TRIAL

Conduct of trial

12.1 (1) The court may give directions for a particular trial about the order of evidence and addresses and the conduct of the trial generally.

(2) This rule applies subject to any directions the court gives.

(3) At the trial:

(a) the claimant presents his or her case first if the claimant has the burden of proof on any question; and

(b) the defendant presents his or her case first if the defendant has the burden of proof on every question.

[12.1.1] Example See for example *Seldon v Davidson* [1968] 1 WLR 1083 at 1088, 1091; [1968] 2 All ER 755 at 758, 759.

(4) Evidence is to be brought, and addresses made, in the following order:

(a) the party who presents his or her case first (the "first party") makes an address opening the proceeding and, if evidence is to be given orally, brings evidence in support of his or her case;

[12.1.2] Order of witnesses This is solely a matter for counsel and not for the court: *Briscoe v Briscoe* [1968] P 501 at 504; [1966] 1 All ER 465 at 466; [1966] 2 WLR 205 at 207. Judicial interference may not always amount to a denial of natural justice but may readily lead an appellate court to conclude that there was prejudice: *Barnes v BPC* [1976] 1 All ER 237 at 239; [1975] 1 WLR 1565 at 1568.

[12.1.3] No case to answer The trial may not proceed beyond this point if the first party has not made out a case. See for example the outcome in *Vanuatu Fisaman Cooperative v Jed Land Holdings & Investment Ltd* [2008] VUSC 73; CC 184 of 2006.

(b) the other party cross-examines the first party's witnesses;

[12.1.4] "Right" to cross-examine There is no right to cross-examination. Rather, there is a right to a fair trial, of which cross-examination is usually an incident. Accordingly, the right to cross-examine is not absolute and may be controlled as appropriate. See further r.11.7(3) and *Kalmet v Lango* [1997] VUSC 39; CC 161 of 1996.

[12.1.5] Failure to cross-examine The court cannot conclude disputed facts in favour of a party who did not cross-examine the other side's witnesses about them: *Hack v Fordham* [2009] VUCA 6; CAC 30 of 2008 at [30].

[12.1.6] Propriety of cross-examination It should be remembered that cross-examination is not unrestricted. In addition to the rules of evidence there are standards of professional behaviour that must be borne in mind. See for example *Iririki Island Holdings v Ascension Ltd* [2009] VUSC 131; CC 70 of 2007 at [9], [11] (challenge to witness without appropriate specific instructions).

(c) the other party then makes an address opening their case and, if evidence is to be given orally, brings evidence in support of their case;

(d) the first party cross-examines the other party's witnesses;

(e) if there are any other parties, they in turn make their opening addresses, bring their evidence in support and cross-examine each other's witnesses;

(f) the first party then makes a closing address;

(g) the other parties in turn make their closing addresses.

[12.1.7] Order of address between defendants If there are two or more defendants, they will usually address in the order in which they are named.

[12.1.8] Written closing addresses It has become common for judges to require written closing addresses, a practice which the Court of Appeal has derided as contributing to delay: *Hack v Fordham* [2009] VUCA 6; CAC 30 of 2008 at [31] – [32].

Trial in open court

12.2 The trial of a proceeding must be held in open court unless the court orders otherwise.

[12.2.1] Purpose Administration of justice is ordinarily conducted in public unless the court is guarding the interests of a person under its parental jurisdiction, or where publicity might destroy the subject matter of proceedings, or in such other circumstances where the presence of the public would be impractical: *Scott v Scott* [1913] AC 417 at 437. Proceedings from which the public are improperly excluded are voidable: *McPherson v McPherson* [1936] AC 177 at 203; [1935] All ER 105 at 111; *R v Tait & Bartley* (1977) 24 ALR 473 at 490, 492; (1979) 46 FLR 386 at 405, 407.

[12.2.2] Meaning of "open court" An "open court" is not defined and whether a court is such is to be answered by a broad consideration of all relevant circumstances: *R v Denbigh Justices, ex parte Williams* [1974] 1 QB 759 at 766; [1974] 3 WLR 45 at 51; [1974] 2 All ER 1052 at 1057. The exclusion of the media strongly suggests that the court is not open, however the wrongful exclusion at any moment of a particular member of the public who wished to attend is probably not decisive: *R v Denbigh Justices, ex parte Williams* at 765-6; 50-1; 1056-7. Merely keeping the door open in proceedings otherwise held in circumstances of secrecy will not make them open within the meaning of the rule: *Dando v Anastassiou* [1951] VLR 235 at 238. See also *McPherson v McPherson* [1936] AC 177 at 197; [1935] All ER 105 at 108 where proceedings behind a closed (but not locked) door marked "Private" were held not to be open. An alternative or makeshift venue well-known to be a place at which the court sits and to which the public are welcome is likely to suffice as an open court: *Lang v Warner* (1975) 10 SASR 289 at 294-5; *cf Dando v Anastassiou.*.

