from the formula in r.4.3(1)(b) which refers to "… for service *of documents*…" The difference is probably accidental and of no consequence.

(b) be in Form 7; and

(c) be completed and signed

[4.4.3] Who may complete and sign The subrule does not state by whom Form 7 must be signed and leaves uncertainty as to companies, partnerships, persons acting under power of attorney, unqualified persons (as to which see *Re Ainsworth* [1905] 2 KB 103 at 106), etc. The Form refers to the defendant or the defendant's lawyer. It is also uncertain whether a law clerk may sign (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 (noting also 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.

[4.4.4] Lawyer's warranty of authority A lawyer who files and serves a response impliedly warrants that he has the authority to do so. If that is not the case, the defendant may have the response vacated: *Yonge v Toynbee* 1910] 1 KB 215 at 228; [1908-10] All ER 204 at 208.

[4.4.5] Whether response waives irregularities, submits to jurisdiction It is not settled whether the completed boxes of Form 7 may amount, in an appropriate case, to a waiver of any irregularities, an admission of fact or a submission to jurisdiction.

[4.4.6] Incomplete response If the response is either incomplete or unsigned, the appropriate course may be to apply to set it aside and seek default judgment.

[4.4.7] Incorrect spelling of defendant Where a defendant's name is incorrectly spelled, it is suggested that the defendant should file Form 7 using the correct name: *Alexander Korda Film Productions v Columbia Pictures* [1946] Ch 336 at 342, 343; [1946] 2 All ER 424 at 428. This does not relieve the claimant of the obligation to amend as appropriate.

(3) The defendant need not file a response if he or she files and serves a defence within 14 days of the date of service of the claim.

[4.4.8] Filing of defence alternative to response This is perhaps the better course where Form 7 is inapposite, such as when a party objects to the jurisdiction of the court or where a party does not admit the claim but proposes to abide by the decision of the court. See further [4.4.5].

Defence

4.5 (1) If the defendant intends to contest the claim, the defendant must file and serve a defence on the claimant within the period required by Rule 4.13.

[4.5.1] Defence within 28 days Rule 4.13(1)(b) provides that the defence must be filed and served within 28 days of the date of service of the claim unless the defendant chooses to file a defence instead of a response.

(2) The defence must contain a statement of the case.

[4.5.2] Location of insertion of statement of the case This is to be inserted in Form 8 where the form requires the defendant to "set out details of defence in numbered paragraphs".

E *CPR* r16.5(1)

(3) The defendant must not deny the claimant's claim generally, but must deal with each fact in the claim.

[4.5.3] No general denial General denials are not permitted because they do not address the purpose of statements of the case as described in r. 4.1(2). See generally *Pinson v Lloyds* [1941] 2 KB 72 at 80; [1941] 2 All ER 636 at 641. The defendant must clearly and specifically deal with every allegation of fact in the claim which the defendant does not wish to admit. So, for example, if it is alleged that a defendant owes a debt and the defendant accepts part of the debt, it is not sufficient to generally deny the indebtedness – the defendant must state what part of the debt is admitted and what part is denied.

[4.5.4] Holding defence So-called "holding" defences based on evasive general denials are to be discouraged because they cause inconvenience, expense, delay and unnecessary interlocutory applications.

[4.5.5] Facts rather than law The rule specifically relates to the facts stated in the claim and so it is not generally necessary to deal with matters of law, subject to limited exceptions (eg. *Commonwealth v Spotless Catering Services Ltd* [1999] WASCA 136 at [27], [37-38] as to whether there was an agreement). Where the defendant admits the facts but denies the legal consequences which the claimant says attaches to them (usually called a "confession and avoidance), this must be specifically set out. See further r.4.7.

[4.5.6] Not required to set out facts before dealing with them The requirement that "each" fact be dealt with does not mean that each individual fact must be set out before being dealt with. It is common practice to use the form "the Defendant denies each and every allegation contained in paragraph… of the claim" or similar: *Adkins v North Metropolitan Tramway* (1893) 10 TLR 1731; 63 LJKB 361; *John Lancaster Radiators v General Motor Radiator Co* [1946] 2 All ER 685 at 687.

E *CPR* r16.5(2)

(4) If the defendant does not agree with a fact that the claimant has stated in the claim, the defendant must file and serve a defence that:

(a) denies the fact; and

[4.5.7] Admission of non-controversial facts Facts which are not in dispute should be admitted: *Lee Conservancy Board v Button* (1879) 12 Ch D 383 at 398. This is consistent with the overriding objective and the failure to admit facts for merely "tactical" reasons may lead to penalty costs orders: *Unioil v Deloitte* (No2) (1997) 18 WAR 190 at 193.

[4.5.8] Non-admissions Under the former rules it was acceptable to deal with a fact which was not admitted either by denial or by non-admission. The distinction was that a denial was used to dispute the fact and a non-admission was used to put the opponent to proof. It is suggested that non-admissions are no longer acceptable unless subrule (6) applies. Parties ought to investigate allegations at an early stage and respond with either a denial or an admission. Of course, it may still be appropriate to explicitly "not plead" to allegations which are irrelevant or do not concern the particular defendant.

(b) states what the defendant alleges happened.

[4.5.9] Facts supporting positive defence must be stated A defendant will not be permitted to raise a positive defence under cover of a general denial: *Crook v Derbyshire* [1961] 3 All ER 786 at 790; [1961] 1 WLR 1360 at 1365; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 318; 41 ALR 255 at 259-60; 56 ALJR 681 at 683. Accordingly, it is necessary for the defendant to state such facts as are necessary to set up his defence.

