CONFERENCES

Application of Part 6

6.1 This Part applies only to the Supreme Court.

Conferences

6.2 (1) The purpose of conferences is to enable the judge to actively manage the proceeding.

[6.2.1] Adjunct to r.1.4 This Part is an adjunct to r.1.4. See further r.6.4. The time taken for the resolution of civil proceedings can be substantially reduced by active case management: *Trade Practices Commission v Rank* (1994) 53 FCR 303 at 316; 123 ALR 551 at 562.

(2) The same judge must preside at all conferences held in a particular proceeding, if this is practicable.

[6.2.2] Docket system The so-called "individual docket system" is designed to ensure that judges will give early attention to a matter, making for closer involvement and greater efficiency: See generally C Sage *et al*, *Case Management Reform: A Study of the Federal Court's Individual Docket System*, 2002.

(3) A party need not attend a conference in person unless the judge orders him or her to attend.

[6.2.3] Who may be ordered to attend The reference to "him or her" in the subrule suggests that only parties who are natural persons may be ordered to attend.

[6.2.4] Party participation The rationale for the subrule is to enhance the likelihood of early negotiation and settlement of disputes and to assist the parties to understand the litigation process, especially their rights and obligations. In practice, such orders are very seldom made.

First conference between parties

6.3 (1) A judge will arrange a conference (called "Conference 1") between the parties when a defence has been filed by a defendant.

[6.3.1] General observations It is noted that there are sometimes delays of many months encountered at this stage of proceedings. It is suggested that a party experiencing delay at this stage should contact the registry to ascertain the identity of the docket judge and then write to the judge by way of application under subr.(3).

(2) The conference is to take place on the date the judge fixes. This must be a date after the date for filing the last reply in the proceeding.

(3) Any party can apply to a judge to fix a date for Conference 1 to be held.

(4) A judge may also arrange a conference at any other time.

[6.3.2] Conference when defence not filed Subrule (4) is often used to schedule conferences when the time for filing the defence is not complied with.

Purpose of Conference 1

E *CPR* r3.1(2)(m)

6.4 (1) The purpose of conference 1 is, as far as practicable, to enable the court to actively manage the proceeding by covering the matters mentioned in r. 1.4.

[6.4.1] See r.1.4(2) as to the content of active case management.

(2) At Conference 1, the judge may:

(a) deal with any interlocutory application (see Part 7), or fix a date for hearing them; and

[6.4.2] Meaning of "any interlocutory application" There are no limits on the range of interlocutory applications which may be so dealt with: *William v AHC (Vanuatu) Limited* [2008] VUCA 16; CAC 8 of 2008.

(b) make orders:

(i) adding or removing parties (see Part 3); and

(ii) about whether it is necessary to employ experts (see Part 11 dealing with evidence); and

(iii) for the medical examination of a party; and

[6.4.3] See further r.11.14.

(iv) about disclosure of information and documents (see Part 8); and

(v) that gives a party security for costs (see Part 15); and

(vi) that statements of the case be amended or that further statements of the case be filed; and

[6.4.4] Statements of the case subsequent to reply See further r.4.11. The reference to "further statements of the case" may be a reference to such statements as may be necessary subsequent to a reply. No express provision is made in the *Rules* for such documents which are seldom required. Under the former *Rules* a pleading subsequent to a reply was a rejoinder which was followed, if necessary, by a rebuttal and a surrebuttal.

(vii) about any other matter necessary for the proper management of the case.

Other conferences

6.5 (1) At the first Conference, a judge will set a date for a Trial Preparation Conference or other conferences unless, in the judge's opinion, the proceeding can be set down for trial without further conferences.

(2) At these conferences the judge:

(a) must check whether all orders made at previous conferences have been complied with; and

(b) if they have not been complied with, must make whatever orders are necessary to ensure compliance; and

(c) may vary existing orders, and make any other orders to give effect to the purposes of Conference 1; and

[6.5.1] Extent of power to vary The judge may not be limited to varying existing orders made at a conference and may vary other interlocutory orders if they can be shown to be mistaken: *Apia v Magrir* [2006] VUCA 10; CAC 04 of 2006 and 14 of 2006. Any interlocutory applications may be dealt with: *William v AHC (Vanuatu) Limited* [2008] VUCA 16; CAC 8 of 2008.

E *CPR* r3.1(2)

(d) may make any other orders necessary to continue the progress of the proceeding.

Trial Preparation Conference

6.6 (1) The purpose of the Trial Preparation Conference is:

[6.6.1] Court-generated documents often refer to "pre-trial conferences" rather than "trial preparation conferences".

(a) to identify precisely what are the issues between the parties; and

(b) to identify the evidence needed to prove these matters; and

(c) otherwise to ensure the matter is ready to be tried; and

(d) to see whether the matter can be resolved by alternative dispute resolution.

