COSTS

Division 1 – General

General provisions about costs

E *CPR* r44.3(1)

15.1 (1) The court has a discretion in deciding whether and how to award costs.

[15.1.1] Power to award costs Costs are the creation of statute: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 876; [1881-5] All ER 1111 at 1113. The courts of common law had no inherent power to award costs. In the absence of a statutory basis to support an order under this rule, the jurisdiction to award costs must be regarded as dubious: *Thiess v Chief Collector of Taxes* [1982] PGSC 22; [1982] PNGLR 385. See generally *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 876; [1881-5] All ER 1111 at 1113; A Goodhart, "Costs" (1929) 38 Yale LJ 849; *Cachia v Hanes* (1994) 179 CLR 403 at 410; 120 ALR 385 at 394; *Walton v McBride* (1995) 36 NSWLR 440 at 449. On the other hand, the making of costs orders, albeit perhaps without a proper foundation, has now become so common that it is arguably part of the common law of Vanuatu.

[15.1.2] Costs includes disbursements This Part uses the word "costs" to include both professional costs and disbursements. Rules 15.4(a) and 15.7(3)(c) confirm the existence of that distinction. See further [15.7.5].

[15.1.3] Costs order usually only made between parties The general rule is that costs orders are made only between parties. There are, however cases in which costs have been ordered against non-parties and the words of the subrule do not foreclose this possibility. Recognition of the possibility appears in *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. See generally *Edginton v Clark* [1964] 1 QB 367 at 384; [1963] 3 All ER 468 at 476; [1963] 3 WLR 721 at 731-2; *Aiden Shipping Co v Inter Bulk* [1986] AC 965 at 980; *Knight v FP* (1992) 174 CLR 178 at 192, 202; 66 ALJR 560 at 565-6, 570; 107 ALR 585 at 595, 603; *Shah v Karanjia* [1993] 4 All ER 792 at 805. See also *VIDA v Jezabelle Investments* [2009] VUCA 33; CAC 33 of 2009 (costs ordered against directors challenging winding-up).

E *CPR* r44.3(2)(a)

(2) As a general rule, the costs of a proceeding are payable by the party who is not successful in the proceeding.

[15.1.4] No right to costs The rule affirms the established general principle. It is said that a successful party has a reasonable expectation of a costs order but no right to it, because the court has a wide discretion: *Scherer v Counting Instruments (1977)* [1986] 2 All ER 529 at 536; [1986] 1 WLR 615 at 621; *Bankamerica v Nock* [1988] AC 1002 at 1010; [1988] 1 All ER 81 at 86; [1987] 3 WLR 1191 at 1197; *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 at 237; [1992] 1 WLR 1207 at 1213; *Orah v Vira* [2000] VUSC 9; CC 1 of 1999. Note also *Inter-Pacific Investment Ltd v Sulis* [2007] VUCA 26; CAC 4 of 2007 from which this is implicit.

[15.1.5] Departure from the usual rule The Court of Appeal has specifically refused to provide a guideline judgment as to the circumstances meriting departure from the "usual rule" as to costs: *Inter-Pacific Investment Ltd v Sulis* [2007] VUCA 26; CAC 4 of 2007. It was explained that the costs order will reflect the "reality of what has occurred in a particular piece of litigation", an approach which might be informed by *Voyce v Lawrie* [1952] NZLR 984. Indeed, the court seems willing to look to a wide variety of circumstances and the occasions where the usual rule is not applied seem almost as numerous as otherwise. Detailed explanations for departing from the usual rule are seldom provided. A possible explanation might appear from warnings as to the "chilling" effect of onerous costs orders contained in *Hurley v Law Council* [2000] VUCA 10; CAC 12 of 1999.

[15.1.6] Circumstances justifying departure A number of circumstances have been said to justify departure in other jurisdictions: Misconduct, refusal to compromise, wastage, etc (see generally r. 15.5(5)). The discretion should be exercised judicially: *Donald Campbell v Pollak* [1927] AC 732 at 811; [1927] All ER 1 at 41; *Ottway v Jones* [1955] 2 All ER 585 at 587, 591; [1955] 1 WLR 706 at 708-9, 714-5; *Taione v Pohiva* [2006] TOSC 23; CV 374 2004. The court ought to give reasons if the discretion is exercised otherwise than in accordance with the usual rule: *Orah v Vira* [2000] VUSC

9; CC 1 of 1999; *Pepys v London Transport* [1975] 1 All ER 748 at 752, 754; [1975] 1 WLR 234 at 238, 241. It is not proper for a successful party to be ordered to pay costs unless exceptional circumstances exist: *Ritter v Godfrey* [1920] 2 KB 47 at 60-1; [1918-9] All ER 714 at 723; *Ottway v Jones* [1955] 2 All ER 585 at 587, 591; [1955] 1 WLR 706 at 708-9, 714-5; *Knight v Clifton* [1971] Ch 700 at 717-8; [1971] 2 All ER 378 at 390; [1971] 2 WLR 564 at 577-8; *Scherer v Counting Instruments (1977)* [1986] 2 All ER 529 at 537; [1986] 1 WLR 615 at 622; *Secretary of Fisheries v Lanivia* [1999] Tonga LR 179; [1999] TOCA 17; CA 17 1999; *Robinson v AASW* [2000] SASC 239 at [1], [3], [20]. An example of a costs order against the successful party is *Worwor v Leignkone* [2006] VUCA 19; CAC 23 of 2006 & CAC 26 of 2006.

[15.1.7] Extent of success Where a litigant has been partially successful it may be appropriate that he bear the expense of litigating that part upon which he has failed: *Forster v Farquhar* [1893] 1 QB 564 at 569-70; *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at [26]; *Islam v Ali* [2003] EWCA Civ 612 at [18]. Where there is such a mixed outcome, the extent of a party's "success" may be difficult to measure and the court must exercise caution in trying to ascertain success from the party's respective viewpoints: *LMI v Baulderstone (No 2)* [2002] NSWSC 72 at [34] *et seq*. In this connection it is not necessary to show that a party has acted unreasonably or improperly: *Summit Property v Pitmans* [2001] EWCA Civ 2020 at [16]. The costs order of the Court of Appeal on the cross-appeal in *PSC v Tari* [2008] VUCA 27; CAC 23 of 2008 is difficult to reconcile with general principles or the encouragement of compromise. Without hearing argument, the court awarded costs on the cross-appeal despite the fact that it was conceded.

[15.1.8] Counsel's duty to seek costs Counsel has a duty to seek to recover costs on behalf of clients, wherever possible: *Apisai v Government of Vanuatu* [2007] VUCA 1; CAC 30 of 2006.

(3) However, nothing in this Part prevents the parties to a proceeding from agreeing to pay their own costs.

(4) The court may order that each party is to pay his or her own costs.

[15.1.9] No order as to costs This is the usual order when some supervening event renders the litigation between the parties moot. An order that "there be no order as to costs" has the result that each party bear their own costs: *Re Hodgkinson* [1895] 2 Ch 190 at 194.

When court may make order for costs

15.2 (1) The court may make an order for costs at any stage of a proceeding or after the proceeding ends.

[15.2.1] Examples See for example *Chapman v Wickman* [2000] FCA 536 at [14] (application for indemnity costs after conclusion of proceedings); *Commerce Commission v Southern Cross Medical Care* [2004] 1 NZLR 491 (usual rule applies to interlocutory steps and to substantive hearing). See further r.15.6(2).

(2) If the court awards the costs of a part of the proceeding during the proceeding, the court must also if practicable determine the amount of the costs and fix a time for payment.

[15.2.2] When interlocutory costs orders payable An interlocutory order for costs does not usually entitle the receiving party to recover them until the conclusion of the proceedings. Where, however, the interlocutory proceedings are sufficiently discrete or where there are special circumstances which otherwise require that a party ought not to be kept out of its costs, the court may order that costs be paid "forthwith" or at some other, earlier time: *Life Airbag (Aust) v Life Airbag (NZ)* [1998] FCA 545; *All Services v Telstra* (2000) 171 ALR 330 at 333; *Fiduciary v Morningstar* (2002) 55 NSWLR 1 at 4-5; [2002] NSWSC 432 at [11] – [13]. It is quite common in Vanuatu for "wasted costs" (eg. due to non-attendance at conferences) to be ordered to be paid within a short period. See further r.15.25(6).