[4.5.10] Defence must not be evasive The defence must not be vague or evasive and must answer the point of substance: *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639-40; *Tildesley v Harper* (1878) 7 Ch D 403 at 407.

E *CPR* r16.4(5)

(5) If the defendant does not deny a particular fact, the defendant is taken to have agreed with it.

[4.5.11] Admissions may be express or implied Admissions of fact may be express or implied by the absence of a denial. Such an admission is of the same effect as an express admission: *Byrd v Nunn* (1877) 7 Ch D 284 at 287; *Green v Sevin* (1879) 13 Ch D 589 at 595.

[4.5.12] No requirement to plead to particulars An implied admission will not arise where there is an omission to plead to particulars (*Chapple v Electrical Trades Union* [1961] 3 All ER 612 at 615; [1961] 1 WLR 1290 at 1293-4) or to matters of law (but see *Commonwealth of Australia v Spotless Catering Services Ltd* [1999] WASCA 136 at [27], [37-38] as to whether there was an agreement). Where a defendant admits allegations of fact and joins issue only on points of law, the claimant will not usually be permitted to adduce evidence at the hearing: *Pioneer Plastic Containers v Commissioners of Customs* [1967] Ch 597 at 602; [1967] 1 All ER 1053 at 1056; [1967] 2 WLR 1085 at 1088.

(6) If the defendant does not know about a particular fact and cannot reasonably find out about it, the defendant must say so in the defence.

[4.5.13] Plea of not knowing Where allegations relate to the claimant only or to other defendants, a defendant can state that they "do not know" and perhaps also that they

"do not plead to" it. A statement that the defendant "does not know" an allegation of fact made against him directly should be struck out as evasive: *Duke Group (in liq) v Arthur Young (No13)* (1991) 5 ACSR 212 at 220.

Reply

E *CPR* r16.7(1)

4.6 (1) If a claimant does not file and serve a reply, the claimant is taken to deny all the facts alleged in the defence.

[4.6.1] Mere denial in reply It is not necessary to file a reply only to deny the allegations in the defence. However, the claimant may need to do more than merely deny allegations in the defence. See further r.4.7.

(2) If a claimant wishes to allege further relevant facts after the defence has been filed and served, the claimant must file and serve a reply.

[4.6.2] When reply must be filed The further facts which may be raised in the reply are those which are necessary to meet some issue raised by the defence: *Francis v Francis* [1952] VLR 321 at 323; [1952] ALR 573. The claimant is not entitled to use the reply to raise a new cause of action: *Williamson v London & North Western Railway* (1879) 12 Ch D 787 at 793.

(3) The claimant's reply must:

(a) contain a statement of the case; and

[4.6.3] Location of insertion of statement of the case This is to be inserted in Form 9 where the form requires the claimant to "set out details of reply in numbered paragraphs".

(b) state what the claimant alleges happened.

[4.6.4] See [4.6.2].

E *CPR* r16.7(2)(b)

(4) If the claimant's reply does not deal with a particular fact, the claimant is taken to deny it.

(5) The reply must be in Form 9

[4.6.5] Form of reply and defence to counterclaim If the claimant is filing a reply and defence to counterclaim, the heading ought to be "Reply and Defence to Counterclaim" and the two elements kept separate in the body of the document under subheadings "Reply" and "Defence to Counterclaim" with paragraph numbers in uninterrupted sequence. See further r.4.8(4).

Matters to be stated in a defence or reply

E *RSC* O18r8

4.7 In a defence or a reply, the statement of the case must specifically mention a matter that:

[4.7.1] Meaning of "matter" There is no definition of "matter". In *North Western Salt v Electrolytic Alkali* [1913] 3 KB 422 at 425 it was held that the expression "any matters" in the English provision included only matters of fact. By contrast, in *Nicholson v Colonial Mutual Insurance* (1887) 13 VLR 58 at 63 it was held that both matters of fact and matters of law are to be stated for the purposes of the Victorian provision. It is suggested that the latter case is more compelling in the context of the scheme of case management contemplated in Part 1 of the rules.

E *RSC* O18r8(1)(a)

(a) makes another party's claim or defence not maintainable; or

[4.7.2] Examples These will include matters such as performance, release and limitation. It is for the claimant to state and prove such matters. For example, a bare denial of the existence of a contract is not enough if the defendant wishes to raise *non est factum*.

(b) shows a transaction is void or voidable; or

[4.7.3] Examples These include matters such as fraud (*Davy v Garrett* (1877) 7 Ch D 473 at 489) or illegality *(Bullivant v A-G for Victoria* [1901] AC 196 at 204; [1900-3] All ER 812 at 816). Full particulars must be given: *Belmont Finance v Williams Furniture* [1979] Ch 250 at 268; [1979] 1 All ER 118 at 130; [1978] 3 WLR 712 at 728-9 (fraud, dishonesty); *Castlemaine Perkins v Queen Street Hotels* [1968] Qd R 501 at 513 (illegality).

E *RSC* O18r8(1)(b)

(c) may take another party by surprise if it is not mentioned; or

[4.7.4] Examples The purpose of subr. 4.7(c) is to avoid ambush: *Re Robinson's Settlement* [1912] 1 Ch 717 at 728; see further [4.1.2]. Matters which must be stated will largely overlap with matters required to be stated under subr 4.7(a) and (b) but will also include such matters as *non est factum* (*Gallie v Lee* [1971] AC 1004 at 1019; [1970] 3 All ER 961 at 965; [1970] 3 WLR 1078 at 1085), contributory negligence (*Fookes v Slaytor* [1979] 1 All ER 137 at 140; [1978] 1 WLR 1293 at 1297-8), non-fulfilment of a condition precedent (*Tsakiroglou v Transgrains* [1958] 1 Lloyd's Rep 562 at 573), estoppel (*Carl Zeiss Stiftung v Rayner (No3)* [1970] Ch 506 at 537; [1969] 3 All ER 897 at 908; [1969] 3 WLR 991 at 1009), failure to mitigate damage, equitable defences, etc.

