MISCELLANEOUS

Extending and shortening time

E *CPR* r3.1(2)(a)
E *SCR* O3r5

18.1 (1) The court may, on its own initiative or on the application of a party, extend or shorten the time set out in these Rules for doing an act.

[18.1.1] Purpose of rule The rule is designed to avoid injustice: *Saunders v Pawley* (1885) 14 QBD 234 at 237; *Schafer v Blyth* [1920] 3 KB 140 at 143. Time limits are, however, important to the efficient operation of the administration of justice and must not be ignored: *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12; [1964] 3 All ER 933 at 935; *Day v Ost (No 2)* [1974] 1 NZLR 714.

[18.1.2] Scope of rule The rule permits the extension or shortening of any time limits in these *Rules* but does not permit the extension or shortening of statutory time limitations: *Russell v Attorney-Genera*l [1995] 1 NZLR 749. The rule does not affect the computation of time as to which see Part V, *Interpretation* [Cap 132].

[18.1.3] Explanation for failure required The failure to comply with applicable times usually requires a proper explanation or excuse: *Revici v Prentice Hall* [1969] 1 All ER 772 at 774; [1969] 1 WLR 157 at 159; *Warinco v Samor* [1979] 3 All ER 64 at 64; [1979] 1 WLR 884 at 884; *Hashtroodi v Hancock* [2004] EWCA Civ 652; [2004] 1 WLR 3206 at [18]; *Lerro v Stagg* [2006] PGNC 2 at [63] – [66]. Without such an explanation, there will be nothing upon which the court may exercise the discretion: *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935; [1965] 1 WLR 8 at 12; see also *Simeon v Family Rakom* [2004] VUSC 45; 121 of 2004 and *Aru v Vanuatu Brewing* [2002] VUCA 43; CAC 21 of 2002 (both as to the importance of an explanation for delay in the context of appeals).

[18.1.4] Width of discretion The rule is remedial and ought to be given a wide and generous interpretation: *Schafer v Blyth* [1920] 3 KB 140 at 143. Time will usually be extended, subject to case management considerations, whenever costs will be adequate compensation for the delay: *Atwood v Chichester* (1878) 3 QBD 722 at 723; *Outboard Marine v Byrnes* [1974] 1 NSWLR 27 at 30.

[18.1.5] Delay by lawyer Where a party seeks an extension due to delay or other error on the part of the party's lawyer, the court may be more willing. As Lord Denning explained in *Salter Rex & Co v Ghosh* [1971] 2 QB 597 at 601: "We never like a litigant to suffer by the mistake of his lawyers". See however *Shing v Tapangararua* [2007] VUSC 75; CC 74 of 2007.

[18.1.6] Inherent jurisdiction apart from rule Apart from this rule the court has an inherent jurisdiction to enlarge or abridge any time to avoid injustice: *R v Bloomsbury & Marylebone County Court* [1976] 1 All ER 897 at 900; [1976] 1 WLR 362 at 365; *Champtaloup v Northern Districts Aero Club Inc* [1980] 1 NZLR 673; *Samuels v Linzi Dresses* [1981] QB 115 at 126; [1980] 1 All ER 803 at 812; [1980] 2 WLR 836 at 845-6.

E *CPR* r3.1(2)(a)
E *SCR* O3r5(2)

(2) The application may be made before or after the time for doing the act has ended.

[18.1.7] Costs As to the costs consequences of an application to extend time, see *Atwood v Chichester* (1878) 3 QBD 722 at 723 and r.15.13.

Urgency

18.2 If a claim asks for urgent relief, the claimant must:

(a) state this in the claim; and

[18.2.1] Failure to state urgency in claim This is often overlooked and it is suggested that r.7.7(b) makes clear that the failure to mention urgency in the claim should not preclude the grant of urgent interlocutory relief in an appropriate case. It may also happen that urgency develops after the claim is filed.

(b) tell the court staff separately in writing at the time the claim is filed.

