INTERLOCUTORY MATTERS

What is an interlocutory order

7.1 (1) An interlocutory order is an order that does not finally determine the rights, duties and obligations of the parties to a proceeding.

[7.1.1] A legal test Whether an order is interlocutory or final can be important, especially as to the right of appeal. The distinction is not easy to make: *Francois v Ozols* [1998] VUCA 5; CAC 155 of 1996. There has been a significant divergence of opinion in various Commonwealth jurisdictions and it may be possible to say with certainty only that the test is legal rather than practical: *Carr v Finance Corp of Australia* (1981) 147 CLR 246 at 248; 34 ALR 449 at 450; 55 ALJR 397 at 398.

[7.1.2] Whether order is interlocutory or final The divergence of English authority falls into two categories of approach to the question. The first was described in *White v Brunton* (1984) QB 570 as the "order approach" and traces to *Shubrook v Tufnell* (1882) 9 QBD 621. The order approach looks to the order as made and asks whether it finally determined the proceedings. If so, the order was final rather than interlocutory. The second category, described in *White v Brunton* as the "application approach", can be traced to *Salaman v Warner* (1891) 1 QB 734 (which did not refer to *Shubrook*) and looks to the application which led to the making of the order. If the application could have led to an order finally disposing of the matter or, if rejected, would have permitted the matter to continue, then it is interlocutory rather than final. The application approach, subject to some established exceptions, appears now to have gained tentative ascendancy in England: See *Minister for Agriculture, Food and Forestry v Alte Leipziger* [2000] IESC 13 for a useful summary and analysis. This seemed also to be the approach of the Court of Appeal of Vanuatu which held in *Miller v National Bank of Vanuatu* [2006] VUCA 1; CAC 33-05 that an order striking out proceedings (even having the practical effect of bringing proceedings to an end) is an interlocutory order. Unfortunately, the Court of Appeal did not refer to authority or this rule. In *Colmar v Valele Trust* [2009] VUCA 40 at [38]; CAC 13 of 2009 a more robust and less formal approach was suggested, but the court did not finally decide the issue and granted leave in case it was necessary. It is respectfully suggested that the last word on the subject has not yet been heard. In the meantime, in the absence of any better guidance, parties may have to follow the advice of Lord Denning in *Salter Rex & Company v Ghosh* (1971) 2 QB 597: "The question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books to see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way."

[7.1.3] Availability of appeal, etc does not affect finality An order is not less final because it is subject to appeal or may later be set aside or become otherwise inoperative: *Clyne v Deputy Commissioner of Taxation (NSW)* (1983) 48 ALR 545 at 548; 57 ALJR 673 at 675; 14 ATR 563 at 565; 83 ATC 4532 at 4534. For an example of an unsuccessful attempt to vary final orders on an interlocutory application see *Panketo v Natuman* [2005] VUSC 132; CC45-2002. See also the preliminary comments in *Duduni v Vatu* [2003] VUCA 15; CC 28 of 2003.

[7.1.4] Reasons for interlocutory orders It is not always necessary for an interlocutory order to be accompanied by reasons. Some orders, of a simple kind, involving the exercise of discretion, such as to adjourn or extend time, are usually given without reasons. Where, however, the orders were produced after a consideration of detailed evidence or legal argument there will be an expectation of reasons: *Capital & Suburban Properties v Swycher* [1976] Ch 319 at 325-6; [1976] 2 WLR 822 at 827; [1976] 1 All ER 881 at 884. See further r.13.1(1)(d).

(2) An interlocutory order may be made during a proceeding or before a proceeding is started.

[7.1.5] General observations This rule should be read together with rr.7.2 (to which it is complementary) and 7.1 (in respect of which it is redundant).

(3) An application under this Part, if in writing, must be in Form 10.

Applying for an interlocutory order during a proceeding

7.2 (1) A party may apply for an interlocutory order at any stage of a proceeding.

[7.2.1] Meaning of "proceeding" The word "proceeding" is very wide and includes everything 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. See further r.7.7(a).

(2) If the proceeding has started, the application must if practicable be made orally during a conference.

[7.2.2] Manner in which applications to be made The rule is explicit – applications "must" be made this way. The intent is clearly to reduce filing bulk and dispose of as much business as possible in one conference (See r.1.4(2)(i)). It is suggested, however, that all but routine applications should be made upon written notice to avoid surprise, adjournments and delay. Despite the mandatory words of the rule, it is common for the court to require a written application in all but the simplest situations. An application for an order which, if granted, will in substance finally dispose of the proceeding, should always be written: *Duduni v Vatu* [2003] VUCA 15; CAC 28 of 2003.

(3) An application made at another time must be made by filing a written application.

(4) A written application must:

E *CPR* r23.6

(a) state what the applicant applies for; and

[7.2.3] Draft orders This is usually done in generic terms, but it is good practice to include a separate draft of any complex orders or where the application seeks restraining orders of any sort: *Mele v Worwor* [2006] VUCA 17; CAC 25 of 2006.

E *CPR* r22

(b) have with it a sworn statement by the applicant setting out the reasons why the order should be made, unless:

(i) there are no questions of fact that need to be decided in making the order sought; or

(ii) the facts relied on in the application are already known to the court.

Service of application

E *CPR* r23.4(1)

7.3 (1) An application must be served on each other party to the proceeding unless:

[7.3.1] Ambush Stealth plays no part in the legal system and is inconsistent with the overriding objective: *VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010; *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009. Orders which have a final effect will attract more onerous service obligations than those which are only provisional: *Dinh v Samuel* at [42]. Where the application does not state the date of the hearing, r.5.1 will require that notice (even if already or usually given by the court) also be given to the other party: *Dinh v Samuel* at [39]-[42]; *VCMB v Dornic* at [30].