[4.7.5] No surprise when matter raised by at least one party If only one of two defendants states a matter which is open to both, the claimant cannot maintain that he was taken by surprise and the court will allow both defendants the benefit of what is stated: *Re Robinson's Settlement* [1912] 1 Ch 717 at 728.

E *RSC* O18r8(1)(c)

(d) raises a question of fact not arising out of a previous statement of the case.

Counterclaim

4.8 (1) If a defendant in a proceeding wants to make a claim against the claimant (a "counterclaim") instead of bringing a separate proceeding, the defendant must include details of it in the defence.

[4.8.1] Nature of counterclaim A counterclaim is treated as an independent action: *Amon v Bobbett* (1889) 22 QBD 543 at 548; *Stumore v Campbell* [1892] 1 QB 314 at 317; [1891-4] All ER 785 at 787. Accordingly, the court must have jurisdiction in relation to the subject matter of the counterclaim: *Pellas v Neptune Marine Insurance* (1879) 5 CPD 34; 49 LJQB 153; 42 LT 35; 28 WR 405; *Bow, McLachlan & Co v The Ship 'Camosun'* [1909] AC 597 at 610-1; [1908-10] All ER 931 at 936-7; *Williams Bros v E T Agius* [1914] AC 510 at 522.

(2) A counterclaim must contain a statement of the case.

[4.8.2] Striking out of counterclaims This is a separate entity from the defence and may be struck out separately: *Owen v Pugh* [1995] 3 All ER 345 at 351-2. Accordingly, leave to amend the defence does not include leave to amend the counterclaim: *Grundy v Lewis* (1995) 62 FCR 567 at 571; 133 ALR 400 at 405.

(3) That part of the defence dealing with the counterclaim must:

(b) be shown clearly as the counterclaim; and

[4.8.3] Form of counterclaim The document may be named "Defence and Counterclaim" and the two elements kept separate in the body of the document under subheadings "Defence" and "Counterclaim" with paragraph numbers in uninterrupted sequence.

(b) set out details of the counterclaim as if it were a claim; or

(4) If the defendant has counterclaimed:

(a) the claimant may include a defence to the counterclaim in the claimant's reply; and

[4.8.4] Form of reply and defence to counterclaim If the claimant is filing a reply and defence to counterclaim, the heading ought to be "Reply and Defence to Counterclaim" and the two elements kept separate in the body of the document under subheadings "Reply" and "Defence to Counterclaim" with paragraph numbers in uninterrupted sequence.

(b) rule 4.5 applies to that part of the claimant's reply that deals with the counterclaim as if the reply were a defence.

(5) If the claimant defends the counterclaim:

(a) the defendant may file a reply (headed "defence to counterclaim") dealing with that part of the claimant's reply that relates to the counterclaim; and

(a) rule 4.6 applies to the defendant's reply.

(6) This rule applies to the conduct of a counterclaim (whether the counterclaim is against a person who was a party before the counterclaim was made or not) as if:

(a) the counterclaim is a claim, and the person making it a claimant in an original proceeding; and

(b) the party against whom the counterclaim is made is a defendant to an original proceeding.

Counterclaim against additional party

4.9 (1) A defendant may make a counterclaim against a person other than the claimant if:

(a) the claimant is also a party to the counterclaim; and

(b) either:

(i) the defendant alleges the other party is liable with the claimant for the counterclaim; or

[4.9.1] Meaning of "with the claimant" Such a counterclaim can only be maintained where the other party is liable "with the claimant". See for example *Harris v Gamble* (1877) 6 Ch D 748 at 752; *Furness v Booth* (1876) 4 Ch D 586 at 587.

(ii) the relief the defendant claims against the other person is related to or connected with the original subject matter of the proceeding.

[4.9.2] Cross claim Such a counterclaim can only be maintained when the counterclaim is "related to" or "connected to" the original subject matter. See for example *Smith v Buskell* [1919] 2 KB 362 at 369; [1918-9] All ER 747 at 750; *Times Cold Storage v Lowther & Blankley* [1911] 2 KB 100 at 106.

(2) The defendant must serve the defence and counterclaim, and the claim, on the other party within the time allowed for service under rule 4.13(1) on the claimant.

(3) The other person becomes a party to the proceeding on being served with the defence and counterclaim.

Damages

4.10 (1) If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.

[4.10.1] Meaning of "damage" and "damages" "Damage" refers to the disadvantage suffered by a person as a result of some wrongful act or omission. "Damages" are the monetary compensation which the law gives in respect of wrongs: *Jabbour v Custodian of Absentee's Property of Israel* [1954] 1 All ER 145 at 150; [1954] 1 WLR 139 at 143-4; [1953] 2 Lloyd's Rep 760 at 774; *Cassell v Broome* [1972] AC 1027 at 1070; [1972] 2 WLR 645 at 668; [1972] 1 All ER 801 at 823. It is important to distinguish between damages and other kinds of money payment, such as debt, money due under contract and quantum meruit, which are often incorrectly conflated with the notion of damage. It is also important to appreciate that damages do not always depend upon damage being suffered as some wrongs are actionable *per se*, such as injurious falsehood and trespass. Of course, actual damage may also be caused in such cases.

