PRELIMINARY

Title

1.1 These Rules are the Civil Procedure Rules.

[1.1.1] **History** Rule 18.16 repeals and replaces the pre-Independence *High Court (Civil Procedure) Rules* 1964 and the *Magistrates' Courts (Civil Procedure) Rules* 1976. The new *Civil Procedure Rules* (No 49 of 2002) were made under s.30(1), *Courts* [Cap 122] and commenced on 31 January 2003. At that time the *Courts Act* was slated for repeal and replacement by *Judicial Services and Courts* [Cap 270] which had already received assent on 29 December 2000, well before the new *Rules* were made, but which did not commence until 2 June 2003, after the *Rules* came into operation. Sections 66(6) and 76(5) of the *Judicial Services and Courts Act* provide that rules in force immediately prior to commencement of the Act remain in force and are deemed to have been made under the new Act. Section 66(3) of the *Judicial Services and Courts Act* is the current source of the power to make rules.

[1.1.2] **Inherent jurisdiction** The power to make rules is also an incident of the inherent jurisdiction of courts to regulate their practice: *Bartholomew v Carter* (1841) 3 Man & G 125 at 131; 133 ER 1083 at 1086. The inherent jurisdiction was usefully described in Sir Jack Jacob's seminal article "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 at 51 as a "reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them". In *Hunter v Chief Constable of West Midland Police* [1982] AC 529 at 536 it was said that courts have an inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of rules of court, would nevertheless be unfair to a party or otherwise bring the administration of justice into disrepute. See also *Connelly v DPP* [1964] AC 1254 at 1301; [1964] 2 WLR 1145 at 1153; [1964] 2 All ER 401 at 409; *Taylor v A-G* [1975] 2 NZLR 675 at 679**;** *Bremer v South India Shipping* [1981] AC 909 at 977; [1981] 1 All ER 289 at 295; [1981] 2 WLR 141 at 147; [1981] 1 Lloyd's Rep 253 at 257. This inherent jurisdiction usually survives the creation of a statutory rule-making power: *Beavan v Mornington* (1860) 8 HL Cas 525 at 534; 11 ER 534 at 538; *S v S* [1972] AC 24 at 46; [1970] 3 All ER 107 at 113-4; [1970] 3 WLR 366 at 376-7. The inherent jurisdiction of the Supreme Court and Court of Appeal was expressly preserved in s.29(1) of the *Courts Act* and continues to be preserved by s.65(1) of the *Judicial Services and Courts Act*. See also *S v Moti* [1999] VUSC 38; CC 132 of 1998; *Esau v Sur* [2006] VUCA 16; CAC 25 of 2005. Section 78 also provides that the Act does not take, lessen or impair any jurisdiction previously exercised.

[1.1.3] **Practice and procedure** Sections 30(1) of the *Courts Act* and 66(3) of the *Judicial Services and Courts Act* both permit the making of rules relating to "practice and procedure". This is an important qualification and limitation – see [1.1.5]. The phrase "practice and procedure" is often used as a composite phrase and interchangeably in English authorities (*Poyser v Minors* (1881) 7 QBD 329 at 333-4; *Mitchell v Harris Engineering* [1967] 2 QB 703 at 720; [1967] 2 All ER 682 at 687; [1967] 3 WLR 447 at 459) but the separate words are not necessarily synonymous. The word "procedure" may have a more comprehensive meaning than "practice": *Union Bank v Harrison Jones & Devlin* (1910) 11 CLR 492 at 504; 11 SR (NSW) 283 at 285; *White v White* [1947] VLR 434 at 440; *Price v Price (Nos 1 & 2)* [1963] 4 FLR 43 at 52; *Adam P Brown Male Fashions v Philip Morris* (1981) 148 CLR 170 at 176; 55 ALJR 548 at 550; 35 ALR 625 at 629; *Gosper v Sawyer* (1985) 160 CLR 548 at 558; 59 ALJR 429 at 433; 58 ALR 13 at 18. Substantive law creates rights and obligations whereas procedure is an adjunct to substantive law: *Re Coles and Ravenshear* [1907] 1 KB 1 at 4. It is not always easy, however, to differentiate between substance and procedure: See for example *Black v Dawson* [1895] 1 QB 848 at 849; *Cleland v Boynes* (1978) 19 SASR 464 (production of privileged documents); *Mahfoud v Minister for Immigration, Local Government and Ethic Affairs* (1993) 33 ALD 609 at 612; 43 FCR 217 at 220-1; 115 ALR 603 at 607 (limitation periods); *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49 (right to adduce evidence). Section 66(3)(e) also refers to the making of rules "necessary or convenient", however this should not be read as an extension (beyond matters of practice and procedure) of the permitted scope of the *Rules*: *In the Marriage of Horne* (1997) 21 Fam LR 363 at 373.

[1.1.4] **Jurisdiction of the courts** Unlike section 30(1) of the *Courts Act,* s66(3)(b) of the *Judicial Services and Courts Act* also permits the making of rules "for or in relation to" the "criminal and civil jurisdiction" of the courts. The extent to which this provision could effectively validate a rule which conferred new jurisdiction on the courts or affected substantive law is uncertain. There are a number of provisions in the *Rules* which purport to do so. Although made under the *Courts Act*, which did not permit such rules, s.76(5) of the *Judicial Services and Courts Act* provides that rules made under the former are deemed to have been made under the latter.

[1.1.5] **Limits of rule making power** Rules of court, like any other subordinate legislation, must be confined within the limits and purpose marked out by the enabling instrument: *Britain v Rossiter* (1879) 11 QBD 123 at 129; [1874-80] All ER Rep Ext 1483 at 1486; *North London Rwy v Great Northern Rwy* (1883) 11 QBD 30 at 39-40; *Read v Brown* (1888) 22 QBD 128 at 132; *British South Africa v Companhia de Mocambique* [1893] AC 602 at 625 and 628-9; *Carbines v Powell* (1925) 36 CLR 88 at 91; *Foster v Aloni* [1951] VLR 481 at 484; *Shanahan v Scott* (1957) 96 CLR 245 at 250; *Lynch v Brisbane CC* (1961) 104 CLR 353 at 364-5; 35 ALJR 25 at 28-9; [1961] Qd R 463 at 480; *F. Hoffmann-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 at 365-6; [1974] 3 WLR 104 at 131; [1974] 2 All ER 1128 at 1153; *R v Her Majesty's Treasury* [1985] 1 QB 657 at 666-7; [1985] 1 All ER 589 at 593-4; [1985] 2 WLR 576 at 580-1; *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49; *R v Secretary of Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 at 401-2; [1997] 1 WLR 275 at 292-3.

[1.1.6] **Rules and substantive law** That a rule intrudes into an area of substantive law does not necessarily rob it of its procedural character - only if the rule, *ex facie* procedural, could not reasonably have been adopted for procedural purposes may it be said to have gone too far: *Watson v Petts* [1899] 1 QB 54 at 55; *Re Marchant* [1908] 1 KB 998 at 1000; *Re Jackson* [1915] 1 KB 371 at 375-6; [1914-5] All ER 959 at 961; *Taylor v Gutilla* (1992) 59 SASR 361; *Harrington v Lowe* (1996) 190 CLR 311 at 324; 70 ALJR 495 at 500; 136 ALR 42 at 49; *Air Link v Paterson (No 2)* (2003) 58 NSWLR 388; [2003] NSWCA 251 at [94]. The validity of a rule does not lie in its ultimate fairness, but in the extent to which it is a reasonable means of attaining the ends of the rule-making power: *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155; *South Australia v Tanner* (1998-9) 166 CLR 161 at 168.

[1.1.7] **Practice Directions** The inherent power to make rules is sometimes exercised by the issue of Practice Notes or Practice Directions. These are in the nature of informal rules and are, in Vanuatu, comparatively rare. When they are issued, lawyers must abide by them and they may be enforced: *Langley v North West Water Authority* [1991] 3 All ER 610 at 613-4; [1991] 1 WLR 697 at 701-2; *Gittins v WHC Stacy & Son Pty Ltd* [1964-5] NSWR 1793 at 1794-5.

Overriding objective

E *CPR* r1.1
NSW *CPA* s56(1)
Q *UCPR* r5(1)
SA *SCCR* r3(a)
NZ *HCR* r4
CAN *FCR* r1(3)
BC *SCR* r1(5)

1.2 (1) The overriding objective of these Rules is to enable the courts to deal with cases justly.

[1.2.1] **History** This is the guiding principle behind the *Rules*.. The overriding objective, and most of this Part, is taken, verbatim, from the draft developed by Lord Woolf and appended to *Access to Justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996) which has since become the basis of the *Civil Procedure Rules* 1998 for England and Wales and the inspiration for rules of court in other Commonwealth jurisdictions. The attainment of justice through the rules of court is, of course, hardly a new aspiration and has long been a guiding procedural principle. As long ago as *Coles v Ravenshear* [1907] 1 KB 1 at 4 the court explained the proper approach to rules of court in substantially identical terms: "…the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case". See also *Michel v Director of Finance* [1997] VUSC 40; CC 68 of 1997; *Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999; *Schmidt v BNZ Ltd* [1991] 2 NZLR 60 at 63; *Harding v Bourke* (2000) 48 NSWLR 598; [2000] NSWCA 60 at [26]. Similarly, in the context of pleadings, *Astrovlanis v Linard* [1972] 2 All ER 647 at 654; [1972] 2 QB 611 at 620; [1972] 2 WLR 1414 at 1421 referred to "the overriding principle that litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to reduce costs".

[1.2.2] **Difference between English rule and Vanuatu rule** It is important to note that this rule is qualitatively different in one important respect from its English counterpart which commences by stating that "These Rules are a new procedural code". The significance of Vanuatu's adoption of Part 1 but excluding reference to the *Rules* being a code is discussed at [1.3.2] *et seq*.

E *CPR* r1.1(2)
NSW *CPA* s58(2)

(2) Dealing with cases justly includes, so far as is practicable:

[1.2.3] **Subrule (2) non-exhaustive** The language suggests that the list below is not exhaustive. Other factors indicated by the "justice" of the case may be taken into consideration such as, perhaps, a party's history of expedition or compliance: See for example *Ifira Wharf v Kaspar* [2006] VUCA 4; CAC 29 of 2005.

[1.2.4] **Criticism of rule** Precisely how to deal with a case "justly" is a difficult question. Critics of the corresponding part in Lord Woolf's model have drawn attention to its broad and largely unguided discretions. One commentator thought they permitted "*ad hoc* exercises of subjective, antagonistic and potentially prejudicial judicial discretion to meet the perceived exigencies of individual cases": N Andrews, `The Adversarial Principle: Fairness and Efficiency' in A Zuckerman & R Cranston (eds), *Reform of Civil Procedure: Essays on `Access to Justice',* Clarendon Press, Oxford 1995, 182. See also N Browne-Wilkinson, 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' (1999) 28(2) UWAL Rev 181; M Gleeson, 'Access to Justice – A New South Wales Perspective' (1999) 28(2) UWAL Rev 192. These are ancient concerns, Sir Francis Bacon having warned that "the best law is that which leaves least to the discretion of judges, and the best judge is he who leaves least to his discretion" (cited by Lord Keith of Kinkel, 'Judicial Discretion' (1982) 1 CJQ 22 at 23). The Australian Law Reform Commission has also noted that more questions are raised than answered by such a rule: Discussion Paper 62: *Review of the Federal Civil Justice System*, 1999.

[1.2.5] **Discretion to be exercised judicially** What must always be borne in mind is that the court exercises a judicial power and must discharge its duty judicially: *Lee v Budge Rwy Co* (1871) LR 6 CP 576. Nothing in the *Rules* can be used to deprive a party of the opportunity to present a proper case, nor absolve a party who bears the onus of proof from the necessity of discharging it: *R v Watson* [1976] HCA 39 at [12]; (1976) 136 CLR 248 at 257-8. Indeed, art.47(1) of the *Constitution* states that "The function of the judiciary is to resolve proceedings according to law". There is no reason to think that this requirement excludes procedural law. See further *R v Wilkes* (1770) 4 Burr 2527 at 2539;*VCMB v Dornic* [2010] VUCA 4 at [28]-[33]; CAC 2 of 2010.

E *CPR* r1.1(2)(a)

(a) ensuring that all parties are on an equal footing; and

[1.2.6] **Meaning of "equal footing"** It has long been recognised that justice cannot always be measured in money and that a judge is entitled to weigh in the balance the strain that litigation imposes upon litigants, a strain that personal litigants are likely to feel more acutely than business corporations or commercial persons: *Ketteman v Hansel Properties* [1987] AC 189 at 220. While judges can ensure that orders are sensitive to these considerations and that both parties comply with rules and directions, and receive equality of treatment generally, there are obvious limits to the ability of a court to ensure equality. See for example the problem in *O'Hara v Rye* [1999] EWCA Civ 779 (inequality arising from "naive, guileless, and tactically suicidal conduct").

[1.2.7] **Limiting legal representation and arguments** The court probably cannot deprive litigants of the right to counsel of their choice in order to create a more "equal" environment: *Grimwade v Meagher* [1995] 1 VR 446 at 452; *Maltez v Lewis* (1999) *The Times*, 4 May 1999. Neither can the court prevent a party from putting forward important submissions or evidence, though it may legitimately seek to control how those are raised with a view to controlling costs: *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at 794. On the other hand, applications, even those consistent with technical merits, may be refused if the applicant is seeking to take unfair advantage of the other side: *O'Hara v Rye* [1999] EWCA Civ 779. Where a smaller firm or sole practitioner requires more time to complete steps than a larger firm with greater resources, this may be given: *Maltez v Lewis.*

[1.2.8] **Requirements of applications under this rule** If a party wishes to restrain the procedural steps of another with the aim of achieving greater equality under the rule, the applicant must demonstrate that they are themselves conducting the proceedings with a desire to limit expense: *McPhilemy v Times Newspapers* [1999] 3 All ER 775 at 792-3.

E *CPR* r1.1(2)(b)
NSW *UCPR* r2.1
Q *UCPR* r5(1), (2)
SA *SCCR r*3(e)
V *SCR r*1.4
NZ *HCR r*4
CAN *FCR r*1(3)
BC *SCR r*1(5)

(b) saving expense; and

[1.2.9] **Factors affecting expense** Active case management may increase costs and the court should be diligent to consider just how much management is required in each case: *A & N Holding v Andell* [2006] NSWSC 55 at [32]. Increased litigation cost may result from the requirement of additional documentation, additional case management events, a high level of case preparation at the "front end" of litigation and an emphasis on written evidence and submissions. Nevertheless, the court often orders written, submissions (where oral submissions would be appropriate) and statements of agreed/disputed issues of fact and law (even when the pleadings are simple).

E *CPR* r1.1(2)(c)
NSW *CPA* s60

(c) dealing with the case in ways that are proportionate:

[1.2.10] **Proportionality principle** This is associated with the philosophical theories of `distributive justice', discussed by John Rawls (J Rawls, *A Theory of Justice,* Belknap Press, Cambridge Massachusetts 1971), Ronald Dworkin (R Dworkin, *A Matter of Principle,* Harvard University Press, Cambridge Massachusetts 1985), Amartya Sen (A Sen, *On Ethics and Economics,* Blackwell, Oxford 1987, Robert Nozick, (R Nozick *Anarchy, State and Utopia,* Basic Books, New York 1977), John Roemer (J Roemer, *Theories of Distributive Justice,* Harvard University Press, Cambridge Massachusetts 1996) and others. The central theme of the Woolf report was that a sense of *proportionality* should guide the management of litigation – to apply the limited resources available within the civil justice system in such a way as to meet the greatest need: *Lownds v Home Department* [2002] 1 WLR 2450; [2002] 4 All ER 775 at [10].

[1.2.11] **Examples** In *Reed v Oury* [2002] EWHC 369 (Ch) where the court held that, having regard to the defendant's conduct of the litigation, the weakness of his counterclaim and the fact that even if he was successful on the counterclaim he would still owe a very large sum on the claim (which had proceeded to judgment), the proportionate method of furthering the overriding objective was to stay the counterclaim until the defendant paid what was owed.

E *CPR* r1.1(2)(c)(i)
NSW *CPA* s60

(i) to the importance of the case; and

[1.2.12] **Meaning of "importance"** The rule does not specify whether it is concerned with the importance of the case to society, to the parties, to the development of the law or otherwise. The importance of a case is, at least partly, a function of its merit, and accordingly, an arguable though dubious claim ought perhaps to be afforded lower priority. As far back as *Willis v Earl Beauchamp* (1886) 11 PD 59 at 63 it was expressly recognised that there was an inherent power to prevent the use of legal machinery to drag defendants through long and expensive litigation for no benefit. See also *Bhamjee v Forsdick (No2)* [2004] 1 WLR 88; [2003] EWCA Civ 1113 at [15]; *Bezant v Rausing* [2007] EWHC 1118 at [129].

