

## PARTICULAR PROCEEDINGS

### *Division 1 – Introductory*

#### Application of Part 16

##### 16.1 (1) This part applies as follows:

- (a) Division 2 (dealing with claims for release), Division 3 (dealing with accounts and inquiries) and Division 8 (dealing with customary land) apply only to the Supreme Court;
- (b) Division 4 (dealing with domestic violence protection orders), Division 5 (dealing with civil claims made in criminal proceedings), Division 6 (dealing with referring matters from the Magistrates Court to the Supreme Court) and Division 7 (dealing with interpleader) apply in the Magistrates Court and the Supreme Court;
- (c) Division 9 (dealing with appeal from Magistrates Courts) apply only to the Supreme Court;
- (d) Division 10 (dealing with appeal from Island Courts) apply in the Magistrates Court and the Supreme Court.

#### Application of the rest of the rest of these Rules to a proceeding under Part 16

##### 16.2 (1) The rest of these Rules apply to a proceeding under this Part subject to the rules in this Part.

### *Division 2 – Claims for Release (Habeas Corpus)*

#### Definitions for this Division

##### 16.3 In this Division:

**“claim for release” (formerly known as a writ of habeas corpus) means a claim for the release of a person who is being held under unlawful restraint;**

[16.3.1] Full historical name of writ There are a number of ancient “habeas corpus” writs. The full original name of the writ contemplated by this Division is “*habeas corpus ad subjiciendum*”. This was the most common form of habeas corpus writ and its name literally means “you should have the body to submit”.

#### Claim for release (habeas corpus)

[16.4.1] History and legal foundation The writ probably existed at common law prior to *Magna Carta*, ch.29 of which provides: “No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.” Although the import of this provision is

chiefly sentimental and the rights to which it relates are now firmly part of the common law, it has never been repealed and is probably part of the inherited law of Vanuatu pursuant to art.95(2) of the *Constitution*. In any event, there is clearly a sufficient common law basis.

**16.4 (1) A person seeking the release of a person who is held under unlawful restraint may file a claim claiming that the person be released.**

[16.4.2] **Function of claim** The claim tests the lawfulness of the restraint, not whether the person held is guilty of an offence nor the merits of the detention otherwise: *R v Brixton Prison, ex parte Armah* [1968] AC 192 at 230; [1966] 3 All ER 177 at 184; [1966] 3 WLR 828 at 838. However, even an order for detention that is technically good on its face can be vitiated if there is some misuse of power or bad faith or similar (*R v Brixton Prison, ex parte Sarno* (1916) 2 KB 742 at 749; *R v Brixton Prison, ex parte Soblen* [1963] 2 QB 243 at 281, 315; [1962] 3 All ER 641 at 657, 668; [1962] 3 WLR 1154 at 1174-5, 1192) or if there was no evidence upon which the detention could reasonably have been based (*R v Home Department, ex parte Iqbal* [1979] 1 All ER 675 at 684; [1978] 3 WLR 884 at 894; *Zamir v Home Department* [1980] AC 930 at 949; (1980) 2 All ER 768 at 772; [1980] 3 WLR 249 at 255). The writ was not available to persons convicted of criminal charges as a means of appeal against conviction or sentence.

[16.4.3] **Concept of restraint** There is no definition of "restraint" which would appear to be a wider concept than actual physical custody: *R v Home Affairs, ex parte O'Brien* (1923) 2 KB 361 at 398-9. Mere obstruction may not be sufficient: *Bird v Jones* (1845) 115 ER 668 at 669. On the other hand, the existence of some element of freedom of movement is not decisive of a lack of restraint if it is in fact illusory: See the discussion in *Victorian CCL v Minister for Immigration* (2001) 110 FCR 452; (2001) 182 ALR 617; (2001) 64 ALD 67; [2002] 1 LRC 189; [2001] FCA 1297 at [57] – [87] and the authorities cited therein.

**(2) The claim must name as defendant the person who, to the best of the claimant's knowledge, is responsible for holding the first person.**

**(3) A claim may be made:**

- (a) by the person being held or by someone else on his or behalf; and**
- (b) without notice being given to anyone.**

[16.4.4] **Ex parte procedure** The original English procedure was to make an *ex parte* application to make out a prima facie case for the issue of a writ. The court would then make an *order nisi* for the issue of the writ which would be served. The writ required the respondent to bring the detainee to court and show cause why the detention is lawful. There followed a substantive hearing during which the lawfulness of detention was ruled upon. If it was found to be unlawful, the order nisi would be made absolute. It was always possible, however, for the court to grant relief *ex parte* in a clear case. The simplified procedure in this Division formalises this option.