[18.2.2] General observations This should be reserved for genuine urgency: *Bates v Lord Hailsham* [1972] 1 WLR 1373 at 1380; [1972] 3 All ER 1019 at 1025. The appropriate course is to provide the court staff with a letter explaining that urgent relief is sought and, briefly, why.

Office hours

18.3 (1) The offices of the Supreme Court and Magistrates Courts must be open during the hours fixed by the Chief Justice.

[18.3.1] General observations The opening hours do not appear to be published. In mid-2008 the Supreme Court office ceased to process documents filed after 2:45pm, though these would be accepted for processing the following day. Note also r.18.7(1)(b).

(2) The Chief Justice may fix the periods when the court is closed, except for dealing with urgent claims.

[18.3.2] Urgent claims outside hours Genuinely urgent matters ought to be listed, however lawyers should not lightly seek urgent hearings during court closures: *Re Showerings, Vine Products and Whiteways Ltd's Application* [1968] 3 All ER 276 at 278; [1968] 1 WLR 1381 at 1384-5.

Records

18.4 (1) The registrar of a court must keep a record of all claims filed in the court.

(2) The registrar must not allow a document filed in the court, or a record kept by the court, to be taken out of the court, unless the court orders otherwise.

Court seal

18.5 (1) The registrar of a court must keep a seal showing the name of the court and, for the Magistrates Court, its location.

E *CPR* r2.6 **(2) The seal must be stamped on each document filed in the court or issued by the court.**

[18.5.1] See further s.64, *Judicial Services and Courts* [Cap 270].

Copies of documents

E *CPR* r5.4B,C,D **18.6 (1) A person may ask the registrar for a copy of a document filed in the court.**

(2) If the person pays the fee (if any) prescribed for copies of documents, the registrar must give the person the copy.

[18.6.1] General observation There appears to be no limitation on who may obtain documents or the nature of the filed documents which may be obtained: *Spaulding v Kakula Island Resorts* [2008] VUSC 72; CC 29 of 2008.

(3) The copy must be sealed and have the word "copy" stamped on it.

Delegation

18.7 (1) The Chief Justice may delegate his or her powers under the following Rules to a person from time to time holding, occupying or performing the duties of the office of Registrar of a court:

(a) rule 10.3 (dealing with mediators);

[18.7.1] General observation It is difficult to locate any appropriately delegable power in r.10.3. See also generally s.42A, *Judicial Services and Courts* [Cap 270].

(b) rule 18.3 (dealing with court office hours);

(2) The following provisions apply to a delegation by the Chief Justice:

(a) the delegation may be made either generally or as otherwise provided by the instrument of delegation; and

(b) the powers that may be delegated do not include that power to delegate; and

(c) a function or power so delegated, when performed or exercised by the delegate, is taken to be performed or exercised by the Chief Justice; and

(d) a delegation by the Chief Justice does not prevent the performance or exercise of a function or power by the Chief Justice.

Lawyer ceasing to act

18.8 (1) A lawyer who begins to act for a party during a proceeding, or ceases to act for a party, must:

(a) as soon as practicable, file a notice in Form 35; and

[18.8.1] Consequences of failure to file notice It is important that a lawyer file a notice immediately upon ceasing to act. The lawyer on the record will, in the absence of a notice, remain on the record after judgment and until execution (if necessary) has been completed: *Lady de La Pole v Dick* (1885) 29 Ch D 351 at 357; *Bagley v Maple* (1911) 27 TLR 284 at 285.

[18.8.2] General observations It is unfortunate that lawyers seldom file the required notices with anything resembling alacrity. It is not uncommon for there to be several months of delay before the appropriate notice is filed, if ever. The courts must, with respect, accept some of the responsibility for this situation and its inconvenient consequences. It is rare for the court to show that any importance is attached to this subject when it arises. Lawyers are commonly permitted to appear for parties without an undertaking or orders to file a notice being required or made. An appropriate method of ensuring that lawyers comply with this requirement would be to withhold costs of parties where their lawyer is not "on the record". This method, which is applied in other Commonwealth jurisdictions, is noted to be very effective.

(b) serve the notice on each party to the proceeding.

(2) The notice is effective after the last service.