E *CPR* r1.1(2)(c)(ii)
NSW *CPA* ss58(2)(b)(i), 60

(ii) to the complexity of the issues; and

[1.2.13] **Consequences of complexity** The complexity of the case may affect the scope of procedural requirements in a given case. In a simple case the court may, subject to considerations of fairness, prejudice, etc, impose limits on the scope of interlocutory or hearing procedures: See for example *Sita v Sita* [2005] NSWSC 461. Conversely, in complex cases, the court may impose such additional procedural requirements as the dictates of justice require.

E *CPR* r1.1(2)(c)(iii)
NSW *CPA* s58(2)(b)(vii)
BC *SCR r*68(13)

(iii) to the amount of money involved; and

[1.2.14] **Relative amount of money** It is not certain if the rule refers to gross sums or sums relative to the circumstances of the parties. The latter is probably more compelling and consistent with the next subparagraph. It is suggested that non-monetary claims or those which cannot be evaluated in purely financial terms should be assessed under paragraph (i).

E *CPR* r1.1(2)(c)(iv)

(iv) to the financial position of each party; and

NSW *CPA* s58(2)(b)(vii)

[1.2.15] **Assessment of financial position** There is no guidance as to how information about the financial position of the parties is to be obtained. Parties may be inclined to guard the precise details of their financial position as a matter of strategy and for reasons of privacy, so this is likely to assume significance only where financial disparity is obvious.

[1.2.16] **Avoidance of injustice** Lord Loreburn LC in *Brown v Dean* [1910] AC 373 at 374; [1908-10] All ER 661 at 662 admonished courts to remember that "people who have means at their command are easily able to exhaust the resources of a poor antagonist." See for example *Singh v Singh* [2002] NSWSC 852. See further r.1.2(2)(a).

E *CPR* r1.1(2)(d)
NSW *CPA* s59
NSW *UCPR* r2.1
Q *UCPR* r5(1), (2)
SA *SCCR r*3(c)
V *SCR r*1.14
WA *SCR* O1r4A
NZ *HCR r*4
CAN *FCR r*1(3)
BC *SCR r*1(5)

(d) ensuring that the case is dealt with speedily and fairly; and

[1.2.17] **Relationship between speed, fairness and cost** There is clearly a substantial public interest in the elimination of delay: *Hughes v Gales* (1995) 14 WAR 434 at 450; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [46]. The length of cases also has an important bearing on litigation costs. Speed should not be pursued at the expense of fairness, which would not be consistent with the overriding objective: See for example Sir Anthony Mason in A Mason, "The Courts as Community Institutions" (1998) 9 *Public Law* 83 at 85; *Queensland v JL Holdings Pty Ltd* [1997] HCA 1; (1997) 189 CLR 146 at 154; 141 ALR 353 at 357-8. Regrettably, the court is noticeably reluctant to work to dispose of cases that are conspicuously lacking in merit or which are left to lie dormant, even for many years. The warnings in cases such as *VCMB v Dornic* [2010] VUCA 4; CAC 2 of 2010, though entirely appropriate in the context of the procedural denials of natural justice in those cases, have had a certain chilling effect more generally.

[1.2.18] **Consequences for procedural appeals** This provision has been said to lead to a much diminished enthusiasm for appeals on procedural points: *Kaminski v Somerville College* [1999] EWCA Civ 1169. See further r.21, *CoAR*.

E *CPR* r1.1(2)(e)
NSW *CPA* s58(2)(b)(vii)

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[1.2.19] **Distributive justice** The right of litigants to be heard is not unrestricted. Case management is intended to avoid unnecessary cost and delay and ensure that courts, like other public resources, are economically managed: *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *VCMB v Dornic* [2010] VUCA 4 at [33]; CAC 2 of 2010. "Most judges nowadays accept a responsibility, not merely towards the particular litigants who are currently before them, but also to the others who are waiting in the queue": Sir Murray Gleeson "Access to Justice" (1992) 66 ALJ 270. "Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues": *Ashmore v Lloyd's* [1992] 1 WLR 446 at 448; [1992] 2 All ER 486 at 488; [1992] 2 Lloyd's Rep 1 at 3; see also *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *Bhamjee v Forsdick (No2)* [2004] 1 WLR 88, [2003] EWCA Civ 1113 at [15]. It has been explained that "It is no longer the rule of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately proportionately used in accordance with the requirements of justice": *Dow Jones & Co v Jameel* [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614 at [54]. These considerations are especially important to a jurisdiction with modest resources: S Farran & E Hill 'Making Changes With Rules in the South Pacific: Civil Procedure in Vanuatu' (2005) 3(2) JCLLE 27 at 37.

[1.2.20] **Balance between administration of justice and parties** The most important change wrought by the new system is that it does not confine the court to considering only the relative positions of the parties – the court must also consider the effect on the administration of justice generally: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940 per Lord Woolf; *Morris v Bank of America* [2000] 1 All ER 954 at 971. What might be perceived as injustice to a party when considered in a narrow party/party context may not be so when considered in the wider context including the public interest: *Sali v SPC* [1993] HCA 47; 116 ALR 625 at 629. Accordingly, in *Stephenson v Mandy* (1999) *The Times*, 21 July 1999 the court declined to hear an appeal from an interim injunction preventing the defendant from breaching a negative covenant in an employment contract where the appeal was scheduled for 30 June and the substantive trial for 20 July. It was said not to be an appropriate use of the court's resources to hear the appeal given the imminence of the

substantive trial. Similarly, in *Adoko v Jemal* (1999) *The Times*, 8 July 1999 an appeal was dismissed (with indemnity costs) where the court wasted over an hour trying to sort out the confusion created by the appellant's failure to comply with directions and his defective notice of appeal (of which prior warning was given by the other side). The court should consider the state of the list from time to time as well as general matters of efficiency: *Bomanite v Slatex* (1991) 32 FCR 379 at 383-4; 104 ALR 165 at 169.

Courts to apply overriding objective

E *CPR* r1.2
NSW *CPA* s58
Q *UCPR* r5(2)
WA *SCR* O1r4B
CAN *FCR r*1(3)

1.3 The courts must give effect to the overriding objective when they:

[1.3.1] **Nature of obligation** The English provision states that the court "must *seek* to give effect…" to the stated objectives. The Vanuatu provision seems more stringent; the court *must* give effect to the overriding objective. The obligation probably applies even when the parties themselves do not wish to conduct the proceedings quickly or cheaply: *Sherborne Estate (No 2)* (2005) 65 NSWLR 268; [2005] NSWSC 1003 at [29].

E *CPR* r1.2(a)
NSW *CPA* ss56(2), 58
CAN *FCR r*1(3)

(a) do any act under these Rules; or

E *CPR* r1.2(b)
NSW *CPA* s56(2), 58
NZ *HCR r*4
CAN *FCR r*1(3)

(b) interpret these Rules.

[1.3.2] **Persuasiveness of earlier authorities** This obligation raises difficult questions in relation to the applicability of earlier procedural case law. Lord Woolf described the *Rules* as a "self-contained code" and said that "earlier authorities are no longer of any relevance" and "would mislead rather than inform". He subsequently endorsed a decision at first instance where the judge stated that it was his "firm belief that authorities decided under the old procedure should not be taken as binding or probably even persuasive upon this court": *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1932; [1999] 4 All ER 934 at 939; *Lombard NatWest v Arbis* (unreported, Chancery Division, 29 October 1999); *MacDonald v Thorn* [1999] TLR 691; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [46]; *Price v Price (Poppyland Headwear)* [2003] EWCA Civ 888 at [38]; [2003] 3 All ER 911. This attitude is lent support by the (English) rules themselves, which are described as a code (see [1.2.2]), a description that was specifically added later to discourage parties from referring back to old authorities, but is absent in the (Vanuatu) *Rules*. Nevertheless, absent a specific description as a code in *Lenijamar v AGC* (1990) 27 FCR 388 at 394-5; (1990) 98 ALR 200 at 206-7 the Federal Court of Australia showed a marked disinclination to look back to authorities predating the creation of that court. Yet there are indications that English courts have not been rigid in this approach and will not hesitate to look to older cases as a guide to the exercise of discretions where the old procedure is similar to the new: See for example *Walsh v Misseldine* [2000] EWCA Civ 61 at [80] - [81] (citing *Purdy v Cambran* [1999] CPLR 843 where May LJ explained Lord Woolf's decision in *Biguzzi* as "not saying that the underlying thought processes of previous decisions should be completely thrown overboard"); *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318; *Nomura International plc v Granada Group Ltd* [2007] EWHC 642; [2007] 2 All ER (Comm) 878. It seems that the English courts will continue to have regard to older cases on similar procedural processes but will no longer feel so constrained to follow them. There are indications that a similar approach is taken in Vanuatu. As Lord Nicolas Browne-Wilkinson observed, it would indeed be brave to "throw away 120 years of experience in construing and working out the parameters of procedures which will continue to apply": 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' (1999) 28(2) UWAL Rev 181 at 184. Procedural authorities do not, in any event, cut down the jurisdiction of the court, though they afford valuable guidelines as to the applicable principles, especially in cases involving similar facts: *Re Baxters and Midlands Rwy* (1900) 95 LT 20 at 23.

[1.3.3] **Persuasiveness of recent authorities** Of course, the requirements of this rule will undoubtedly be raised as justification for distinguishing even recent authorities and perhaps also for departing from the strict requirements of the *Rules* on the basis that slavish adherence to the letter rather than the spirit, effect and totality of the *Rules* is not a recipe for a just and equitable disposition of a matter": *Food-Tech v APV-Bell Bryant* (1989) 3 PRNZ 222 at 225; *Bomanite v Slatex* (1991) 32 FCR 379 at 391; 104 ALR 165 at 177; *Idoport v NAB* (2000) 49 NSWLR 51; [2000] NSWSC 338 at [28]. While such observations have obvious merit, there is also a very real danger that individualised procedure confers too much judicial discretion which is relatively

unchecked by appellate supervision. Variations of style, and even whim or caprice, can quickly rob civil procedure of core values such as consistency and predictability. It is respectfully suggested that there are a growing number of procedural authorities in Vanuatu that are difficult to reconcile with one another. In many of these the overriding objective is invoked as a mystical substitute for proper judicial reasoning and it is respectfully suggested that this practice is profoundly unsatisfactory and debilitating. Rules of court typically afford judges a broad discretion, however the traditional role of judges is to do justice *according to law*: *Jimmy v Rarua* [1998] VUCA 4; CAC 2 of 1999; *Sydney City Council v Ke-Su Investments Pty Ltd* (1985) 1 NSWLR 246 at 252; *R v Wilkes* (1770) 4 Burr 2527 at 2539. Moreover, the process of applying the overriding objective should result in the development and clarification of relevant criteria, etc which can then be applied (albeit flexibly) to the case at hand *and* to subsequent cases with relative certainty. The direct application of a policy such as the overriding objective in each case without formulating relevant principles will lead only to uncertainty and judicial diversity: *Caltex Oil v The Dredge "Willemstad"* (1975-6) 136 CLR 529 at 567.

[1.3.4] **Plain meaning** The *Rules* are drafted in plain language. Accordingly, the court should give effect to the natural meaning of the words used and avoid results which depart from them: *Vinos v Marks and Spencer plc* [2001] 3 All ER 784 at [20]. Neither should the overriding objective be used to interpret the *Rules* in such a way as to confer on the court a jurisdiction which does not in fact exist, even in a deserving case: *Godwin v Swindon Borough Council* [2001] EWCA Civ 1478 at [45].

Courts' duty to manage cases

E *CPR* r1.4(1)
NSW *CPA* s56(3), 57
WA *SCR* 029A

1.4 (1) In particular, the courts must actively manage cases.

[1.4.1] **Purpose of active case management** It has been said that the adoption of active case management represents more than a mere change in the mechanics of litigation and signifies the development of a "new philosophy of procedure": A Zuckerman, `Justice in crisis: Comparative Dimensions of Civil Procedure' in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure,* Oxford University Press 1999, 48. See also G Watson, `From an Adversarial to a Managed System of Litigation: A comparative critique of Lord Woolf's interim report' in R Smith, *Achieving Justice,* Legal Action Group, London 1995, 65. It has been said that case management is consistent with the "prevailing theory" as to modern judicial function which "encourages active case management to reduce issues, avoid surprise and embarrassment, minimise cost and delay, and provide expeditious and efficient justice": *Cockerill v Collins* [1999] 2 Qd R 26 at 28.

[1.4.2] **Parties no longer to drive case management** The traditional approach was to permit the claimant to drive the case on the assumption that expedition was in his interest, however experience has shown this to be an unreliable assumption: *Rastin v British Steel* [1994] 1 WLR 732 at 739; [1994] 2 All ER 641 at 646. Increased judicial involvement in cases should be expected under active case management: See D Ipp, 'Judicial Intervention in the Trial Process' (1995) 69(5) ALJ 365 at 384; J Wood, 'The Changing Face of Case Management: The New South Wales Experience' (1995) 4 *Journal of Judicial Administration* 121; *Asiansky Television v Bayer-Rosin* [2001] EWCA Civ 1792 at [48]; *Aon Risk Services v ANU* [2009] HCA 27 at [156]. There remains, however, an important role for litigant autonomy and the court should be careful not to overlook the wishes of a party for whose most direct benefit case management orders are ostensibly made: *Government of Vanuatu v Carlot* [2003] VUCA 23; CAC 19 of 2003. Unfortunately, the efficiencies promised by active case management are as yet unrealised in Vanuatu. Attempts by parties to have matters listed or otherwise dealt with on an urgent basis are often futile. Letters to the court are seldom answered. Extraordinary delays in listing, frequent re-listing, long delays in judgment and interlocutory judgment delivery, and other problems have shown that the court is far *less* able to dispense active case management than parties are able to receive it. Those few examples where the court adopts aggressive schedules are often inexplicable and as likely to be inappropriate.

[1.4.3] **Case management not an end in itself** Case management is not an end in itself, but an important and useful aid for ensuring the prompt and efficient disposal of litigation, and it must always be borne in mind that the ultimate aim of the court is the attainment of justice: *Queensland v J L Holdings* [1997] HCA 1; (1997) 189 CLR 146 at 154; 71 ALJR 294 at 296; 141 ALR 353 at 357;*Abbey National Mortgages plc v Key Surveyors Nationwide* [1996] 3 All ER 184 at 186-7. Of course, the attainment of justice includes consideration of the public interest in efficiency: *Aon Risk Services v ANU* [2009] HCA 27.

E *CPR* r1.4(2)

(2) Active case management includes:

[1.4.4] **Subrule (2) non-exhaustive** The language suggests that the following list is not exhaustive. The Victorian Magistrates Court *Civil Procedure Rules* contains, for example, an additional paragraph, (m), to the effect that case management also includes "limiting the time for the hearing or other part of the case, including at the hearing the number of witnesses and the time for the examination or cross-examination of a witness." In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal also identified the discouragement of interlocutory applications in favour of determination on the merits as an aspect of case management.

E *CPR* r1.4(2)(a)
Q *UCPR* r5(4)
SA *SCCR r3*(b)

(a) encouraging the parties to co-operate with each other during the proceedings; and

[1.4.5] **Meaning of "co-operation"** One commentator has opined that the application of the overriding objective will result in an immense increase in correspondence from lawyers to their clients and opposition, not for the chivalrous purpose of providing additional information, but to make a good impression on the court: R Harrison, "Will Woolf Change the Way We Behave?" (1998) 148 NLJ 1853 at 1854. This does not mean that lawyers are not permitted to litigate robustly, only that they balance their obligations to the client against the necessity of preserving justice: *R v Wilson & Grimwade* [1995] 1 VR 163. See further r.1.5.

[1.4.6] **Examples of encouragement** Applications, even those consistent with technical merits, may be refused if the applicant is seeking to take unfair advantage of the other side: *O'Hara v Rye* [1999] EWCA Civ 779. The court's "encouragement" may also extend to tailoring costs orders (including punitive costs orders) in appropriate cases: *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001; *Hertsmere Primary Care v Rabindra-Anandh's Estate* [2005] EWHC 320 Ch; [2005] 3 All ER 274 at [11]; *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009 (where service is strategically withheld).