E *CPR* r23.11

(a) the matter is so urgent that the court decides the application should be dealt with in the absence of the other party; or

[7.3.2] *Ex parte* applications only in urgent circumstances Applications should be made *ex parte* only in genuine urgency: *Bates v Lord Hailsham* [1972] 3 All ER 1019 at 1025; [1972] 1 WLR 1373 at 1380. Even so, the court should refrain from making final orders until a future occasion on which all necessary parties can be present: *Dinh v Samuel* [2010] VUCA 6 at [46]; CAC 16 of 2009.

(b) the court orders for some other reason that there is no need to serve it.

E *CPR* r23.7(1)

(2) The application must be served at least 3 days before the time set for hearing the application, unless the court orders otherwise.

[7.3.3] Duty of applicant Parties are entitled to at least the minimum prescribed notice of applications unless there are special reasons otherwise: *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009. The applicant must ensure that at least the minimum notice is given and that the respondent is aware of the hearing date (even if the court has issued the notice of conference): *VCMB v Dornic* [2010] VUCA 4 at [30]; CAC 2 of 2010; *Dinh v Samuel* [2010] VUCA 6 at [42]; CAC 16 of 2009. It may sometimes be necessary to give more than the minimum notice and parties should not deliberately limit notice periods as a matter of strategy, a practice which may sound in costs (incuding penalty costs): *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009.

[7.3.4] Duty of court Where a party fails to appear in relation to an application the court should enquire as to whether notice of the application and the conference has been given and should not make precipitous orders unless satisfied that it has: *VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010; *Dinh v Samuel* [2010] VUCA 6 at [44]; CAC 16 of 2009.

[7.3.5] Abridgment of time Where, due to urgency or other reason, the applicant cannot give 3 days notice, one of the orders sought by the application should be that the time for service be abridged. If there is some reason why proper service is delayed it is courteous to inform the other side of the application informally.

Hearing of interlocutory application made during a proceeding

7.4 An interlocutory application made during a proceeding is not to be dealt with in open court unless:

[7.4.1] No cross-examination of interlocutory deponents This rule has been held to lend support to the proposition that cross-examination on interlocutory sworn statements is permitted only in exceptional circumstances: *Iririki v Ascension* [2007] VUSC 57 at [5]; CC 70 of 2007; *contra Kontos v Laumae Kabini* [2008] VUSC 23 at [4]; CC 110 of 2005 (Bulu J permitting cross-examination on an application to set aside default judgment without reference to *Iririki,* on the basis that it was consistent with the overriding objective). As to what constitutes open court see the annotations to r.12.2.

(a) it is in the public interest that the matter be dealt with in open court; or

[7.4.2] Examples See for example *Bani v Minister of Trade* [1997] VUSC 19; CC 86 of 1997.

(b) the judge is of the opinion for other reasons that the matter should be dealt with in open court.

Application for interlocutory order before a proceeding is started

7.5 (1) A person may apply for an interlocutory order before a proceeding has started if:

[7.5.1] Pre-action injunctions The type of order most obviously contemplated by this rule is the injunction. Note that the prerequisites listed below borrow from the language of cases such as *American Cyanamid v Ethicon* [1975] AC 396 at 406-8; [1975] 1 All ER 504 at 509-11; [1975] 2 WLR 316 at 321-4 (which is to be applied in applications for injunctions in the course of proceedings as in *Tropical Rainforest Aromatics v Lui* [2006] VUSC 6 at [6]; CC 1 of 2006; *Iririki v Ascension* [2007] VUCA 58 at [7]; CC 70 of 2007) but the approach is slightly different in several respects leading to the result that the test for grant of an injunction (or indeed any interlocutory application) may be substantively different according to whether the application is made before or during the proceedings: See for example *Dinh v Kontos* [2005] VUSC 1; CC 238 of 2004.

(a) the applicant has a serious question to be tried; and

[7.5.2] Meaning of "serious question to be tried" Note that this criterion is differently expressed to that in subr. (3)(a). The applicant must have a serious question to be tried in order to qualify to make the application, however, the applicant cannot obtain an order under the rule unless it is also shown that the applicant is "likely to succeed" upon the applicant's evidence.

[7.5.3] Whether necessary to show likelihood of success The "real question to be tried" described by Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396 at 406-8; [1975] 1 All ER 504 at 509-11; [1975] 2 WLR 316 at 321-4 involved a real (as opposed to fanciful) prospect of ultimate success. It did *not* require the applicant to demonstrate a prima facie case in the sense that the applicant was more likely than not to succeed ultimately. This is, however, what seems to be required by subr. (3)(a), at least on the applicant's own evidence.

(b) the applicant would be seriously disadvantaged if the order is not granted.

[7.5.4] Disadvantage to applicant It is to be noted that the disadvantage in issue is that of the applicant and there is no reference to the so-called "balance of convenience" test.

[7.5.5] Meaning of "serious disadvantage" It is suggested that for the disadvantage to be regarded as "serious" it must be shown that damages would not be an adequate remedy for the applicant.

(2) The application must:

(a) set out the substance of the applicant's claim; and

(b) have a brief statement of the evidence on which the applicant will rely; and

(c) set out the reasons why the applicant would be disadvantaged if the order is not made; and

(d) have with it a sworn statement in support of the application.