[4.10.2] Meaning of "special damages" In the context of statements of the case, the reference to "special" damages is probably intended to include all items of damage which do not flow in the ordinary course and are exceptional in some way: *Commissioners for Admiral of United Kingdom v Steamship Susquehanna* [1926] AC 655 at 661; *Ströms Bruks Aktie Bolag v Hutchison* [1905] AC 515 at 525-6; *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 486; [1969] 1 WLR 570 at 579-80. "Special" damage was described in *Ratcliffe v Evans* [1892] 2 QB 524 at 528; [1891-4] All ER 699 at 702 as "the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at trial". Accordingly, all particular items of past or future loss (*Domsalla v Barr* [1969] 3 All ER 487 at 492; [1969] 1 WLR 630 at 634), any items of consequential loss (*Re Simms* [1934] 1 Ch 1 at 22) and any matters of aggravation *(Whitney v Moignard* (1890) 24 QBD 630 at 631) should be stated as special damage with appropriate particulars: *Ilkiw v Samuels* [1963] 2 All ER 879 at 887; [1963] 1 WLR 991 at 1001. See further [4.10.5].

[4.10.3] When exemplary damages awarded In some circumstances, the conduct or motives of a party may lead to more than the usual measure of damages by way of punishment, called "exemplary" damages: *Mahe v Presdient of the Republic of Vanuatu* [2008] VUSC 39; Const Cas 3 of 2005; *British Transport Commission v Gourlay* [1956] AC 185 at 206; [1955] 3 All ER 796 at 804; [1955] Lloyd's Rep 475 at 482; *Harrisen v Holloway (No1)* [1984] VUSC 8; [1980-1994] Van LR 106. Exemplary damages are awarded for conduct which outrages the court, representing the community: *Andikar v Siro* [2008] VUCA 1; CAC 2 of 2008; *Gray v Motor Accident Commission* (1998) 158 ALR 485; 73 ALJR 45; [1998] HCA 70 at [101]. The sole factor for considering whether exemplary damages ought to be awarded is the defendant's conduct, not the claimant's loss: *Rookes v Barnard* [1964] AC 1129 at 1221, 1228; [1964] 2 WLR 269 at 324, 330; [1964] 1 All ER 367 at 407, 412; [1964] 1 Lloyd's Rep 28 at 62-3, 67; *AB & Ors v South West Water Services Ltd* [1993] QB 507 at 524, 529; [1993] 1 All ER 609 at 621, 625;

[1993] 2 WLR 507 at 520, 524 (but note the reservation in *Andikar v Siro* [2008] VUCA 1; CAC 2 of 2008). The claimant must state facts which are arguably capable of supporting an award for exemplary damages.

[4.10.4] Particulars of damages Under the former practice, it was not necessary to state a specific amount except for liquidated damages: *London & Northern Bank v Newnes* (1900) 16 TLR 433. It is now necessary to state an amount for every claim of damages, including general damages (see further subr. (2)). It is suggested that amendment ought to be allowed relatively freely to overcome the inherent uncertainty of quantifying all forms of damage. In deciding a sum to claim by way of general damages, lawyers should have regard to levels of ordinary income in Vanuatu and the value of money and general conditions in the Republic: *Manu & Tonga v Muller* [1997] Tonga LR 192

[4.10.5] Exaggerated damages claims Unfortunately, it has become conventional to seek damages in wildly optimistic sums, presumably in the hope of establishing in the minds of the defendant and the court a more generous frame of reference. It is suggested that this practice ought to be discouraged by appropriate costs orders, as to which see [15.8.9]. In *Telecom Vanuatu v Kalsau Langwor* [2003] VUSC 36; CC 124 of 2002 Coventry J gave the following warning: "These Courts have said this many times, yet some lawyers still pay no attention. Hopelessly inflated claims do nothing but harm what might otherwise be a good cause. It is for the lawyer to make a realistic assessment of how much can be claimed, ensure he can prove it and resist any pressure from his client to add a few noughts. The Court will use its Civil Procedure Rules powers to make the lawyer pay where such mispleading causes wasted costs". See also *Boblang v Lau* [2008] VUSC 59; CC 46 of 2007 at [23] Lawyers should also bear in mind that awards of damages in Vanuatu will not automatically reflect awards in other countries but will be adjusted to reflect economic realities in Vanuatu: *Moli v Heston* [2001] VUCA 3; CAC 11 of 2000; *Obed v Kalo* [2008] VUSC 47; CC 221 of 2006 at [20].

(2) If general damages are claimed, the following particulars must be included:

[4.10.6] Meaning of "general damages" "General" damages in this context refer to all items of loss which the claimant is not required to specify in order to recover them at trial. These are inferred or presumed or are the necessary and immediate consequences of the alleged wrongful act. See further [4.10.2].

(a) the nature of the loss or damage suffered; and

(b) the exact circumstances in which the loss or damage was suffered; and

(c) the basis on which the amount claimed has been worked out or estimated.

[4.10.7] Where actual damage not required to be proved It is not known precisely how this requirement will operate in situations in which actual damage is not required to be shown. In all other cases it is not sufficient merely to seek "damages". See also *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 485; [1969] 1 WLR 570 at 579; *Domsalla v Barr* [1969] 3 All ER 487 at 492; [1969] 1 WLR 630 at 634.

[4.10.8] Facts supporting damages calculations ought to be stated If a claimant bases a claim for damages on calculations (whether precise or approximate), the factual matters underpinning calculation ought to be stated in particulars: *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 486; [1969] 1 WLR 570 at 579-80; *Hillier v Lucas* (2000) 81 SASR 451 at [574]. See further subr.(3).