E *CPR* r1.4(2)(b)

(b) identifying the issues at an early stage; and

[1.4.7] **Benefits and examples** The early identification of issues through case management is likely to encourage early settlement of disputes and reduce the duration of proceedings. Post-trial amendments are likely now to be viewed with greater strictness than in the past: *Nikken Kosakusho Works v Pioneer Trading Co* [2005] EWCA Civ 906. There seems, however, to be a marked, though unexplained, reluctance selectively to strike out parts of statements of the case or sworn statements to achieve this purpose. There also seems to be a similar reluctance to invoke r.12.4.

E *CPR* r1.4(2)(c)

(c) deciding promptly which issues need full investigation and trial and resolving the others without a hearing; and

[1.4.8] **Scope of rule** This paragraph does not supplant the inherent jurisdiction to strike out nor does it create an additional option to striking out in which there is a preliminary trial adopting the standard of proof applicable to a trial: *Royal Brompton Hospital v Hammond (No 5)* [2001] EWCA Civ 550 at [21], [23]. There is, however, a principle implied in the overriding objective that it is not just to subject a defendant to a lengthy and expensive trial where there is no realistic prospect of success: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [88]-[93], [132]-[134], [192]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Sutradhar v Natural Environment Research Council* [2006] UKHL 33 at [3] *et seq*; [2006] 4 All ER 490. See further paragraph (c).

[1.4.9] **Preliminary issue trials** The court should be slow to deal with single issues where there will need to be a full trial on liability involving evidence in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [92]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Wragg v Partco* [2002] EWCA Civ 594 at [27]; [2002] 2 Lloyd's Rep 343. See further r.12.4.

E *CPR* r1.4(2)(d)

(d) deciding the order in which issues are to be resolved; and

[1.4.10] **Preliminary issue trials** Costs and judicial resources can be saved by identifying decisive issues and trying them first. The resolution of one issue, although not itself decisive, may facilitate settlement of the remainder of the dispute. See further r.12 .4.

[1.4.11] **Case stated** The power, to state a case for consideration of the Court of Appeal is contained in s.31(5), *Judicial Services and Courts* [Cap 270]. It has been suggested that this should only be invoked in special circumstances where a real advantage can be shown: *Benard v Citizenship Commission* [2007] VUSC 71; CC 230 of 2006 at [7]. A magistrate may state a case for the Supreme Court pursuant to s.17(1) of the Act.

E *CPR* r1.4(2)(e)
SA *SCCR r*3(b)

(e) encouraging parties to use an alternative dispute resolution procedure if the court considers it appropriate, and facilitating its use; and

[1.4.12] **Meaning of "alternative dispute resolution"** The term "alternative dispute resolution" is not defined but is generally understood to refer to some form of mediation by a third party*: Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [5]; [2004] 1 WLR 3002; [2004] 4 All ER 920. See further Part 10 and s.42A, *Judicial Services and Courts* [Cap 270].

[1.4.13] **Encouragement by costs** Costs orders would usually be a source of encouragement: See for example *Dunnett v Railtrack* [2002] EWCA Civ 303 at [15]; [2002] 1 WLR 2434; [2002] 2 All ER 850; *Leicester Circuits v Coates Brothers* [2003] EWCA Civ 333. See however r.10.6.

E *CPR* r1.4(2)(f)

(f) helping the parties to settle the whole or part of the case; and

[1.4.14] **Nature of help** Although it is clear that case management aims to provide a framework within which to promote the early compromise of cases, the precise nature of the "help" contemplated by this paragraph is unclear. Presumably, it might include a greater willingness for judges to share their tentative views as to the merits of a case or some issue: "At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx": *Johnson v. Johnson* (2000) 201 CLR 488; 74 ALJR 1380; 174 ALR 655; 26 Fam LR 627; [2000] HCA 48 at [13]. "Now, it is the court's duty to help 'the parties to settle the whole or part of the case' as a part of active case management. If the court must just sit, like "patience on a monument," saying nothing that can never be done": *Hart v Relentless Records* [2002] EWHC 1984 at [47]-[48] (also citing the dictum of Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim (No 8)* (1994) 6 Admin LR 348 at 356 as being "reinforced" by the new active case management philosophy).

E *CPR* r1.4(2)(g)

(g) fixing a timetable for the case or otherwise controlling its progress; and

[1.4.15] **Control of long-running cases** Active case management should, in theory, eliminate those cases which drag on for many years due to inaction of the claimant and eventually lead to an application to dismiss for want of prosecution: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940; *Khan v Falvey* [2002] EWCA Civ 400 at [56]. The ability to control such delay was previously constrained by authorities such as *Birkett v James* [1978] AC 297; [1977] 3 WLR 38; [1977] 2 All ER 801; but the situation under the *Rules* is now very different: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1932; [1999] 4 All ER 934 at 939. See however [1.4.2].

[1.4.16] **Control of interlocutory issues** In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 it was suggested that it was appropriate to intervene in litigation to discourage interlocutory applications and force substantive issues on for early trial.

E *CPR* r1.4(2)(h)

(h) considering whether the likely benefits of taking a particular step justify the costs of taking it; and

[1.4.17] See further r.1.2(2)(c).

E *CPR* r1.4(2)(i)

(i) dealing with as many aspects of the case as it can at the one time; and

[1.4.18] **Extent of utilisation** See further r.7.2(2). It is noted that this requirement is frequently overlooked, many judges preferring to deal with single interlocutory issues at a time, even where the balance of interlocutory issues are simple and the parties willing.

E *CPR* r1.4(2)(j)

(j) dealing with the case without the parties needing to be at court; and

[1.4.19] **Telephone conferences** A telephone conference may often be convenient and sensible, but not suitable for long or complex matters: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. This option is rarely explored, if ever. It would be especially convenient as a replacement for routine chambers appearances in Santo. See further *Babbings v Kiklees* (2004) *Times*, 4 November.

E *CPR* r1.4(2)(k)

(k) taking advantage of technology; and

[1.4.20] **Use of technologies** The court should, subject to considerations of fairness and public interest, embrace whatever available technologies might enhance justice or the efficient and economical disposition of cases: *Tari v Minister of Health* [2002] VUSC 42; CC 36 of 2001. See further r.11.8.

E *CPR* r1.4(2)(l)

(l) giving directions to ensure that the trial of a case goes ahead quickly and efficiently.

[1.4.21] **Control of interlocutory issues** In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal indicated that it was appropriate to intervene in litigation to discourage interlocutory applications and force substantive issues on for early trial. It is respectfully suggested that this admonition is sometimes taken to extremes, with trial dates being urged upon the parties before the slightest inquiry as to the necessity of interlocutory steps. On the other hand, there is a marked disinclination to strike out cases which are conspicuously untenable.

Duties of the parties

E *CPR* r1.3
NSW *CPA* s56(3)
Q *UCPR* r5(3)

1.5 The parties to a proceeding must help the court to act in accordance with the overriding objective.

[1.5.1] **Critique of rule** Litigation would function better if parties worked cooperatively and undertook proportionate work. On the other hand, real questions arise as to how such conduct can be mandated in an adversarial system, especially where it might conflict with duties to, or instructions from, clients. In the English provision the word “must” was replaced with “are required to” after practitioners considered that “must” imposed a new professional duty inconsistent with that to the client.

[1.5.2] **Adversarialism, strategy, etc** Lord Woolf recognised that the success of his reforms would depend on changing the legal culture to minimise adversarialism and tactical game play: Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London, 1996 at 7. In *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001 the Court of Appeal echoed these sentiments, considering it “regrettable” that the parties appeared to be “taking every technical and tactical point” and hinted at costs sanctions and greater intervention in the future. The spirit of the rules must be borne in mind: *Pooraka v Participation Nominees* [1991] SASC 2692 at [6]; *Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999 (“Litigation is about problem-solving not game-playing”); *Tremeer v City of Stirling* [2002] WASCA 281 at [33] (“Litigation is not a game, played for the amusement of the lawyers engaged to conduct it, in which they are free to take advantage, in any way they like, of errors, incompetence or dilatoriness on the part of their opponents.”); *Fujitsu (NZ) v International Business Solutions Limited & Ors* [1998] VUCA 13; CAC 7 of 1998; *VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010 and *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009.

[1.5.3] **Scope of duty** In *R v Wilson and Grimwade* [1995] 1 VR 163 the Supreme Court of Victoria described the general responsibility of lawyers: "…part of the responsibility of all counsel in any trial, criminal or civil, is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less… This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interest demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law…" Accordingly, the duty is wide and may include a duty for lawyers to cooperate (*Hertsmere Primary Care v Rabindra-Anandh's Estate* [2005] EWHC 320 Ch at [11]; [2005] 3 All ER 274), to offer realistic estimates of time and to brief counsel, experts, etc in a timely manner (*A & N Holding v Andell* [2006] NSWSC 55 at [45]), to consult with each other and the court to ascertain convenient hearing dates (*Matthews v Tarmac Bricks & Tiles* [1999] EWCA Civ 1574), to disabuse the other side of a misconception (*White v Overland* [2001] FCA 1333 at [4]; *Nowlan v Marson Transport* (2001) 53 NSWLR 116; [2001] NSWCA 346 at [1], [29], [46]; *Tremeer v City of Stirling* [2002] WASCA 281 at [33]), to ascertain the reasons for a party's absence (*Municipality of Luganville v Garu* [1999] VUCA 8; CAC 8 of 1999; *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006; *Dinh v Samuel* [2010] VUCA 6 at [42]; CAC 16 of 2009), to simplify and concentrate issues rather than advance a multitude of ingenious arguments (*Ashmore v Lloyd's* [1992] 2 All ER 486 at 487-8, 493; [1992] 1 WLR 446 at 447-9, 453-4), to help identify the rule or other power under which an interlocutory application is made (*Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006); to keep up to date with authority and bring relevant authorities to the court's attention (*Copeland v Smith* [2000] 1 All ER 457 at 462-3; [2000] 1 WLR 1371 at 1375-6), to bring to a Judge's attention failures to comply with the *Rules* and avoid process errors by encouraging courts to ensure that everybody concerned may bring forward their cases and have them properly considered (*Duduni v Vatu* [2003] VUCA 15; CAC 28 of 2003) and not to use unfair or dishonest means or tactics to hinder the other side (*VCMB v Dornic* [2010] VUCA 4 at [29]; CAC 2 of 2010; *Dinh v Samuel* at [43]; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [111]; (2005) 223 CLR 1).

Application of these Rules

1.6 (1) These Rules apply in all civil proceedings in the Supreme Court and the Magistrates Court except:

(a) in proceedings of the kind set out in subrule (2); or

(b) where these Rules state they only apply in the Supreme Court or in the Magistrates Court.

(2) These Rules do not apply to:

(a) a constitutional petition brought under section 218 of the Criminal Procedure Code; or

(b) a proceeding for which other Rules made under an enactment are in force.

(3) In these Rules, a reference to "court" is a reference to either the Supreme Court or the Magistrates Court or both, depending on the context of the provision.

Position if no provision in Rules

1.7 If these Rules do not deal with a proceeding or a step in a proceeding:

(a) the old Rules do not apply; and

NSW *UCPR* r2.1
NZ *HCR* r9

(b) the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice.

[1.7.1] **Inherent jurisdiction** The *Rules* are complementary to the inherent jurisdiction to act effectively within the court's jurisdiction: *Connelly v DPP* [1964] AC 1254 at 1301; [1964] 2 WLR 1145 at 1153; [1964] 2 All ER 401 at 409; *R v Bloomsbury and Marylebone CC* [1976] 1 WLR 362 at 366; [1976] 1 All ER 897 at 901; *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005. This includes an untrammelled power to regulate its own proceedings: *Abse v Smith* [1986] 1 QB 536 at 555; [1986] 2 WLR 322 at 335; [1986] 1 All ER 350 at 361. It is proper to exercise the power not only where it is strictly necessary, but also to secure or promote convenience, expedition and efficiency: *O'Toole v Scott* [1965] AC 939 at 959; [1965] 2 WLR 1160 at 1170; [1965] 2 All ER 240 at 247. See further [1.1.2].

[1.7.2] **Absence of specific procedure** Where there is no specific procedure the court may use its best efforts to address the dictates of justice and may employ *ad hoc* procedures: *Edgar v Greenwood* [1910] VLR 137 at 145; *A-G for Ontario v Daly* [1924] AC 1011 at 1015; *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21 at 29.

[1.7.3] **Procedural justice** Substantial justice has been held to include procedural justice: *Public Prosecutor v Kaltabang* [1986] VUSC 3; [1980-1994] Van LR 211.

Interpretation

1.8 (1) Some words used in these Rules have a particular meaning. They are defined in Part 20.

(2) The Notes in these Rules do not form part of the Rules and are for information only.

[1.8.1] The notes are not reproduced as their content is subsumed by the annotations.

Forms

1.9 A reference to a Form by number is a reference to the form identified by that number in Schedule 3 at the end of these Rules.

[1.9.1] See further r.18.9. In this book Schedule 3 is reproduced in the chapter "Forms".

STARTING PROCEEDINGS

Kinds of proceedings

2.1 These Rules provide for the following types of civil proceedings:

(a) claims; and

(a) applications made during a proceeding.

[2.1.1] **Petitions and Constitutional Proceedings not covered** Petitions and Constitutional proceedings are not covered, except to the extent of r.1.3, *ConPR* and r.1.3 *EPR*.

[2.1.2] **Meaning of "proceeding"** The word "proceeding" is very wide and includes everything occurring from the moment the court's jurisdiction is first invoked until final judgment is enforced or performed: *Poyser v Minors* (1881) 7 QBD 329 at 334*; Re Shoesmith* [1938] 2 KB 637 at 648, 652.

How to start a proceeding

E *CPR* r7.2(1)

2.2 A proceeding is started by filing a claim.

[2.2.1] **Jurisdiction invoked by filing, not service** The jurisdiction of the court is invoked once a claim is filed and without regard to whether it is served in accordance with Part 5, subject of course to r.5.3(2).

[2.2.2] **Meaning of "claim"** The word "claim" is not defined and seems to include both general law claims and claims for judicial review. The provision of different forms to commence each such claim (see Forms 5 and 32) suggests that different and separate originating processes must be commenced. There does not seem to be a definitive published ruling on this subject, however in *Telecom Vanuatu v Minister for Public Utilities* CC 205 of 2005 (unpublished remarks of 20 February 2006 and 3 April 2006) Treston J doubted whether a claim for breach of contract could be mingled with judicial review.

[2.2.3] **State Proceedings** Proceedings against the State will not be competent unless prior notice is given in accordance with s.6, *State Proceedings Act*, 2007.

Where to start a proceeding - Supreme Court

2.3 A proceeding in the Supreme Court is started by filing a claim in an office of the Supreme Court anywhere in Vanuatu.

[2.3.1] **Location of offices** Offices of the Supreme Court of Vanuatu are presently located at: Port Vila (Efate), Luganville (Espiritu Santo), Lakatoro (Malekula) and Lenakel (Tanna).

[2.3.2] **Forum non conveniens** As to *forum non conveniens* see *Naylor v Kilham* [1999] VUSC 11; CC 54 of 1998.

Where to start a proceeding - Magistrates Court

2.4 A proceeding in the Magistrates Court is started by filing a claim in the office of the Magistrates Court in the district where:

[2.4.1] **Location of offices** Offices of the Magistrates Court are presently located at: Port Vila (Efate), Luganville (Espiritu Santo), Norsup (Malekula), Saratamata (Ambae) and Lenakel (Tanna).

(a) the claimant or defendant lives; or

[2.4.2] **Meaning of "lives"** The former English provision used the word "dwells" instead of "lives" but the authorities may nevertheless provide some guidance. It was held that "dwells" refers to a place of permanent rather than temporary abode, although an individual may have more than one dwelling at a time: *Bailey v Bryant* (1858) 1 E & E 340 at 345; 120 ER 936 at 939. Gaol may not be such a place (*Dunstan v Paterson* (1858) 5 CB (NS) 267 at 278; 141 ER 106 at 111) nor are merely temporary lodgings (*MacDougall v Patterson* (1851) 11 CB 755 at 795; 138 ER 672 at 678) unless no other more permanent residence is maintained (*Alexander v Jones* [1866] LR 1 Exch 133 at 136-7). If the defendant is a company, the place where its principal business is conducted ought to be taken as the place at which it lives: *Taylor v Crowland* (1855) 11 Exch 1 at 3; 156 ER 720 at 721; *National Bank of New Zealand v Dalgety* [1922] NZLR 636.