Costs determination

15.3 If the parties do not agree on the amount of costs to be awarded, the judge must determine the costs as set out in these Rules.

[15.3.1] Meaning of "determine" The rules are silent as to the exact process of determination. Although subr.15.7(2) *et seq* suggests a process similar to the traditional "taxation" of costs whereby each item of cost is separately considered (see the detailed description of this process in *Jet Corp v Petres* (1985) 10 FCR 289 at 290-1; 64 ALR 265 at 267-8 and the shorter description in *Benard v Hakwa* [2004] VUCA 15; CAC 13 of 2004), the court may, having regard to r. 1.2(2), adopt a fairly summary procedure: *Makin v IAC Pacific* [2003] VUSC 24; CC 140 of 1998; *Regona v Director of Land Records* [2008] VUSC 80; CC 109 of 2007 at [26]. This may in some ways resemble the old Chancery practice of "moderation" as to which see *Johnson v Telford* (1827) 3 Russ 477 at 478; 38 ER 654 at 655. See also the approach taken in *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999.

[15.3.2] Treatment of confidential material during determination It is probable that there will be confidential documents within the file of the lawyers whose costs are to be determined, and these cannot be made available to the other side. Subject to that reservation, the lawyer's file should be available for examination by the opposing side to determine whether to take any objection to individual items: *Hudson v Greater Pacific Computers* [1998] VUCA 12; CAC 3 of 1998.

[15.3.3] Inherent jurisdiction There is an inherent jurisdiction, apart from the *Rules*, to control and regulate the conduct of barristers and solicitors who are officers of the court. That power extends to the regulation of the amount that may be charged by barristers and solicitors for professional fees to their own clients: *Hudson v Greater Pacific Computers* [1997] VUCA 2; CAC 7 of 1997.

[15.3.4] The "outstanding costs principle" There is a general principle that there should be a stay of second proceedings between the same parties in respect of the same or substantially the same subject matter as first proceedings until outstanding costs on the first proceedings are paid. This is a discretionary exercise of the court's inherent jurisdiction to prevent abuse of its process: See for example *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443 at 448-9; *Thames Investment Security plc v Benjamin* [1984] 3 All ER 393 at 394.

Self-represented parties

15.4 A party who is not represented by a lawyer:

(a) may recover disbursements; but

(b) is not entitled to recover costs

[15.4.1] History This is a long-standing principle: *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 875; [1881-5] All ER 1111 at 1112; *R v Archbishop of Canterbury* [1903] 1 KB 289 at 292, 296-7; [1900-3] All ER 1180 at 1183, 1187; *Inglis v Moore (No 2)* [1979] 25 ALR 453 at 455; *Cachia v Hanes* (1994) 179 CLR 403; 120 ALR 385 at 387; *Collier v Registrar* (1996) 10 PRNZ 145; *Karingu v Papua New Guniea Law Society* [2001] PGSC 10; *Culliwick v Lini* [2004] VUSC 35; CC 201 of 2004.

Standard basis and indemnity basis for costs

E *CPR* r44.4(2)

15.5 (1) Costs awarded on a standard basis (formerly known as a party and party basis) are all costs necessary for the proper conduct of the proceeding and proportionate to the matters involved in the proceeding.

[15.5.1] Basis of standard costs These are not intended to be a complete indemnity *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999) but to provide something like an indemnity to a party who has not undertaken any unusual or over-cautious methods to protect their rights (*Societe Anonyme v Merchants' Marine*

Insurance [1928] 1 KB 750 at 762; *LJP v Howard Chia* (1990) 24 NSWLR 499 at 509; *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999). The test is "whether each of the items of work was strictly necessary, and whether the time spent reflects reasonable efficiency, or a degree of painstaking care which exceeds that which the unsuccessful party should be required to compensate": *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999. See also *Smith v Buller* (1875) LR 19 Eq 473 at 475; [1874-80] All ER 425 at 426; *Scheff v Columbia Pictures* [1938] 4 All ER 318 at 322; *W & A Gilbey v Continental Liqueurs* [1964] NSWR 527 at 534. For a critique see *Berry v British Transport* (1962) 1 QB 306 at 323; [1961] 3 WLR 450 at 459; [1961] 3 All ER 65 at 72.

[15.5.2] Appropriate rate In 1999 the appropriate hourly rate for costs on this basis was said to be VT10,000: *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999 (affirmed on appeal *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999, subject to any unique features of the case). See further [15.7.7] as to time charging and the general observations of Lunabek CJ in *Hudson v Sunrise* [1996] VUSC 2; CC 59 of 1995.

(2) Costs awarded on an indemnity basis (formerly known as a solicitor and client basis) are all costs reasonably incurred and proportionate to the matters involved in the proceeding, having regard to:

[15.5.3] Basis of indemnity costs These costs are intended to be closer to a complete indemnity and represent all the work done and expenses incurred in the proceeding except so far as they may be of an unreasonable amount or were unreasonably incurred: *Morin v Asset Management Unit* [2007] VUCA 15; CAC 34 of 2007; *EMI v Ian Cameron Wallace* [1983] 1 Ch 59 at 71; [1982] 3 WLR 245 at 256; [1982] 2 All ER 980 at 989; *Hurstville MC v Connor* (1991) 24 NSWLR 724 at 730; *Bottoms v Reser* [2000] QSC 413. The amount of costs actually incurred is relevant to, but not decisive of, this question: *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 at [50]; *Regona v Director of Land Records* [2008] VUSC 80; CC 109 of 2007 at [17].

(a) any costs agreement between the party to whom the costs are payable and the party's lawyer; and

[15.5.4] Nature of solicitor/client costs agreements Costs agreements between lawyers and their clients are contracts and therefore governed by the law of contract. An agreement setting out a range of fees may be void for uncertainty: *Chamberlain v Boodle King* [1982] 3 All ER 188 at 191; [1982] 1 WLR 1443 at 1445**;** but see *Lewandowski v Mead* [1973] 2 NSWLR 640 at 643 and *Weiss v Barker Gosling* (1993) FLC 92-399, 80,061 at 80,080; (1993) 114 FLR 223 at 245-6 for the position in Australia. There is nothing requiring the agreement to be in writing: *Regona v Director of Land Records* [2008] VUSC 80; CC 109 of 2007 at [18].

(b) charges ordinarily payable by a client to a lawyer for the work.

[15.5.5] Appropriate rate In 1999 the usual commercial rate was said to be VT20,000 per hour: *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999. This may now be VT25,000 per hour: *Regona v Director of Land Records* [2008] VUSC 80; CC 109 of 2007 at [24].

(3) Costs are normally to be awarded on a standard basis unless the court orders the costs to be awarded on an indemnity basis.

[15.5.6] Indemnity costs orders exceptional The ordinary rule is that costs when ordered in adversary litigation are to be recovered on the standard basis and any attempt to disturb that rule requires careful consideration. A high threshold must be passed: *Vanuatu Fisaman Cooperative Marketing Consumer Society v Jed Land Holdings & Investment Ltd* [2008] VUSC 73; CC 184 of 2006 (only "in the most extreme cases"); *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188. It should only be departed from where the conduct of the party against whom the order is sought is plainly unreasonable: *Preston v Preston* (1982) 1 All ER 41 at 58; [1982] Fam 17 at

39; [1981] 3 WLR 619 at 637; *Packer v Meagher* [1984] 3 NSWLR 486 at 500; *Degmam v Wright (No 2)* [1983] 2 NSWLR 354 at 358; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 89; 72 ALJR 578 at 587; 152 ALR 83 at 95; [1998] HCA 11 at [44]; *Nobrega v Archdiocese of Sydney (No 2)* [1999] NSWCA 133; *Re Malley SM* [2001] WASCA 83 at [2]. The Court of Appeal indicated that an indemnity costs order will follow only from "very extreme" cases: *Air Vanuatu (Operations) Ltd v Molloy* [2004] VUCA 17; CAC 19 of 2004. A detailed history of indemnity costs and a useful list of circumstances (noting that these are not closed) which have been thought to warrant indemnity costs is contained in Colgate *Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248 at 257 (approved in New Zealand in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694).