[7.5.6] Consequences of deponent failing to give evidence subsequently If the deponent does not give evidence at a subsequent trial, comment may be made on the sworn statement and on any difference between it and subsequent evidence: *Earles Utilities v Jacobs* (1934) 51 TLR 43; 52 RPC 72.

(3) The court may make the order if it is satisfied that:

(a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and

(b) the applicant would be seriously disadvantaged if the order is not made.

(4) When making the order, the court may also order that the applicant file a claim by the time stated in the order.

[7.5.7] Subrule (4) order usually made Such an order should usually be made to avoid abuse. The failure subsequently to file a claim within the said time may amount to contempt (*P.S. Refson v Saggers* [1984] 1 WLR 1025 at 1029; [1984] 3 All ER 111 at 114) and lead to discharge of the orders (*Siporex v Comdel* [1986] 2 Lloyd's Rep 428 at 438).

Urgent interlocutory applications

7.6 The court may allow an oral application to be made if:

[7.6.1] Scope of rule This of course refers to *pre-action* oral applications.

(a) the application is for urgent relief; and

(b) the applicant agrees to file a written application within the time directed by the court; and

(c) the court considers it appropriate:

(i) because of the need to protect persons or property; or

(ii) to prevent the removal of persons or property from Vanuatu; or

(iii) because of other circumstances that justify making the order asked for.

[7.6.2] *Ex parte* applications An urgent oral application is likely to be made *ex parte*. Orders made in such circumstances should be designed to create minimal disruption and, as far as possible, to preserve the rights of parties who have not been heard. If interim orders are made, there will afterward be a short adjournment and the whole of the evidence will be gone into and all parties will be heard on the next return date: *Deamer v Unelco* [1992] 2 VLR 554 at 557; *SCAP Unlimited v Thomson* [1997] VUSC 18; CC 54 of 1997; *Dinh v Samuel* [2010] VUCA 6 at [46]; CAC 16 of 2009.

Interlocutory orders

7.7 A party may apply for an interlocutory order:

(a) at any stage:

(i) before a proceeding has started; or

(ii) during a proceeding; or

(iii) after a proceeding has been dealt with; and

[7.7.1] General observations It is difficult to see what this adds to subr.7.1(2) and 7.2(1).

(b) whether or not the party has mentioned an interlocutory order in his or her claim or counterclaim.

Order to protect property (freezing order, formerly called a Mareva order)

The former name derives from *Mareva Compania Naviera v International Bulkcarriers* [1980] 1 All ER 213; [1975] 2 Lloyd's Rep 509.

7.8 (1) In this rule:

"owner", for assets, includes the person entitled to the possession and control of the assets.

[7.8.1] Limitations of the remedy The limitation of freezing orders to "assets" may imply limits on the remedy. For example, it has been held that an injunction may restrain a defendant from exercising voting rights in such a way as would dissipate assets (*Standard Chartered Bank v Walker* [1992] 1 WLR 561 at 567), but it is uncertain whether voting rights could be described as an asset. It may be argued that the inherent power of the court to protect the integrity of its processes once set in motion (which was the original juridical basis for the Mareva injunction) could also permit the court to make a freezing order in a proper case despite the subject not being an "asset" within the meaning of r.20.1.

[7.8.2] Present and future assets A freezing order will apply not only to assets possessed or controlled at the time of the order, but also to those acquired subsequently: *TDK Tape v Videochoice* [1986] 1 WLR 141 at 145; [1985] 3 All ER 345 at 349.

[7.8.3] Meaning of "possession and control" It is doubtful whether the court could properly make an order against a party who "possessed" and "controlled" assets in a capacity different from that in which they were sued, such as on trust.

(2) The Supreme Court may make an order (a "freezing order") restraining a person from removing assets from Vanuatu or dealing with assets in or outside Vanuatu.

[7.8.4] Limitations The purpose of the order is to preserve assets where it is likely that the claimant will obtain judgment and there are reasons to believe that the defendant may take steps designed to remove or dispose of assets to make them unavailable upon enforcement: *Best v Owner of the Ship "Glenelg" (No1)* [1982] VUSC 9; [1980-1994] Van LR 27. It does not enforce anything nor does it create any future rights, status or priority; it merely facilitates possible future enforcement and guards against abuse. A freezing order is not to be used to provide security for a claim: *Neat Holdings v Karajan Holdings* (1992) 8 WAR 183.

[7.8.5] Extra-territorial effect Some limit on the extra-territorial effect of the freezing order may be required in order to avoid conflict with the jurisdiction of foreign courts: *Derby v Weldon (Nos 3 & 4)* [1990] Ch 65 at 97; [1989] 2 WLR 412 at 438. See further [7.8.15] as to the form of the order.

[7.8.6] Meaning of "dealing with assets" The concept of "dealing with assets" in not confined only to their disposal. The order can be tailored according to circumstance to include any form of alienation, encumbrance, etc.

(3) The court may make a freezing order whether or not the owner of the assets is a party to an existing proceeding.

[7.8.7] Discretion to be exercised cautiously The court will exercise a high degree of caution before making an order against assets of non-parties, which will not occur unless they are in some way answerable to a party or holding or controlling assets of a party. See generally *Cardile v LED Builders* (1999) 198 CLR 380; 162 ALR 294; 73 ALJR 657; [1999] HCA 18 at [57].

[7.8.8] Assesment of ownership claims Where the assets are those of a party's spouse or a company they control, the court is not required to accept assertions about

ownership at face value: *SCF Finance v Masri* [1985] 1 WLR 876 at 883; [1985] 2 All ER 747 at 752; [1985] 2 Lloyd's Rep 206 at 211; *Re a Company* [1985] BCLC 333; *TSB Private Bank v Chabra* [1992] 1 WLR 231 at 241-2; [1992] 2 All ER 245 at 255-6.