(b) the actions that led to the proceeding happened; or

[2.4.3] **Determination of location where actions happened** Determining where the actions leading to the proceedings occurred may present difficulties. It is sometimes the case that the actions in question occurred in more than one place: see generally *Clarke Bros v Knowles* [1918] 1 KB 128; [1916-17] All ER Rep 604 (contract entered into by post).

(c) the property the subject of the claim is located.

[2.4.4] **Court is a single court** It is clear from Part 3, *Judicial Services and Courts* [Cap 270], that the Magistrates Court is a single court with jurisdiction throughout the whole of Vanuatu. Accordingly, a claimant may commence proceedings in any district according to its interpretation of the requirements of paragraphs (a) – (c) and the choice is valid unless and until an order under r.2.5(1) is made.

Change of district - Magistrate

E *SCR* O12r 8

2.5 (1) A Magistrate may change the district where a proceeding is dealt with if he or she is satisfied that the matter can be more conveniently or fairly dealt with in another district.

[2.5.1] **Change of district** The ability to change the district for "convenience" or "fairness" would seem to contemplate not just the criteria mentioned in r.2.4 but also any other relevant matter (eg. location of witnesses, financial position of the parties, etc), apparently importing the common law notion of *forum non conveniens* as to which see generally *Spiliada Maritime Corporation v Cansulex* [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843.

[2.5.2] **Burden of proof** In an application under this rule the burden will be upon the claimant: *Vitkovice v Korner* [1951] AC 869 at 883, 889; [1951] 2 All ER 334 at 340, 344.

(2) A defendant who wishes to object to the place where a proceeding is to be dealt with must state this in his or her response or defence.

[2.5.3] **Early objection to district** It is suggested that a defendant ought to raise any objection at the earliest opportunity. It may be argued that the failure to take objection amounts to a waiver or that late objections should not be permitted in the interests of case management. See generally *Boyle v Sacker* (1888) 39 Ch D 249 at 252; *Pringle v Hales* [1925] 1 KB 573 at 581, 583.

Form of documents

2.6 (1) All documents filed in the Supreme Court must have the heading as set out in Form 1.

(2) All documents filed in the Magistrates Court must have the heading as set out in Form 2.

(3) All documents filed in a proceeding must:

(a) be typewritten or in neat legible handwriting; and

(b) show the number of the proceedings, if any; and

(c) have each page consecutively numbered; and

(d) be divided into consecutively numbered paragraphs, with each paragraph dealing with a separate matter; and

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(e) show the address of the party's lawyer or, if the party is not represented by a lawyer, the party's address; and

(f) if these Rules require the document to be in a form in Schedule 3, be in that form.

(4) A sworn statement must be in Form 3.

[2.6.2] **Formal parts** The formal parts of a sworn statement are not mere technicalities and lawyers should take care to ensure compliance. Having said that, there are a large number of older English authorities concerning technical defects which are probably now of limited persuasiveness in Vanuatu. See further Part 11 and *Oaths* [Cap 37]. Merely technical irregularities could be dealt with under r.18.10: See for example *Eastridge Ltd v Oceanic Life Ltd* (1997) 10 PRNZ 340.

[2.6.3] **Jurat** The jurat must be completed by the Commissioner (or other qualified person) before whom the statement is sworn and irregularities in the jurat were traditionally viewed with seriousness. The jurat should never appear on a page by itself. Note that the jurat should be modified where the deponent is blind or illiterate or where the sworn statement has been translated: See generally *Chitty & Jacob's Queen's Bench Forms,* Chapter 36. For the duty of Commissioners see *Bourke v Davis* (1889) 44 Ch D 110 at 126. If the name of the person taking the sworn statement is not apparent from the signature, their full name should be written. Note that the jurat in Form 3 is slightly at variance with s.11(4) of the *Oaths Act* which requires the place of swearing to be included. It is suggested that the jurat in Form 3 be modified accordingly.

[2.6.4] **Affirmation instead of swearing** Appropriate modifications to the form should also be made where the statement is affirmed rather than sworn, in accordance with s.9(1) of the *Oaths Act*.

Applications during a proceeding

2.7(1) A person may apply during a proceeding for an interlocutory order.

(2) The application must:

(a) be signed by the person or the person's lawyer; and

[2.7.1] **Requirement of signature** It is uncertain whether it is sufficient for a law clerk to sign the application (see *France v Dutton* [1891] 2 QB 208 at 211; *Fick & Fick v Assimakis* [1958] 1 WLR 1006 at 1009; [1958] 3 All ER 182 at 184) or a lawyer from the same firm as the lawyer representing the person (noting that the definition of "lawyer" in Part 20 is personal). As to the use of facsimile signatures see *R v Brentford Justices* [1975] QB 455 at 462-3; [1975] 2 WLR 506 at 511-2; [1975] 2 All ER 201 at 206-7.

(b) name as defendant anyone whose interests are affected by the order sought.

[2.7.2] **Meaning of "anyone"** The reference to "anyone" affected by the order sought seems wide enough to include even non-parties. Such an interpretation seems contrary to expectation and does not accord with either the definition of "defendant" in Part 20, the description of parties in Part 2 or the service requirements in Part 7. Accordingly, it is suggested that interlocutory applications ought to name only those defendants whose interests are affected. If it appears that another party ought to be added, the procedure to do so is contained in Part 3.

(3) Nothing in this Rule prevents:

(a) a party to a proceeding making an oral application during the proceeding; or

[2.7.3] See further r.7.2(1) which refers to making an oral application "at any stage of a proceeding".

(b) the court making an order on an oral application.

[2.7.4] See further r.7.2(2) which provides that interlocutory applications must be made orally, "if practicable".

Outline of proceedings

2.8 The flow charts in Schedule 4 give an outline of typical undefended and defended proceedings in the Magistrates Court and the Supreme Court, and the procedure for enforcing judgments.

PARTIES TO A PROCEEDING

Who can be a party to a proceeding

3.1 (1) A person is a party to a proceeding if he or she is:

[3.1.1] **Meaning of "proceeding"** The word "proceeding" is very wide and includes everything from the moment the court's jurisdiction is first invoked until final judgment is enforced or performed: *Poyser v Minors* (1881) 7 QBD 329 at 334*; Re Shoesmith* [1938] 2 KB 637 at 648, 652.

(a) the claimant; or

[3.1.2] **Who may be a claimant** A person may not be a claimant unless they have an actual or contingent legal (as opposed to merely commercial) interest in a proceeding: *Re I G Farbenindustrie AG Agreement* [1944] Ch 41 at 43; [1943] 2 All ER 525 at 528.

(b) the defendant; or

[3.1.3] **Who may be a defendant** A person may be a defendant if some relief is claimed against him: *Amon v Raphael Tuck* [1956] 1 QB 357 at 380, 386; [1956] All ER 273 at 286-7, 290; [1956] 2 WLR 372 at 392, 397. A person cannot be joined as a defendant merely to obtain costs: *Burstall v Beyfus* (1884) 26 Ch D 35 at 40.

(c) a person who becomes a party; or

(d) a person whom the court orders to take part in the proceeding.

[3.1.4] **Impossibility of being a claimant and a defendant** A person cannot be a claimant and a defendant (or an applicant and respondent): *Ellis v Kerr* [1910] 1 Ch 529 at 537.

(2) There can be more than one claimant and defendant in the one proceeding.

[3.1.5] **Parties only named once** However, a claimant or defendant is named only once, even if their status as a party involves them in different capacites: *Hardie v Chiltern* [1928] 1 KB 663 at 699.

Adding and removing parties

E *CPR* r19.2(2)
E *SCR* O15r 6

3.2 (1) The court may order that a person becomes a party to a proceeding if the person's presence as a party is necessary to enable the court to make a decision fairly and effectively in the proceeding.

[3.2.1] **History** The object of such provisions was to give effect to the aim of the *Judicature Acts* to prevent a multiplicity of proceedings by bringing all parties to the dispute before the court at the same time and thus reduce delay, inconvenience, expense, etc: *Byrne v Brown* (1889) 22 QB 657 at 666; *Montgomery v Foy* [1895] 2 QB 321 at 324; *John Cooke v Commonwealth* (1922) 31 CLR 394 at 411.

[3.2.2] **Prevention of injustice** A further object of the provision is to prevent injustice to a person whose rights or liabilities may be affected by the court's judgment by failing to afford them the opportunity to be heard: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999 ("a fundamental rule of procedure"); *Dinh v Samuel* [2010] VUCA 6 at [33]; CAC 16 of 2009 (an "inflexible" rule); *Gurtner v Circuit* [1968] 2 QB 587 at 595, 602-3; [1968] 2 WLR 668 at 673-4, 680; [1968] 1 All ER 328 at 332, 336. A person

indirectly interested will not be added: *Moser v Marsden* [1892] 1 Ch 487 at 490; [1891-4] All ER 458 at 459-60; *Re I G Farbenindustrie AG Agreement* [1944] Ch 41 at 43; [1943] 2 All ER 525 at 528; *Westpac Banking Corp v Goiset* [2009] VUSC 103; CC 213 of 2007.

[3.2.3] **Meaning of "necessary"** It is difficult to attempt exhaustively to describe what might be "necessary": *Gurtner v Circuit* [1968] 2 QB 587 at 595, 602-3; [1968] 2 WLR 668 at 673-4, 680; [1968] 1 All ER 328 at 332, 336. It may be "necessary" to add a person against whom there is no cause of action so that they will be bound by the result: *Amon v Raphael Tuck* [1956] 1 QB 357 at 380, 386; [1956] All ER 273 at 286-7, 290; [1956] 2 WLR 372 at 392, 397. It may also be "necessary" to add a party for case management reasons: *Woodings v Stevenson* (2001) 24 WAR 221 at 226. Other examples of necessity may include where rights may be directly affected by a declaration to be made (*London Passenger Transport Board v Moscrop* [1942] AC 332 at 345; [1942] 1 All ER 97 at 104) and where a co-owner's rights in land may be affected (*Pralle v Scharka* [1978] 2 NSWLR 450 at 451). Regrettably, there are many cases in Vanuatu, particularly land cases, where the obviously necessary parties are not joined, with disastrous results. It is clear that, in some of these cases, the parties are aware of the interest of others and deliberately refrain from alerting the court to them, a strategy which should be, but seldom is, discouraged with costs orders. See generally the discussion in *Dinh v Samuel* [2010] VUCA 6 at [33] *et seq*; CAC 16 of 2009.

[3.2.4] **Necessity distinguished from other things** The provision may not permit the addition of a party only because it is "just" or "convenient": *Vandervell v White* [1971] AC 912 at 936; [1970] 3 WLR 452 at 463; [1970] 3 All ER 16 at 24. On the other hand, the considerations in Part 1 may lead to a "watering down" of the requirement of necessity as in *Benard v Vanuatu Investment Promotion Authority* [2003] VUCA 3; CAC 29 of 2003. See also *Iata v Hocten* [2008] VUSC 28; CC 194 of 2002 where a non-party who had made gratuitous contributions toward a judgment debt to foster peace between the disputants was not joined in proceedings under enforcement.

[3.2.5] **Requirement of existing proceedings** There must be an existing proceeding to which a party can be added. If, for example, a party dies and the cause of action does not survive the party's death, there can be no addition of a party to save the proceedings: *International Bulk Shipping v Minerals & Metals Trading Corp of India* [1996] 1 All ER 1017 at 1024, 1028; [1996] 2 Lloyd's Rep 474 at 478, 481.

(2) The court may order that a party to a proceeding is no longer a party if:

(a) the person's presence is not necessary to enable the court to make a decision fairly and effectively in the proceeding; or

(b) for any other reason the court considers that the person should not be a party to the proceeding.

[3.2.6] **Removal of improper party** A defendant who is improperly included as a party ought to be removed: *Vacher v London Society of Compositors* [1913] AC 107 at 116; [1911-3] All ER 241 at 245; *Edmanly v The Police Service Commission* [2005] VUSC 135. It is, unfortunately, common for lawyers to give inadequate thought to the proper parties, leading to wasteful applications. The problem is especially acute in relation to Government, where s.5 of the *State Proceedings Act* No.9 of 2007 makes clear how to name Government parties, but is widely overlooked.

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

(a) a person be made a party to the proceeding; or

[3.2.7] **Description of added party** A person may be added as a "claimant" (see further [3.1.2]), a "defendant" (see further [3.1.3]) or otherwise (eg. "amicus", etc) as appropriate. It is conventional for persons with private or incidental interests to be added as "interested party".

[3.2.8] **Public interest issues** See further Part 4 *State Proceedings Act* No.9 of 2007 as to the involvement of the Attorney-General.

(b) a person (including the party applying) be removed from the proceeding.

[3.2.9] **Time for making application** The application may be made at any stage of the proceedings so long as something remains to be done (even if only an assessment of damages): *The Duke of Buccleuch* [1892] P 201; 61 LJP 57; 67 LT 7392; 40 WR 455; *Bullock v London General Omnibus* [1907] 1 KB 264 at 271; [1904-7] All ER 44 at 47; *Ives v Brown* [1919] 2 Ch 314 at 321; *The W H Randall* (1928) 29 Lloyd's LR 234 at 236. There may, of course, be case management considerations, and it is suggested that parties should make an appropriate application early: *Roberts v Evans* (1878) 7 Ch D 830 at 833; *Ruston v Tobin* (1879) 49 LJ Ch 262**;** *Sheehan v Great Eastern Railway* (1880) 16 Ch D 59 at 63-4; *Thomas v Moore* [1918] 1 KB 555 at 569.

(4) A person affected by a proceeding may apply to the court for an order that the person be made a party to the proceeding.

[3.2.10] **Meaning of "affected"** This seems to be an entirely different and separate test to the "necessity test" in subrule (1). It has been said to be a fundamental rule of procedure that a person whose rights in respect of the subject matter of an action will be directly affected by any order which may be made in the action must be joined as a party. This rule is based on the need to prevent injustice by there being an adjudication upon the matter in dispute without the person whose rights will be affected being a given proper opportunity to be heard: *Rarua v Electoral Commission of Vanuatu* [1999] VUCA 13; CAC 7 of 1999 (majority judgment applying *Pegang Mining v Choong Sam* [1969] 2 MLJ 52 and *News Ltd v Australian Rugby League* (1997) 139 ALR 193 at 298). In *Westpac Banking Corp v Goiset* [2009] VUSC 103; CC 213 of 2007 the application to become involved at an enforcement stage was refused on the basis that the applicant's interest was purely commercial and arose after judgment (and with knowledge of it).

(5) An application must have with it a sworn statement setting out the reasons why the person should be made a party, or be removed as a party.

Joining and separating claims

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3.3 (1) The court may order that several claims against the one person be included in the one proceeding if:

(a) a common question of law and fact is involved in all the claims; or

(b) the claims arise out of the same transaction or event; or

(c) for any other reason the court considers the claims should be included in the proceeding.

[3.3.1] **Meaning of "arising out of the same transaction or event"** This rule should be construed liberally. The expression "arising out of the same transaction or event" in paragraph (b) is wide enough to encompass all matters of relevance to, or which have a connection with, the transaction which is the subject of a dispute. The situation must be viewed as a whole. The claimants must show some causal act or breach on the part of the defendant which damaged them: *A-G v Pacific International Trust* [1998] VUSC 4; CC 8, 12 and 13 of 1997.

(2) The court may order that several claims against the one person be treated and heard as separate proceedings if:

(a) the claims can be more effectively dealt with separately; or

(b) for any other reason the court considers the claims should be heard as separate proceedings.

[3.3.2] **Examples** Such reasons may include where the joined claims might embarrass or delay a fair trial.

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

(a) several claims against the one person (including the party applying) be included in the one proceeding; or

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(b) several claims that are included in the one proceeding be treated and heard as separate proceedings.

[3.3.3] **Time for making application** The application should be made as soon as possible, though it can be made as late as the trial: *Thomas v Moore* [1918] 1 KB 555 at 569.

Consolidated proceedings

E *SCR* O4r 9(1)

3.4 The court may order that several proceedings be heard together if:

(a) the same question is involved in each proceeding; or

(b) the decision in one proceeding will affect the other; or

(c) for any other reason the court considers the proceedings should be heard together.

[3.4.1] **Opportunity to be heard before order** No order should be made unless all parties are given the opportunity to be heard: *Daws v Daily Sketch* [1960] 1 All ER 397 at 399; [1960] 1 WLR 126 at 129.