**(4) The claim must:**

- (a) set out the grounds for making the claim; and**
- (b) have with it a sworn statement in support of the claim; and**
- (c) be in Form 28.**

**(5) The sworn statement may:**

- (a) be made by the person being held or by another person; and
- (b) contain statements based on information and belief if it also states the sources of the information and the grounds for the belief.

### Hearing of claim

#### 16.5 (1) After the claim and sworn statement have been filed:

- (a) the Registrar must immediately tell a judge about the claim; and
- (b) the judge must hold a hearing as soon as practicable.

[16.5.1] Claim during court vacation A person wrongfully imprisoned may have justice for the liberty of his person, as well in the vacation time, as in the term: *Crowley's Case* (1818) 2 Swan 1 at 48; 36 ER 514 at 526 cited in *Re N (Infants)* [1967] 1 Ch 512 at 526; [1967] 2 WLR 691 at 697; [1967] 1 All ER 161 at 166. Coke referred to habeas corpus as *festinum remedium* ("a hasty remedy"): *Cox v Hakes* (1890) 15 AC 506 at 514-5. As to priority of listing claims for release see *R v Home Department, ex parte Cheblak* [1991] 1 WLR 890 at 894; [1991] 2 All ER 319 at 322.

#### (2) At the hearing, the judge must consider the claim and sworn statement and may:

- (a) order the defendant to release the person being held; or

[16.5.2] No re-arrest The person being held cannot then be re-arrested on substantially the same charges: *A-G of Hong Kong v Kwok a Sing* (1873) LR 5 PC 179 at 202; *R v Brixton Prison, ex parte Stallman* [1912] 3 KB 424 at 442-3; [1911-3] All ER 385 at 391-2. Presumably the court would only order a person's release under this rule rather than under r.16.7 (ie after a further hearing) in a particularly clear case.

[16.5.3] Inherent jurisdiction There is said to be an inherent jurisdiction to order the release of a person on bail: *R v Home Department, ex parte Swati* [1986] 1 All ER 717 at 724; *R v Home Department, ex parte Turkoglu* [1988] 1 QB 398 at 401; [1987] 3 WLR 992 at 995; [1987] 2 All ER 823 at 825-6; *R v Home Department, ex parte Sezec* [2001] EWCA Civ 795; *R v Lee* [2001] 3 NZLR 858 at [15]; *R v Payne* [2003] 3 NZLR 638 at [3]. The limits of this jurisdiction are uncertain: compare *Zaoui v A-G* [2004] NZCA 228 at [71] and *R v Home Department, ex parte Turkoglu* [1988] 1 QB 398 at 400-1; [1987] 3 WLR 992 at 994-5; [1987] 2 All ER 823 at 825-6. The jurisdiction may be also be implied from the Constitution: *Zoeller v Germany* (1989) 90 ALR 161 at 163-4; 64 ALJR 137 at 138-9; *Cabal v United Mexican States* [2000] HCA 42; (2001) 180 ALR 593 at [15]; *United Mexican States v Cabal* [2001] HCA 60; (2001) 209 CLR 165; (2001) 75 ALJR 1663; (2001) 183 ALR 645 at [35] – [38]. It is likely that s.60(3) of the *Criminal Procedure Code* [Cap 136] provides an express and independent statutory basis for release upon bail. As to the form of such an order see *United Mexican States v Cabal* [2001] HCA 60; (2001) 209 CLR 165; (2001) 75 ALJR 1663; (2001) 183 ALR 645 at [1] – [6].

- (b) dismiss the claim; or

[16.5.4] Discretion It is said that the writ of habeas corpus will issue *ex debito justitiae* but not as a matter of course, though the discretion to refuse relief is probably very limited if the grounds are made out: *R v Morn Hill Camp, ex parte Ferguson* (1917) 1 KB 176 at 181; *R v Langdon* (1953) 88 CLR 158 at 241; *R v Pentonville Prison, ex parte Azam* [1974] AC 18 at 41-2; [1973] 2 All ER 741 at 758-9.