[4.10.9] Particularisation of damages no bar to higher award The rule does no more than require particulars be provided. It does not create a duty to state an upper limit on the amount claimed nor does it have the effect of imposing any limit on recovery: *Dare v Pulham* (1982) 148 CLR 658 at 665; 44 ALR 117 at 121; 57 ALJR 80 at 82.

(3) In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.

[4.10.10] Facts supporting damages claims to be stated The degree of particularity required when stating damages depends on the character of the acts producing the damage and the circumstances under which they are done. As much particularity as is reasonable having regard to these factors must be given: *Ratcliffe v Evans* [1892] 2 QB 524 at 532-3; [1891-4] All ER 699 at 706.

[4.10.11] Onus of proving quantum of damages on claimant The claimant bears the onus of proving the fact and quantum of damage, even if the defendant does not specifically deny allegations of damage, suffers default judgment or admits the fact (but not the quantum) of damage. Accordingly, it is not strictly necessary specifically to traverse allegations of damage, except if it is intended to deny that the defendant caused any loss: *Rankine v Garton Sons* [1979] 2 All ER 1185 at 1188. It is good practice, however, to traverse all allegations of damage except as to the quantum. Where the defendant seeks to allege a failure to mitigate damage, the onus is then on the defendant and the relevant facts must be stated in the defence: *Roper v Johnson* (1873) LR 8 CP 167; 42 LJCP 65; 28 LT 296; 21 WR 384; *Wenkart v Pitman* (1998) 46 NSWLR 502 at 504, 520-3. Similarly, any issues of remoteness, causation, etc ought to be raised in the defence as a matter of good practice.

Amendment of statement of the case

4.11 (1) A party may amend a statement of the case to:

(a) better identify the issues between the parties; or

[4.11.1] General approach to amendment The original English provision referred to amendments which were "necessary for the purpose of determining the real question in controversy". The provision under the present rules is cast in more permissive terms as it is not required to show that a proposed amendment is "necessary". As a remedial provision, the court will usually adopt a fairly lenient and flexible approach to amendment in order to ascertain the true controversy: *Cropper v Smith* (1884) 26 Ch D 700 at 710-11; *Tildesley v Harper* (1878) 10 Ch D 393 at 397; *Kurtz v Spence* (1888) 36 Ch 770 at 774; *The Alert* [1891-4] All ER 1275 at 1278; *Wright v Stephenson & Co Ltd v Copeland* [1964] NZLR 673; *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001. Accordingly, it is not usually necessary for the party proposing the amendment strictly to show that the amended statement of the case actually "better identifies" the issues – it is enough that the party seeking amendment considers that the amendment has this effect – of course the court may refuse leave where the proposed amendment plainly does not. The approach in the Magistrates Court may be even more flexible: *Hills v Stanford* (1904) 23 NZLR 1061 at 1067. In other jurisdictions in which active case management has been adopted, the liberality of the traditional approach has been modified by the growing realisation that excessive liberality has a damaging influence on the conduct of litigation. The point was well made by Bryson J in *Maronis Holdings v Nippon Credit* [2000] NSWSC 753 at [15]: "In view of the state of the law governing allowance of amendments, amendment applications brought forward before the trial began were treated with uncomplaining supine liberality, notwithstanding that they sometimes showed that problems had been addressed years after they should have been. I do not think that the law requires the discretion to allow amendments to be exercised in entire innocence of understanding the obvious impact of forebearance and liberality on the behaviour of litigants, who have diminished incentive to do their thinking in due time and to tell the court and their opponents their full and true positions. When forebearance and liberality are extended to a delinquent the burden of inconvenience and lost opportunities for preparation tends to fall heavily and without adequate repair on parties who have not been delinquent. A relative disadvantage is imposed on those who proceed methodically and in due time; their interest in procedural justice should claim at least as much consideration as the interests of the applicant for a late amendment who does not have to look far for the creator of his difficulty. It is even conceivable that a litigant might deliberately pursue a course which will impose disadvantage on an opponent who has to reconsider his ground and change course in the midst of a contest." In Vanuatu the approach lingers closer to the traditional approach, despite the requirements of Part 1.

[4.11.2] Substantial amendments It may not be appropriate to amend in such a way as to substantially change the proceedings where it would be more convenient to try the proceedings afresh*: Raleigh v Goschen* [1898] 1 Ch 73 at 81; *Commonwealth Dairy Produce v McCabe* (1938) 38 SR (NSW) 397 at 400 (see further *Blackmore v Edwards* [1879] WN 175 as to the costs consequences). It is, however, generally permissible to amend proceedings to raise new causes of action which are not time-barred: *Budding v Murdoch* (1876) 1 Ch D 42 at 42; *Hubbuck v Helms* (1887) 56 LJ Ch 539; 56 LT 232; 35 WR 574; 3 TLR 381; *Makin v IAC* [2003] VUSC 24; CC 140 of 1998. As to amendments which seek to resuscitate time-barred actions see generally *Weldon v Neal* (1887) 19 QBD 394 at 395. There is an important difference between allowing amendments to clarify the issues and those which provide a distinct claim or defence to be raised for the first time: *Ketteman v Hansel Properties* [1987] AC 189. The former may be more readily allowed. The latter will be allowed subject to this rule and case management considerations. Amendments which introduce new causes of action arising after the claim was initiated will not be competent: *Eshelby v Federated European Bank* [1932] 1 KB 254; [1931] All ER 840; *Vanuatu Copra & Cocoa Exporters Ltd v Maison du Vanuatu* [2007] VUCA 24 at 14; CAC 12 of 2007.