[18.8.3] Effective date of notice A lawyer will be unable to disclaim service until after a notice is filed: *Toyota v Ken Morgan Motors* [1994] 2 VR 106 at 165, 179, 214. A lawyer who is replaced by a notice filed by another lawyer can no longer be served: *R v Justices of Oxfordshire* [1893] 2 QB 149 at 153-4; [1891-4] All ER 1149 at 1151.

(3) Filing the notice does not affect the power of the court to make an order for costs against the lawyer personally under these Rules.

[18.8.4] General observations See further r.15.26. Presumably this power relates only to things done or omitted to be done by the lawyer while they were acting.

Forms

E *CPR* r4(2), (4)
E *SCR* O1r9(1)

18.9 Strict compliance with a form prescribed by these Rules is not required and substantial compliance is sufficient.

[18.9.1] Titling of court documents Judges have often suggested that the title of court documents (particularly, sworn statements, interlocutory applications and submissions) ought to be more informative, for example "Sworn Statement of [name] in support of [party's] [application]" rather than merely "sworn statement". Having regard to what was said in *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006 it would be prudent also to identify the source of relevant powers in the heading of applications.

Failure to comply with these Rules

E *CPR* r3.10
E *SCR* O2r1

18.10(1) A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding, a nullity.

[18.10.1] History Such a rule was first introduced in England in 1964 (*RSC* O2r1) to negative the effect of *Re Pritchard, Pritchard v Deacon* [1963] Ch 502 at 526; [1963] 1 All ER 873 at 884; [1963] 2 WLR 685 at 701 which was based on the principle that *ex nihilo nihil fit* (nothing can come from nothing): *Harkness v Bell's Asbestos* [1967] 2 QB 729 at 734-5; [1966] 3 All ER 843 at 845; [1967] 2 WLR 29 at 32-3. The rule does away with old distinctions between nullities and irregularities.

[18.10.2] Consequences of irregularity The consequence of an "irregularity" is that the party may not rely on it until waived by the other side or the court has exercised its discretion under subrule (2): *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 323, 325; [1985] 1 WLR 513 at 520, 522.

[18.10.3] Late filed documents See r.4.14.

(2) If there has been a failure to comply with these Rules, the court may:

[18.10.4] Considerations relevant to discretion This is a discretion which must be exercised judicially. The object of the court is to decide the rights of the parties rather than punish them for mistakes: *Cropper v Smith* (1884) 26 Ch D 700 at 710-711. Prejudice (and lack of prejudice) will be highly relevant to the interests of justice: *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 326; [1985] 1 WLR 513 at 523. On the other hand, there may be circumstances where the irregularity is so fundamental that, even in the absence of prejudice, ought not to be cured: *Carmel Exporters v Sea-Land Services* [1981] 1 All ER 984 at 991; [1981] 1 WLR 1068 at 1077; [1981] 1 Lloyd's Rep 458 at 463. Much will depend upon the explanation offered: *Morres v Papuan Rubber & Trading* (1914) 14 SR (NSW) 141 at

144 (approved in *Bishop v The Queen* (1982) 58 FLR 233 at 235). The party who seeks an exercise of the court's powers under this rule (whether to punish or to cure) bears the onus of persuading the court: *Hubbard Association of Scientologists v Anderson & Just (No2)* [1972] VR 577 at 580.

[18.10.5] Limits of rule As a remedial rule, the words are to be given a wide and generous interpretation: *Harkness v Bell's Asbestos* [1967] 2 QB 729 at 734-5; [1966] 3 All ER 843 at 845; [1967] 2 WLR 29 at 33; *Carmel Exporters v Sea-Land Services* [1981] 1 All ER 984 at 991; [1981] 1 WLR 1068 at 1077; [1981] 1 Lloyd's Rep 458 at 463. On the other hand, it is not the purpose of such a rule to effect an amendment to the rules to confer a power which the court would not otherwise have had: *Survival & Industrial Equipment v Owners of the "Alley Cat"* (1992) 36 FCR 129 at 138. Similarly, the rule should not be used to circumvent the requirements of other rules: *Leal v Dunlop Bio-Processes* [1984] 2 All ER 207 at 213; [1984] 1 WLR 874 at 882.