- (c) order that:

- (i) the claim and sworn statement be served on the defendant and on anyone else named in the order; and
- (ii) the defendant and anyone else served file a defence within the time stated in the order; and

[16.5.5] What defence should contain This should set out the facts said to permit the detention with full particulars: *R v Home Department, ex parte Iqbal* [1979] 1 All ER 675 at 679; [1978] 3 WLR 884 at 888-9.

- (iii) the claim be further heard at the date and time stated in the order; and
- (iv) the defendant bring the person being held to the court at the time stated in the order; and
- (v) any other steps stated in the order be taken to deal with the claim.

#### Service of claim

**16.6** If the defendant is a person in charge of a police station, prison or other institution, it is sufficient if the claim is served on the person for the time being in charge of the police station, prison or institution.

#### Further hearing of claim

**16.7 (1)** At the further hearing of the claim the court may do any of the following:

- (a) hear evidence in support of the claim;
- (b) let the respondent show cause why the person should not be released;

[16.7.1] Onus This may suggest that, once a *prima facie* case is made out by the applicant, the onus shifts to the respondent to satisfy the court that the restraint is lawful: *R v Home Department, ex parte Khawaja* [1984] AC 74 at 105, 111-2, 123-4; [1983] 2 WLR 321 at 338, 344, 355; [1983] 1 All ER 765 at 777, 782, 791; *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97 at 112; [1996] 2 WLR 863 at 874; [1996] 4 All ER 256 at 267. On the other hand, in the case of a restraint which is *prima facie* valid the court does not usually proceed to conduct a general review the decision upon which it is based: *R v Brixton Prison, ex parte Armah* [1968] AC 192 at 233, 239, 255, 257; [1966] 3 All ER 177 at 187, 191, 200, 202; [1966] 3 WLR 828 at 840-1, 845-6, 859, 861.

- (c) if it considers the restraint of the person is unlawful, order the person be released or held in another place;

[16.7.2] See further [16.5.2], [16.5.3].

- (d) dismiss the claim;

[16.7.3] See further [16.5.4].

- (e) if the court is satisfied someone other than the defendant has custody of the person being held, adjourn the proceedings and make orders about the service of the claim and other matters the court thinks appropriate to deal with the claim;
- (f) make any other orders it thinks appropriate.

*Division 3 – Accounts and Inquiries*

**Definition for this Division:**

**16.8 In this Division:**

“accounting party” means the party required to account.

**Order for account**

**16.9 (1) If a claim involves taking an account, the court may at any stage order an account.**

[16.9.1] Scope of rule The rule is probably not directed to the taking of an account the right to which depends on the success in the claim: *Re Gyhon* (1885) 29 Ch 834 at 837, 838. See generally *Malere v Maltape* [2006] VUSC 22; CC 185 of 2002.

**(2) The order must state:**

- (a) the transaction or series of transactions of which the account is to be taken; and
- (b) the basis of the account; and

[16.9.2] Bases of accounting There are two bases of accounting and the court's order should make clear upon which basis it will proceed. A common account requires the accounting party to account only for what they have received and disposed of and assumes no misconduct. An accounting on the basis of wilful default requires the accounting party to account for what they have received and disposed of and also for what would have been received if their duties were properly discharged. This will be the basis of accounting only if some misconduct is already established: *Bartlett v Barclays Bank (No 2)* [1980] Ch 539 at 547; [1980] 2 All ER 92 at 98; [1980] 2 WLR 430 at 453.

- (c) the period of the account.

**(2) The order may also include directions about:**

- (a) any advertisements to be published, the evidence to be brought, the procedure to be followed, and the time and place for taking the account; and
- (b) whether in taking the account the books and records of account are evidence of the matters they contain; and
- (c) who is to be served with the order (including persons who are not parties to the proceeding); and

- (d) who is entitled to be heard on the taking of the account; and
- (e) the persons to be called as witnesses; and
- (f) whether a judgment should be given for any amount found to be owing; and
- (g) any other matter the court considers appropriate.

#### **Service of order**

- 16.10 (1)** If the order is to be served on a person who is not a party to the proceeding, it must be served personally.
- (2)** The account may not be taken until everyone ordered to be served has been served, unless the court orders otherwise.
- (3)** If the court orders some people need not be served, it may also order that those people are bound by the order for the account unless it was obtained by fraud or non-disclosure of material facts.