[12.2.3] Confidentiality Nothing in this rule prevents the court from adopting procedures designed to confer some measure of confidentiality where appropriate; for example a direction to conceal the name of a witness (*R v Socialist Worker, Printers and Publishers* [1975] QB 637 at 644-5; [1975] 1 All ER 142 at 144; [1974] 3 WLR 801 at 804) or the handing up of a document which is not to be read in public (*Andrew v Raeburn* (1874) 9 Ch App 522 at 523-4).

[12.2.4] Exclusion of public The power to exclude the public is ordinarily exercised only where lesser procedures are inadequate to provide the necessary confidentiality. In such cases it is appropriate for the court to mention the reasons for its order: *R v Tait & Bartley* (1977) 24 ALR 473 at 490, 492; (1979) 46 FLR 386 at 405, 407.

[12.2.5] Public access to evidence in chief The exchange of sworn statements in lieu of evidence-in-chief and the absence of any requirement to read the content of a sworn statement into evidence (see r.11.7(2)) means that such evidence is seldom heard or known to the public. This can, in an appropriate case, be cured by orders: See for example *Hammond v Scheinberg* (2001) 52 NSWLR 49; [2001] NSWSC 568 at [2], [6].

Adjournment

12.3 The court may at or before a trial adjourn the trial.

[12.3.1] Inherent jurisdiction The court also has an inherent jurisdiction, independent of this rule, to the same effect: *Hinckley v Freeman* [1941] Ch 32 at 39; [1940] 4 All ER 212 at 216. The adjournment may be upon the application of a party or of the court's own motion: *Carlot v Santhy* [2009] VUCA 5; CAC 25 of 2008 at [22].

[12.3.2] Applicable criteria The discretion should be exercised having regard to the particular circumstances and the overriding objective. It is suggested that an adjournment should usually be granted where any prejudice to other parties can satisfactorily be cured by costs or other appropriate orders. See generally *Coconut Oil Production v Tavoa* [2005] VUCA 24; CAC 16 of 2005 (adjournment ought to have been granted where counsel became innocently double-booked and other side consented); *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006 (adjournment for 7 days upon earlier request ought to have been granted where counsel could not obtain a flight to Santo). On the other hand, last-minute requests for adjournments without good cause are unlikely to be favourably received: See for example *Re Clements* [1988] VUSC 4; [1980-1994] Van LR 331; *VIDA v Jezabelle Investments* [2009] VUCA 33; CAC 33 of 2009; *Joseph v Natu* [2009] VUSC 68; CC 44 of 2008. Lawyers may never take for granted the way in which a Judge will exercise his discretion: *Isom v PSC* [2009] VUSC 40; CC 216 of 2005. Unless counsel have clear and unequivocal pre-approval of an adjournment (even if the parties agree) then lawyers must always ensure representation at a set hearing date: *Coconut Oil Production v Tavoa*; *William v Rovu* [2005] VUCA 26; CAC 23 of 2005; *VIDA v Jezabelle Investments*; *Joseph v Natu*.

[12.3.3] Costs of adjournment A party applying for an adjournment is, traditionally, ordered to pay the costs thereof: *Lydall v Martinson* (1877) 5 Ch D 780 at 781.

Preliminary issues

12.4 The court may hear legal argument on preliminary issues between the parties if it appears likely that, if the issues are resolved, the proceeding or part of the proceeding will be resolved without a trial.

[12.4.1] Relationship to overriding objective Rules 1.4(2)(b), (c) and (d), to identifying issues at an early state, deciding promptly which issues need full investigation and trial and resolving others without a hearing, and deciding the order in which issues are resolved. These matters are relevant to the exercise of this rule: *PSC v Nako* [2009] VUCA 7; CAC 31 of 2009 (referring to r.1.4(a), (b) and (c), [*sic* r.1.4(2)(b)(c), (d)]).

[12.4.2] Caution to be exercised Splitting issues can have unintended consequences and care should be exercised where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [92]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Tepko v Water Board* (2001) 206 CLR 1; 178 ALR 634; [2001] HCA 19 at [107], [152]; *Wragg v Partco* [2002] EWCA Civ 594 at [27]; [2002] 2 Lloyd's Rep 343. Care must be taken in framing the preliminary issues – see for example the problems generated in *Ayamiseba v Vanuatu* [2008] VUSC 15 at [4], [29]; CC 196 of 2006; *National Housing Corp v Tokon* [2008] VUCA 29; CAC 9 of 2008.