[7.8.9] Position of third parties See generally *Galaxia Maritime v Mineralimportexport* [1982] 1 All ER 796 at 799-800; [1982] 1 WLR 539 at 541-2; [1982] 1 Lloyd's Rep 351 at 353-4; *Oceanica Castelana Armadora v Mineralimportexport* [1983] 2 All ER 65 at 70; [1983] 1 WLR 1294 at 1300; [1983] 2 Lloyd's Rep 204 at 208; *Bank of Queensland v Grant* [1984] 1 NSWLR 409 at 414; (1984) 70 FLR 1 at 6; 54 ALR 306 at 312**;** *Cardile v LED Builders* (1999) 198 CLR 380; 162 ALR 294; 73 ALJR 657; [1999] HCA 18 at [57].

[7.8.10] Third party in breach of order A third party who, knowing the terms of a freezing order, wilfully assists in a breach of it, is liable for contempt of court (*Re Hurst* [1989] LSG 1 Nov 1989 at 48) regardless of whether the party himself had notice of it (*Z v A-Z* [1982] QB 558 at 581; [1982] 1 All ER 556 at 570; [1982] 2 WLR 288 at 302-3; [1982] 1 Lloyd's Rep 240 at 248).

(4) The court may make the order only if:

[7.8.11] Discretion to be exercised cautiously The limited circumstances described below in which the court may grant the order reflect the high degree of caution displayed by the courts: see for example *Negocios del Mare v Doric Shipping* [1979] 1 Lloyd's Rep 331 at 334; *Cardile v LED Builders* (1999) 198 CLR 380 at 403-4; 162 ALR 294 at 310-11; 73 ALJR 657; [1999] HCA 18 at [50]-[51].

(a) the court has already given judgment in favour of the applicant and the freezing order is ancillary to it; or

[7.8.12] Order in support of judgment Although the above paragraph may refer to any judgment, a freezing order is usually granted to support money judgments (whether or not the exact sum has been quantified): *Jet West v Haddican* [1992] 2 All ER 545 at 548-9; [1992] 1 WLR 487 at 490-1. Alternatively, the order can be used to support possible future orders in relation to the assets themselves. See further subr. 7.8(4)(b)(ii).

(b) the court is satisfied that:

(i) the applicant has a good and arguable case; and

[7.8.13] Meaning of "good arguable case" An applicant need not show that its case is so strong that there is no defence, but it must show more than a merely arguable case: *Rasu Maritima v Pertamina* [1978] QB 644 at 661; [1977] 3 WLR 518 at 528; [1977] 3 All ER 324 at 334; [1977] 2 Lloyd's Rep 397 at 404. This does not necessarily mean that the chances of success must be greater than 50%: *Ninemia Maritime v Trave Schiffahrtsgesellschaft* [1983] 1 WLR 1412 at 1422; [1984] 1 All ER 398 at 419; *Aiglon v Gau Shan* [1993] 1 Lloyd's Rep 164 at 170. That a party can show a good arguable case does not guarantee the order; it is merely the minimum which must be shown to meet the threshold for the exercise of the jurisdiction: *Ninemia Maritime v Trave Schiffahrtsgesellschaft* [1983] 1 WLR 1412 at 1417; [1984] 1 All ER 398 at 414. This is to be contrasted with paragraph (a) in which a party's rights have already been established.

[7.8.14] Future cause of action insufficient A future cause of action is not sufficient: *Steamship Mutual v Thakur Shipping* [1986] 2 Lloyd's Rep 439 at 440; *Veracruz Transportation v VC Shipping* (1992) 1 Lloyd's Rep 353 at 357; *Zucker v Tyndall Holdings* [1993] 1 All ER 124 at 131, 132; [1992] 1 WLR 1127 at 1134, 1136.

(ii) a judgment or order in the matter, or its enforcement, is likely to involve the assets; and

[7.8.15] Requirement of "involvement" It is not clear exactly what level of "involvement" is required to be shown.

(iii) the assets are likely to be removed from Vanuatu, or dealing with them should be restrained.

[7.8.16] Extent of likelihood The applicant must show that refusal would pose a real risk that the defendant's actions would result in the judgment being unsatisfied: *Ninemia Maritime v Trave Schiffahrtsgesellschaft* [1983] 1 WLR 1412 at 1422; [1984] 1 All ER 398 at 419. The strength of the likelihood informs the strength of the application.

[7.8.17] Subjective fear insufficient A claimant cannot obtain an order merely because he fears there will be nothing against which he can enforce judgment or to secure his position against other creditors – the purpose of a freezing order is only to prevent against abuse of process by the frustration of the court's remedies: *Jackson v Sterling Industries* (1987) 162 CLR 612 at 625; 61 ALJR 332 at 337; 71 ALR 457 at 465.

[7.8.18] Form of order The order will commonly restrain a party from transferring assets abroad and from dealing with them locally, regardless of which risk was the basis of the application: *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 926; *Z v A-Z* [1982] QB 558 at 585; [1982] 1 All ER 556 at 571-2; [1982] 2 WLR 288 at 306; [1982] 1 Lloyd's Rep 240 at 251.

[7.8.19] Order interlocutory in nature A freezing order will usually be regarded as interlocutory, as opposed to a permanent injunction: *Siskina & Ors v Distos Compania Naviera SA* [1979] AC 210 at 253.