(3) At the Trial Preparation Conference, the parties should be in a position to:

[6.6.2] Importance of conference Lawyers appearing in the Trial Preparation Conference must be fully conversant with the case even if not intended to be counsel at the trial. The role of this conference is illustrated by *Government of Vanuatu v Mathias* [2006] VUCA 7; CAC 10 of 2006 in which a trial was derailed when insufficient earlier attention was given to the framing of the issues between the parties.

(a) assist the judge in finally determining the issues; and

(b) tell the judge the number of witnesses each proposes to call, and any special considerations about the taking of evidence; and

(c) give estimates of the time the hearing is likely to take; and

[6.6.3] Importance of time estimates In order to avoid part-heard cases and to promote efficiencies in listing, it is absolutely essential that lawyers give realistic and informed estimates of the likely duration of a hearing.

(d) agree on facts that have been admitted (and which will therefore not need to be proved); and

(e) discuss whether expert witnesses will be called; and

(f) report on compliance with orders made at earlier conferences; and

(g) deal with any other matters that can reasonably be dealt with before the trial.

(4) In particular, at the Trial Preparation Conference the judge may:

(a) fix dates for the exchange of proofs of evidence and agreed bundles of disclosed documents, if this has not been done; and

[6.6.4] Meaning of "proof of evidence" There is no definition of "proof of evidence" and, though it is a term known to lawyers, was probably used in error. Presumably this is a reference to the sworn statement in place of evidence in chief required by r.11.3.

E *CPR* r3.1(2)

(b) give directions for the further preparation for trial; and

(c) if possible, decide any preliminary legal issues that need to be resolved before the trial, or fix a date for hearing these; and

(d) fix a date for the trial.

[6.6.5] Trial other than at the appointed date/time The judge should not commence a trial before the listed start time unless all parties are present and agree: *Palaud v Commissioner of Police* [2009] VUCA 10; CAC 6 of 2009.

Time for compliance with orders made at conferences

6.7 When the judge makes an order at a conference, the judge must also:

(a) fix the date and time within which the order is to be complied with; and

(b) record the order in writing.

Effect of non-compliance with orders made at conferences

6.8 (1) If:

(a) A party does not comply with an order made at a conference by the time fixed for complying; and

(b) another party incurs expense because of this;

the judge may order costs against the non-complying party or his or her lawyer.

[6.8.1] Against whom order may be made The reference to "his or her" lawyer suggest that this option is available only against an individual party, however such an interpretation would lead to an absurdity.

[6.8.2] When order against lawyer should be made Lawyers have a duty to facilitate the progress of case management: see also r.1.5. The court should not hesitate to make appropriate costs orders against a lawyer where it is clear that their behaviour has led to needless expense: See for example *Unioil v Deloitte (No2)* (1997) 18 WAR 190 at 194; *Whyte v Brosch* (1998) 45 NSWLR 354 at 355. See further rr.15.26, 15.27, 15.28; *Kaukare v Cai* [2009] VUSC 11; CC 93 of 2008 (also noting the "gross lack of courtesy").

(2) If a party or his or her lawyer has failed to comply with an order made at a conference without reasonable excuse, the judge may order that the party's claim or defence be struck out.

[6.8.3] When claim or defence should be struck out A compliant party has the right to expect that the court will uphold the integrity of the process by appropriate orders against a defaulting party. The discretion conferred by the subrule is not confined, however striking out is appropriate only where there has been significant repeated non-compliance: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006; see also *Lenijamar v AGC* (1990) 27 FCR 388 at 396-7; 98 ALR 200 at 208-9; *Australian Securities Commission v Macleod* (1994) 54 FCR 309 at 314; 130 ALR 717 at 721-2. In all other situations r.18.11 is applicable: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006.

[6.8.4] No springing order The court must consider whether there is a reasonable excuse ifor non-compliance and it is not, therefore, possible to make self-executing (aka "springing") orders: *Government of of Vanuatu v Carlot* [2003] VUCA 23; CAC 19 of 2003. See further r.18.11.

(3) A judge may set the proceeding down for trial although some orders made at a conference have not been complied with.

Agreed facts

6.9 If the parties agree on facts at a conference, the judge must direct one of the parties to write down the agreed facts and send a copy to the court and to each other party.

Telephone conferences

E *CPR* r3.1(2)(d)

6.10 A conference may be held by telephone if the judge and all parties are able to participate.

[6.10.1] Relevant considerations This is a discretionary matter. Telephone conferences are unlikely to be suitable for complex, difficult or long applications, however, no arbitrary time limits ought to be imposed: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. Though seldom considered, telephone conferences for Santo-based litigation would be especially useful as they would avoid the costs associated with travel. See further rr.1.4(2)(j), (k), 11.8.

Conference not to be in open court

6.11 A conference is not to be held in open court unless:

(a) it is in the public interest that the conference be held in open court; or

(b) the judge is of the opinion for other reasons that the conference should be held in open court.

[6.11.1] See further r.7.4 and compare r.12.2.