(4) The court may order costs to be paid on an indemnity basis if the costs are:

(a) to be paid to a party who sues or is sued as a trustee; or

[15.5.7] Expectation of order This order is commonly made: *Re Bradshaw* [1902] 1 Ch 436 at 450.

(b) the costs of a proceeding brought for non-compliance with an order of the court; or

[15.5.8] General observations The court has an inherent power to prevent its processes from being abused and the corresponding power to protect their integrity once set in motion: *CSR v Cigna* (1997) 189 CLR 345 at 391; 71 ALJR 1143 at 1165; 146 ALR 402 at 432-3. Persistent non-compliance may lead to indemnity costs orders. See also subr. 1.2(2)(d).

[15.5.9] Contemnors A contemnor is usually ordered to pay costs on an indemnity basis. See generally *McIntyre v Perkes* (1988) 15 NSWLR 417 at 428.

(c) to be paid out of a fund.

[15.5.10] Expectation of order Trustees, personal representatives and mortgagees are usually entitled to their costs from the funds held or the mortgaged property. See for example *Re Buckton* [1907] 2 Ch 406 at 414. See further r. 15.14 as to trustees.

(5) The court may also order a party's costs be paid on an indemnity basis if:

[15.5.11] See also Division 3 – Costs unnecessarily incurred.

[15.5.12] Relevant considerations In exercising its discretion, the court is not confined to consideration of the conduct of the parties in the course of litigation, but may consider also previous conduct: *Harnett v Vise* (1880) 5 Ex D 307 at 312; *Bostock v Ramsey DC* [1900] 1 QB 357 at 360-1.

(a) the other party deliberately or without good cause prolonged the proceeding; or

[15.5.13] Examples See for example *FAI v Burns* (1996) 9 ANZ Ins Cas 61-384 at 77,221; *Chen v Karandonis* [2002] NSWCA 412 at [110], [134], [135]. Note also r. 1.5.

(b) the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or

[15.5.14] Meaning of "misuse" This would include, for example, when the court's process has been used for some ulterior purpose: *Packer v Meagher* [1984] 3 NSWLR 486 at 500. The initiation or continuation of any process in which there are no prospects of success may give rise to a presumption that there is an ulterior purpose even if it

cannot specifically be identified: *J-Corp v Australian Builders Union (No 2)* (1993) 46 IR 301 at 303; *Colgate-Palmolive v Cussons* (1993) 46 FCR 225 at 231; 118 ALR 248 at 255 (citing *J-Corp v Australian Builders Union (No 2)* (1993) 46 IR 301 at 303). See also *Cooper v Whittingham* (1880) 15 Ch D 501 at 504; *Fountain v International Produce Merchants* (1988) 81 ALR 397 at 401; *Penfold v Higgins* [2003] NTSC 89 at [6]. It may not be necessary to be satisfied that the process will succeed, only that there is a rational basis for the hope that it might: *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166-7; 44 ATR 315 at 325; [2000] FCA 674 at [45], [50].

(c) the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or

[15.5.15] Relevant test The test may be whether the conduct in question permits a reasonable explanation: *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861-2; [1994] 3 WLR 462 at 478. See also r. 1.5.

(d) in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.

[15.5.16] Relevant circumstances This paragraph confers a wide discretion which ought to be read in the light of r.15.5.3 and the criteria described in paragraphs (a) – (c): *Wokon v Government of Vanuatu* [2007] VUSC 115 at [8]; CC 165 of 2002 This is not to suggest that the discretion is necessarily to be confined to these criteria, nor indeed to any previously recognised categories: *NMFM v Citibank* (No 11) (2001) 109 FCR 77 at 92; 187 ALR 654 at 668; [2001] FCA 480 at [53]. Of course, some kind of delinquency must be shown (*Harrison v Schipp* (2002) 54 NSWLR 738 at 743-4) whether or not there is a lack of moral probity (*Reid Minty v Taylor* [2002] 2 All ER 150 at 156-8; [2002] 1 WLR 2800 at 2806-8).

[15.5.17] Unmeritorious serious allegations The costs of dealing with hopeless or irrelevant allegations of fraud have traditionally led to indemnity costs orders: *Andrews v Barnes* (1888) 39 Ch D 133 at 139; [1886-90] All ER 758 at 760-1; *Forester v Read* (1870) 6 LR Ch App 40 at 42-3; *Christie v Christie* (1873) 8 LR Ch App 499 at 507; *Degmam v Wright (No 2)* [1983] 2 NSWLR 354 at 358; *Reef Pacific v Price Waterhouse* [1999] SBHC 132; HC-CC 164 of 1994.

[15.5.18] Offers to settle See r.15.11.

Costs in Supreme Court

15.6 (1) The judge must make an order for costs of a proceeding in the Supreme Court.

(2) The order must be made at the time of judgment or, if that is not practicable, as soon as practicable after judgment.

[15.6.1] See further r. 15.2(1).

(3) A party may apply to the court for an order that:

(a) one party pay all the other party's costs; or

[15.6.2] "Bullock" order Where a claimant succeeds against one defendant but fails against the other on substantially the same issue, the court may order that the claimant recover from the unsuccessful defendant all the costs, including those incurred in pursuing the successful defendant if the joinder was reasonable. This is commonly known as a "Bullock order" after *Bullock v London Omnibus* [1907] 1 KB 264 at 269; [1904-7] All ER 44 at 45.

[15.6.3] "Sanderson" order The court may order that an unsuccessful defendant pay costs directly to a successful defendant. This is commonly known as a "Sanderson order" after *Sanderson v Blyth Theatre Co* [1903] 2 KB 533 at 538-9.

(b) one party pay only some of the other party's costs, either:

(i) a specific proportion of the other party's costs; or

(ii) the costs of a specific part of the proceeding; or

(iii) the costs from or up to a specific day; or

(c) the parties pay their own costs.

[15.6.4] It is difficult to see what (c) adds to r.15.1(4).

Amount of costs in Supreme Court

15.7 (1) If possible, the judge must also determine the amount of costs at the time of judgment.

[15.7.1] Summary determination A determination under this subrule is not usually the result of a process of "taxation" of costs and so the quantum can only be fixed broadly having regard to the information before the court: *Beach Petroleum v Johnson (No 2)* (1995) 57 FCR 119 at 124; 135 ALR 160 at 166; *Harrison v Schipp* (2002) 54 NSWLR 738 at 743; *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973 at [54]. Accordingly, the court should only undertake a determination under this subrule if it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available: *Cornwall v Rowan* (No 4) (2006) 244 LSJS 183; [2006] SASC 111 at [16].

(2) However, if the judge cannot do this, the judge must:

(a) ask the successful party to prepare a statement of costs, and fix a time by which this is to be done; and

[15.7.2] General observations In order to draw and justify the items of work in the statement, it is important that the lawyer keep proper records of all work done, the date on which it was done and the amount of time consumed. In the absence of proper records, the lawyer may find it difficult to justify his charges: *Abai v The State* [1998] PGNC 92. Of course, the fact that a lawyer spent a particular amount of time on a file does not necessarily mean that the court is obliged to make an award for all such time: *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999.

(b) fix a date for determining the costs.

[15.7.3] Meaning of "determine" As to the procedure involved in determining costs see [15.3.1]. A useful summary of the process and considerations involved in "taxing" (determining) a "bill of costs" (statement of costs) is to be found in *Jet Corp v Petres* (1985) 10 FCR 289 at 290-1; 64 ALR 265 at 267-8. See also *Simpsons Motor Sales [London] Ltd v Hendon Corporation* (1965) 1 WLR 112.

(3) The statement must set out:

(a) each item of work done by the lawyer, in the order in which it was done, and numbered consecutively; and

[15.7.4] Extent of detail The detail need not be so great that it may be assessed without the need for any further information (*Haigh v Ousey* (1857) 7 E & B 578 at 583; 119 ER 1360 at 1362; *Florence Investments v HG Slater* (1975) 2 NSWLR 398 at 401) but should be meaningful in the sense that it must be clear what was the relevance of each item to the proceedings.