(5) The application must:

[7.8.20] Requirement of full disclosure An applicant is under a duty to make full and frank disclosure of all material facts known to him and to make proper inquiries before applying. The provisions of this subrule and subrule (6) are generally reflective of the requirements laid down by the authorities: see generally *R v General Commissioners For Income Tax For Kensington* [1917] 1 KB 486 at 506; *Third Chandris v Unimarine* [1979] QB 645 at 668-9; [1979] 2 All ER 972 at 984-5; [1979] 3 WLR 122 at 137-8; [1979] 2 Lloyd's Rep 184 at 189; *Brinks-MAT v Elcombe* [1988] 3 All ER 188; [1988] 1 WLR 1350; *Dormeuil Freres v Nicolian* [1988] 3 All ER 197; [1988] 1 WLR 1362; *Lloyd's Bowmaker v Britannia Arrow Holdings* [1988] 3 All ER 178 at 181-2; [1988] 1 WLR 1337 at 1342-3; *Manor Electronics v Dickson* [1988] RPC 618; (1990) 140 NLJ 590 (applicant in financial difficulties); *Behbehani v Salem* [1989] 1 WLR 723; [1989] 2 All ER 143 (disclosure of existing or contemplated proceedings elsewhere).

(a) describe the assets and their value and location; and

[7.8.21] Foreign assets There is no reason why the order cannot be directed to assets located outside Vanuatu: *Derby v Weldon (Nos 3 & 4)* [1990] Ch 65; [1989] 2 WLR 412; *National Australia Bank v Dessau* [1988] VR 521.

[7.8.22] Scope of order The requirement to describe known assets and location does not mean that the order will necessarily be confined to these. The order may be drawn to have an ambulatory effect, attaching to such assets as the party may have from time to time: *TDK Tape v Videochoice* [1986] 1 WLR 141 at 145; [1985] 3 All ER 345 at 349.

(b) include the name and address of the owner of the assets, if known, and the identity of anyone else who may be affected by the order and how they may be affected; and

[7.8.23] Extent of applicant's knowledge It is not fatal to an application that the applicant has little or no knowledge of circumstances particular to others or that, with greater effort, it could have discovered more: *Commr of State Taxation (WA) v Mechold* (1995) 30 ATR 69 at 74; 95 ATC 4053 at 4058.

(c) if a proceeding has not been started, set out:

(i) the name and address of anyone else likely to be a defendant; and

(ii) the basis of the applicant's claim; and

(iii) the amount or nature of the claim; and

(iv) what has been done to recover the amount of the claim, or to get the relief claimed; and

(v) any possible defences to the claim.

(d) in any case, set out:

(i) how the assets to be subject to the order will form part of any judgment or its enforcement; and

(ii) what will be done to preserve the assets; and

(iii) if the application has not been made on notice, the reason for this; and

[7.8.24] *Ex parte* application The initial application is invariably made *ex parte* to ensure that the defendant does not dissipate assets before an order can be made.

(e) include an undertaking as to damages that may be caused to the defendant or potential defendant, or anyone else who may be adversely affected, if the order is made; and

[7.8.25] Applicant's ability to meet undertaking The applicant must always give an undertaking and the sworn statement should address the applicant's ability to satisfy the undertaking: *Intercontex v Schmidt* [1988] FSR 575. In a proper case a freezing order may be made even though the applicant is legally aided or of limited means: *Allen v Jambo Holdings* [1980] 1 WLR 1252 at 1257; [1980] 2 All ER 502 at 505.

[7.8.26] Costs of compliance of non-parties The applicant will also need to undertake to pay the costs incurred by non-parties in complying with the court's order: *Guinness Peat Aviation v Hispania Lineas Aeras* [1992] 1 Lloyd's Rep 190 at 196.

[7.8.27] Security for undertaking In an appropriate case, the undertaking may need to be supported by a bond or security: *Third Chandris v Unimarine* [1979] QB 645 at 669; [1979] 2 All ER 972 at 985; [1979] 3 WLR 122 at 138; [1979] 2 Lloyd's Rep 184 at 189.

(f) have with it:

(i) a sworn statement in support of the application; and

(ii) a draft freezing order.

[7.8.28] Form of order and nature of risk The form of order will commonly restrain the party from transferring assets abroad and from dealing with them locally regardless of which risk was the basis of the application: *Z v A-Z* [1982] QB 558 at 585; [1982] 1 All ER 556 at 571-2; [1982] 2 WLR 288 at 306; [1982] 1 Lloyd's Rep 240 at 251.

[7.8.29] Form of order and type/value of assets covered The order will usually specify a maximum value of the assets covered by the order and allowance ought to be made for normal living expenses, business operating costs, etc: see for example *PCW v Dixon* [1983] 2 All ER 158 at 162; [1983] 2 Lloyd's Rep 197 at 201.

[7.8.30] Form of order and what/whom applicant must advise The applicant will usually be ordered to inform the defendant (or any other affected party) of the terms of the order and supporting documents forthwith. The order should expressly inform non-parties of their right to apply for a variation.

[7.8.31] Discovery The court has inherent jurisdiction to order discovery in aid of a freezing order to make the remedy effective: *A J Bekhor v Bilton* [1981] 1 QB 923 at 955; [1981] 2 All ER 565 at 586; [1981] 2 WLR 601 at 628; [1981] 1 Lloyd's Rep 491 at 509.

[7.8.32] Precedent A useful precedent is to be found in *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 4 All ER 52; [1994] 1 WLR 1233.