[18.10.6] Overriding objective The extent to which the discretion might be influenced by the overriding objective was perhaps indicated in the comments (on a slightly different point) of Lord Justice Saville in *British Steel v Customs & Excise Commissioners* [1997] 2 All ER 366 at 379: "It is now well over a hundred years ago that our predecessors made a great attempt to free our legal process from concentrating upon the form rather than the substance, so that the outcome of cases depended not on strict compliance with intricate procedural requirements, but rather on deciding the real dispute over the rights and obligations of the parties". Procedural requirements are designed to further the interests of justice and any consequence which achieves a result contrary to those interests should be treated with considerable reservation: *R v Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354 at 359; [1999] 3 All ER 231 at 235-6. See also *Michel v Director of Finance* [1997] VUSC 40; CC 68 of 1997. In *Asiansky Television v Bayer Rosin* (a firm) [2001] EWCA Civ 1792 at [49] Clarke LJ emphasised the flexible nature of the *Rules* and the need to concentrate on the intrinsic justice of the case in designing orders, particularly that there exist a number or remedies short of the draconian remedy of striking out.

E *CPR* r3.4(2)(c)
E *SCR* O2r2

(a) set aside all or part of the proceeding; or

E *SCR* O2r2

(b) set aside a step taken in the proceeding; or

E *SCR* O2r2

(c) declare a document or a step taken to be ineffectual; or

(d) declare a document or a step taken to be effectual; or

(e) make another order that could be made under these Rules; or

(f) make another order dealing with the proceeding generally that the court considers appropriate.

[18.10.7] Width of power The words of para.(f) are wide enough to empower the court to make a dispensing order waiving an irregularity: *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 325; [1985] 1 WLR 513 at 522.

[18.10.8] Proceedings in wrong form This common situation may, where appropriate, be cured under this rule, rather than striking out the proceeding and forcing the party to re-file. In a simple case the court may, under either para.(d) or (f), declare the proceeding to have been correctly commenced as a proceeding of the correct type: See for example *Lewis v Poultry Processors (Holdings) Pty Ltd* (1988) 3 PRNZ 167. Alternatively, the court might direct additional documents to be filed and additional fees to be paid so as to bring the defective proceedings into conformity.

(3) If a written application is made for an order under this rule, it must set out details of the failure to comply with these Rules.

[18.10.9] When application to be made An application may, apparently, be made at any time. It is suggested that applications should be made promptly or they may be refused in the court's discretion: See for example *Reynolds v Coleman* (1887) 36 ChD 453; *Singh v Atombrook Ltd* [1989] 1 All ER 385.

Failure to comply with an order

18.11(1) This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.

(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.

(3) The application:

[18.11.1] Importance of procedure This procedure must be followed in applications of this type: *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005.

(a) must set out details of the failure to comply with the order; and

(b) must have with it a sworn statement in support of the application; and

(c) must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application.

[18.11.2] Minimum notice This provision should be contrasted with r.7.3(2) which appears to be less strict. The failure to comply with the minimum notice will usually be fatal: *VCMB v Dornic* [2010] VUCA 4 at [7], [10], [12], [29], [32]; CAC 2 of 2010.

(4) The court may:

(a) give judgment against the non-complying party; or

[18.11.3] When judgment appropriate This will usually be appropriate only in cases of persistent or critical non-compliance: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006; see for example *Ferrieux Patterson v Vanuatu Maritime Authority* [2004] VUSC 69; CC 117 of 2003 where Treston J characterised the defendant's attitude to the claim as "one of prevarication, delay and non-compliance with the Court orders". See also the discussion in *Placito v Slater & Ors* [2003] EWCA Civ 1863 at [39] – [49].

[18.11.4] Final order A judgment under this paragraph will, for the purposes of appeal, be a final judgment. In both *VBTC v Malere & Ors* [2008] VUCA 2; CAC 3 of 2008 and *VCMB v Dornic* [2010] VUCA 4; CAC 10 the Court of Appeal entertained appeals from such orders without enquiry as to the necessity for leave. In the latter case, an application made to the primary judge (Saksak J) asserting the necessity of leave was rejected in an as yet unpublished judgment delivered on 19 February 2010. Cf [9.10.3].