[12.4.3] Indications A preliminary point may usefully be separated where its outcome is crucial to the outcome of the proceedings (*Dunstan v Simmie* [1978] VR 669 at 671; *Verwayen v Commonwealth (No2)* VR 712 at 717; *Visic v State Government Insurance Commission* (1990) 3 WAR 122 at 123; *Benard v Citizenship Commission* [2007] VUSC 71 at [8]; CC 230 of 2006) or where it may lead to a settlement between the parties (*Smith v Maloney* (1998) 19 WAR 209 at 223).

[12.4.4] Contraindications It may not be appropriate to split issues where the result depends upon detailed or complex factual disputes (*Tilling v Whiteman* [1980] AC 1 at 17, 19, 25; [1979] 2 WLR 401 at 403, 405, 410; [1979] 1 All ER 737 at 738, 740, 744; *Allen v Gulf Oil Refining* [1981] AC 1001 at 1010-1, 1015, 1022; [1981] 1 All ER 353 at 355, 358, 364; [1981] 2 WLR 188 at 190, 194, 200-1), where the utility, economy or fairness of that course is questionable (*Tepko v Water Board* (2001) 206 CLR 1; 178 ALR 634; [2001] HCA 19 at [52], [168]-[170]; *Benard v Citizenship Commission* [2007] VUSC 71; CC 230 of 2006 at [8]) or in cases of developing jurisprudence: *Barrett v Enfield* [2001] 2 AC 550; [1999] 3 WLR 79 at 83; [1999] 3 All ER 193 at 197; *X v Bedfordshire* [1995] 2 AC 633 at 694, 741; [1995] 3 WLR 152 at 175; [1995] 3 All ER 353 at 373; *Wragg v Partco* [2002] EWCA Civ 594 at [28]; [2002] 2 Lloyd's Rep 343.

[12.4.5] Case stated Note also the power to state a case contained in ss. 17 and 31, *Judicial Services and Courts* [Cap 270].

[12.4.6] Appeals from preliminary issue judgments There is usually an appeal as of right from a specifically framed preliminary issue: *PSC v Nako* [2009] VUCA 7; CAC 31 of 2009 (applying *White v Brunton* [1984] 2All ER 606).

Court may hear evidence early

12.5 If a witness will not be available at the time of the trial, the court may hear the witness's evidence before the trial, in accordance with rule 11.9.

Giving of evidence

12.6 (1) A witness's evidence is to be given as provided in Part 11.

(2) The witness must attend at the trial, if required under Part 11, and may be examined on his or her evidence by all other parties to the proceeding.

[12.6.1] Failure to attend cross-examination See further r.11.7(4). The failure of a witness to attend to be cross-examined is a matter going to weight, not to admissibility: *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006.

Referee

12.7 (1) This rule applies only in the Supreme Court.

(2) If a proceeding raises questions of a complex technical nature, the court may by order appoint a person qualified and experienced in that field as a referee to hear and determine those questions.

[12.7.1] Difference between referee and expert Expert referees are different to court-appointed experts. The court determines the scope of the referee's powers who, generally speaking, will inquire and report on certain issues in dispute.

[12.7.2] Consent unnecessary A referee may be appointed with or without the consent of the parties: *Badische Anilin v Levinstein* (1883) 24 Ch D 156 at 167.

(3) The court may give the referee power to:

(a) give directions about preparing for the hearing, including directions about written submissions, disclosure of documents and information, compiling bundles of diagrams and sketches and dealing with technical information; and

(b) issue summonses in Form 20 requiring persons to attend the hearing and give evidence, give evidence and produce documents or produce documents; and

(c) hear argument and oral evidence as the court does at a trial; and

(d) inspect objects and places; and

(e) adjourn the hearing from time to time; and

(f) deal with any matters incidental to the hearing.

(4) The referee may refer a matter to the judge for assistance or determination.

(5) The court may not give the referee any power of enforcement or punishment.

(6) The referee must give his or her findings to the judge in the form, and in the time, set out in the order of appointment.

(7) The judge must give each party a copy of the referee's findings.

(8) The judge may accept all, some or none of the referee's findings.

[12.7.3] No Constitutional infringement This provision probably saves the rule from offending art.47 of the *Constitution* granting to the courts the exclusive responsibility to decide disputes. In relation to the use of a referee's report, see *Cape v Maidment* (1991) 98 ACTR 1 at 3-4.