#### **Form and verification of account**

- 16.11 (1)** Unless the court orders otherwise:
- (a) all items in the account must be numbered consecutively; and
  - (b) the accounting party must verify the account by sworn statement and the account must be attached to the sworn statement; and
  - (c) all payments over VT10.000 must be verified by receipts.
- (2)** An alteration in an account must not be made by erasure and the party before whom the accounting party's sworn statement was made must initial the alteration.

#### **Filing and service of account**

**16.12** The accounting party must:

- (a) file the account and sworn statement within the period specified by the court; and
- (b) serve copies as soon as practicable on all the people entitled to be heard at the taking of the account.

#### **Certificate of account**

**16.13 (1)** After an account has been taken:

- (a) the accounting party must file a draft certificate in Form 29 setting out the result of the taking of the account, stating that the account has been taken and attaching a copy of the account; and
  - (b) after the certificate has been sealed, it must be served on everyone who was served with the accounting order.
- (2) The account becomes final and binding 7 days after the last service, unless it is challenged under rule 16.14.

### Challenging the account

#### 16.14 (1) A person who wishes to challenge an account must:

- (a) set out details of the errors and omissions in the account; and
  - (b) within 7 days of being served with the certificate under rule 16.12, file and serve a copy of the statement on the accounting party.
- (2) The court may set aside or vary the certificate and make any other order that it considers appropriate.

### *Division 4 – Domestic Violence*

**Obsolescence of Division** This Division has largely been supplanted by the passage of the *Family Protection Act* No.26 of 2008. The President referred the bill to the Supreme Court pursuant to art.16(4) of the *Constitution* in proceedings numbered 6 of 2008; *The President v The Speaker*. The Chief Justice delivered his opinion on 22 November 2008 in favour of the validity of the bill and, at the time of going to press, it is not known whether the President will appeal or will sign the bill. Assuming that the bill will be signed, there seems little scope for the continued operation of any part of this Division.

### Definitions for this Division

#### 16.15 In this Division:

“domestic violence” means actual or threatened physical violence or abuse by a man, woman or child of a family to another man, woman or child of the family;

“domestic violence protection order” means an exclusive occupation order, a non-molestation order and a non-violence order;

“exclusive occupation order” means an order requiring the defendant:

- (a) to leave a residence shared with the claimant immediately or at the time stated in the order; and

- (b) not to return to the residence except at the times and under the conditions stated in the order;

“family” includes a person who is accepted as a member of a family, whether or not the person is related by blood or marriage to the other members of the family;

“non-molestation order” means an order that prohibits the defendant from doing any of the following:

- (a) contacting the claimant personally, by talking, meeting or in any other way;
- (b) contacting the claimant by telephone, fax or email;
- (c) in any way disturbing the claimant or any child of the family on whose behalf the claim was made in his or her daily life;

“non-violence order” means an order that prohibits the defendant from using force, or threatening to use force, for any reason, against the claimant or a child of the family on whose behalf the claim was made, but does not prohibit other contact between the parties.

#### **Claim for domestic violence protection order**

**16.16(1)** A person may file a claim claiming a domestic violence protection order against another member of the person’s family.

**(2)** The claim must:

- (a) set out the order claimed and the reasons why the order should be made; and
- (b) include a statement that, if the order is made, the claimant agrees to pay damages to the defendant if it turns out that the order should not have been made; and
- (c) have with it a sworn statement in support of the claim; and
- (d) be in Form 30.

**(3)** The sworn statement must be in Form 31.

#### **Hearing of claim**

**16.17 (1)** After the claim and sworn statement have been filed:

- (a) the Registrar must immediately tell the magistrate about the claim; and
- (b) the magistrate must hear the matter as soon as practicable.



- (2) The claimant may appear in person or be represented by a lawyer or another person approved at the hearing by the magistrate.**
- (3) The hearing is to be without notice to the defendant.**
- (4) At the hearing the magistrate:**
  - (a) may make whichever domestic violence protection order is appropriate, or may dismiss the claim; and**
  - (b) may make whatever other order is appropriate; and**
  - (c) must fix a date, not later than 28 days after the date of the order, for a further hearing and write the date on the order.**
- (5) The order must be in Form 32.**
- (6) The order must include a statement authorising the police to arrest the defendant if he or she breaches the order, unless the magistrate directs that this power is not to be included.**

#### **Service of order**

- 16.18(1) The order must be served on the defendant as soon as practicable.**
- (2) The magistrate must direct who is to serve the order. This is not to be the claimant.**
- (3) A copy of the order must be given to the police in the area concerned.**

#### **Further hearing**

- 16.19(1) The further hearing is to be held on the date fixed by the magistrate or, if either party asks for an earlier date, on that earlier date.**
- (2) At the hearing the magistrate must:**
  - (a) consider whether the domestic violence protection order should be continued, amended or revoked and make an order accordingly; and**
  - (b) if the order is continued or amended, give directions about the progress of the case.**

#### **Referral to Supreme Court**

- 16.20(1) A magistrate may refer a domestic violence protection proceeding to the Supreme Court if at any time the magistrate is of the view**

that the level of violence or threatened violence is serious.