(b) extend the time for complying with the order; or

[18.11.5] See further rule 18.1.

(c) give directions; or

(d) make another order.

[18.11.6] Costs A defaulting party must expect to bear the onus of initiating procedures to rectify default and be liable for wasted costs, which should, if possible, be assessed and paid within one or two weeks: *Vatu v Anser* [2001] VUCA 4; CAC 6 of 2001.

(5) This rule does not limit the court's powers to punish for contempt of court.

[18.11.7] See further s.32, *Judicial Services and Courts* [Cap 270] and rr.18.13, 18.14.

Vexatious litigants

[18.12.1] Observations on validity of rule It is arguable that this rule infringes the freedoms described in art.5(1)(d) and (k) of the *Constitution*. In any event, such a rule is unlikely to be valid without a clear legislative mandate: *Jones v Skyring* (1992) 109 ALR 303 at 312; 66 ALJR 810 at 814 (goes beyond practice and procedure); *R v Lord Chancellor ex parte Witham* [1998] QB 575 at 585-6; [1998] 2 WLR 849 at 858; [1997] 2 All ER 779 at 787-8; *R v Dept of Constitutional Affairs* [2006] EWHC 504 (Admin) at [25]. The first such was *Vexatious Actions Act* 1896 (UK). It is suggested that there is nothing in ss.29 or 65 (or otherwise) of *Judicial Services and Courts* [Cap 270] that would suffice. The counter argument is that the power derives from the inherent jurisdiction to protect its process from abuse which is given formal expression in this rule: See *Bhamjee v Forsdick (No2)* [2004] 1 WLR 88, [2003] EWCA Civ 1113 for a very useful and detailed historical analysis.

E *CPR* r3.4

18.12(1) A person may apply to the Supreme Court for an order that another person be declared a vexatious litigant.

(2) A judge or magistrate may refer the question whether a person is a vexatious litigant to the Supreme Court.

(3) The following provisions apply:

(a) the judge dealing with the matter must refer it to the Registrar; and

(b) the Registrar must list the number and kind of proceedings that the person has started, and their outcome; and

(c) the person must be summonsed to appear and show cause why he or she should not be declared a vexatious litigant.

(4) If the question has been referred by a judge, it must be dealt with by a different judge.

(5) If the Supreme Court is satisfied that a person persistently and without reasonable cause has started vexatious proceedings or proceedings that disclose no reasonable cause of action, the court may declare the person to be a vexatious litigant.

[18.12.2] Meaning of "vexatious" In *A-G v Barker* [2000] 1 FLR 759 at [22]; [2000] 2 FCR 1; [2000] Fam Law 400 Lord Bingham CJ described "vexatious proceedings" in connection with s.42(1) of the *Supreme Court Act* 1981 (UK): "The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of revisiting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who, if they were to be sued at all should be joined in the same action; that the claimant automatically challenges every adverse decision on appeal, and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop." In *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 491 Roden J discussed the

principal authorities in relation to what constitutes vexatious proceedings and concluded: "It seems then that litigation may properly be regarded as vexatious for present purposes on either objective or subjective grounds. I believe that the test may be expressed in the following terms: 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought. 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise. 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless". The test is objective: *Jones v Skyring* (1992) 109 ALR 303 at 309-10; 66 ALJR 810 at 812.

[18.12.3] Discretionary considerations The order should not be made lightly: *Kaltabang v Director of Lands* [2008] VUSC 22; CC 36 of 2007.