Hearing of question of law only

12.8 If the parties have agreed on the facts but there remains a question of law in dispute, the court must hear argument from the parties about the question of law.

Failure to attend

12.9 (1) If a defendant does not attend when the trial starts:

[12.9.1] Defendant to be called Before making any of the orders mentioned in paragraphs (a) or (b) the defendant should be called inside and outside the courtroom: *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005. The court should also inquire into the reason for non-attendance and should not proceed unless satisfied that service took place: *Dinh v Samuel* [2010] VUCA 6; CAC 16 of 2009.

(a) the court may adjourn the proceeding to a date it fixes; or

[12.9.2] Costs See further r.12.3. In this event, the claimant will usually pay wasted costs. The failure of parties or counsel to attend or attend on time causes difficulties for the court, wasted time and the running up of unnecessary costs. If there is no good excuse then a defaulting party must expect to bear the onus of initiating procedures to rectify the default and be liable for wasted costs, which should, if possible, be assessed and made payable within one or two weeks: *Vatu v Anser* [2001] VUCA 4; CAC 6 of 2001.

(b) the court may give judgment for the claimant; or

[12.9.3] Examples See for example *Ifira Wharf v Kaspar* [2006] VUCA 4; CAC 29 of 2005 in which the decision of the primary judge to adopt this course was held not to be inconsistent with the overriding objective. The Court of Appeal noted that the defendant was a significant corporate entity with its own in-house legal advisor and who was responsible for a number of (unexplained) procedural delays. Where a defendant has otherwise played a role in the proceedings (such as by filing a defence, etc) and there is likely to be some other reason for non-attendance, it is appropriate to invoke r.18.11 rather than to enter judgment: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006.

(c) the claimant, with permission of the court, may call evidence to establish that he or she is entitled to judgment against the defendant.

[12.9.4] Example See *Asemele v Marmar* [2009] VUSC 119; CC 19 of 2009 where the defendant/counterclaimant had failed to attend, file evidence or pay hearing fees.

(2) If a claimant does not attend when the trial starts:

[12.9.5] Meaning of "claimant" Claimant includes, for the purposes of this rule, a counterclaimant: *Carlot v Santhy* [2009] VUCA 5; CAC 25 of 2008 at [23].

[12.9.6] Claimant to be called Before making any of the orders mentioned in paragraphs (a) or (b) the same considerations discussed in [12.9.1] apply.

(a) the court may adjourn the proceeding to a date it fixes; or

(b) the court may dismiss the claimant's claim and give judgment for the defendant; or

[12.9.7] Relevance of burden of proof The court may dismiss the claim, with costs, even if the statements of the case disclose that the burden of proof is on the defendant: *Armour v Bate* [1891] 2 QB 233 at 234. A counterclaim must, however, be proved.

[12.9.8] When inquiry into absence appropriate Where a claimant has otherwise played a role in the proceedings and there is likely to be some other reason for non-attendance, it is appropriate to invoke r.18.11 rather than to enter judgment: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006. In *Carlot v Santhy* [2009] VUCA 5; CAC 25 of 2008 the Court of Appeal approved a summary dismissal in circumstances where the [counter]claimant had not filed any witness statements in support of the [counter]claim.

(c) the defendant, with permission of the court, may call evidence to establish that he or she is entitled to judgment under a counterclaim against the claimant.

(3) The court may give directions about further dealing with the proceeding and must consider the question of costs.

[12.9.9] Costs The failure of parties or counsel to attend or attend on time causes difficulties for the court, wasted time and the running up of unnecessary costs. If there is no good excuse then a defaulting party must expect to bear the onus of initiating procedures to rectify the default and be liable for wasted costs, which should, if possible, be assessed and made payable within one or two weeks: *Vatu v Anser* [2001] VUCA 4; CAC 6 of 2001.

Re-opening a proceeding

12.10 The court may by order allow a party to re-open a proceeding after trial but before judgment if the court is satisfied that it is necessary to do so in order for substantial justice to be done.

[12.10.1] Fresh evidence Until an order is perfected, the court retains control over its judgment and its decision and may reopen argument. Obviously, the court will be reluctant to reopen a trial without good reason, such as the discovery of fresh evidence. That reluctance will be greater, and the reasons exceptional, if the court has already expressed a decision but not yet perfected judgment. See further [13.2.3].

Judgment

12.11 After the trial, the court must give judgment, as set out in Part 13.

[12.11.1] See further r.13.2.