- (2) The Supreme Court must deal with the proceeding as soon as practicable.
- (3) In dealing with the proceeding, the Supreme Court may make any order that a magistrate can make under these Rules.

#### *Division 5 – Civil Claim in Criminal Proceedings*

#### **Civil claim against person charged with criminal offence**

**16.21** These Rules apply to the progress and hearing of a claim under section 213 of the Criminal Procedure Code (Cap 136) as if the claim had been filed under these Rules, but subject to Part XII of the Criminal Procedure Code.

[16.21.1] Source of power Part XII of the Code permits such a claim to be brought within criminal proceedings and s.217 provides for the making of rules of procedure in relation to such a claim. As to the situation prior see *Moti v S, An Infant* [2000] VUCA 3; CAC 3 of 2000.

#### *Division 6 – Referring matters from Magistrates Court to Supreme Court*

#### **Referral of Constitutional issue or question of law**

**16.22(1)** This rule applies when a magistrate:

- (a) refers a question about interpretation of the Constitution to the Supreme Court under section 53(3) of the Constitution; or
- (b) reserves a question of law for the consideration of the Supreme Court under section 11 of the Courts Act (Cap 122).

[16.22.1] Repeal of Courts Act The *Courts Act* [Cap 122] has since been repealed by *Judicial Services and Courts* [Cap 270]. Section 17(1) of the latter permits a magistrate to refer questions of law to the Supreme Court and s.17(2) permits the Supreme Court to determine such questions. References to the *Courts Act* are now to be taken to be references to the corresponding provision of the *Judicial Services and Courts Act* pursuant to s.72 of the latter.

[16.22.2] When magistrate required to refer In addition to the requirement under art.53(3) of the *Constitution*, the new requirements contained in s.12(c), *Government Proceedings* No 9 of 2007 provide that a magistrate must refer to the Supreme Court an “important public issue” as defined in that Act.

**(2) In each case the magistrate must:**

- (a) state the question to be decided; and
- (b) state concisely the facts necessary to enable the Supreme Court to decide the question.

- (3) The questions and facts (the “case stated”) must be set out in numbered paragraphs.**
- (4) A copy of the case stated must be served on all parties to the proceeding.**
- (5) The Supreme Court:**
  - (a) must hear the matter as soon as practicable; and**
  - (b) may hear argument on the constitutional question or the question of law from all parties to the proceeding; and**
  - (c) when it decides the question, must return the matter to the Magistrates Court for action in accordance with the Supreme Court’s decision.**
- (6) The magistrate and a party must not take any steps in the proceeding until the Supreme Court has decided the question and returned the proceeding to the Magistrates Court.**

[16.22.3] See also s.17(2), *Judicial Services and Courts Act* [Cap 270] which provides that the magistrate must not deliver a finding until the Supreme Court’s decision has been received.

### *Division 7 – Interpleader*

#### **Claim for interpleader**

**16.23(1) A person may file a claim for interpleader if the person:**

- (a) owes a debt; or**
- (b) has possession of goods (including money) on behalf of another person;**

**and expects to be sued by competing claimants for the debt or the goods.**

[16.23.1] *Nature of interpleader* Interpleader is a proceeding enabling a person from whom two or more persons claim the same debt or property (and who does not dispute the claims) can call on the two claimants to “interplead” against one another. There must be some real expectation of being sued in rival claims: *Watson v Park Royal Caterers* [1961] 1 WLR 727 at 734; [1961] 2 All ER 346 at 352.