[3.4.2] **Scope of rule** Proceedings may be consolidated even if the result is that one of the parties obtains a limitation advantage: *Arab Monetary Fund v Hashim (No4)* [1992] 4 All ER 860 at 864; [1992] 1 WLR 1176 at 1181. Where there are several claims arising from the same circumstances (eg. multiple personal injuries) it may be appropriate to consolidate only up to the point where liability is decided*: Healey v Waddington & Sons* [1954] 1 All ER 861 at 862; [1954] 1 WLR 688 at 692.

[3.4.3] **Effect of prejudice** Prejudice to a party will militate against consolidation: *Payne v British Time Recorder & WW Curtis* [1921] 2 KB 1 at 16; [1921] All ER 388 at 393.

[3.4.4] **De-consolidation** There is probably nothing to preclude an order for the de-consolidation of an action which was previously consolidated under this rule: *Lewis v Daily Telegraph (No 2)* [1964] 2 QB 601 at 616; [1964] 2 WLR 736 at 743-4; [1964] 1 All ER 705 at 711; *Bolwell Fibreglass v Foley* [1984] VR 97 at 100, 119.

Costs

3.5 When making an order under rule 3.2, 3.3 or 3.4, the court may also make an order about who is to pay the costs of that order.

Amending documents after change of party

3.6 (1) After an order is made changing the parties to a proceeding, the person who applied for the order must:

(a) file an amended claim showing:

(i) the new party; and

(ii) the date of the order; and

(b) serve the amended claim on the new party; and

(c) if the order added or changed a defendant - serve the amended claim on the continuing party.

(2) The amended claim must be filed and served:

(a) within the time fixed by the order; or

(b) if no time was fixed – within 14 days of the date of the order.

(3) If the order added or substituted a defendant, everything done in the proceeding before the order was made has the same effect for the new defendant as for the old defendant, unless the court orders otherwise.

Third Parties

3.7 (1) If a defendant claims a contribution, indemnity or other remedy against a person not a party to the proceeding, the defendant may file and serve a notice (a "third party notice") on that person stating:

[3.7.1] **Scope of third party procedure** The third party procedure does not afford any defence but does give a defendant the ability to seek contribution, etc simultaneously with the claimant's proceedings: *Benecke v Frost* (1876) 1 QB 419 at 422; *Barclays Bank v Tom* [1923] 1 KB 221 at 224; [1922] All ER 279 at 280. This is limited to contribution in respect of the same liability that the claimant is asserting: *Meyer v Whitesands Resort & Country Club* [2008] VUSC 60; CC 54 of 2006.

(a) that the defendant claims the contribution, indemnity or other remedy; and

(b) that the person is a party to the proceeding from the date of service.

(2) The third party notice must be in Form 4.

(3) The defendant must obtain permission of the court (leave of the court) if the third party notice is filed after the defence has been filed.

[3.7.2] **Factors affecting leave** The question of leave may involve case management, public interest or prejudice considerations. The court will not, however, consider the merits of the third party claim except to the extent to determine that it is not frivolous: *Carshore v North Eastern Rwy* (1885) 29 Ch D 344 at 346; *Edison v Holland* (1886) 33 Ch D 497 at 499. The application for leave ought to be made as soon as possible and

may be refused due to case management considerations if the delay would be multiplied: *Meyer v Whitesands Resort & Country Club* [2008] VUSC 60; CC 54 of 2006.

(4) The person becomes a party to the proceeding with the same rights and obligations in the proceeding as if the defendant had started a proceeding against the person.

[3.7.3] **Rights and obligations of third party** Accordingly, the third party may cross-examine the claimant's witnesses (*Re Salmon* (1889) 42 Ch D 351 at 360, 362); appeal (or seek leave to appeal) the judgment between the claimant and defendant (*Asphalt and Public Works v Indemnity Guarantee Trust* [1969] 1 QB 465 at 471; [1968] 3 WLR 968 at 971-2; [1968] 3 All ER 509 at 511; *Helicopter Sales v Rotor-Work* (1974) 132 CLR 1 at 5, 15; 48 ALJR 390 at 390; 4 ALR 77 at 79), etc. It does not appear, however, that there is any obligation on the third party to file any kind of defence to the third party notice.

Persons under a legal incapacity

3.8 (1) A person is under a legal incapacity if the person:

(a) is a child; or

[3.8.1] **History** The common law has traditionally considered children to be under a disability. It is presumed that a child cannot assert rights or form judgment*: Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62.

(b) is a person with impaired capacity.

[3.8.2] **Extent of impairment required** A person must have the necessary legal capacity to perform legally effective acts and make legally effective decisions. Without such capacity, such acts and decisions will be void. The test is said to be whether the party to proceedings can understand (with explanation from legal advisers) the issue on which their decision is called for: *Masterman-Lister v Brutton* [2003] 3 All ER 162; [2003] 1 WLR 1511; [2002] EWCA Civ 1889 at [55] *et seq*.

E *CPR* r21.6(1)

(2) The court may appoint a person to be the litigation guardian of a person under a legal incapacity.

[3.8.3] **Appointment and powers of guardian** A child's litigation guardian will usually be the legal guardian or a close relative of that child: *Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62 at 113. This person invariably provides free and flexible assistance and has an intimate knowledge of the circumstances and best interests of the child. There may be cases, however, where such a person is unavailable or unwilling, or where the issues sought to be raised by the child are adverse to a guardian. In such cases the court may use this power to appoint a suitable person.

[3.8.4] **Replacement of guardian** The court may use this power to replace a litigation guardian, whether appointed by the court or otherwise. This may occur where there is concern that the guardian is unfit or as to the conduct of the proceedings. Applications to appoint, or appoint a new, litigation guardian, should probably depose to the appropriateness of the proposed guardian and, if applicable, the inappropriateness of the current guardian.

E *CPR* r21.2(1)

(3) A person under a legal incapacity may start or defend a proceeding only acting through the person's litigation guardian.

[3.8.5] **Lawyers to be alert to incapacity** Lawyers should be alert to any signs of mental incapacity in their clients and should not take any steps until satisfied of the position. If proceedings are started or continued without a litigation guardian, even in

good faith, the defendant may apply for an order that the lawyer should be personally liable for the costs: *Geilinger v Gibbs* [1897] 1 Ch 479 at 482; *Yonge v Toynbee* [1910] 1 KB 215 at 228; [1908-10] All ER 204 at 208. Such a proceeding may then be dismissed or continued with a litigation guardian, in the court's discretion: *Cooper v Dummett* [1930] 2 WN 248; (1930) 70 L Jo 394; 170 LT Jo 468.

[3.8.6] **Duty of guardian** Common law recognises that the litigation guardian must act in the best interests of the person under a legal incapacity: *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579; *In re Taylor's Application* (1972) QB 369. A failure to do so may result in an order for costs against the guardian: *Dey v Victorian Railway Commissioners* (1948-9) 78 CLR 62. There is nothing which elaborates on the role which might be played by the incapacitated person in giving instructions or making decisions. As to children, see further art.12, *UN Convention on the Rights of the Child*.

[3.8.7] **Critique of rule** So far as this rule restricts the ability of children to commence proceedings, it may be more than merely procedural and its validity should not be assumed: *Chester v Bateson* [1920] 1 KB 829; *R & W Paul Ltd v Wheat Commission* [1937] AC 139; *Haines v Leves* (1987) 8 NSWLR 442 at 449. There may also be arguable infringements of art.5(1)(d) of the *Constitution* and art.12 of the *UN Convention on the Rights of the Child*.

(4) In all civil proceedings, anything required to be done by a person under a legal incapacity may be done only by the person's litigation guardian.

Death of party

3.9 (1) If:

(a) the claimant dies during a proceeding; and

(b) the proceeding involves a cause of action that continues after death;

then:

(c) the proceeding may be continued by the claimant's personal representative; and

(d) the court may give whatever directions are necessary to allow the personal representative to continue the proceeding.

[3.9.1] **Significance of cause of action** If death terminates the cause of action or the interest of the (sole) claimant at issue, the action is ended: *James v Morgan* [1909] 1 KB 564 at 566. This does not occur where the cause of action survives in other claimants in the proceedings: *Lloyd v Dimmack* (1878) 7 Ch D 398 at 399. The surviving claimants may proceed with or without the personal representative of the deceased: *Smith v London & North Western Railway* (1853) 2 E & B 69 at 74, 76; 118 ER 694 at 696-7. On the other hand, the death of the claimant before judgment in a wrongful dismissal claim did not, surprisingly, seem to trouble the court in *J v Public Service Commission* [2009] VUSC 128 at [30]; CC 216 of 2005 where Clapham J proceeded to judgment.

E *CPR* r19.8

(2) If, at the start of a proceeding:

(a) the defendant is dead; and

(b) no personal representative has been appointed; and

(c) the cause of action continues after the defendant's death

then:

(a) if the claimant knows the person is dead, the claim must name the "estate of [person's name] deceased"; and

(b) after a personal representative is appointed, all documents in the proceeding must name the personal representative as defendant.

[3.9.2] **Action commenced against deceased a nullity** An action commenced against a person already dead is usually a nullity and cannot be cured by substituting the executors as a party: *Dawson v Dove* [1971] 1 QB 330 at 335-6; [1971] 2 WLR 1 at 6; [1971] 1 All ER 554 at 558. Subrule (2) operates only in respect of such claims as continue after the death of a defendant.

Party becomes bankrupt, under a legal incapacity or dies during a proceeding

3.10 (1) If a party becomes bankrupt, becomes a person under a legal incapacity or dies during a proceeding, a person may take another step in the proceeding for or against the party only:

(a) with the court's permission; and

(b) in accordance with the court's directions.

(2) If a party becomes bankrupt or dies, the court may:

(a) order the party's trustee or personal representative or, if there is no personal representative, someone else, to be substituted as a party; and

(b) make other orders about the proceeding.

(3) The court may require notice to be given to anyone with an interest in the deceased party's estate before making an order under this rule.

(4) If:

(a) the court orders someone, other than a personal representative to be substituted for a deceased party; and

(b) another person is later appointed as personal representative;

the first person must give all documents in the proceeding to the personal representative as soon as practicable.

[3.10.1] **Example** See however *J v Public Service Commission* [2009] VUSC 128 at [30]; CC 216 of 2005 where Clapham J proceeded to judgment without reference to this rule.

Partners

3.11 (1) One partner may start a proceeding in the partnership name.

[3.11.1] **Corollary of rule that partners may bind each other** This reflects the ordinary law of partnership that each partner is *praepositus negotiis societatis* and may consequently bind the other partners by his acts. Any dissent within the partnership may be resolved internally. A difficulty arises where a partner of a defunct partnership wishes to take action in the partnership name on a cause of action arising during the life of the partnership. See *Seal v Kingston* [1908] 2 KB 579 at 582.

[3.11.2] **Partners may not sue each other in partnership name** This rule does not affect the ordinary law of partnership and the rights of partners against each other. Accordingly, it does not permit one or more partners to sue other partners in the partnership name: *Meyer v Faber (No 2)* [1923] 2 Ch 421 at 434.

(2) A proceeding against persons who are alleged to be partners may be brought against the persons in the partnership name.

[3.11.3] **Convenience** The use of a partnership name is merely a convenience denoting that each partner is sued as though their names were all set out: *Western National Bank of New York v Perez* [1891] 1 QB 304 at 314.

[3.11.4] **Proceedings not affected by change in partnership** A change in the partnership during the proceedings does not constitute a change of parties: *Re Frank Hill; Ex parte Holt & Co* [1921] 2 KB 831 at 834.

(3) A party to a partnership proceeding may by written notice require the partnership, within not less than 2 days of the date of service, to give the names of all partners.

(4) The notice must be served:

(a) at the place of business of the partnership; and

(b) on one of the partners.

(5) If the partnership does not give this information, the court may:

(a) order the proceeding be suspended (stayed) until the information is given; or

(b) order a document that has been filed be struck out; or

(c) make any other order it considers appropriate.

(6) If a judgment is given against a partnership, the court may by order allow enforcement against individual partners.

Representative party

E *CPR* r19.6(1)

3.12 (1) A proceeding may be started and continued by or against one or more persons who have the same interest in the subject-matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding.

[3.12.1] **Objective** This rule is another way of ensuring that all parties having an interest in the proceedings are before the court: *Dinh v Samuel* [2010] VUCA 6 at [34]; CAC 16 of 2009.

[3.12.2] **Meaning of "same interest"** It is necessary for the persons to have the same interest and not merely parallel but different interests arising from the same facts: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006.

[3.12.3] **Identification of all class members unnecessary** It is not necessary to identify each and every member of the represented class, provided the class is identified with sufficient particulars: *Carnie v Esanda Finance* (1995) 69 ALJR 206 at 217; 127 ALR 76 at 91; *Campbell v Thompson* [1953] 1 QB 445 at 451, 453-4; [1953] 2 WLR 656 at 659, 661; [1953] 1 All ER 831 at 833-4. Accordingly, it is possible, where large numbers are involved, to bind unidentified members of a class: See for example *EMI Records v Kudhail* [1985] FSR 36; [1983] Com LR 280; (1984) 134 NLJ 408; *Maritime Union of Australia v Patrick Stevedores* [1998] 4 VR 143 at 159; (1998) 144 FLR 420 at 437.

[3.12.4] **Wide discretion** The rule is flexible and ought to be used according to its permissive scope: *John v Rees* [1969] 2 All ER 274 at 282-3; *Carnie v Esanda Finance* (1995) 69 ALJR 206 at 217; 127 ALR 76 at 91. The court's discretion is at large and the court will consider matters of expense, delay, etc which are relevant to the overriding objective. See also the various discretionary factors considered in *Kolou v Traverso* [2009] VUSC 58; CC 81 & 82 of 2008.

(2) At any stage of the proceeding the court may appoint one or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.

(3) When appointing a person who is not a party, the court must also order that the person is to become a party.

(4) An order made in a proceeding against a representative party may be enforced against a person not named as a party only with the court's leave.

[3.12.5] **Unnamed party not bound by judgment** On the application for leave, the non-party is bound by the estoppel created by the judgment and cannot challenge its correctness – he may only challenge the enforcement to the extent of the circumstances particular to the non-party: *Commissioners of Sewers v Gellatly* (1876) 3 Ch D 610 at 615-6.

(5) An application for leave to enforce the order must be served on the person against whom enforcement is sought as if the application were a claim.

[3.12.6] See further rr.5.2, 5.3.

STATEMENTS OF THE CASE

What are statements of the case

4.1 (1) A statement of the case is set out in a claim, a defence or a reply

(2) The purpose of statements of the case is to:

(a) set out the facts of what happened between the parties, as each party sees them; and

(b) show the areas where the parties agree; and

(c) show the areas where the parties disagree (called the "issues between the parties") that need to be decided by the court.

[4.1.1] **Importance of statements of the case** Statements of the case (formerly called "pleadings") play a critical role in civil procedure and are not merely a formality: *Farrell v Secretary for Defence* [1980] 1 All ER 166 at 173; [1980] 1 WLR 172 at 179; *Pulham v Dare* [1982] VR 648 at 653. It is a fundamental principle of the law that a party knows what allegations are made against him with precision so that he can decide how to respond to them: *Roqara v Takau* [2001] VUCA 15; CAC 5 of 2001. The parties are confined by their statements of the case: *Blay v Pollard & Morris* [1930] 1 KB 628 at 634; [1930] All ER 609 at 612; *Waghorn v Wimpey* [1970] 1 All ER 474 at 479; [1969] 1 WLR 1764 at 1771. The court is also confined by the statements of the case and may not decide issues not raised by them: *Banbury v Bank of Montreal* [1918] AC 626 at 659; [1918-9] All ER 1 at 7; *Bell v Lever Bros* [1932] AC 161 at 216; [1931] All ER 1 at 27; *Esso v Southport Corp* [1956] AC 218 at 238-9; [1955] 3 All ER 864 at 868-9; [1956] 2 WLR 81 at 86-7*; Qualcast v Haynes* [1959] AC 743 at 758; [1959] 2 All ER 38 at 44; [1959] 2 WLR 510 at 518; *Water Board v Moustakas* (1988) 180 CLR 491 at 496; 62 ALJR 209 at 211-2; 77 ALR 193 at 197. Statements of the case also define the scope of admissible evidence.

[4.1.2] **History** Part 4 adopts much of the substance of the system of pleading which first appeared in the First Schedule to the Judicature Act 1875 (UK) and the purpose has little changed since then: "The whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay" (*Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 per Jessel MR). Statements of the case also fulfill the underlying requirement of natural justice that each party be given fair and proper notice of the other side's case: *Palmer v Guadagin* [1906] 2 Ch 494 at 497; *Esso v Southport Corp* [1956] AC 218 at 238-9; [1955] 3 All ER 864 at 868-9; [1956] 2 WLR 81 at 86-7; *Qualcast v Haynes* [1959] AC 743 at 758; [1959] 2 All ER 38 at 44; [1959] 2 WLR 510 at 518; *Roqara v Takau* [2001] VUCA 15; CAC 5 of 2001; *Telecom Vanuatu v Minister for Infrastructure* [2005] VUSC; CC 205 of 2005.