(b) the amount claimed for each item; and

(c) the amount disbursed for each item; and

[15.7.5] Disbursements Items of expenditure (eg. court fees) which are necessary to the conduct of the case may be claimed. A distinction, sometimes fine, is to be drawn between proper disbursements and a lawyer's mere office overheads – the former are recoverable, the latter not: *Stobbart v Mocnaj* [1999] WASC 252 at [29]; *Regona v Director of Land Records* [2008] VUSC 80; CC 109 of 2007. Receipts will usually need to be shown to recover a disbursement as it must have actually been paid: *Daniel v Supenatavui Tano Island Land Tribunal* [2009] VUSC 105; CC 46 of 2006. The classical description of what constitutes an allowable disbursement is contained in *Re Remnant* [1849] 11 Beav 603; 50 ER 949 at 953-4, which continues to be frequently cited. In an endeavour to obtain a coherent statement of principle the Master of the Rolls took the advice of the Taxing Masters as to what constituted a professional disbursement. They advised "Such payments as the solicitor, in the due discharge of the duty he has undertaken, is bound to make, so long as he continues to act as solicitor, whether his client furnishes him with money for the purposes or with money on account, or not: as, for instance, fees of the officers of the court, fees of counsel, expense of witnesses; and also such payments in general business, not in suits, as the solicitor is looked upon as the person bound by custom and practice to make, as, for instance, counsel's fees on abstracts and conveyances, payments for registers in proving degree, stamp duty on conveyances and mortgages, charges of agents, stationers or printers employed by him, are by practice, and we think properly, introduced into the solicitors bill of fees and disbursements… We think also, that the question whether such payments are professional disbursements or otherwise, is not affected by the state of the cash account between the solicitor and the client; and that (for instance) counsel's fees would not the less properly be introduced into the bill of costs as a professional disbursement , because the client may have given money expressly for paying them." Having accepted their opinion, Lord Langdale MR went on to say: "And it seems to me a very reasonable and proper rule, that those payments only, which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs". See also *In re Blair & Girling* [1906] 2 KB 131.

[15.7.6] Particular disbursements Regarding travel expenses of overseas witnesses see *Vanuatu Fisaman Cooperative Marketing Consumer Society v Jed Land Holdings & Investment Ltd* [2008] VUSC 73; CC 184 of 2006. As to agent's fees see *Re Pomeroy v Tanner* [1897] 1 Ch 284. As to medical reporting expenses with a good discussion of the principles see *Woollard v Fowler* [2005] EWHC 90051 (Costs) at [15] *et seq.*

(d) the lawyer's rate of charge.

[15.7.7] Flat rates and time charging Flat rates of time charge have long been criticised in other jurisdictions and it is suggested that different rates of charge should apply to different work. See generally *NSW Crime Commission v Fleming* (1991) 24 NSWLR 116 at 143-4. Nevertheless, in *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999 (affirmed in *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999) a flat rate of VT10,000 per hour was held to be usual. No distinction appears to be drawn between lawyers of differing skill or seniority, as suggested by r.15.8(3)(a).

[15.7.8] "Unit" charging It is suggested that the widespread practice of "unit charging" whereby each task is expressed in certain units of time (and therefore subject to "rounding" up) rather than in real time is probably unacceptable as a basis for party/party assessment.

(4) The statement of costs must be filed and served on the other party within the time fixed by the judge.

[15.7.9] Manner of proceeding where party in default Where the statement is not served within time and the other party is prejudiced, there were three broad possibilities suggested in *MacDonald Holdings v Taree Holdings* [2001] EWCA Civ 312 at [17]: (1) Grant a short adjournment before proceeding and bear in mind the limited preparation

time given to the innocent party by erring on the side of lighter figures; (2) Adjourn to another day for a detailed assessment, perhaps ordering the late party to pay the costs occasioned by the adjournment; or (3) Adjourn the assessment with a direction as to filing written submissions in lieu of a further hearing. Only in cases of deliberate non-service should a party be deprived of some or all of their costs.

(5) The judge may give directions to facilitate the costs determination.

Matters judge to take into account

15.8 (1) In determining an amount of costs, the judge may consider:

(a) whether it was reasonable to carry out the work to which the costs relate; and

[15.8.1] Meaning of "reasonable" See further [15.5.1]. This is a question for the court: *Esther v Markalinga* (1993) 8 WAR 400. Even if the court accepts that time has been spent, it does not follow that all such time will be accepted as reasonable in all the circumstances: *Iauko v Vanuararoa* [2007] VUSC 70; CC 98 of 2007 at [2]. Conduct designed only to harass the other side rather than advance or resolve the case is unlikely to be thought reasonable, even if it was the product of zeal rather than any improper purpose: *Ridehalgh v Horsefield* [1994] Ch 205 at 237; [1994] 3 All ER 848 at 866; [1994] 3 WLR 462 at 482-3.

(b) what was a fair and reasonable amount of costs for the work concerned.

[15.8.2] See further [15.5.1]

(2) The judge must determine the amount of costs that, in his or her opinion, is a fair and reasonable amount.

(3) In determining what is a fair and reasonable amount of costs, the judge may have regard to:

[15.8.3] Evidence relating to "fair and reasonable" test The parties are not precluded from adducing further evidence after the hearing to address the matters below: *Computer Machinery v Dreschler* [1983] 3 All ER 153 at 158; [1983] 1 WLR 1379 at 1385.

(a) the skill, labour and responsibility shown by the party's lawyer; and

[15.8.4] Example For example in *Higgs v Camden & Islington Health Authority* [2003] EWHC 15 at [51] the judge doubled the guideline figure on the basis that the case was a heavy, difficult case run knowledgeably by an expert in that particular field.

(b) the complexity, novelty or difficulty of the proceeding; and

[15.8.5] Examples See *Inspector of Awards v London Residential Flats* (1951) 7 MCD 233; 46 MCR 58; *Howlett v Saggers* [1999] NSWSC 445 at [36].

(c) the amount of money involved; and

(d) the quality of the work done and whether the level of expertise was appropriate to the nature of the work; and

[15.8.6] Visiting counsel So-called "Rolls Royce" representation involving the use of visiting counsel (with attendant costs of travel, accommodation, etc) which could otherwise have been carried out by a local practitioner cannot be expected to be recovered in full: *Hurley v Law Council of Vanuatu* [1999] VUSC 39; CC 98 of 1999 (on appeal *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999 the Court of Appeal noted with approval the approach of courts in Papua New Guinea and Tonga but were prepared to make an allowance for foreign counsel in the exceptional circumstances of that case).

(e) where the legal services were provided; and

(f) the circumstances in which the legal services were provided; and

[15.8.7] Importance of case The importance of a case may justify a higher allowance: *Iauko v Vanuararoa* [2007] VUSC 70; CC 98 of 2007 at [3] (10% loading for urgency and importance).

(g) the time within which the work was to be done; and

[15.8.8] Urgency The urgency of a case may justify a higher allowance: *Iauko v Vanuararoa* [2007] VUSC 70; CC 98 of 2007 at [3] (10% loading for urgency and importance).

(h) the outcome of the proceedings.

[15.8.9] Measurement of success See [15.1.5] as to the measurement of success. Even where a claimant receives a substantial award, exaggeration of the claim may lead the court to deprive a claimant of a substantial amount of costs: *Telecom Vanuatu v Kalsau Langwor* [2003] VUSC 36; CC 124 of 2002; *Boblang v Lau* [2008] VUSC 59; CC 46 of 2007 at [21], [23]; *Allison v Brighton & Hove CC* [2005] EWCA Civ 548; *Jackson v Ministry of Defence* [2006] EWCA Civ 46 at [19]. In this connection, parties should be mindful 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. Where only nominal damages are recovered and the entitlement to such was never in issue, but the proceedings were mostly concerned with whether the claimant was entitled to any more, the amount of costs awarded to the claimant might be reduced: *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685 at 692.

Proceeding brought in wrong court

15.9 (1) The Supreme Court may determine lower costs where, because of the small nature or amount of the claim and of any final order made, it would have been more appropriate to sue in the Magistrates Court.

(2) Subrule (1) does not apply if the claim involves an important issue or a complex question of law.

[15.9.1] Example See for example *Howlett v Saggers* [1999] NSWSC 445 at [36].