- (2) The claim must:**
  - (a) name as defendants all persons who claim the debt or goods; and**
  - (b) describe the debt or goods; and**
  - (c) state why the claimant owes the debt or possesses the goods; and**

- (d) state that the claimant has no claim to the goods personally, except for charges and costs the claimant has incurred; and
  - (e) state where and how the goods are kept, and the charges for keeping them; and
  - (f) state that there is no collusion between the claimant and any defendant; and
  - (g) have with it a sworn statement in support of the claim; and
  - (h) ask the court to decide to whom the debt should be paid or the goods given.
- (3) The claim and sworn statement must be served on all the defendants, as set out in rules 5.2 and 5.3.
- (4) If the person is already a party to a proceeding, the person must make an application setting out the matters in subrule (2).

*Division 8 – Enforcement of decisions under the Customary Land Tribunal Act  
No 7 of 2001*

**Definitions for this Division**

**16.24 In this Division:**

**“Act” means the Customary Land Tribunal Act No 7 of 2001;**

[16.24.1] Designated Chapter 271.

**“decision” means a decision of a land tribunal;**

[16.24.2] See s.29 of the Act for decisions of the Land Tribunal.

**“land tribunal” means a land tribunal established under the Act;**

**“record of the decision” means a record of a decision as set out in Schedule 3 of the Act.**

[16.24.3] See s.34 of the Act for records of decisions.

**Claim for enforcement**

**16.25(1) A person who wishes to enforce a decision of a land tribunal may file a claim in the Supreme Court.**

[16.25.1] General observations Absent any statutory mandate for the enforcement of Land Tribunal decisions, it is doubtful whether this rule is effective in conferring jurisdiction: See [1.1.3]. Accordingly, the validity of anything in this Division should not be assumed.

**(2) The claim must:**

- (a) set out the decision, the date it was made and who made it; and
  - (b) name as defendant the person against whom the decision is to be enforced; and
  - (c) state in what way the defendant is not complying with the decision; and
  - (d) set out the orders asked for; and
  - (e) have with it a sworn statement in support of the claim.
- (3) The sworn statement must:
- (a) give full details of the claim; and
  - (b) have with it a copy of the record of the decision; and
  - (c) state that:
    - (i) the time for an appeal from the decision has ended and no appeal has been lodged; or
    - (ii) an appeal was made but was unsuccessful.
- (4) The claim and sworn statement must be served on the defendant.
- (5) A defence filed in the proceeding must not dispute anything in the record of the decision.
- (6) If the court is satisfied that the defendant is in breach of the decision, the court may make an enforcement order.

*Division 9 – Appeal from Magistrates Court*

**Definitions for this Division**

**16.26 In this Division:**

“decision” means:

- (a) a judgment or final order of the Magistrates Court; and
- (b) an interim injunction;

but does not include any other interlocutory order.

## Right of appeal

**16.27(1) A party to a proceeding in the Magistrates Court may appeal from a decision of the Magistrates Court.**

**(2) The appeal may be made on a question of law or fact or mixed law and fact.**

[16.27.1] Source of appellate jurisdiction This rule is superfluous. The appellate jurisdiction of the Supreme Court is conferred by s.30(1), *Judicial Services and Courts Act* [Cap 270], to which this rule adds nothing. See further CoAR, [19.1].

[16.27.2] Appeals on fact/law The Supreme Court is the final court of appeal for the determination of questions of fact. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave: *Judicial Services and Courts Act*, s.30(4).

## Procedure for appeal

**16.28(1) An appeal is made by filing and serving an application within 28 days of the date of the decision.**

[16.28.1] Meaning of “decision” The decision to which this rule refers is a judgment or final order: *Simeon v Family Rakom* [2004] VUSC 45; CC 121 of 2004.

[16.28.2] Extension of time The time limit may be extended under r.18.1. As to the circumstances in which time will be extended see *Aru v Vanuatu Brewing* [2002] VUCA 43; CAC 21 of 2002; *Simeon v Family Rakom* [2004] VUSC 45; CC 121 of 2004.

**(2) The application must:**

**(a) set out the grounds of appeal; and**

**(b) be in Form 33.**

**(3) The court must write the first hearing date on the application.**

## Service of application

**16.29(1) The application must be served on all other parties to the Magistrates Court proceeding not less than 7 days before the first hearing date.**

**(2) For subrule (1), service on the lawyer who acted for a party in the Magistrates Court proceeding is sufficient.**

## First hearing date

**16.30 At the first hearing date the court must:**

**(a) set a date and time for hearing the appeal; and**

[16.30.1] This should not be necessary in the circumstances contemplated by r.16.31(a) which ought to be ascertained at the first hearing date.