[7.8.30] Duration Where the order is expressed to run "until judgment", the applicant will need to be careful not to obtain default judgment without a further order extending the operation of the injunction as an aid to enforcement: see *Stewart Chartering v C & O* [1980] 1 WLR 460 at 461; [1980] All ER 718 at 719; [1980] 2 Lloyd's Rep 116 at 117.

(6) The sworn statement must include the following:

[7.8.33] See commentary in relation to subr. (5).

(a) why the applicant believes:

(i) the assets may be removed from Vanuatu; or

(ii) dealing with the assets should be restrained; and

(b) if the court has already made a judgment or order, why the applicant believes the judgment or order already made may not be able to be satisfied, or may be thwarted, if the freezing order is not made; and

(c) if a proceeding has not been started and the name and address of the owner of the assets, and anyone else likely to be a defendant, are not known, what has been done to find out those names and addresses; and

(d) in any case:

(i) how the assets to be subject to the order will form part of any judgment or its enforcement; and

(ii) what will be done to preserve the assets; and

(iii) if the application has not been made on notice, the reasons for this.

(7) If the name and address of the owner of the assets is not known, the application may be served as follows:

(a) for service on a ship, by attaching it to the mast; or

(b) for service on an aircraft, by attaching it to the pilot controls; or

(c) in any case, as the court directs.

(8) When making the freezing order, the court must also:

(a) fix a date on which the person to whom the order is granted is to report back to the court on what has been done under the order; and

(b) if a proceeding has not been started, order that:

(i) the applicant file a claim by the time stated in the order; and

[7.8.34] Failure to file claim may amount to contempt The failure by a lawyer to file a claim within the said time may amount to a contempt (*Refson v Saggers* [1984] 1 WLR 1025 at 1029; [1984] 3 All ER 111 at 114) and may lead to the discharge of the orders (*Siporex v Comdel* [1986] 2 Lloyd's Rep 428 at 438).

(ii) if the defendant is not known, the defendant be described in the claim as "person unknown"; and

(iii) if the name and address of the defendant or potential defendant is known, fix a time for serving the claim on him or her.

(9) The court may set aside or vary a freezing order.

[7.8.35] When application may be made The defendant or any other party affected by a freezing order may apply to vary or set it aside at any time: *Galaxia Maritime v Mineralimportexport* [1982] 1 All ER 796 at 799-800; [1982] 1 WLR 539 at 541-2; [1982] 1 Lloyd's Rep 351 at 353-4.

[7.8.36] Onus upon applicant If a defendant or other party applies for a variation to release funds for any purpose, they bear the onus of proof that such release does not conflict with the underlying reason for the freezing order: *A v C (No 2)* [1981] 1 QB 961 at 963; [1981] 2 All ER 126 at 127; [1981] 2 WLR 634 at 636; [1981] 1 Lloyd's Rep 559 at 560. Particular examples include *TDK Tape v Videochoice* [1986] 1 WLR 141 at 145; [1985] 3 All ER 345 at 349 (living expenses); *Atlas Maritime v Avalon Maritime (No 3)* [1991] 4 All ER 783 at 790-1; [1991] 1 WLR 917 at 925-6; [1991] 2 Lloyd's Rep 374 at 378-9 (repayment of loan); *Commissioner of Taxation v Manners* (1985) 81 FLR 131 at 136 (legal costs).

[7.8.37] Material non-disclosure A freezing order is liable to be set aside for material non-disclosure *(R v General Commissioners For Income Tax For Kensington* [1917] 1 KB 486 at 506; *Brinks-MAT v Elcombe* [1988] 3 All ER 188 at 192-3; [1988] 1 WLR 1350 at 1356-7) or delay in pursuing the action *(Lloyd's Bowmaker v Britannia Arrow* [1988] 3 All ER 178 at 185-6; [1988] 1 WLR 1337 at 1347).

[7.8.38] Change of circumstances It is expected that if the circumstances giving rise to the order have materially changed, the applicant will return to court and make disclosure: *Commercial Bank of the Near East v A, B, C & D* [1989] 2 Lloyd's Rep 319 at 322-3.

Order to seize documents or objects (seizing order, formerly an Anton Pillar order)

The former name derives from *Anton Piller v Manufacturing Processes* [1976] 1 Ch 55 at 60; [1976] 2 WLR 162 at 165-6; [1976] All ER 779 at 782-3.

7.9 (1) The Supreme Court may make an order (a "seizing order") authorising the applicant to seize documents and objects in another person's possession.

[7.9.1] Purpose The purpose of a seizing order is to allow the applicant to enter defendant's premises to inspect documents or objects and take custody of them in circumstances where they might be destroyed and so be unavailable as evidence.

[7.9.2] Against whom order may be sought It does not seem to be necessary that the person having possession of the documents or objects is required to be a defendant or potential defendant, but see *EMI Records v Kudhail* [1985] FSR 36; [1983] Com LR 280; *AB v CDE* [1982] RPC 509.

(2) The court may make a seizing order:

(a) without notice to the defendant or potential defendant; and

[7.9.3] When ex parte application is appropriate In *EMI Ltd v Pandit* [1975] 1 WLR 302 at 307; [1975] 1 All ER 418 at 424 the Court of Appeal held that the jurisdiction to grant such an order *ex parte* was limited to "exceptional and emergency cases". See further r.7.3. In *Systematica v London Computer Centre* [1983] FSR 313 it was noted that *ex parte* applications were inappropriate where the defendant was operating openly.