Particular provision for costs in Magistrates Court

15.10(1) A magistrate must make an order for costs of a proceeding.

(2) The order must be made when the magistrate gives judgment.

[15.10.1] Summary assessment of costs It seems clear that the method of assessment is intended to be summary as there is no equivalent mechanism to that which is contained in subr.15.7(2).

(3) Costs of a proceeding in the Magistrates Court are to be worked out according to the appropriate scale in Schedule 2.

[15.10.2] Use of multiple scales It is not certain whether just one scale may be applied to the whole of the costs of a proceeding or if the Magistrate has the discretion to apply a different scale for different aspects of the proceedings if justice requires: see for example *Armstrong v Boulton* [1990] VR 215.

(4) In deciding which is the appropriate scale, the magistrate is to take into account:

(a) the amount recovered or claimed; and

(b) the complexity of the case; and

(c) the length of the proceeding; and

(d) any other relevant matter.

[15.10.2] See generally the commentary to sub r.15.8(3).

Court to take into account offers to settle

15.11 When considering the question of costs, the court must take into account any offer to settle that was rejected.

[15.11.1] How offers to settle to be taken into account This rule should be read together with r.9.7(10), both of which offer guidance as to the exercise of the discretion: *Hack v Fordham* [2009] VUCA 6; CAC 30 of 2008 at [27]. Consistently with subr. 1.4(2)(e) the court ought to ensure that parties give serious consideration to reasonable offers of settlement: see for example *Health Waikato v Elmsly* [2004] NZCA 35 at [53]. Accordingly, the unreasonable refusal of an offer of compromise may lead to a successful litigant being deprived of its costs (at least from the date of the offer) unless that party's success is greater than the offer: *Calderbank v Calderbank* [1975] 3 All ER 333 at 343; (1976) Fam 93 at 106; [1975] 3 WLR 586 at 596-7; *Cutts v Head* [1984] Ch 290 at 312, 315; [1984] 1 All ER 597 at 610, 612; [1984] 2 WLR 349 at 365, 368; *Corby DC v Holst* (1985) 1 WLR 427 at 433**;** [1985] 1 All ER 321 at 326. Such a party may not only lose their costs but might be made to pay the costs of the other party. The imprudent refusal of a reasonable offer may also sometimes lead to indemnity costs: *Baillieu Knight Frank v Ted Manny Real Estate* (1991) 30 NSWLR 359 at 362; *Australian Federation of Consumer Organisations v Tobacco Institute* (1991) 100 ALR 568 at 571; *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 725; *Colgate-Palmolive v Cussons* (1993) 46 FCR 225 at 231; 118 ALR 248 at 255. The court must, however consider all of the circumstances: *Coshott v Learoyd* [1999] FCA 276 at [48]; *Chapman v Wickman* [2000] FCA 536. In Vanuatu the costs consequences are less predictable – see for example *Vanuatu Fisaman Cooperative Marketing Consumer Society v Jed Land Holdings & Investment Ltd* [2008] VUSC 73; CC 184 of 2006.

[15.11.2] Measurement of success by reference to offers to settle In considering the relationship between the extent of success and the terms of any rejected offer there may be difficulties where non-money components of the final result and the offer are to be compared. The court will look at the judgment overall and may have regard to non-money elements: *Timms v Clift* [1998] 2 Qd R 100 at 107; *Stambulich v Ekamper* (2001) 48 ATR 159 at 160, 162, 171; [2001] WASCA 283 at [2], [12], [97]; *Keith Henry Burns v A-G* [2003] NZCA 130 at [21], [22]; *Jones v Associated Newspapers Ltd* [2007] EWHC 1489; [2008] 1 All ER 240 at [14] – [20]. The interest which accrues to an award after the making of an offer must be discounted to see whether the offer has been beaten at trial: *Blackburn v Enterprise UK* [2004] EWCA Civ 1109. That an offer

turns out to be only slightly more than what was awarded is not a good reason for ignoring the offer, but the court may consider all the circumstances, including the final margin: *Carver v BAA plc* [2008] EWCA Civ 412 at [22] *et seq*. In such a case where the margin is small, the court may take into account the offer but award less than full costs: *Hack v Fordham* [2009] VUCA 6; CAC 30 of 2008 at [27].

[15.11.3] "Without prejudice" offers An offer which is expressed to be "without prejudice" is privileged and will not be considered. If intended to be raised in relation to the question of costs, the letter ought to be marked "without prejudice except as to costs" (or some similar express reservation of the right to use the offer in relation to costs): *Cutts v Head* [1984] Ch 290 at 312, 315; [1984] 1 All ER 597 at 610, 612; [1984] 2 WLR 349 at 365, 368; *Fresh Prepared v De Jong* [2006] NZHC 947 at [21].

[15.11.4] Offer should contain explanation An offer will secure for the offeror the maximum advantage if it sets out the reasoning behind the offer, including any relevant calculations and the reasons why the offeree might fail: *Dukemaster v Bluehive* [2003] FCAFC 1 at [8]. An offer also should include some detail as to costs: *Allan Clifford Binnie v Pacific Health* [2003] NZCA 69 at [30].

[15.11.5] Offer must be unequivocal A lawyer's letter to the effect that the lawyer was *prepared to advise* the party to settle on certain terms should not generate any costs advantage because the party may not have heeded the advice: *Trotter v Maclean* (1879) 13 Ch D 574 at 588.

Costs of amendments

15.12 A party who amends a document must pay the costs arising out of the amendment, unless:

(a) the amendment was made because of another party's amendment or default; and

(b) the court orders another party to pay them;

[15.12.1] Form of order It is usual for a party seeking an indulgence, such as leave to amend, to pay "costs thrown away by the amendment and any consequential amendments" by the other party: *Golski v Kirk* (1987) 72 ALR 443 at 457; 14 FCR 143 at 157. The costs of any application to amend should also usually follow this rule unless the other side resists the amendment unsuccessfully in which case the court may, depending on the circumstances, order the unsuccessful party to pay the costs.

[15.12.2] General observation It is not uncommon for judges to decline to follow this rule, without reasons being given, despite its mandatory terms.

[15.12.3] See further subr. 4.11(3)(a).

Extending or shortening time

15.13 A party who applies to extend or shorten a time set under these Rules must pay the costs of the application.

[15.13.1] See generally r.18.1 and *Golski v Kirk* (1987) 72 ALR 443 at 457; 14 FCR 143 at 157 as to such indulgences.

Trustee's Costs

15.14 (1) This rule applies to a party who sues or is sued as trustee.

(2) The trustee is entitled to have the costs that are not paid by someone else paid out of the funds held by the trustee, unless the court orders otherwise.

[15.14.1] History and convention The subrule is based on the principle in *Re Grimthorpe* [1958] Ch 615 at 623; [1958] 1 WLR 381 at 386; [1958] 1 All ER 765 at 769. Previously,

the right of trustees to their costs was a matter of contract between the trustee and beneficiary and not within the discretion of the court: *Turner v Hancock* (1882) 20 Ch D 303 at 306. Provided that a trustee is not guilty of misconduct, the costs will be paid out of trust funds: *Lo Po v Lo* [1997] VUCA 4; CAC 9 of 1996.

Costs of counterclaim

15.15 A party who is successful on a counterclaim may be awarded the costs of the counterclaim although the party was unsuccessful in the proceedings overall.

[15.15.1] Defendant succeeds in counterclaim or set-off Where the defendant admits the claim and succeeds on the counterclaim, the defendant is entitled to the costs of the counterclaim and the claimant is not entitled to any costs subsequent to the admission: *N V Amsterdamsche v H & H* [1940] 1 All ER 587 at 589-90. Similarly, when a defendant succeeds in a set off equal to the claimant's claim, the costs of the proceedings ought to go to the defendant: *Stooke v Taylor* (1880) 5 QBD 569 at 582-3.

[15.15.2] Claim and counterclaim dismissed Where the claim and counterclaim are both dismissed with costs the usual rule is that the claim should be treated as if it stood alone and the counterclaim should be assessed to the extent that it increased the costs of the proceedings: *Saner v Bilton* (1879) 11 Ch D 416 at 418-9; *Wilson v Walters* [1926] All ER 412 at 414-6. *Smith v Madden* (1946) 73 CLR 129 at 133. The same principle applies when both the claim and the counterclaim succeed: *Medway Oil v Continental Contractors* [1929] AC 88 at 105.