(b) correct a mistake or defect; or

[4.11.3] General approach to mistakes The famous dictum of Bowen LJ in *Cropper v Smith* is often cited throughout the Commonwealth: "[T]he object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases… I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party… as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. See further r. 1.4(2)(b). That principle continues to apply, but modified by case management principles. The same indulgence that was shown to the negligent conduct of litigation as might have been posible in a more leisured age may no longer be shown: *Aon Risk Services v ANU* [2009] HCA 27 at [25], [133]-[134], [156].

[4.11.4] Meaning of "mistake" "Mistake" includes errors made with fault: *Mitchell v Harris Engineering* [1967] 2 QB 703 at 719, 721; [1967] 2 All ER 682 at 686, 688; [1967] 3 WLR 447 at 457, 460.

[4.11.5] Correction of party name An amendment to correct the name of a party may be made even where the effect is to substitute a new party provided that the mistake is genuine: *Rodriguez v Parker* [1967] 1 QB 116 at 139; [1966] 2 All ER 349 at 365; [1966] 3 WLR 546 at 566; *Mitchell v Harris Engineering* [1967] 2 QB 703 at 719, 721; [1967] 2 All ER 682 at 686, 688; [1967] 3 WLR 447 at 457, 460; *Evans Construction v Charrington* [1983] QB 810 at 825; [1983] 1 All ER 310 at 320; [1983] 2 WLR 117 at 130; *Bridge Shipping v Grand Shipping* (1991) 173 CLR 231 at 234, 260; 66 ALJR 76 at 88; 103 ALR 607 at 627.

(c) provide better facts about each issue.

[4.11.6] Fact pleading The Judicature Acts introduced a system of fact pleading in the late 19th Century which confers nearly total freedom on the parties to fix the facts to which the the issues between the parties are to be resolved on the evidence. That new system of fact pleading, which is still found in Vanuau today and in many other Commonwealth jurisdictions, was coupled with a fairly liberal approach to amendment of those facts: *Aon Risk Services v ANU* [2009] HCA 27 at [15]-[16]..

[4.11.7] Particulars This paragraph may be intended to facilitate the provision of additional facts, perhaps by way of particulars. Under the former rules voluntary particulars of pleading could be provided at any time and it is suggested that this continues to be so.

(2) The amendment may be made:

(a) with the leave of the court; and

[4.11.8] Discretionary considerations The grant or refusal of leave is a matter of discretion: *Baume v Commonwealth* (1906) 4 CLR 97 at 114; *G L Baker v Medway*

[1958] 3 All ER 540 at 546; [1958] 1 WLR 1216 at 1231. That discretion must be exercised having regard to the system of case management (*Tony Sadler v McLeod* (1994) 13 WAR 323 at 335-6; *Aon Risk Services v ANU* [2009] HCA 27) and also to the overriding objective (*Queensland v JL Holdings* (1997) 189 CLR 146 at 154; 141 ALR 353 at 356; 71 ALJR 294 at 296). It is suggested that the list of matters contained in subr. (3) is not exhaustive. The court will always consider the materiality and utility of the proposed amendment. Where it can be seen that the proposed amendment is bad, leave should be refused: *Sinclair v James* [1894] 3 Ch 554 at 557; *Hubbuck v Wilkinson, Heywood & Clark* [1899] 1 QB 86 at 94; [1895-9] All ER 244 at 248; *Hooker Corp v Commonwealth* (1986) 65 ACTR 32 at 38; 82 FLR 321 at 326; *Atkinson v Fitzwater* [1987] 1 All ER 483 at 490, 502; [1987] 1 WLR 201 at 210, 223. Leave should also be refused if the proposed amendment is an abuse of process (*Petropoulos v Commissioner for Railways (No 1)* [1963] NSWR 286 at 290-1, 296; 36 ALJR 185; *Midland Bank v Green (No2)* [1979] 1 All ER 726 at 736; [1979] 1 WLR 460 at 472; *Nationwide News v Wiese* (1990) 4 WAR 263 at 267, 271) or is otherwise not in good faith or dishonest (*Tildesley v Harper* (1878) 10 Ch D 393 at 397; *Lawrance v Lord Norrey* (1890) 39 Ch D 213 at 221, 235; *Busch v Stevens* [1963] 1 QB 1 at 5; [1962] 1 All ER 412 at 414; [1962] 2 WLR 511 at 514).

[4.11.9] Form of application The application for leave should ideally be accompanied by a draft of the proposed amendment: *Busch v Stevens* [1963] 1 QB 1 at 4; [1962] 1 All ER 412 at 414; [1962] 2 WLR 511 at 514; *Hyams v Stuart King* [1908] 2 KB 696 at 724. Having regard to the principles of case management, it is probably inappropriate to permit a party to apply to strike out an amendment after leave has been given on the basis of a draft of the proposed amendment: *Southern Equities v Western Australian Government Holdings* (No2) (1993) 10 WAR 351 at 353-4. Unfortunately, it is very common in Vanuatu for leave to be sought and given (even for extensive or late amendments) without a draft. This undermines the policy behind requiring leave and, it is suggested, ought to be discouraged.