(b) if the matter is extremely urgent, before a proceeding has started

(3) The court may make a seizing order only if it is satisfied that:

[7.9.4] Relevant criteria The criteria listed below (and in subr. (4)) reflect those described in *Anton Piller v Manufacturing Processes* [1976] 1 Ch 55 AT 62; [1976] 2 WLR 162 at 167; [1976] All ER 779 at 784. See also *CBS (UK) v Lambert* [1983] Ch 37 at 44; [1982] 3 WLR 746 at 752-3; [1982] 3 All ER 237 at 243; *EMI Ltd v Pandit* [1975] 1 WLR 302 at 307; [1975] 1 All ER 418 at 424**;** *Columbia Pictures v Robinson* [1987] Ch 38 at 76; [1986] 3 WLR 542 at 570; [1986] 3 All ER 338 at 371; *Universal Thermosensors v Hibben* [1992] 1 WLR 840 at 860-1; [1992] 3 All ER 257 at 275-6.

(a) the order is required to preserve documents and objects as evidence; and

[7.9.5] Not an aid in execution This would seem to exclude the grant of an order in aid of execution of judgment as in *Distributori Automatica Italia v Holford* [1985] 1 WLR 1066 at 1073; [1985] 3 All ER 750 at 756.

(b) there is a real possibility that, unless the order is made, the defendant or potential defendant is likely to destroy, alter or conceal the documents or objects or remove them from Vanuatu; and

[7.9.6] General observations The likelihood of this will, in most cases, necessarily be a matter of inference from such material as the applicant can obtain (*Dunlop v Staravia* [1982] Com LR 3) however the court must guard against the possibility of unfairness and oppression: *Booker McConnell v Plascow* [1985] RPC 425.

(c) the applicant has an extremely strong case; and

(d) if the documents or objects are not seized, there is the likelihood of serious potential or actual harm to the applicant's interest; and

(e) there is clear evidence that the documents or objects are in the defendant's possession.

(4) An application for a seizing order must:

(a) describe the documents and objects, or kinds of documents and objects, to be covered by the seizing order; and

(b) give the address of the owner of the premises for which the seizing order is sought; and

(c) set out the basis of the applicant's claim; and

(d) set out proposals for the matters listed in subrule (5); and

(e) include an undertaking as to damages that may be caused to the defendant or potential defendant, or any one else who may be adversely affected, if the seizing order is made; and

(f) have with it:

(i) a sworn statement in support of the application; and

(ii) a draft seizing order.

[7.9.7] Order to be drawn narrowly Due to the extraordinary nature of the remedy, seizing orders should be drawn narrowly. See further subr. (6) and (7).

[7.9.8] Discovery The court has inherent jurisdiction to order discovery in aid of a seizing order to make the remedy effective: *Rank Film v Video Information Centre* [1982] AC 380 at 439; [1981] 2 All ER 76 at 79.

[7.9.9] Protection against incrimination The order should include a clear machinery protecting against incrimination: *Den Norske Bank v Antonatos* [1999] QB 271 at 289-90, 296; [1998] 3 All ER 74 at 89, 90, 96; [1998] 3 WLR 711 at 728, 734.

[7.9.10] Precedent A useful precedent is found in *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 4 All ER 52; [1994] 1 WLR 1233. See also the form of orders appended to *Long v Specifier Publications* (1998) 44 NSWLR 545 at 546, 549 and the advice given in *CBS (UK) v Lambert* [1983] Ch 37 at 44; [1982] 3 WLR 746 at 752-3; [1982] 3 All ER 237 at 243 and *Universal Thermosensors v Hibben* [1992] 1 WLR 840 at 860-1; [1992] 3 All ER 257 at 275-6.

(5) The sworn statement must include the following:

[7.9.11] Full disclosure The sworn statement should err on the side of excessive disclosure: *Thermax v Schott* [1981] FSR 289; *Jeffrey Rogers Knitwear v Vinola* [1985] FSR 184; [1985] JPL 184; *Columbia Pictures v Robinson* [1987] Ch 38 at 77; [1986] 3 WLR 542 at 571; [1986] 3 All ER 338 at 372.

(a) why the order is required to preserve the documents and objects as evidence; and

(b) the basis for the applicant's belief that:

(i) there is a real possibility that, unless the order is made, the defendant or potential defendant is likely to destroy, alter or conceal the documents or objects or remove them from Vanuatu; and

(ii) if the documents or objects are not seized, there is the likelihood of serious potential or actual harm to the applicant's interests; and

[7.9.12] Basis of belief in likelihood must be explained The basis of this belief must be set out clearly: *Hytrac Conveyors v Conveyors International* [1982] 3 All ER 415 at 418; [1983] 1 WLR 44 at 47.

(c) verification of the facts that support the applicant's claim; and

(d) the evidence that the documents or objects are in the defendant's possession; and

(e) the damage the applicant is likely to suffer if the order is not made.

(6) The seizing order must include provisions about:

[7.9.13] See also the annotations to subr.(4)(f)(ii).

(a) service of the order on the defendant or potential defendant; and

(b) who is to carry out the order; and

(c) the hours when the orders may be carried out; and

(d) the name of a neutral person who is to be present when the orders are carried out; and

(e) access to buildings vehicles and vessels; and

[7.9.14] No forced entry The order will not santion forced entry and is not equivalent to a search warrant. If a person refuses to obey the court's order and give access, there is a contempt. If relevant documents or objects are stored in locked cabinets, the person may be ordered to hand over the key or allow removal of the cabinet: *Hazel Grove Music v Elster Enterprises* [1983] FSR 379.

(f) making a record of seized documents and objects; and

(g) how and where the documents and objects are to be stored; and

(h) the time given for copying and returning documents, and returning objects; and

[7.9.15] Electronic documents When relevant documents are stored in a computer, there may be an order to print them in readable form: *Gates v Swift* [1982] RPC 339; [1981] FSR 57.