Costs of determination

15.16 The costs of determining costs of a proceeding form part of the costs of the proceeding.

[15.16.1] Excessive claims for costs Where the statement of costs is found, upon determination, to be excessive, it may be appropriate for the costs of the determination to go against the party making the claim in order to discourage inflated claims: *Re Grundy, Kershaw & Co* (1881) 17 Ch D 108 at 114-5.

Division 2 – Security for costs

Security for costs ordinarily only in Supreme Court

15.17 An order requiring that security be given for the costs of a proceeding may not be made in a proceeding in the Magistrates Court unless:

(a) the proceeding is to set aside a default judgment; or

(b) the claimant is ordinarily resident outside Vanuatu.

[15.17.1] See r. 15.19(d).

Security for costs

E *CPR* r25.12

15.18(1) On application by a defendant, the court may order the claimant to give the security the court considers appropriate for the defendant's costs of the proceeding.

[15.18.1] Source of power The power to order security for costs derives from: (1) This rule; (2) The inherent jurisdiction of the court; and (3) As to companies only, s.403, *Companies* [Cap 191]. Accordingly, the court's full power is significantly wider than is contained here: *Rajski v Computer Manufacture* [1982] 2 NSWLR 443 at 445-50.

[15.18.2] By whom application may be made Questions arise as to whether other parties (not strictly "claimants") can seek security. In *Duffy v Joli* [2007] VUSC 52; CC 8 of 2007 at [7] Tuohy J said of this Part that it "provide[s] that the Court may order a claimant to give security for defendant's costs. I think that giving the rules proper purposive interpretation, claimant can include an appellant and defendant can include a respondent, which is strictly what the parties are in this case". No reference was made to the earlier case of *Narai v Foto* [2006] VUSC 77; CC 175 of 2004 at [19] *et seq* in which His Lordship adopted a much stricter reading of this rule in an application for security in connection with an application for punishment for contempt. It is difficult to reconcile the two cases. It may be that *Narai* is distinguishable on the basis suggested in [20], *viz*., that it turned on a rejection of the attempt to fragment proceedings into separate pieces for the purposes of security for costs. Neither decision considered the inherent jurisdiction or the definition of "claimant" in Part 20, which supports a strict reading. It is respectfully suggested that a defendant/counterclaimant and any party may be ordered to give security in the inherent jurisdiction, if not under this rule (see for example *Buckley v Bennell Design* (1974) 1 ACLR 301 at 306) and that, despite *dicta* in *Narai* as to the limitation of interlocutory options, the overriding objective is best served by considering each application on its merits.

[15.18.3] Evidentiary burden The applicant will bear the evidentiary burden of leading evidence to establish a *prima facie* entitlement to such an order and as to the amount. Normally, the asserting party bears the onus: *Scott Fell v Lloyd* (1911) 13 CLR 230 at 241*; Bankinvest v Seabrook* (1988) 14 NSWLR 711 at 717; 92 FLR 153 at 157; 90 ALR 407 at 412; *Idoport v NAB* [2001] NSWSC 744 at [60]. In *Warren Mitchell v AMOU* (1993) 12 ACSR 1 at 5 the word "credible" in the Australian equivalent to s. 403 of the *Companies Act* was said to suggest that an evidentiary burden is undertaken by the party seeking the order who must show that the material before the court is sufficiently persuasive to permit a rational belief to be formed that the corporation would be unable to pay the costs.

[15.18.4] Constitutional implications The suggestion that the imposition of security was a fetter on the constitutional guarantee of access to justice was rejected in *Awa v Colmar* [2009] VUCA 37; CAC 7 of 2009 on the basis that the power of the Court to order security for costs is a power intended to protect the rights of the other parties to the litigation. The discretion to award security for costs recognised by the Rules of Court is a discretion to be exercised fairly having regard to the competing interests of the parties in a case. So long as the discretion is properly exercised having regard to those interests, the order will not be inconsistent with the right to protection of the law.

(2) The application must be made orally, unless the complexity of the case requires a written application.

[15.18.5] Prior demand It is suggested that, time permitting, a demand for security should be made before any application.

[15.18.6] Calculation of amount of security sought It will often be necessary for the applicant to give adequate information by sworn statement as to the amount of security: *Procon v Provincial Building* [1984] 2 All ER 368 at 376; [1984] 1 WLR 557 at 567. It is suggested that a draft statement of costs be prepared and annexed to the sworn statement.

[15.18.7] When application should be made The application may be made at any time but should be made promptly: *Grant v The Banque Franco-Egyptienne* (1876) 1 CPD 143 at 144*; Brundza v Robbie (No 2)* (1952) 88 CLR 171 at 175; *Smail v Burton* (1975) VR 776 at 777; 1 ACLR 74; *Caruso v Portec* (1984) 8 ACLR 818 at 820; [1984] 1 FCR 311 at 313; *Southern Cross v Fire & All Risks Insurance* (1985) 1 NSWLR 114 at 123; *Bryan E. Fencott v Eretta* (1987) 16 FCR 497 at 514.

When court may order security for costs

15.19 The court may order a claimant to give security for costs only if the court is satisfied that:

[15.19.1] Meaning of "claimant" The reference to the claimant may not be strictly interpreted and might include any party making a claim for relief in any proceedings: *Buckley v Bennell Design* (1974) 1 ACLR 301 at 306, but see the limited definition of "claimant" in Part 20 which suggests otherwise.

[15.19.2] Poverty no bar to litigation The criteria below reflect the principle that poverty is no bar to litigation: *Cowell v Taylor* (1885) 31 Ch D 34 at 38. Note also art.5(1)(d), *Constitution*. In *Lawrence v Stevens* [2008] VUSC 66; CC 55 of 2007 at [6] Tuohy J referred, without citation, to "old but good authority" for this principle.

E *CPR* r25.13(2)(c)

(a) the claimant is a body corporate and there is reason to believe it will not be able to pay the defendant's costs if ordered to pay them; or

[15.19.2] Company in liquidation The fact that a company is in liquidation is prima facie evidence that it will be unable to pay costs unless evidence to the contrary is given: *Northampton Coal v Midland Waggon* (1878) 7 Ch D 500 at 503; *Pure Spirit v Fowler* (1890) 25 QBD 235 at 236; *Tricorp v Deputy Commissioner of Taxation* (1992) 10 ACLC 474 at 475; (1992) 6 ACSR 706 at 707. By making this a basis for the order of security, parliament must have envisaged that the order might be made in respect of a claimant company that would find difficulty in providing security: *Pearson v Naydler* [1977] 3 All ER 531 at 536-7; [1977] 1 WLR 899 at 906.

E *CPR* r25.13(2)(e)

(b) the claimant's address is not stated in the claim, or it is not stated correctly, unless there is reason to believe this was done without intention to deceive; or

[15.19.3] See generally *Knight v Ponsonby* [1925] 1 KB 545 at 552.

E *CPR* r25.13(2)(d)

(c) the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or

[15.19.4] See generally *Knight v Ponsonby* [1925] 1 KB 545 at 552.

E *CPR* r25.13(2)(a)

(d) the claimant is ordinarily resident outside Vanuatu; or

[15.19.5] Meaning of "ordinarily resident" As to when a claimant is "ordinarily resident" outside Vanuatu see *Appah v Monseu* [1967] 2 All ER 583 at 584; [1967] 1 WLR 893 at 895-6. The question is one of fact and degree: *Levene v IRC* [1928] AC 217 at 225; [1928] All ER 746 at 750.

[15.19.6] Foreign claimant with local assets If a foreign claimant satisfies the court that there are assets in the jurisdiction that will remain available to satisfy any costs order, no security should be ordered: *Ebrard v Gassier* (1884) 28 Ch D 232 at 235).

[15.19.7] Foreign companies The rules also apply to foreign companies: *Re Appollinaris Co's TM* [1891] 1 Ch 1 at 3; *Farmalita v Delta West* (1994) 28 IPR 336.

(e) the claimant is about to depart Vanuatu and there is reason to believe the claimant has insufficient fixed property in Vanuatu available for enforcement to pay the defendant's costs if ordered to pay them; or

(f) the justice of the case requires the making of the order.