[18.12.4] Meaning of "persistently" In *Attorney-General v Wentworth* (1988) 14 NSWLR 481 at 492 the word "persistently" was said to suggest "determination, and continu[ation] in the face of difficulty or opposition, with a degree of stubbornness." In *Brogden v Attorney-General* [2001] NZCA 208; the Court of Appeal said, at [21]: "What constitutes institution of such proceedings 'persistently' will not depend merely on the number of them but, just as importantly, on their character, their lack of any reasonable ground and the way in which they have been conducted. A litigant may be said to be persisting in litigating though the number of separate proceedings he or she brings is quite small if those proceedings clearly represent an attempt to re-litigate an issue already conclusively determined against that person, particularly if this is accompanied by extravagant or scandalous allegations which the litigant has no prospect of substantiating or justifying. The Court may also take into account the development of a pattern of behaviour involving a failure to accept an inability in law to further challenge decisions in respect of which the appeal process has been exhausted, or attacking a range of defendants drawn into the widening circle of litigation solely because of an association with a defendant against whom a prior proceeding has failed."

[18.12.5] Meaning of "without reasonable cause" The requirement that proceedings also be started without reasonable cause is necessarily satisfied if the proceedings are utterly hopeless. This requirement will have an independent operation only where the proceedings are considered vexatious on a basis other than their hopelessness. In that instance, the fact that the plaintiff followed independent legal advice in bringing a claim may be relevant: *Attorney-General for Victoria v Weston* [2004] VSC 314 at [22].

[18.12.6] Costs of applications A successful application under equivalent provisions in other jurisdictions will usually be accompanied by an order for costs, sometimes for indemnity costs due to the very nature of such applications. By comparison, in *Kaltabang v Director of Lands* [2008] VUSC 22; CC 36 of 2007 at [16] Tuohy J declined to make any award of costs in the only declaration of this kind ever made in Vanuatu, explaining that in "[his] view, [costs] are not appropriate in an application of this nature".

(6) The declaration remains in force for the period stated in the declaration, not being longer than 2 years.

(7) A person declared to be a vexatious litigant may not start a proceeding while the declaration is in force without the leave of the court.

[18.12.7] Meaning of "proceeding" This would appear to apply to any proceeding in any court, an interpretation consistent with the need to protect all courts from abuse as well as all litigants: *R v Central London County Court* (2004) *Times*, 13 July.

[18.12.8] Discretion to grant leave The onus will be upon the person declared to be a vexatious litigant to satisfy the court of the reasonableness of a proposed proceeding: *Phillip Morris Ltd v A-G Victoria* [2006] VSCA 21 at [116]. The discretion is otherwise at large. Authorities on this point from other jurisdictions are guided by the words of the applicable statute – in Vanuatu there is no applicable statute. It is suggested that the court should grant leave where the proposed proceedings are seen to raise a proper cause of action which is not merely a re-fashioned case which previously failed.

[18.12.9] Costs of applications In *Attorney-General for NSW v Bar-Mordecai* [2008] NSWSC 774 at [73] the costs of an unsuccessful application for leave were awarded against the applicant on the standard basis, the court explaining that applications for leave ought to be approached with due regard to the access that, ordinarily, a person should have to the courts. In the case of a person who is the subject of an order, there

is a hurdle to that access in the requirement to satisfy the court that the person ought to be allowed to commence the proceedings and therefore the imposition of an additional hurdle in the form of the threat of indemnity costs is not necessarily warranted even though, by their nature, unsuccessful applications for leave will often provide a basis for an application for such costs.

(8) If a party persistently makes unmeritorious applications in a proceeding, the court may order that the party may not make any further applications in the proceeding without leave of the court.

[18.12.10] General observations It may be that the power in this subrule falls more obviously within the inherent jurisdiction of the court to prevent abuse of its process and avoids the other potential sources of difficulty described at [18.12.1], [18.12.2].

Contempt in the hearing of the court

18.13(1) If it appears to a court that a person is guilty of contempt in the court's hearing, the court may:

[18.13.1] Meaning of "in the hearing of the court" It is uncertain whether contempt "in the hearing of the court" is synonymous with, or a subset of, contempt "in the face of the court". The words of the rule suggest that it might be confined to that conduct actually viewed (or heard) by the court. This confinement may not reflect the common law of contempt which contains examples of contempt taking place in the courtroom, the passageways, the verandah and the steps leading to it, even if not witnessed by the judge: *Ex parte Tubman* [1970] 3 NSWR 41 at 63; 72 SR (NSW) 555 at 582**;** *Registrar, Court of Appeal v Collins* [1982] 1 NSWLR 682 at 707; cf *European Asian Bank v Wentworth* (1986) 5 NSWLR 445 at 458.