(i) how long the order stays in force; and

(j) fixing a date on which the person to whom the order is granted is to report back to the court on what has been done under the order.

(7) The seizing order may also:

(a) require the defendant to give the information stated in the order about the proceeding; and

(b) include another order restraining, for not more than 7 days, anyone served with that order from telling anyone else about the seizing order.

(8) The court may set aside or vary a seizing order.

[7.8.16] When application may be made It is common to permit a defendant to apply to set aside an order on very short notice.

[7.9.17] Discharge if order should not have been made An order (even if fully executed) can be discharged if it is established that it should never have been made: *Booker McConnell v Plascow* [1985] RPC 425; *Lock International v Beswick* [1989] 1 WLR 1268 at 1279, 1285; [1989] 3 All ER 373 at 382, 387.

Receivers

7.10 (1) The Supreme Court may appoint a person to be the receiver of a defendant's property.

[7.10.1] Inherent jurisdiction There is also an inherent power to appoint a receiver which the rule enlarges rather than confines: *Cummins v Perkins* [1899] 1 Ch 16 at 19; *Corporate Affairs Commission v Smithson* [1984] 3 NSWLR 547 at 552; (1984) 9 ACLR 371 at 375; *Parker v Camden ; Newman v Camden* [1986] Ch 162 at 173, 176, 179; [1985] 2 All ER 141 at 146, 148, 150; [1985] 3 WLR 47 at 54, 57, 60; *Bond Brewing v National Australia Bank* (1990) 1 ACSR 445 at 461-2. See further Part VII Companies Act [Cap 191] as to receivers of companies.

[7.10.2] Functions of a receiver A "receiver" is a person who receives rents and other income while paying ascertained outgoings. A receiver does not manage the property in the sense of buying or selling or anything of that kind. A "receiver and manager" can buy and sell and carry on the trade. As the word "receiver" is not defined in the rules and does not generally include a "manager", an order appointing a receiver to a going concern will probably have the effect of bringing the business to a halt: *Re Manchester & Milford Railway Co* (1880) 14 Ch D 645 at 653, 658. Where the receiver is appointed pursuant to the Companies Act [Cap 191], the term "receiver" includes "manager" due to s. 349(a).

[7.10.3] By whom appointed Receivers may be appointed by the court (generally, where legal remedies are inadequate) or out of court (upon an act of default under a debenture).

[7.10.4] Receiver stands possessed of property The receiver stands possessed of the property of the defendant as the court's officer with the duty of dealing with it fairly in the interests of all parties: *Re Newdigate Colliery* [1912] 1 Ch 468 at 478.

(2) In deciding whether to appoint a receiver, the court must consider:

(a) the amount of the applicant's claim; and

(b) the amount likely to be obtained by the receiver; and

(c) the probable costs of appointing and paying a receiver.

(3) A person must not be appointed as a receiver unless the person consents to the appointment.

(4) The court may require the receiver to give security acceptable to the court for performing his or her duties.

[7.10.5] Security from receiver The order is often conditional on giving security in which case a receiver may not take possession unless the security is perfected in accordance with the order: *Freeman v Trimble* (1906) 6 SR(NSW) 133 at 139. In urgent cases, the court may permit the receiver to act upon an undertaking pending the provision of proper security: *Makins v Percy Ibotson* [1891] 1 Ch 133 at 139; *Taylor v Eckersley* (1876) 2 Ch D 302 at 303. An undertaking as to damages may also be required.

(5) The sworn statement in support of the application for the appointment of a receiver must:

(a) describe the defendant's property; and

(b) give reasons why the appointment of a receiver is necessary to preserve the defendant's property.

[7.10.6] What sworn statement should contain The sworn statements must establish appropriate grounds for the appointment. If the application proposes a named person to be appointed, the sworn statements should address that person's fitness: *Re Church Press Ltd* (1917) 116 LT 247 at 248-9. The defendant may be heard in opposition: *Gibbs v David* (1875) 20 LR Eq 373 at 378; *Re Prytherch* (1889) 42 Ch D 590 at 601.

(6) The order appointing the receiver must:

(a) specify the receiver's duties; and

(b) state the period of the receiver's appointment; and

(c) specify what the receiver is to be paid; and

[7.10.7] What sworn statement should contain The sworn statements should state the fee structure upon which the proposed receiver will consent to the appointment and should also mention whether these fees are competitive in the market.

(d) require the receiver to file accounts and give copies to the parties, and at the times, the court requires; and

(e) contain anything else the court requires.

[7.10.8] What order should contain The order should specify the property to which it relates with as much particularity as possible so as to avoid collateral disputes. The orders should also take care to preserve the rights of strangers.

(7) The court may set aside or vary the order.

[7.10.9] Reasons for discharge A receiver will not normally be discharged unless there is some reason why the parties should be put to the expense of a change: *Smith v Vaughan* (1744) Ridg T H 251 at 251; 27 ER 820 at 820.

Service of order

7.11 The applicant must serve a copy of an interlocutory order on:

(a) the defendant; and

(b) anyone else who is required to comply with the order.

[7.11.1] Practice The court usually provides a sealed copy of interlocutory orders to all parties, making service under this rule unnecessary in most cases. Parties intending to rely on an important order should consider additional, verifiable service. Service of orders against non-parties affected by the orders should be considered. By analogy with *Dinh v Samuel* [2010] VUCA 6 at [41]-[42]; CAC 16 of 2009, it is likely that the court's usual practice will not be held to alleviate a party of the responsibility of service.