[15.19.8] Examples See *Awa v Colmar* [2009] VUCA 37; CAC 7 of 2009 in which security was ordered as a condition of an adjournment. See *Duke de Montellano v Christin* (1816) 5 M & S 503 at 503; 105 ER 1135 at 1135 in relation to the position of an ambassador.

What court must consider

15.20 In deciding whether to make an order, the court may have regard to any of the following matters:

[15.20.1] Relevant considerations The list below is not exhaustive: *Sir Lindsay Parkinson v Triplan* [1973] QB 609 at 626; [1973] 2 All ER 273 at 285; [1973] 2 WLR 632 at 646; *Gentry Bros v Wilson Brown* (1992) 8 ACSR 405 at 415; [1992] ATPR 40,503; *McLachlan v MEL* (2002) 16 PRNZ 747 at [13] – [16]. The court also has an inherent jurisdiction to order security: *J H Billington v Billington* [1907] 2 KB 106 at 109-10. See further [15.18.1]. In exercising the discretion the court must strike a balance between ensuring that adequate and fair protection is provided to the defendant, and avoiding injustice to an impecunious claimant by unnecessarily shutting it out or prejudicing it in the conduct of the proceedings: *Rosenfield v Bain* (1988) 14 ACLR 467 at 470.

(a) the prospects of success of the proceeding;

[15.20.2] How prospects to be ascertained This reverses the rule in *Crozat v Brogden* [1894] 2 QB 30 at 36. The court should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure: *Porzelack v Porzelack* [1987] 1 All ER 1074 at 1077; [1987] 1 WLR 420 at 423. It is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim: *Kearey v Tarmac* [1995] 3 All ER 534 at 539 *et seq*.

(b) whether the proceeding is genuine;

[15.20.3] How genuineness to be ascertained As a general rule, where a claim is regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is genuine with a reasonable prospect of success: *Bryan E. Fencott v Eretta* (1987) 16 FCR 497 at 514.

(c) for rule 15.19(a), the corporation's finances;

[15.20.4] Possibility of finance being raised This enquiry should also include whether the company might be able to raise sufficient finances.

(d) whether the claimant's lack of means is because of the defendant's conduct;

[15.20.5] Where lack of means caused by defendant The court will be concerned to prevent the power to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly if the defendant's conduct might in itself have been a material cause of the claimant's impecuniosity: *Farrer v Lacy* (1885) 28 Ch D 482 at 485. The claimant bears the evidentiary onus on this issue: *BPM v HPM* (1996) 131 FLR 339 at 345.

(e) whether the order would be oppressive or would stifle the proceeding;

[15.20.6] General observations This may be a powerful factor in the claimant's favour: *Yandil v Insurance Co of North America* (1985) 3 ACLC 542 at 545. The possibility or probability that the company will be deterred from pursuing its claim by an order for security is not, however, without more, a sufficient reason for not ordering security: *Okotcha v Voest* [1993] BCLC 474 at 479; *Kearey v Tarmac* [1995] 3 All ER 534 at 539 et seq. See further [15.19.3].

[15.20.7] Effect of delay Delay in applying may lead to oppression by generating hardship in the future conduct of the action, especially where the action is soon to be tried: *Aspendale v W J Drever* (1983) 7 ACLR 937 at 942; 1 ACLC 941. See further [15.18.7]. Of course, delay will operate oppressively in some cases and not in others: See for example *Lindsay v Hurd* (1874) LR 5 PC 221 at 240; *Crypta v Svelte* (1995) 19 ACSR 68 at 71. As a general rule, the further a claimant has proceeded in an action and the greater the costs incurred, the more difficult it will be for an applicant to persuade the court that the order would not be oppressive: *Bryan E. Fencott v Eretta* (1987) 16 FCR 497 at 514.

[15.20.8] Inequality of power The court will be concerned to prevent the power to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly if the defendant's conduct might in itself have been a material cause of the claimant's impecuniosity: *Farrer v Lacy* (1885) 28 Ch D 482 at 485; *M A Productions v Austarama* (1982) 7 ACLR 97 at 100; *Yandil v Insurance Co of North America* (1985) 3 ACLC 542 at 545. But the court will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company: *Pearson v Naydler* [1977] 3 All ER 531 at 536-537; [1977] 1 WLR 899 at 906.

[15.20.9] Evidence of "stifling" effect Before the court refuses to order security under this ground, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence: *Trident v Manchester Ship Canal* [1990] BCLC 263; [1990] BCC 694. Often, however, evidence will be required: *Tricorp v Deputy Commissioner of Taxation* (1992) 10 ACLC 474 at 476; (1992) 6 ACSR 706 at 708; *Seltsam v McGuiness ; James Hardie v McGuiness* (2000) 49 NSWLR 262 at 276; *Carr v Baker* (1936) 36 SR (NSW) 301 at 306; *Caswell v Powell Duffryn* [1940] AC 152 at 169-170; [1939] 3 All ER 722 at 733-4; *Jones v Great Western Rwy* (1930) 144 LT 194 at 202.

(f) whether the proceeding involves a matter of public importance;

[15.20.10] Example See generally *Ratepayers & Residents v Auckland CC* [1986] 1 NZLR 746 at 750; *Webster v Lampard* (1993) 112 ALR 174 at 175-6.

(g) whether the claimant's delay in starting the proceeding has prejudiced the defendant;

(h) the costs of the proceeding.

[15.20.11] Ascertainment of quantum of costs The quantum of costs likely to be incurred by the defendant is a matter which may require detailed consideration. The judge may rely on any evidence put before him (see [15.18.2]) and may also rely on his own experience: *Remm v Allco* (1992) 57 SASR 180 at 188, 191-2.

[15.20.12] Security may include past and future costs Security for costs is not confined to future costs and may apply to all costs incurred or to be incurred: *Brocklebank v King's Lynn Steamship* (1878) 3 CPD 365 at 366-7; *Massey v Allen* (1879) 12 Ch D 807 at 811; *Procon v Provincial Building Co* [1984] 2 All ER 368 at 379; [1984] 1 WLR 557 at 571.

[15.20.13] Security not a complete indemnity The amount of security will not represent a complete indemnity for costs: *Brundza v Robbie (No 2)* (1952) 88 CLR 171 at 175; *Allstate Life Insurance v ANZ (No 19)* (1995) 134 ALR 187 at 200-1.

How security is to be given

E *CPR* r25.12(3)

15.21(1) If the court orders the claimant to give security for costs, the court must also order:

(a) the form of the security; and

[15.21.1] Manner in which security to be given This is flexible and ought to take into account the circumstances of the claimant. The most common form of security is the payment of a lump sum into court, but it may be appropriate that security be given in the form of a bond. See for example *Green v Australian Industrial Investment* (1989) 90 ALR 500 at 514 (lodgment of share certificates allotted to the overseas claimant with local lawyers).

[15.21.2] Consideration of amount of security The court will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount: *Roburn v William Irwin* [1991] BCC 726. See also [15.20.13].

(b) when it is to be given; and

[15.21.3] Progressive orders Where there is difficulty estimating the likely costs, orders for security should be made progressively as the action progresses: See for example *APEP v Smalley* (1983) 8 ACLR 260 at 264.

(c) any conditions the court thinks appropriate for giving the security.

(2) As soon as practicable after the security is given, the claimant must give the defendant written notice of when and how security was given.

Suspension or dismissal of proceedings

15.22(1) If the court orders the claimant to give security for costs, any time set for another party to do anything in the proceedings does not run until security is given.

(2) If security is not given:

(a) the proceeding is suspended as far as things to be done by the claimant are concerned; and

(b) the defendant may apply to have the proceedings dismissed; and

[15.25.1] Example See *La Grange v McAndrew* (1879) 4 QBD 210 at 211.

(c) if the defendant does, the court may order all or part of the proceeding be dismissed.

Setting aside or varying order

15.23 The court may set aside or vary an order for security for costs if the court is satisfied that:

(a) the security is no longer necessary; or

(b) there are other special circumstances.