**(b) give any directions necessary for hearing the appeal,**

including directions about:

- (i) preparing the appeal book; and
- (ii) written submissions from the parties; and
- (iii) security for costs.

#### Hearing of appeal

**16.31 At the hearing of the appeal, the court may:**

- (a) deal with the appeal on the notes of evidence recorded in the case without hearing the evidence again; or**

[16.31.1] Requirement of consent This is possible only where no party objects: s.30(3), *Judicial Services and Courts* [Cap 270].

- (b) hear any evidence again; or**
- (c) hear any fresh evidence.**

[16.31.2] Hearing *de novo* The appeal is a hearing *de novo* unless the parties agree otherwise: s.30(2)(a), *Judicial Services and Courts* [Cap 270].

#### Orders court may make

**16.32 After the hearing, the court may do any of the following:**

- (a) confirm or quash all or part of the decision appealed from;**
- (b) by order, refer part or all of the proceeding back to the Magistrates Court for rehearing;**
- (c) make any order the Magistrates Court can make.**

[16.32.2] General observations and source of power This rule is superfluous and adds nothing but confusion to s.30(2), *Judicial Services and Courts Act* [Cap 270] by differently expressing what it cannot add to nor subtract from. The true powers of the Supreme Court are contained in (and only in) paragraphs 30(2)(b)-(e).

#### *Division 10 – Appeal from Island Court*

#### Definition for this Division

**16.33 In this Division:**

**“Island Court” means a court established under the Island Courts Act (Cap 167).**

#### Appeal to the Supreme Court

**16.34(1) This Rule applies to appeals from Island Courts to the Supreme Court.**

[16.34.1] Appellate jurisdiction Section 22, *Island Courts* [Cap 167] provides for an appeal to the Supreme Court (with two assessors) from decisions relating to ownership of land. The appeal is final and no further appeal lies to the Court of Appeal: *Island Courts Act*, s.22(4) but this limitation may not apply if the Supreme Court is defectively constituted: *Matarave v Talivo* [2010] VUCA 3; CAC 1 of 2010. The powers of the Supreme Court on appeal are found in s.23.

**(2) The appellant must:**

**(a) file a Notice of Appeal in the Supreme Court; and**

[16.34.2] Time limit This must be done within 30 days: *Island Courts* [Cap 167], s.22(1). The court may, however, grant an extension provided that the application is made within 60 days of the decision of the Island Court: s.22(5), *Island Courts*. There can be no further extension: *Kalsakau v Hong* [2004] VUCA 2; CAC 30 of 2003; *Vanua Rombu v Family Rasu* [2006] VUCA 22; CAC 7 of 2006.

**(b) give a copy of the notice to each other party.**

**(3) Each party must give an address for service of documents to the Supreme Court.**

**(4) The Island Court must ensure that the notice of the appeal and all supporting documents are given to a judge.**

**(5) The judge must:**

**(a) fix a date for Conference 1; and**

**(b) tell the parties about this.**

**(6) At Conference 1, the judge:**

**(a) must appoint 2 or more assessors knowledgeable in custom to sit on the appeal; and**

**(b) may make any other orders, or give any directions, the judge can make under Part 6.**

**(7) At the hearing of the appeal, the assessors sit with the judge.**

**Appeal to the Magistrates Court**

**16.35(1) This Rule applies to appeals from Island Courts to the Magistrates Court.**

[16.35.1] Appellate jurisdiction Section 22, *Island Courts* [Cap 167] provides for an appeal to the Magistrates Court from decisions other than as to ownership of land. The powers of the Magistrates Court on appeal are found in s.23.

**(2) The appellant must:**

**(a) file a Notice of Appeal in the Magistrates Court; and**



- (b) give a copy of the notice to each other party.**
- (3) Each party must give an address for service of documents to the Magistrates Court.**
- (4) The Island Court must ensure that the notice of the appeal and all supporting documents are given to the Magistrates Court.**
- (5) The judge must:**
  - (a) fix a first hearing date; and**
  - (b) tell the parties about this.**
- (6) At the first hearing, the magistrate:**
  - (a) must appoint 2 or more assessors knowledgeable in custom to sit on the appeal; and**
  - (b) may make any other orders, or give any directions, for hearing the appeal; and**
  - (c) must fix a date for hearing the appeal.**
- (7) At the hearing of the appeal, the assessors sit with the magistrate.**

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