[4.11.10] Sworn statement in support It is not usually necessary to file a sworn statement in support of an application for leave as the merits of the application may be assessed on the face of the proposed amendment. It may be necessary to file a sworn statement in some circumstances: Delay (*James v Smith* [1891] 1 Ch 384 at 389; *Davey v Harrow* [1958] 1 QB 60 at 69; [1957] 2 All ER 305 at 307; [1957] 2 WLR 941 at 944; *Tony Sadler v McLeod* (1994) 13 WAR 323 at 336); suspicion of bad faith (*Coynbeare v Lewis* (1881) 44 LT 242); to provide evidence of mistaken admission (*Tony Sadler v McLeod* (1994) 13 WAR 323 at 336; *Divcon v Devine Shipping* [1996] 2 VR 79 at 80).

(b) at any stage of the proceedings.

[4.11.11] When application to be made Thus amendment may be made even after judgment or on appeal: *The Duke of Buccleuch* [1892] P 201 at 212; *Singh v Atombrook* [1989] 1 All ER 385 at 390, 393; [1989] 1 WLR 810 at 817, 821. The traditional approach was to grant leave to make necessary pre-trial amendments, however late, provided that the other side will not be unfairly prejudiced and can be compensated in costs: *Clarapede v Commercial Union* (1883) 32 WR 262; *G L Baker v Medway* [1958] 3 All ER 540; [1958] 1 WLR 1216. This is no longer the approach in case-managed jurisdictions: *Aon Risk Services v ANU* [2009] HCA 27. Late amendments, especially those at or very shortly before trial will be closely examined. In particular, if the necessity of the amendment ought to have been apparent long before, it may not be allowed: *Hipgrave v Case* (1885) 28 ChD 356 at 361. Amendments after evidence has been led involve the danger that parties will tailor their case mid-course: *Custom Credit Corp v Dallas Development Corp* [2003] WASC 98 at [113].

(3) In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:

[4.11.12] Effect of prejudice The subrule does not go so far as to disentitle a party from obtaining leave to amend where there is incurable prejudice, however, it is difficult to imagine circumstances in which the court would be persuaded to grant leave in those circumstances. See generally *Edevain v Cohen* (1889) 43 Ch D 187; *Weldon v Neal* (1887) 19 QBD 394 at 395; *Dornan v J W Ellis* [1962] 1 QB 583; [1962] 1 All ER 303; [1962] 2 WLR 250; *McCoomb v Fleetwood Motors* [1967] NZLR 945. The subrule is probably not an exhaustive list of the matters to be considered by the court in the exercise of its discretion.

(a) awarding costs; or

[4.11.13] Usual costs order The party seeking leave usually bears the costs of the application and of necessary consequential amendments to other statements of the case, adjournments, etc ("costs thrown away"). On the other hand, a party who opposes a proper application for leave will usually bear the costs of the application so as to discourage merely tactical resistance to applications to amend. Unfortunately, costs orders are not always made or do not reliably match the above principles, with the result that spurious opposition is encouraged as a costless strategy.

[4.11.14] Costs not a panacea Modern case management dictates that the same indulgences that were given in the past may no longer be reliably expected. The traditional approach was exemplified by the dictum of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710: "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party". Then, at 711, he added: "I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs." More recently, in *GSA Industries v NT Gas* (1990) 24 NSWLR 710 at 716 Samuels JA said: "…the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe." See also *Rebolledo v Royal & Sun Alliance* [2002] NSWSC 104 at [28], [33]. That approach is winning increasing support and is driven by the requirement that the interests of the whole community in the efficient disposition of litigation must be considered. It is also noted that awards of costs in Vanuatu are often significantly more modest than elsewhere by comparison with actual costs.

(b) extending the time for anything to be done; or

(c) adjourning the proceedings.

[4.11.15] Balancing prejudice of adjournment Slight delay will be overlooked. Having regard to the overriding objective, the prejudice caused by refusing leave must be balanced against the prejudice to the public interest and to the other side by the risk of significant delay: *James v Smith* [1891] 1 Ch 384; *Tony Sadler v McLeod* (1994) 13 WAR 323 at 334, 336. An amendment which necessarily results in an adjournment ought to be carefully scrutinised if the adjournment generates an advantage to the party making it: *Hall Chadwick v Axiom Properties* [2002] WASC 179 at [32]. See further r. 1.2(2).

Court fees

4.12 (1) The fees set out in Schedule 1 are payable.

[4.12.1] A power to make rules does not imply an unlimited authority as to sums payable. It is arguable that the validity of any particular fee lies in the reasonableness of its relationship with the cost of administration or provision of the services to which the fee relates: *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580-1; 40 ALJR 317 at 319-20; *Elder's Trustee v Registrar of Probates for SA* (1917) 23 CLR 169 at 174. In reality however, court fees (which were originaly introduced to discourage trivial, vexatious and unmeritorious claims) are usually charged at a rate far below the real cost of using the system.

(2) However, if Vanuatu is a party to a Convention that provides that fees are not payable for particular proceedings, no fees are payable for those proceedings.

(3) The following provisions apply to the payment of fees:

(a) the fees are payable to an officer of the court; and

(b) a filing fee is payable at the time of filing; and

[4.12.2] General observations On 26 May 2008 the Chief Registrar notified that the accountant was now authorized to accept payments of fees at the Supreme Court Office. The previous method was notoriously cumbersome – an invoice was generated at the office, the fee paid elsewhere (at the Government cashier), the receipt returned to the office as proof of payment.

(c) if Schedule 1 fixes another time for paying another fee, the fee is payable at that time; and

(d) for a filing fee, the officer must write the amount of the fee, and the date and time it was paid, on the document; and

(e) for a filing fee, the officer must write the amount of the fee, and the date and time it was paid, on the document; and

(f) if a party fails to pay his or her trial fee by 14 days before the trial date, the judge may:

(i) order that the party is not to participate in the trial; or

(ii) make any other appropriate order; and

[4.12.3] Discretionary considerations The powers contained in this paragraph must be exercised according to the merits of each case: *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006 (order setting new date for payment of trial fee more appropriate in circumstances that defendant had already evidenced its seriousness by paying security for costs).