[18.13.2] Jurisdiction to punish for contempt The jurisdiction to punish for contempt arises from s.32, *Judicial Services and Courts* [Cap 270].

[18.13.3] Acts amounting to contempt In *Izoura v The Queen* [1953] AC 327 at 336; [1953] 2 WLR 700 at 705; [1953] 1 All ER 827 at 830 the Privy Council noted that it is impossible to particularise the acts which may constitute a contempt in the face of the court. The offence has been said to include "conduct, active or inactive, amounting to an interference with or obstruction to, or tendency to interfere with or obstruct, the due administration of justice": *Ex parte Bellanto* [1963] SR (NSW) 190 at 202.

(a) direct the person be brought before the court; or

(b) issue a warrant for the person to be arrested and brought before the court.

(2) When the person is brought before the court, the court must:

(a) explain to the person how the person committed the contempt; and

[18.13.4] Extent of explanation It has long been accepted that a person should not be punished for contempt unless the specific charge against him or her be distinctly stated and an opportunity of answering it be given to that person. Accordingly, the explanation ought to be detailed and explicit: *Coward v Stapleton* (1953) 90 CLR 573 at 579-80.

(b) ask the person to give reasons why the person should not be punished for the contempt; and

(c) decide the matter in any way the court thinks appropriate; and

(d) order that the person be punished or be discharged.

[18.13.5] Width of discretion The sentencing discretion is wide and was described by Lord Denning MR in *Morris v Crown Office* [1970] 2 QB 114 at 125; [1970] 1 All ER 1079 at 1083 to include "a power to fine or imprison, to give an immediate sentence or postpone it, to commit to prison pending his consideration of the sentence, to bind over to be of good behaviour and keep the peace, and to bind over to come up for judgment if called upon." Section 32, *Judicial Services and Courts* [Cap 270] provides for maxima in relation to imprisonment (one year) and fine (VT100,000).

(3) If the court cannot deal with the matter straight away, the court may order that the person be kept in custody, be released, or be released on conditions.

Contempt by failing to comply with an order

18.14(1) This rule applies where a person fails to comply with an order of the court or an undertaking given to the court during or at the end of a proceeding.

[18.14.1] Nature of disobedience required Failures to comply with orders such as those relating to disclosure and other interlocutory procedures are rarely prosecuted, unless involving deliberate or persistent disobedience, even if the non-compliance is of a lawyer. Contempt proceedings will usually be a last resort. The nature and import of contempt proceedings was considered in *In re Civil Contempt of Court v de Robillard* [1997] VUCA 1; CAC 1 of 1997; *Mele v Worwor* [2006] VUCA 17; CAC 25 of 2006 and briefly in *Tuna Fishing (Vanuatu) Ltd v Government of Vanuatu* [2008] VUCA 3; CAC 4 of 2008 (power to be exercised "with great care") . It is clear from those authorities that contempt proceedings must not be employed inappropriately. For the possibility of contempt arising from non-compliance with an enforcement warrant for the payment of money see *Naylor v Foundas* [2004] VUCA 26; CAC 8 of 2004. For an example involving persistent failure to execute an instrument see *Government v Mahit* [2009] VUSC 98; CC 207 of 2007.

[18.14.2] Contempt by non-parties The reference to a "person" implies that the rule extends to non-parties who have interfered with court orders: *Narai v Foto* [2006] VUSC 77; CC 175 of 2004 at [9].

[18.14.3] No contempt upon uncertain orders The order said to give rise to the contempt must be clearly expressed: *Mele v Worwor* [2006] VUCA 17; CAC 25 of 2006; *Tuna Fishing (Vanuatu) Ltd v Government of Vanuatu* [2008] VUCA 3; CAC 4 of 2008 (citing *Iberian Trust Ltd. v. Founders Trust and Investment Co Ltd* [1932] 2 KB 87). The orders in question need not prescribe exactly the manner in which the court's order is to be carried out – it is sufficient if the court clearly specified that a party carry out a particular course of conduct: *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* [2002] FCA 949 at [7] and [110] – [112].