[15.23.1] Material change in circumstances A material change in circumstances will usually need to be shown before the court will revisit its order: *Premier v Sanderson* (1995) 16 ACSR 304; *Truth About Motorways v Macquarie* [2001] FCA 1603 at [11]; *Tasman Charters v Kamphuis* [2006] NZHC 64 at [9].

Finalising the security

15.24 The security must be discharged:

(a) after the costs have been paid; or

(b) if judgment is given and the party who gave the security is not required to pay all or part of the costs; or

(c) if the court orders the security be discharged; or

(d) if the claimant entitled to the benefit of the security consents.

[15.24.1] Typographical error This should perhaps refer to "party" entitled to the benefit of the security…

Division 3 –Costs unnecessarily incurred

Costs for time wasted

15.25(1) If:

(a) a party does not appear at a conference or hearing when the party was given notice of the date and time; or

[15.25.1] Example See *Solomon Bros v Ginbey* [1998] WASC 285 (inadvertent failure to attend conference due to failure to enter in diary).

(b) a party has not filed and served on time a document that the party was required by the court to file and serve; or

[15.25.2] Example See *Whyte v Brosch* (1998) 45 NSWLR 354 at 355 (failure to file submissions leads to adjournment).

(c) a party's actions, or failure to act, have otherwise led to the time of the court or other parties being wasted;

[15.25.3] Requirement of impropriety The actions or inactions in question must be unreasonable or improper in some way, not merely wrong: *Re J* [1997] EWCA 1215.

and costs were incurred unnecessarily by another party, the court may order costs against the first party for the time wasted by the other party.

[15.25.4] Necessity of actual waste The court has jurisdiction to make the order if there has actually been a waste of costs and only to the extent of that waste: *Ridehalgh v Horsefield* [1994] Ch 205 at 237; [1994] 3 All ER 848 at 866; [1994] 3 WLR 462 at 482-3. *Wokon v Government of Vanuatu* [2007] VUSC 115 at [11]; CC 165 of 2002.

(2) The order may be for costs of the whole or a part of a proceeding.

(3) The order may be made at a conference or hearing.

(4) Any other party may apply for the order.

[15.25.5] When application to be made The rule permits the application to be made at any time, however it has been suggested that, in general, such applications ought to be made after the proceedings have been tried: *Filmlab Systems Int'l v Pennington*, The Times, 2 July 1993.

(5) If the court is satisfied that the unnecessary costs were incurred because of conduct by the party's lawyer, the court may order the costs to be paid by the lawyer personally.

[15.25.6] See [15.25.4].

[15.25.7] Unmeritorious arguments It has been said to be "a dangerous thing" to impose costs personally on counsel just because they advance an "unrealistic position" on behalf of clients *Wokon v Government of Vanuatu* [2007] VUSC 115 at [12]; CC 165 of 2002. That case involved an argument as to the interpretation of costs orders which were described as "ignoring context and common sense" but nevertheless "arguable on a narrow and literal meaning". Other jurisdictions have not been quite so coy: See for example *Levick v DCT* [2000] FCA 674 at [45]. [50]; (2000) 102 FCR 155 (not necessary that lawyer expects argument to succeed, but must be satisfied there is a rational basis on which they might).

(6) The costs are to be paid within the period the court orders, being not less than 7 days.

(7) If the costs are not paid within that period, or another period that the court fixes, the court may order that the proceeding, or a part of the proceeding, be struck out.

Costs payable by lawyer for wasted proceeding

15.26(1) The court may order that the costs of the whole or a part of a proceeding be paid by a party's lawyer personally if the party brings a proceeding that:

[15.26.1] Continuation of proceedings after lack of merit apparent The rules do not address the continuation of proceedings which, in the light of information not held at the start, subsequently appear obviously hopeless: see for example *Edwards v Edwards* [1958] P 235 at 252; [1958] 2 All ER 179 at 189; [1958] 2 WLR 956 at 968; *Shaw v Vauxhall Motors* [1974] 2 All ER 1185 at 1189; [1974] 1 WLR 1035 at 1040.

(a) has no prospect of success, is vexatious or mischievous or is otherwise lacking in legal merit; and

[15.26.2] Insufficiency of mere failure The failure of the litigation is not, of itself, enough; there must be a serious failure to give reasonable attention to the relevant law and facts: *Da Sousa v Minister for Immigration* (1993) 114 ALR 708 at 712-3; 41 FCR 544 at 547-8.

[15.26.3] Likelihood of success not necessary It may not be necessary for there to be a likelihood of success, only that there be a rational basis upon which the argument might succeed: *Levick v Commissioner of Taxation* (2000) 102 FCR 155 at 166-7; 44 ATR 315 at 325; [2000] FCA 674 at [45], [50]; *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861-2; [1994] 3 WLR 462 at 478; *Re J* [1997] EWCA 1215.

(b) a reasonably competent lawyer would have advised the party not to bring the proceeding.

[15.26.4] Meaning of "reasonably competent" Reasonable competence refers to the standards ordinarily to be expected from the profession: *Ridehalgh v Horsefield* [1994] Ch 205 at 232; [1994] 3 All ER 848 at 861-2; [1994] 3 WLR 462 at 478.

(2) The court may order that the costs of the whole or a part of a proceeding be paid by a party's lawyer personally if the court is satisfied that the cost of the proceedings were increased because the lawyer:

[15.26.5] General observations This subrule is confusing when compared with subr. 15.25(1). The latter rule refers to costs which are "wasted" by the conduct therein described whereas the present rule refers to costs having been "increased" by very similar conduct. It is suggested that the material distinction between "wasting" costs and "increasing" costs is wafer thin. See generally the commentary in relation to subr. 15.25(1).

(a) did not appear when required to; or

[15.25.6] Example See *Solomon Bros v Ginbey* [1998] WASC 285 (inadvertent failure to attend conference due to failure to enter in diary).

(b) was not ready to proceed or otherwise wasted the time of the court; or

(c) incurred unnecessary expense for the other party.

[15.26.7] See [15.25.4].

(3) The court must not make an order for costs against a lawyer personally without giving the lawyer an opportunity to be heard.

[15.26.8] What information should be given to lawyer The lawyer should clearly be told what is said to have been done wrong: *Ridehalgh v Horsefield* [1994] Ch 205 at 238; [1994] 3 All ER 848 at 867; [1994] 3 WLR 462 at 484.

Application for costs against lawyer

15.27(1) A party may apply for an order for costs against a lawyer personally under rule 15.26.

[15.27.1] General observations The omission of a reference here to subr. 15.25(5) is curious and probably unintentional. Presumably an application under that subrule is to be made in the same way as a general application.

(2) The application must:

(a) set out the reasons why a costs order is being applied for; and

[15.27.2] See [15.26.8].

[15.27.3] Legal professional privilege There may be situations in which the lawyer cannot, due to legal professional privilege, give a good answer to the allegations. In such a case the court should not make an order unless satisfied that there is nothing the lawyer could say if not precluded and that it is fair to make the order in all the circumstances: *Medcalf v Mardell* [2003] 1 AC 120 at 134, 140, 151; [2002] 3 All ER 721 at 733, 738, 748; [2002] 3 WLR 172 at 184, 189, 200; [2002] UKHL 27 at [23], [46], [75].

(b) fix a date, being not sooner than 14 days, for the lawyer to file a sworn statement in answer to the application; and

(c) fix a date for hearing the application.

(3) A copy of the application, and notice of the hearing date, must be served on the lawyer concerned.

(4) The application is to be dealt with by the trial judge, if practicable.

[15.27.2] Exception The application should be made to another judge only in exceptional circumstances: *Bahai v Rashidian* [1985] 3 All ER 385 at 390-1; [1985] 1 WLR 1337 at 1345-6.

Order for wasted costs

15.28(1) If the court is satisfied that the circumstances in subrule 15.26(1) or (2) apply, the court may order that the costs be paid by the lawyer personally.

[15.28.1] General observations It is not clear what this subrule adds to subr. 15.26(1) or (2) (or, for that matter, to subr. 15.27(1)).

(2) The order is enforceable under Part 14 as if it were a money order within the meaning of that Part.

[15.28.2] General observations As this subrule seems only to apply to costs orders made under r.15.26 there is, perhaps due to inadvertence, no guidance as to how an order under subr. 15.28(5) is to be enforced.