Content of statements of the case

E *RSC* O18r7(1)
E *CPR* r16.2(1)(a), 16.4(1)

4.2 (1) Each statement of the case must:

[4.2.1] **Striking out statements of the case** There is an inherent jurisdiction (supported by the broad terms of ss.28(1)(b) and 65(1), *Judicial Services and Courts* [Cap 270] and rr.1.2 and 1.7) to strike out a statement of the case which does not disclose a reasonable claim or defence (cf *Malas v David* [2008] VUSC 56; CC 3 of 2008 at [5] – which denies any jurisdiction to strike out a defence and which, it is respectfully submitted, is clearly wrong) or where it is frivolous or vexatious: *Jack v Bertaux* [2000] VUSC 21; CC 81 of 1999; *Ebbage v Ebbage* [2001] VUCA 7; CAC 7 of 2001 at [27]; *Kalses v Le Manganese de Vate Ltd* [2005] VUCA 2; CAC 34 of 2003; *Noel v Champagne Beach Working Committee* [2006] VUCA 18; CAC 24 of 2006; *Iririki Island Holdings v Ascension Ltd* [2007] VUCA 13; CAC 35 of 2007 at [17]. The discretion is to be exercised sparingly and only in clear cases: *Jack v Bertaux* [2000] VUSC 21; CC 81 of 1999; *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15; CAC 7 of

2004; *Noel v Champagne Beach Working Committee* [2006] VUCA 18; CAC 24 of 2006 (applying *Electricity Corporation Ltd* v *Geotherm Energy Ltd* [1992] 2 NZLR 641 at 645); *Iririki Island Holdings v Ascension* [2007] VUCA 13; CAC 35 of 2007 at [19]. The test as to whether there is disclosed a reasonable cause of action may be substantially identical to the test for establishing a serious question to be tried in an application for an injunction: *Iririki Island Holdings v Ascension* [2007] VUSC 69; CC 70 of 2007 at [2] (reversed on appeal, but not as to this point). The court does not evaluate conflicts in the evidence but proceeds on the basis that every fact alleged in the statement of the case being attacked might be proved: *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15; CAC 7 of 2004; *Iririki Island Holdings v Ascension* [2007] VUCA 13; CAC 35 of 2007 at [19]; *Newman v Ah Tong* [2007] VUSC 102; CC 41 of 2007 at [5]. It is possible for the court to have recourse to evidence in determining an application to strike out under the inherent jurisdiction, however, the necessity of such course will usually militate against such an application: *Ebbage v Ebbage* [2001] VUCA 7; CAC 7 of 2001 at [30], [31]. Unless the statement of the case is irremediable, the usual order will be to strike out the statement of the case with leave to re-plead: *Kalomtak Wiwi Family v Minister of Lands* [2004] VUSC 47; CC 14 of 2004; *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316. If a party intends to defend a strike-out application with an offer to amend the statement of the case, then a draft of the proposed amendment should be put forward for argument: *CED Distributors (1988) Ltd v Computer Logic Ltd* (1991) 4 PRNZ 35. If the statement of the case is irremediable, the claim itself may be struck out: *Ake v Vanuatu Livestock Development Co* [2007] VUSC 47; CC 20 of 2007 at [4] – [7]. Some leniency is likely to be shown to unrepresented litigants: *Newman v Ah Tong* [2007] VUSC 102; CC 41 of 2007 at [14]; *Republic of Vanuatu v Bohn* [2008] VUCA 6; Const AC 3 of 2008.

[4.2.2] **Costs** Costs will usually follow the event. Parties faced with a strike-out application should consider their vulnerability and, if appropriate meeting it with an offer to amend in order to guard against costs orders: See for example the reasoning in *Blake v Erakor Island Resort* [2008] VUSC 49; CompCas 1 of 2007 at [7].

E *RSC* O18r7(1)
E *CPR* r16.2(1)(a), 16.4(1)(a)

(a) be as brief as the nature of the case permits; and

[4.2.3] **Requirement to be brief** Statements of the case must be as concise as possible, but also should be clear and definite: *Re Parton* (1882) 45 LT 755; 30 WR 287. See generally *Hill v Hart Davis* (1884) 26 Ch D 470.

[4.2.4] **What not to include** Unecessary material or allegations should be excluded, such as citations from statutes, names of cases or propositions of law. Neither is it generally necessary to refer to the other side's prayer for relief, particulars, assertions of law, admissions or to facts raised only against other parties. The material substance of conversations, contracts, documents, statutes, etc should be pleaded rather than reproducing them verbatim (see *Darbyshire v Leigh* [1896] 1 QB 554 at 559; *Eade v Jacobs* (1877) 3 Ex D 335 at 337; [1874-80] All ER 1714 at 1715), unless the actual words are necessary to the cause of action (such as in defamation).

E *RSC* O18r7(1)
E *CPR* r16.4(1)(a)

(b) set out all the relevant facts on which the party relies, but not the evidence to prove them; and

[4.2.5] **Meaning of "relevant facts"** The general rule is that all facts necessary to put the other parties on their guard and tell them what case they have to meet at trial (*Phillipps v Phillipps* (1878) 4 QBD 127 at 139) and every fact necessary to complete the cause of action (*Bruce v Odhams* [1936] 1 KB 697 at 715; [1936] 1 All ER 287 at 296; *Re Dependable Upholstery* [1936] 3 All ER 741 at 745) must be stated.

[4.2.6] **Test of relevance** Whether a particular fact is relevant depends on the substantive law, the remedies sought and upon whom the onus of proof of particular matters rests. Accordingly, it is not possible to identify a firm rule in every case. Matters of corporate status (*Moldex v Recon* [1948] VLR 59 at 60; [1948] 1 ALR 115), standing (*Bridgetown/Greenbushes Friends of the Forest v Executive Director of the Dept of Conservation* (1997) 18 WAR 126 at 132**;** *Kathleen Investments v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 140, 146, 158; 16 ALR 535 at 551, 556, 566), capacity, etc should always be stated. It is not necessary to state matters which are not relevant at the particular time even if they are likely to become relevant: *Gates v Jacobs* [1920] 1 Ch 567 at 570 (performance of condition precedent); *Young v Queensland Trustees* (1956) 99 CLR 560 at 566 (prior demand for payment); *Australian Iron & Steel v Hoogland* (1962) 108 CLR 471 at 488; [1962] ALR 842 at 853; 35 ALJR 489 at 495-6 (acton within limitation period); *Rassam v Budge* [1893] 1 QB 571 at 576 (allegations not yet made).

[4.2.7] **Distinction between facts and evidence** This distinction between facts and the evidence to prove them is sometimes blurred. Generally speaking, when a particular state of facts gives rise to a cause of action, it is enough to allege those facts simply without setting out all the subordinate facts and the means of proving them: *Williams v Wilcox* (1838) 8 A & E 314 at 331; 112 ER 857 at 863; [1835-42] All ER 25 at 27; *Re Dependable Upholstery* [1936] 3 All ER 741 at 745; *East West Airlines v Commonwealth* (1983) 49 ALR 323 at 326; 57 ALJR 783 at 784. However, a fact which is both evidence and a fact to be proved as an element of the cause of action must be alleged: *Blake v Albion* (1876) 45 LJQB 663 at 666; 4 CPD 94; 27 WR 321; 40 LT 211.

E *RSC* O18r11

(c) identify any statute or principle of law on which the party relies, but not contain the legal arguments about it; and

[4.2.8] **How and when to identify statute or principle of law** It is often necessary for a party to refer to a particular law or body of law inferentially by characterizing conduct, for example, that certain action was "in breach of contract" or "negligent" or a "trespass" or contrary to a particular statutory provision, etc: *Chief Morris Mariwota v Estate of Kai* [2008] VUSC 17; CC 190 of 2006 at [8]. In such cases, the underlying facts giving rise to the cause of action must be pleaded. Where, however, a party merely states that certain conduct is "wrongful" or "unlawful" or that a party is "legally liable", such non-specific conclusions of law are meaningless and should be regarded as merely argument: see for example *Day v Brownrigg* (1878) 10 Ch D 294 at 302; *Middlesex County Council v Nathan* [1937] 2 KB 272 at 281; [1937] 3 All ER 283 at 288. It is not the intention of the rules that statements of the case descend to arguments, reasons, theories, etc.

[4.2.9] **Whole case to be brought forward** Parties must bring forward their whole case at one time or they may be estopped from raising further matters based on the same facts in subsequent proceedings: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(d) if the party is relying on custom law, state the custom law.

[4.2.10] **How to state custom law** A matter of custom law should be regarded as a fact which ought to be pleaded, as would a matter of foreign law (as to which see *Aschberg, Hopwood & Crew v Casa Musicale* [1971] 1 All ER 577 at 580; [1971] 1 WLR 173 at 178). Accordingly, the party relying on custom law should specifically raise it and give full particulars of the precise law, its provenance, applicability, etc (see by analogy *Regie National de Usines Renault SA v Zhang* (2002) 210 CLR 491 at [68]; 187 ALR 1; 76 ALJR 551).

E *RSC* O18r15
E *CPR* r16.2(1)(b), 16.4(1)(b)-(d)

(2) If the statement of the case is set out in a claim or a counterclaim, it must also set out the remedies or orders sought

[4.2.11] **Prayer for relief** Forms 5 and 6 omit this requirement. The "prayer for relief" usually reads "AND THE CLAIMANT CLAIMS:" or "AND THE DEFENDANT COUNTERCLAIMS:" followed by separate paragraphs stating the relief sought and (where applicable) against which party.

[4.2.12] **Relief must be sought against each defendant** At least one form of relief must be sought against each defendant: *Belmont Finance v Williams Furniture* [1979] Ch 250 at 269; [1979] 1 All ER 118 at 131; [1978] 3 WLR 712 at 730.

[4.2.13] **Alternative but not inconsistent relief may be claimed** A party may claim more than one form of relief or alternative forms of relief but may not seek relief which is inconsistent with the facts that party has stated: *Cargill v Bower* (1878) 10 Ch D 502 at 517; *Ciavarella v Balmer* (1983) 153 CLR 438 at 449; 48 ALR 407 at 415; 57 ALJR 632 at 636. Nothing prevents a party from setting up two sets of inconsistent facts and claiming relief under them in the alternative: *Bagot v Easton* (1877) 7 Ch D 1 at 8.

[4.2.14] **Prayer for "costs", etc superfluous** It is not strictly necessary to seek "costs" or "general" or "other" relief because the court is always entitled to grant such relief to which it is shown the party is entitled on the facts as found: *Cargill v Bower* (1878) 10 Ch D 502 at 517; *Wicks v Bennett* (1921) 30 CLR 80 at 100; *Rawson v Hobbs* (1961) 107 CLR 466 at 485; *Farrow Finance Co v Farrow Properties* [1999] 1 VR 584 at 635.

Claim

4.3 (1) A claim must:

E *CPR* r7.4(1)(a)

(a) contain a statement of the case; and

[4.3.1] **Location of insertion of statement of the case** This is to be inserted in Forms 5 and 6 where the form requires the claimant to "set out details of claim in numbered paragraphs".

(b) set out the address that is to be the claimant's address for service of documents; and

[4.3.2] **Proper address for service** Unless the claim is filed by the claimant's lawyer, the claimant's residence should be the address for service. If an address is absent, the court should not accept the claim. The requirement of an address deters fraudulent or mischievous claims and enables the defendant to know where to seek to enforce costs orders, etc. See further r.15.19.

(c) for the Supreme Court, be in Form 5; and

(d) for the Magistrates Court, be in Form 6; and

E *CPR* r7.8(1)

(e) have with it a Response Form.

[4.3.3] **Meaning of "response form"** There is no definition of "Response Form". This is generally regarded as a reference to a blank Form 7.

Response

4.4 (1) The defendant must file and serve a response within the period required by Rule 4.13:

[4.4.1] **Response within 14 days** Rule 4.13(1)(a) provides that the response must be filed and served within 14 days of the date of service of the claim.

(2) The response must:

(a) set out the address that is to be the defendant's address for service; and

[4.4.2] **Meaning of "address for service"** This subrule differs from the formula in r.4.3(1)(b) which refers to "… for service *of documents*…" The difference is probably accidental and of no consequence.

(b) be in Form 7; and

(c) be completed and signed

[4.4.3] **Who may complete and sign** The subrule does not state by whom Form 7 must be signed and leaves uncertainty as to companies, partnerships, persons acting under power of attorney, unqualified persons (as to which see *Re Ainsworth* [1905] 2 KB 103 at 106), etc. The Form refers to the defendant or the defendant's lawyer. It is also uncertain whether a law clerk may sign (see *France v Dutton* [1891] 2 QB 208 at 211; *Fick & Fick v Assimakis* [1958] 1 WLR 1006 at 1009; [1958] 3 All ER 182 at 184) or a lawyer from the same firm (noting also that the definition of "lawyer" in Part 20 is personal). As to the use of facsimile signatures see *R v Brentford Justices* [1975] QB 455 at 462-3; [1975] 2 WLR 506 at 511-2; [1975] 2 All ER 201 at 206-7.

[4.4.4] **Lawyer's warranty of authority** A lawyer who files and serves a response impliedly warrants that he has the authority to do so. If that is not the case, the defendant may have the response vacated*: Yonge v Toynbee* 1910] 1 KB 215 at 228; [1908-10] All ER 204 at 208.

[4.4.5] **Whether response waives irregularities, submits to jurisdiction** It is not settled whether the completed boxes of Form 7 may amount, in an appropriate case, to a waiver of any irregularities, an admission of fact or a submission to jurisdiction.

[4.4.6] **Incomplete response** If the response is either incomplete or unsigned, the appropriate course may be to apply to set it aside and seek default judgment.

[4.4.7] **Incorrect spelling of defendant** Where a defendant's name is incorrectly spelled, it is suggested that the defendant should file Form 7 using the correct name: *Alexander Korda Film Productions v Columbia Pictures* [1946] Ch 336 at 342, 343; [1946] 2 All ER 424 at 428. This does not relieve the claimant of the obligation to amend as appropriate.

(3) The defendant need not file a response if he or she files and serves a defence within 14 days of the date of service of the claim.

[4.4.8] **Filing of defence alternative to response** This is perhaps the better course where Form 7 is inapposite, such as when a party objects to the jurisdiction of the court or where a party does not admit the claim but proposes to abide by the decision of the court. See further [4.4.5].

Defence

4.5 (1) If the defendant intends to contest the claim, the defendant must file and serve a defence on the claimant within the period required by Rule 4.13.

[4.5.1] **Defence within 28 days** Rule 4.13(1)(b) provides that the defence must be filed and served within 28 days of the date of service of the claim unless the defendant chooses to file a defence instead of a response.

(2) The defence must contain a statement of the case.

[4.5.2] **Location of insertion of statement of the case** This is to be inserted in Form 8 where the form requires the defendant to "set out details of defence in numbered paragraphs".

E *CPR* r16.5(1)

(3) The defendant must not deny the claimant's claim generally, but must deal with each fact in the claim.

[4.5.3] **No general denial** General denials are not permitted because they do not address the purpose of statements of the case as described in r. 4.1(2). See generally *Pinson v Lloyds* [1941] 2 KB 72 at 80; [1941] 2 All ER 636 at 641. The defendant must clearly and specifically deal with every allegation of fact in the claim which the defendant does not wish to admit. So, for example, if it is alleged that a defendant owes a debt and the defendant accepts part of the debt, it is not sufficient to generally deny the indebtedness – the defendant must state what part of the debt is admitted and what part is denied.

[4.5.4] **Holding defence** So-called "holding" defences based on evasive general denials are to be discouraged because they cause inconvenience, expense, delay and unnecessary interlocutory applications.

[4.5.5] **Facts rather than law** The rule specifically relates to the facts stated in the claim and so it is not generally necessary to deal with matters of law, subject to limited exceptions (eg. *Commonwealth v Spotless Catering Services Ltd* [1999] WASCA 136 at [27], [37-38] as to whether there was an agreement). Where the defendant admits the facts but denies the legal consequences which the claimant says attaches to them (usually called a "confession and avoidance), this must be specifically set out. See further r.4.7.