[18.14.4] Standard of proof The seriousness and quasi-criminal nature of contempt leads to the imposition of the criminal standard of proof – beyond reasonable doubt: *Re Bramblevale* [1970] Ch 128; [1969] 3 All ER 1062; *Witham v Holloway* (1995) 183 CLR 525.

[18.14.5] Intent Without hearing argument on the point, the Court of Appeal in *Tuna Fishing (Vanuatu) Ltd v Government of Vanuatu* [2008] VUCA 3; CAC 4 of 2008, (citing *Bramblevale* [1970] Ch 128; [1969] 3 All ER 1062 as authority) said: that it "must be proved clearly that the order deliberately had not been complied with". It is respectfully suggested that nothing in *Bramblevale* supports that proposition and that the state of the prior common law was that it was *not* necessary to prove any subjective intent deliberately to disobey an order of the Court: *Stancomb v Trowbridge Urban District Council* [1910] 2 Ch 190 at 194; *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* [2002] FCA 949 at [10], [152]

(2) If the failure happens during a proceeding:

(a) the court may initiate proceedings for contempt; or

(b) another party may apply for an order that the first person be punished for contempt.

(3) If the failure happens after the proceeding has ended, another person may apply to reopen the proceeding, and ask that the person be punished for contempt.

(4) The application:

(a) must have with it a sworn statement giving details of the contempt; and

[18.14.6] Particulars of contempt It has long been accepted that a person should not be punished for contempt unless the specific charge against him or her be distinctly stated and an opportunity of answering it be given to that person: *Coward v Stapleton* (1953) 90 CLR 573 at 579-80. Accordingly, the application document should be explicit. If it is not, the sworn statement accompanying the application may not necessarily be relied upon to remedy the deficiency: *Harmsworth v Harmsworth* [1987] 1 WLR 1676 at 1683.

(b) must be served personally on the person.

(5) After hearing the matter, the court may do all or any of the following:

(a) fine the person;

[18.14.7] Accruing fine It is uncertain whether an accruing fine as in *Mudginberri Station v Australasian Meat Union* (1986) 12 FCR 10 could be imposed. See further s.32, *Judicial Services and Courts* [Cap 270] which provides for a maximum fine of VT100,000.

(b) order the person be imprisoned for the period the court decides;

[18.14.8] Period of imprisonment Section 32, *Judicial Services and Courts* [Cap 270] provides for a maximum period of imprisonment of one year. In *Government v Mahit* [2009] VUSC 98; CC 207 of 2007 the contemnor was given a wholly-suspended sentence of two weeks for each of two instances of disobedience of orders to execute an instrument.

(c) for a body corporate, order that the body corporate's property be seized;

[18.14.9] General observations on remedy Contempt of court is a distinctive offence attracting remedies which are *sui generis*: *Morris v Crown Office* [1970] 2 QB 114 at 125; [1970] 1 All ER 1079 at 1083. It is respectfully suggested, however, that such an order may be beyond the power of the court, absent a statutory basis, and that the validity of this rule should not be assumed.

(d) release the person, whether on conditions or not.

[18.14.10] Costs A Contemnor is often ordered to pay the applicant's costs on an indemnity basis: *Government v Mahit* [2009] VUSC 98; CC 207 of 2007; *Australian Competition and Consumer Commission v INFO4PC.com Pty Ltd* [2002] FCA 949 at [160] – [162].

General form of warrant

18.15 A general warrant must be in Form 36.

Repeal of old Rules

18.16 The High Court (Civil Procedure) Rules 1964 and the Magistrates' Courts (Civil Procedure) Rules 1976 are repealed.

[18.16.1] See further [1.1.1].

Commencement

18.17 These Rules come into operation on 31st January 2003.

[18.17.1] See further [1.1.1].