(g) if a trial is adjourned part heard, the judge may make an order about the proportion of any further trial fees to be paid by each party; and

(i) no fee is refundable.

Times for filing documents

4.13 (1) The following documents must be filed within the following times:

(a) the defendant's response must be filed and served within 14 days of the date of service of the claim;

(b) the defence must be filed within 28 days after the date of service of the claim, except if subrule (2) applies;

(2) The defendant may file a defence although he or she has not filed a response. However, if he or she did not file a response, the defence must be filed within 14 days of service of the claim.

[4.13.1] See also r. 4.4(3).

(3) If:

(a) the defence includes a counterclaim; and

(b) the claimant has filed a defence to the counterclaim;

the defendant may file and serve a reply.

(4) Each document must be served as set out in Part 5.

Late filing of documents

4.14 (1) A party may file a document after the time fixed by Rule 4.13.

[4.14.1] Effect of late filing The effect of r.18.10(1) is probably that a late filed document is an irregularity and the party filing it cannot take any further step in reliance on it until the irregularity is waived or the court exercises its jurisdiction under subrule (2): *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 323, 325; [1985] 1 WLR 513 at 520, 522.

(2) The court may decide whether or not the document is effective for the proceeding.

[4.14.2] Discretion See further r.18.10(2). This is a discretion which must be exercised judicially: *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 326; [1985] 1 WLR 513 at 523.

(3) In deciding whether a late filed document is effective, the court may have regard to:

(a) the reasons why the document was filed late; and

[4.14.3] Mere slips, omissions, etc A party should not be defeated because of any mere slip or omission, subject to questions of injustice: *Harkness v Bell's Asbestos* [1967] 2 QB 729 at 736; [1966] 3 All ER 843 at 845-6; [1967] 2 WLR 29 at 33.

(b) any additional expense or inconvenience incurred by the other parties to the proceeding, and the disadvantage to the first party if the late filing is not allowed.

[4.14.4] Prejudice Prejudice will be a highly important (and possibly all-important) consideration: *Gore-Booth v Gore-Booth* [1954] P 1 at 10; [1953] 2 All ER 1000 at 1005; [1953] 3 WLR 602 at 609; *Carmel Exporters v Sea-Land Services* [1981] 1 All ER 984 at 992; [1981] 1 WLR 1068 at 1077-8; [1981] 1 Lloyd's Rep 458 at 464; *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 326; [1985] 1 WLR 513 at 523.

(4) If the court decides the filing of the document is not effective, the court may:

(a) make any order that is appropriate for the proceeding; and

[4.14.5] Compare the range of orders available under r.18.10(2).

(b) make any order about the costs incurred by a party because of the late filing.

[4.14.6] Costs It is suggested that the party whose document is not validated should pay the costs of the application and any costs thrown away.

Renewal of claim

4.15 If a claim is not served within the 3 month period required by rule 5.3:

E *CPR* r7.6(1)
E *SCR* O6r8(2)

(a) the claimant may apply to the court to have the claim renewed; and

[4.15.1] Policy The policy of this rule is to ensure that claims are served. It is not appropriate or desirable that claims should remain dormant for indefinite periods. Accordingly, claims should not be renewed as a matter of course: *Battersby v Anglo-American Oil* [1945] KB 23 at 32; [1944] 2 All ER 387 at 391.

[4.15.2] Time within which application to be made There is no time limit within which a claimant may apply for the renewal of a claim and accordingly, it is possible for a claim to be renewed even where an applicable limitation period has expired. Of course, the expiry of a limitation period is a matter which the court ought to take into consideration: *Hewett v Barr* [1891] 1 QB 98 at 99; *Battersby v Anglo-American Oil* [1945] KB 23 at 32; [1944] 2 All ER 387 at 391; *Heaven v Road & Rail Wagons* [1965] 2 QB 355 at 361, 366; [1965] 2 WLR 1249 at 1255, 1259; [1965] 2 All ER 409 at 413, 416; *Van Leer Australia v Palace Shipping* (1981) 180 CLR 337 at 344, 346; 34 ALR 3 at 9, 11; 55 ALJR 243 at 246; *Irving v Carbines* [1982] VR 861 at 866.

[4.15.3] Discretionary considerations The discretion to renew claims is wide and unfettered. The court should exercise the discretion according to the demands of justice in the particular case and is likely to take into account such matters as the policy underlying the rule (*Brealey v Royal Perth Hospital* (1999) 21 WAR 79 at 81, 89; [1999] WASCA 158 at [1]. [44], [45]), length of delay, reasons for delay (*Baker v Bowkett's Cakes* [1966] 2 All ER 290 at 292-3; [1966] 1 WLR 861 at 866), conduct of the parties, applicable limitation periods, prejudice to the parties (*Jones v Jones* [1970] 2 QB 576 at 585; [1970] 3 WLR 20 at 28; [1970] 3 All ER 47 at 53) and the overriding objective generally. The claimant must show good reasons for the renewal but need not show "exceptional circumstances": *Melgren v Public Trustee* [1971] NZLR 681 at 687.

(b) if the claimant does not do this, the claim ceases to be of any effect.

[4.15.4] Striking out An order striking out the case under r.9.10 may follow: *Family Vanuapura v Supernativuitano Island Tribunal* [2007] VUSC 110; CC 20 of 2007.

[4.15.5] See further r.5.3.