[4.5.6] **Not required to set out facts before dealing with them** The requirement that "each" fact be dealt with does not mean that each individual fact must be set out before being dealt with. It is common practice to use the form "the Defendant denies each and every allegation contained in paragraph… of the claim" or similar: *Adkins v North Metropolitan Tramway* (1893) 10 TLR 1731; 63 LJKB 361; *John Lancaster Radiators v General Motor Radiator Co* [1946] 2 All ER 685 at 687.

E *CPR* r16.5(2)

(4) If the defendant does not agree with a fact that the claimant has stated in the claim, the defendant must file and serve a defence that:

(a) denies the fact; and

[4.5.7] **Admission of non-controversial facts** Facts which are not in dispute should be admitted: *Lee Conservancy Board v Button* (1879) 12 Ch D 383 at 398. This is consistent with the overriding objective and the failure to admit facts for merely "tactical" reasons may lead to penalty costs orders: *Unioil v Deloitte* (No2) (1997) 18 WAR 190 at 193.

[4.5.8] **Non-admissions** Under the former rules it was acceptable to deal with a fact which was not admitted either by denial or by non-admission. The distinction was that a denial was used to dispute the fact and a non-admission was used to put the opponent to proof. It is suggested that non-admissions are no longer acceptable unless subrule (6) applies. Parties ought to investigate allegations at an early stage and respond with either a denial or an admission. Of course, it may still be appropriate to explicitly "not plead" to allegations which are irrelevant or do not concern the particular defendant.

(b) states what the defendant alleges happened.

[4.5.9] **Facts supporting positive defence must be stated** A defendant will not be permitted to raise a positive defence under cover of a general denial: *Crook v Derbyshire* [1961] 3 All ER 786 at 790; [1961] 1 WLR 1360 at 1365; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 318; 41 ALR 255 at 259-60; 56 ALJR 681 at 683. Accordingly, it is necessary for the defendant to state such facts as are necessary to set up his defence.

[4.5.10] **Defence must not be evasive** The defence must not be vague or evasive and must answer the point of substance: *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639-40; *Tildesley v Harper* (1878) 7 Ch D 403 at 407.

E *CPR* r16.4(5)

(5) If the defendant does not deny a particular fact, the defendant is taken to have agreed with it.

[4.5.11] **Admissions may be express or implied** Admissions of fact may be express or implied by the absence of a denial. Such an admission is of the same effect as an express admission: *Byrd v Nunn* (1877) 7 Ch D 284 at 287; *Green v Sevin* (1879) 13 Ch D 589 at 595.

[4.5.12] **No requirement to plead to particulars** An implied admission will not arise where there is an omission to plead to particulars (*Chapple v Electrical Trades Union* [1961] 3 All ER 612 at 615; [1961] 1 WLR 1290 at 1293-4) or to matters of law (but see *Commonwealth of Australia v Spotless Catering Services Ltd* [1999] WASCA 136 at [27], [37-38] as to whether there was an agreement). Where a defendant admits allegations of fact and joins issue only on points of law, the claimant will not usually be permitted to adduce evidence at the hearing: *Pioneer Plastic Containers v Commissioners of Customs* [1967] Ch 597 at 602; [1967] 1 All ER 1053 at 1056; [1967] 2 WLR 1085 at 1088.

(6) If the defendant does not know about a particular fact and cannot reasonably find out about it, the defendant must say so in the defence.

[4.5.13] **Plea of not knowing** Where allegations relate to the claimant only or to other defendants, a defendant can state that they "do not know" and perhaps also that they

"do not plead to" it. A statement that the defendant "does not know" an allegation of fact made against him directly should be struck out as evasive: *Duke Group (in liq) v Arthur Young (No13)* (1991) 5 ACSR 212 at 220.

Reply

E *CPR* r16.7(1)

4.6 (1) If a claimant does not file and serve a reply, the claimant is taken to deny all the facts alleged in the defence.

[4.6.1] **Mere denial in reply** It is not necessary to file a reply only to deny the allegations in the defence. However, the claimant may need to do more than merely deny allegations in the defence. See further r.4.7.

(2) If a claimant wishes to allege further relevant facts after the defence has been filed and served, the claimant must file and serve a reply.

[4.6.2] **When reply must be filed** The further facts which may be raised in the reply are those which are necessary to meet some issue raised by the defence: *Francis v Francis* [1952] VLR 321 at 323; [1952] ALR 573. The claimant is not entitled to use the reply to raise a new cause of action: *Williamson v London & North Western Railway* (1879) 12 Ch D 787 at 793.

(3) The claimant's reply must:

(a) contain a statement of the case; and

[4.6.3] **Location of insertion of statement of the case** This is to be inserted in Form 9 where the form requires the claimant to "set out details of reply in numbered paragraphs".

(b) state what the claimant alleges happened.

[4.6.4] See [4.6.2].

E *CPR* r16.7(2)(b)

(4) If the claimant's reply does not deal with a particular fact, the claimant is taken to deny it.

(5) The reply must be in Form 9

[4.6.5] **Form of reply and defence to counterclaim** If the claimant is filing a reply and defence to counterclaim, the heading ought to be "Reply and Defence to Counterclaim" and the two elements kept separate in the body of the document under subheadings "Reply" and "Defence to Counterclaim" with paragraph numbers in uninterrupted sequence. See further r.4.8(4).

Matters to be stated in a defence or reply

E *RSC* O18r8

4.7 In a defence or a reply, the statement of the case must specifically mention a matter that:

[4.7.1] **Meaning of "matter"** There is no definition of "matter". In *North Western Salt v Electrolytic Alkali* [1913] 3 KB 422 at 425 it was held that the expression "any matters" in the English provision included only matters of fact. By contrast, in *Nicholson v Colonial Mutual Insurance* (1887) 13 VLR 58 at 63 it was held that both matters of fact and matters of law are to be stated for the purposes of the Victorian provision. It is suggested that the latter case is more compelling in the context of the scheme of case management contemplated in Part 1 of the rules.

E *RSC* O18r8(1)(a)

(a) makes another party's claim or defence not maintainable; or

[4.7.2] **Examples** These will include matters such as performance, release and limitation. It is for the claimant to state and prove such matters. For example, a bare denial of the existence of a contract is not enough if the defendant wishes to raise *non est factum*.

(b) shows a transaction is void or voidable; or

[4.7.3] **Examples** These include matters such as fraud (*Davy v Garrett* (1877) 7 Ch D 473 at 489) or illegality *(Bullivant v A-G for Victoria* [1901] AC 196 at 204; [1900-3] All ER 812 at 816). Full particulars must be given: *Belmont Finance v Williams Furniture* [1979] Ch 250 at 268; [1979] 1 All ER 118 at 130; [1978] 3 WLR 712 at 728-9 (fraud, dishonesty); *Castlemaine Perkins v Queen Street Hotels* [1968] Qd R 501 at 513 (illegality).

E *RSC* O18r8(1)(b)

(c) may take another party by surprise if it is not mentioned; or

[4.7.4] **Examples** The purpose of subr. 4.7(c) is to avoid ambush: *Re Robinson's Settlement* [1912] 1 Ch 717 at 728; see further [4.1.2]. Matters which must be stated will largely overlap with matters required to be stated under subr 4.7(a) and (b) but will also include such matters as *non est factum* (*Gallie v Lee* [1971] AC 1004 at 1019; [1970] 3 All ER 961 at 965; [1970] 3 WLR 1078 at 1085), contributory negligence (*Fookes v Slaytor* [1979] 1 All ER 137 at 140; [1978] 1 WLR 1293 at 1297-8), non-fulfilment of a condition precedent (*Tsakiroglou v Transgrains* [1958] 1 Lloyd's Rep 562 at 573), estoppel (*Carl Zeiss Stiftung v Rayner (No3)* [1970] Ch 506 at 537; [1969] 3 All ER 897 at 908; [1969] 3 WLR 991 at 1009), failure to mitigate damage, equitable defences, etc.

[4.7.5] **No surprise when matter raised by at least one party** If only one of two defendants states a matter which is open to both, the claimant cannot maintain that he was taken by surprise and the court will allow both defendants the benefit of what is stated: *Re Robinson's Settlement* [1912] 1 Ch 717 at 728.

E *RSC* O18r8(1)(c)

(d) raises a question of fact not arising out of a previous statement of the case.

Counterclaim

4.8 (1) If a defendant in a proceeding wants to make a claim against the claimant (a "counterclaim") instead of bringing a separate proceeding, the defendant must include details of it in the defence.

[4.8.1] **Nature of counterclaim** A counterclaim is treated as an independent action: *Amon v Bobbett* (1889) 22 QBD 543 at 548; *Stumore v Campbell* [1892] 1 QB 314 at 317; [1891-4] All ER 785 at 787. Accordingly, the court must have jurisdiction in relation to the subject matter of the counterclaim: *Pellas v Neptune Marine Insurance* (1879) 5 CPD 34; 49 LJQB 153; 42 LT 35; 28 WR 405; *Bow, McLachlan & Co v The Ship 'Camosun'* [1909] AC 597 at 610-1; [1908-10] All ER 931 at 936-7; *Williams Bros v E T Agius* [1914] AC 510 at 522.

(2) A counterclaim must contain a statement of the case.

[4.8.2] **Striking out of counterclaims** This is a separate entity from the defence and may be struck out separately: *Owen v Pugh* [1995] 3 All ER 345 at 351-2. Accordingly, leave to amend the defence does not include leave to amend the counterclaim: *Grundy v Lewis* (1995) 62 FCR 567 at 571; 133 ALR 400 at 405.

(3) That part of the defence dealing with the counterclaim must:

(b) be shown clearly as the counterclaim; and

[4.8.3] **Form of counterclaim** The document may be named "Defence and Counterclaim" and the two elements kept separate in the body of the document under subheadings "Defence" and "Counterclaim" with paragraph numbers in uninterrupted sequence.

(b) set out details of the counterclaim as if it were a claim; or

(4) If the defendant has counterclaimed:

(a) the claimant may include a defence to the counterclaim in the claimant's reply; and

[4.8.4] **Form of reply and defence to counterclaim** If the claimant is filing a reply and defence to counterclaim, the heading ought to be "Reply and Defence to Counterclaim" and the two elements kept separate in the body of the document under subheadings "Reply" and "Defence to Counterclaim" with paragraph numbers in uninterrupted sequence.

(b) rule 4.5 applies to that part of the claimant's reply that deals with the counterclaim as if the reply were a defence.

(5) If the claimant defends the counterclaim:

(a) the defendant may file a reply (headed "defence to counterclaim") dealing with that part of the claimant's reply that relates to the counterclaim; and

(a) rule 4.6 applies to the defendant's reply.

(6) This rule applies to the conduct of a counterclaim (whether the counterclaim is against a person who was a party before the counterclaim was made or not) as if:

(a) the counterclaim is a claim, and the person making it a claimant in an original proceeding; and

(b) the party against whom the counterclaim is made is a defendant to an original proceeding.

Counterclaim against additional party

4.9 (1) A defendant may make a counterclaim against a person other than the claimant if:

(a) the claimant is also a party to the counterclaim; and

(b) either:

(i) the defendant alleges the other party is liable with the claimant for the counterclaim; or

[4.9.1] **Meaning of "with the claimant"** Such a counterclaim can only be maintained where the other party is liable "with the claimant". See for example *Harris v Gamble* (1877) 6 Ch D 748 at 752; *Furness v Booth* (1876) 4 Ch D 586 at 587.

(ii) the relief the defendant claims against the other person is related to or connected with the original subject matter of the proceeding.

[4.9.2] **Cross claim** Such a counterclaim can only be maintained when the counterclaim is "related to" or "connected to" the original subject matter. See for example *Smith v Buskell* [1919] 2 KB 362 at 369; [1918-9] All ER 747 at 750; *Times Cold Storage v Lowther & Blankley* [1911] 2 KB 100 at 106.

(2) The defendant must serve the defence and counterclaim, and the claim, on the other party within the time allowed for service under rule 4.13(1) on the claimant.

(3) The other person becomes a party to the proceeding on being served with the defence and counterclaim.

Damages

4.10 (1) If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.

[4.10.1] **Meaning of "damage" and "damages"** "Damage" refers to the disadvantage suffered by a person as a result of some wrongful act or omission. "Damages" are the monetary compensation which the law gives in respect of wrongs: *Jabbour v Custodian of Absentee's Property of Israel* [1954] 1 All ER 145 at 150; [1954] 1 WLR 139 at 143-4; [1953] 2 Lloyd's Rep 760 at 774; *Cassell v Broome* [1972] AC 1027 at 1070; [1972] 2 WLR 645 at 668; [1972] 1 All ER 801 at 823. It is important to distinguish between damages and other kinds of money payment, such as debt, money due under contract and quantum meruit, which are often incorrectly conflated with the notion of damage. It is also important to appreciate that damages do not always depend upon damage being suffered as some wrongs are actionable *per se*, such as injurious falsehood and trespass. Of course, actual damage may also be caused in such cases.

[4.10.2] **Meaning of "special damages"** In the context of statements of the case, the reference to "special" damages is probably intended to include all items of damage which do not flow in the ordinary course and are exceptional in some way: *Commissioners for Admiral of United Kingdom v Steamship Susquehanna* [1926] AC 655 at 661; *Ströms Bruks Aktie Bolag v Hutchison* [1905] AC 515 at 525-6; *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 486; [1969] 1 WLR 570 at 579-80. "Special" damage was described in *Ratcliffe v Evans* [1892] 2 QB 524 at 528; [1891-4] All ER 699 at 702 as "the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at trial". Accordingly, all particular items of past or future loss (*Domsalla v Barr* [1969] 3 All ER 487 at 492; [1969] 1 WLR 630 at 634), any items of consequential loss (*Re Simms* [1934] 1 Ch 1 at 22) and any matters of aggravation *(Whitney v Moignard* (1890) 24 QBD 630 at 631) should be stated as special damage with appropriate particulars: *Ilkiw v Samuels* [1963] 2 All ER 879 at 887; [1963] 1 WLR 991 at 1001. See further [4.10.5].

[4.10.3] **When exemplary damages awarded** In some circumstances, the conduct or motives of a party may lead to more than the usual measure of damages by way of punishment, called "exemplary" damages: *Mahe v Presdient of the Republic of Vanuatu* [2008] VUSC 39; Const Cas 3 of 2005; *British Transport Commission v Gourlay* [1956] AC 185 at 206; [1955] 3 All ER 796 at 804; [1955] Lloyd's Rep 475 at 482; *Harrisen v Holloway (No1)* [1984] VUSC 8; [1980-1994] Van LR 106. Exemplary damages are awarded for conduct which outrages the court, representing the community: *Andikar v Siro* [2008] VUCA 1; CAC 2 of 2008; *Gray v Motor Accident Commission* (1998) 158 ALR 485; 73 ALJR 45; [1998] HCA 70 at [101]. The sole factor for considering whether exemplary damages ought to be awarded is the defendant's conduct, not the claimant's loss: *Rookes v Barnard* [1964] AC 1129 at 1221, 1228; [1964] 2 WLR 269 at 324, 330; [1964] 1 All ER 367 at 407, 412; [1964] 1 Lloyd's Rep 28 at 62-3, 67; *AB & Ors v South West Water Services Ltd* [1993] QB 507 at 524, 529; [1993] 1 All ER 609 at 621, 625;

[1993] 2 WLR 507 at 520, 524 (but note the reservation in *Andikar v Siro* [2008] VUCA 1; CAC 2 of 2008). The claimant must state facts which are arguably capable of supporting an award for exemplary damages.

[4.10.4] **Particulars of damages** Under the former practice, it was not necessary to state a specific amount except for liquidated damages: *London & Northern Bank v Newnes* (1900) 16 TLR 433. It is now necessary to state an amount for every claim of damages, including general damages (see further subr. (2)). It is suggested that amendment ought to be allowed relatively freely to overcome the inherent uncertainty of quantifying all forms of damage. In deciding a sum to claim by way of general damages, lawyers should have regard to levels of ordinary income in Vanuatu and the value of money and general conditions in the Republic: *Manu & Tonga v Muller* [1997] Tonga LR 192

[4.10.5] **Exaggerated damages claims** Unfortunately, it has become conventional to seek damages in wildly optimistic sums, presumably in the hope of establishing in the minds of the defendant and the court a more generous frame of reference. It is suggested that this practice ought to be discouraged by appropriate costs orders, as to which see [15.8.9]. In *Telecom Vanuatu v Kalsau Langwor* [2003] VUSC 36; CC 124 of 2002 Coventry J gave the following warning: "These Courts have said this many times, yet some lawyers still pay no attention. Hopelessly inflated claims do nothing but harm what might otherwise be a good cause. It is for the lawyer to make a realistic assessment of how much can be claimed, ensure he can prove it and resist any pressure from his client to add a few noughts. The Court will use its Civil Procedure Rules powers to make the lawyer pay where such mispleading causes wasted costs". See also *Boblang v Lau* [2008] VUSC 59; CC 46 of 2007 at [23] Lawyers should also bear in mind 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; *Obed v Kalo* [2008] VUSC 47; CC 221 of 2006 at [20].

(2) If general damages are claimed, the following particulars must be included:

[4.10.6] **Meaning of "general damages"** "General" damages in this context refer to all items of loss which the claimant is not required to specify in order to recover them at trial. These are inferred or presumed or are the necessary and immediate consequences of the alleged wrongful act. See further [4.10.2].

(a) the nature of the loss or damage suffered; and

(b) the exact circumstances in which the loss or damage was suffered; and

(c) the basis on which the amount claimed has been worked out or estimated.

[4.10.7] **Where actual damage not required to be proved** It is not known precisely how this requirement will operate in situations in which actual damage is not required to be shown. In all other cases it is not sufficient merely to seek "damages". See also *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 485; [1969] 1 WLR 570 at 579; *Domsalla v Barr* [1969] 3 All ER 487 at 492; [1969] 1 WLR 630 at 634.

[4.10.8] **Facts supporting damages calculations ought to be stated** If a claimant bases a claim for damages on calculations (whether precise or approximate), the factual matters underpinning calculation ought to be stated in particulars: *Perestrello e Companhia Limitada v United Paint* [1969] 3 All ER 479 at 486; [1969] 1 WLR 570 at 579-80; *Hillier v Lucas* (2000) 81 SASR 451 at [574]. See further subr.(3).

[4.10.9] **Particularisation of damages no bar to higher award** The rule does no more than require particulars be provided. It does not create a duty to state an upper limit on the amount claimed nor does it have the effect of imposing any limit on recovery: *Dare v Pulham* (1982) 148 CLR 658 at 665; 44 ALR 117 at 121; 57 ALJR 80 at 82.

(3) In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.

[4.10.10] **Facts supporting damages claims to be stated** The degree of particularity required when stating damages depends on the character of the acts producing the damage and the circumstances under which they are done. As much particularity as is reasonable having regard to these factors must be given: *Ratcliffe v Evans* [1892] 2 QB 524 at 532-3; [1891-4] All ER 699 at 706.

[4.10.11] **Onus of proving quantum of damages on claimant** The claimant bears the onus of proving the fact and quantum of damage, even if the defendant does not specifically deny allegations of damage, suffers default judgment or admits the fact (but not the quantum) of damage. Accordingly, it is not strictly necessary specifically to traverse allegations of damage, except if it is intended to deny that the defendant caused any loss: *Rankine v Garton Sons* [1979] 2 All ER 1185 at 1188. It is good practice, however, to traverse all allegations of damage except as to the quantum. Where the defendant seeks to allege a failure to mitigate damage, the onus is then on the defendant and the relevant facts must be stated in the defence: *Roper v Johnson* (1873) LR 8 CP 167; 42 LJCP 65; 28 LT 296; 21 WR 384; *Wenkart v Pitman* (1998) 46 NSWLR 502 at 504, 520-3. Similarly, any issues of remoteness, causation, etc ought to be raised in the defence as a matter of good practice.

Amendment of statement of the case

4.11 (1) A party may amend a statement of the case to:

(a) better identify the issues between the parties; or

[4.11.1] **General approach to amendment** The original English provision referred to amendments which were "necessary for the purpose of determining the real question in controversy". The provision under the present rules is cast in more permissive terms as it is not required to show that a proposed amendment is "necessary". As a remedial provision, the court will usually adopt a fairly lenient and flexible approach to amendment in order to ascertain the true controversy: *Cropper v Smith* (1884) 26 Ch D 700 at 710-11; *Tildesley v Harper* (1878) 10 Ch D 393 at 397; *Kurtz v Spence* (1888) 36 Ch 770 at 774; *The Alert* [1891-4] All ER 1275 at 1278; *Wright v Stephenson & Co Ltd v Copeland* [1964] NZLR 673; *Makin v IAC* [2001] VUCA 17; CAC 14 of 2001. Accordingly, it is not usually necessary for the party proposing the amendment strictly to show that the amended statement of the case actually "better identifies" the issues – it is enough that the party seeking amendment considers that the amendment has this effect – of course the court may refuse leave where the proposed amendment plainly does not. The approach in the Magistrates Court may be even more flexible: *Hills v Stanford* (1904) 23 NZLR 1061 at 1067. In other jurisdictions in which active case management has been adopted, the liberality of the traditional approach has been modified by the growing realisation that excessive liberality has a damaging influence on the conduct of litigation. The point was well made by Bryson J in *Maronis Holdings v Nippon Credit* [2000] NSWSC 753 at [15]: "In view of the state of the law governing allowance of amendments, amendment applications brought forward before the trial began were treated with uncomplaining supine liberality, notwithstanding that they sometimes showed that problems had been addressed years after they should have been. I do not think that the law requires the discretion to allow amendments to be exercised in entire innocence of understanding the obvious impact of forebearance and liberality on the behaviour of litigants, who have diminished incentive to do their thinking in due time and to tell the court and their opponents their full and true positions. When forebearance and liberality are extended to a delinquent the burden of inconvenience and lost opportunities for preparation tends to fall heavily and without adequate repair on parties who have not been delinquent. A relative disadvantage is imposed on those who proceed methodically and in due time; their interest in procedural justice should claim at least as much consideration as the interests of the applicant for a late amendment who does not have to look far for the creator of his difficulty. It is even conceivable that a litigant might deliberately pursue a course which will impose disadvantage on an opponent who has to reconsider his ground and change course in the midst of a contest." In Vanuatu the approach lingers closer to the traditional approach, despite the requirements of Part 1.

[4.11.2] **Substantial amendments** It may not be appropriate to amend in such a way as to substantially change the proceedings where it would be more convenient to try the proceedings afresh*: Raleigh v Goschen* [1898] 1 Ch 73 at 81; *Commonwealth Dairy Produce v McCabe* (1938) 38 SR (NSW) 397 at 400 (see further *Blackmore v Edwards* [1879] WN 175 as to the costs consequences). It is, however, generally permissible to amend proceedings to raise new causes of action which are not time-barred: *Budding v Murdoch* (1876) 1 Ch D 42 at 42; *Hubbuck v Helms* (1887) 56 LJ Ch 539; 56 LT 232; 35 WR 574; 3 TLR 381; *Makin v IAC* [2003] VUSC 24; CC 140 of 1998. As to amendments which seek to resuscitate time-barred actions see generally *Weldon v Neal* (1887) 19 QBD 394 at 395. There is an important difference between allowing amendments to clarify the issues and those which provide a distinct claim or defence to be raised for the first time: *Ketteman v Hansel Properties* [1987] AC 189. The former may be more readily allowed. The latter will be allowed subject to this rule and case management considerations. Amendments which introduce new causes of action arising after the claim was initiated will not be competent: *Eshelby v Federated European Bank* [1932] 1 KB 254; [1931] All ER 840; *Vanuatu Copra & Cocoa Exporters Ltd v Maison du Vanuatu* [2007] VUCA 24 at 14; CAC 12 of 2007.

(b) correct a mistake or defect; or

[4.11.3] **General approach to mistakes** The famous dictum of Bowen LJ in *Cropper v Smith* is often cited throughout the Commonwealth: "[T]he object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases… I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party… as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. See further r. 1.4(2)(b). That principle continues to apply, but modified by case management principles. The same indulgence that was shown to the negligent conduct of litigation as might have been posible in a more leisured age may no longer be shown: *Aon Risk Services v ANU* [2009] HCA 27 at [25], [133]-[134], [156].

[4.11.4] **Meaning of "mistake"** "Mistake" includes errors made with fault: *Mitchell v Harris Engineering* [1967] 2 QB 703 at 719, 721; [1967] 2 All ER 682 at 686, 688; [1967] 3 WLR 447 at 457, 460.

[4.11.5] **Correction of party name** An amendment to correct the name of a party may be made even where the effect is to substitute a new party provided that the mistake is genuine: *Rodriguez v Parker* [1967] 1 QB 116 at 139; [1966] 2 All ER 349 at 365; [1966] 3 WLR 546 at 566; *Mitchell v Harris Engineering* [1967] 2 QB 703 at 719, 721; [1967] 2 All ER 682 at 686, 688; [1967] 3 WLR 447 at 457, 460; *Evans Construction v Charrington* [1983] QB 810 at 825; [1983] 1 All ER 310 at 320; [1983] 2 WLR 117 at 130; *Bridge Shipping v Grand Shipping* (1991) 173 CLR 231 at 234, 260; 66 ALJR 76 at 88; 103 ALR 607 at 627.

(c) provide better facts about each issue.

[4.11.6] **Fact pleading** The Judicature Acts introduced a system of fact pleading in the late 19th Century which confers nearly total freedom on the parties to fix the facts to which the the issues between the parties are to be resolved on the evidence. That new system of fact pleading, which is still found in Vanuau today and in many other Commonwealth jurisdictions, was coupled with a fairly liberal approach to amendment of those facts: *Aon Risk Services v ANU* [2009] HCA 27 at [15]-[16]..

[4.11.7] **Particulars** This paragraph may be intended to facilitate the provision of additional facts, perhaps by way of particulars. Under the former rules voluntary particulars of pleading could be provided at any time and it is suggested that this continues to be so.

(2) The amendment may be made:

(a) with the leave of the court; and

[4.11.8] **Discretionary considerations** The grant or refusal of leave is a matter of discretion: *Baume v Commonwealth* (1906) 4 CLR 97 at 114; *G L Baker v Medway*

[1958] 3 All ER 540 at 546; [1958] 1 WLR 1216 at 1231. That discretion must be exercised having regard to the system of case management (*Tony Sadler v McLeod* (1994) 13 WAR 323 at 335-6; *Aon Risk Services v ANU* [2009] HCA 27) and also to the overriding objective (*Queensland v JL Holdings* (1997) 189 CLR 146 at 154; 141 ALR 353 at 356; 71 ALJR 294 at 296). It is suggested that the list of matters contained in subr. (3) is not exhaustive. The court will always consider the materiality and utility of the proposed amendment. Where it can be seen that the proposed amendment is bad, leave should be refused: *Sinclair v James* [1894] 3 Ch 554 at 557; *Hubbuck v Wilkinson, Heywood & Clark* [1899] 1 QB 86 at 94; [1895-9] All ER 244 at 248; *Hooker Corp v Commonwealth* (1986) 65 ACTR 32 at 38; 82 FLR 321 at 326; *Atkinson v Fitzwater* [1987] 1 All ER 483 at 490, 502; [1987] 1 WLR 201 at 210, 223. Leave should also be refused if the proposed amendment is an abuse of process (*Petropoulos v Commissioner for Railways (No 1)* [1963] NSWR 286 at 290-1, 296; 36 ALJR 185; *Midland Bank v Green (No2)* [1979] 1 All ER 726 at 736; [1979] 1 WLR 460 at 472; *Nationwide News v Wiese* (1990) 4 WAR 263 at 267, 271) or is otherwise not in good faith or dishonest (*Tildesley v Harper* (1878) 10 Ch D 393 at 397; *Lawrance v Lord Norrey* (1890) 39 Ch D 213 at 221, 235; *Busch v Stevens* [1963] 1 QB 1 at 5; [1962] 1 All ER 412 at 414; [1962] 2 WLR 511 at 514).

[4.11.9] **Form of application** The application for leave should ideally be accompanied by a draft of the proposed amendment: *Busch v Stevens* [1963] 1 QB 1 at 4; [1962] 1 All ER 412 at 414; [1962] 2 WLR 511 at 514; *Hyams v Stuart King* [1908] 2 KB 696 at 724. Having regard to the principles of case management, it is probably inappropriate to permit a party to apply to strike out an amendment after leave has been given on the basis of a draft of the proposed amendment: *Southern Equities v Western Australian Government Holdings* (No2) (1993) 10 WAR 351 at 353-4. Unfortunately, it is very common in Vanuatu for leave to be sought and given (even for extensive or late amendments) without a draft. This undermines the policy behind requiring leave and, it is suggested, ought to be discouraged.

[4.11.10] **Sworn statement in support** It is not usually necessary to file a sworn statement in support of an application for leave as the merits of the application may be assessed on the face of the proposed amendment. It may be necessary to file a sworn statement in some circumstances: Delay (*James v Smith* [1891] 1 Ch 384 at 389; *Davey v Harrow* [1958] 1 QB 60 at 69; [1957] 2 All ER 305 at 307; [1957] 2 WLR 941 at 944; *Tony Sadler v McLeod* (1994) 13 WAR 323 at 336); suspicion of bad faith (*Coynbeare v Lewis* (1881) 44 LT 242); to provide evidence of mistaken admission (*Tony Sadler v McLeod* (1994) 13 WAR 323 at 336; *Divcon v Devine Shipping* [1996] 2 VR 79 at 80).

(b) at any stage of the proceedings.

[4.11.11] **When application to be made** Thus amendment may be made even after judgment or on appeal: *The Duke of Buccleuch* [1892] P 201 at 212; *Singh v Atombrook* [1989] 1 All ER 385 at 390, 393; [1989] 1 WLR 810 at 817, 821. The traditional approach was to grant leave to make necessary pre-trial amendments, however late, provided that the other side will not be unfairly prejudiced and can be compensated in costs: *Clarapede v Commercial Union* (1883) 32 WR 262; *G L Baker v Medway* [1958] 3 All ER 540; [1958] 1 WLR 1216. This is no longer the approach in case-managed jurisdictions: *Aon Risk Services v ANU* [2009] HCA 27. Late amendments, especially those at or very shortly before trial will be closely examined. In particular, if the necessity of the amendment ought to have been apparent long before, it may not be allowed: *Hipgrave v Case* (1885) 28 ChD 356 at 361. Amendments after evidence has been led involve the danger that parties will tailor their case mid-course: *Custom Credit Corp v Dallas Development Corp* [2003] WASC 98 at [113].

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(3) In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:

[4.11.12] **Effect of prejudice** The subrule does not go so far as to disentitle a party from obtaining leave to amend where there is incurable prejudice, however, it is difficult to imagine circumstances in which the court would be persuaded to grant leave in those circumstances. See generally *Edevain v Cohen* (1889) 43 Ch D 187; *Weldon v Neal* (1887) 19 QBD 394 at 395; *Dornan v J W Ellis* [1962] 1 QB 583; [1962] 1 All ER 303; [1962] 2 WLR 250; *McCoomb v Fleetwood Motors* [1967] NZLR 945. The subrule is probably not an exhaustive list of the matters to be considered by the court in the exercise of its discretion.

(a) awarding costs; or

[4.11.13] **Usual costs order** The party seeking leave usually bears the costs of the application and of necessary consequential amendments to other statements of the case, adjournments, etc ("costs thrown away"). On the other hand, a party who opposes a proper application for leave will usually bear the costs of the application so as to discourage merely tactical resistance to applications to amend. Unfortunately, costs orders are not always made or do not reliably match the above principles, with the result that spurious opposition is encouraged as a costless strategy.

[4.11.14] **Costs not a panacea** Modern case management dictates that the same indulgences that were given in the past may no longer be reliably expected. The traditional approach was exemplified by the dictum of Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at 710: "I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party". Then, at 711, he added: "I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs." More recently, in *GSA Industries v NT Gas* (1990) 24 NSWLR 710 at 716 Samuels JA said: "…the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe." See also *Rebolledo v Royal & Sun Alliance* [2002] NSWSC 104 at [28], [33]. That approach is winning increasing support and is driven by the requirement that the interests of the whole community in the efficient disposition of litigation must be considered. It is also noted that awards of costs in Vanuatu are often significantly more modest than elsewhere by comparison with actual costs.

(b) extending the time for anything to be done; or

(c) adjourning the proceedings.

[4.11.15] **Balancing prejudice of adjournment** Slight delay will be overlooked. Having regard to the overriding objective, the prejudice caused by refusing leave must be balanced against the prejudice to the public interest and to the other side by the risk of significant delay: *James v Smith* [1891] 1 Ch 384; *Tony Sadler v McLeod* (1994) 13 WAR 323 at 334, 336. An amendment which necessarily results in an adjournment ought to be carefully scrutinised if the adjournment generates an advantage to the party making it: *Hall Chadwick v Axiom Properties* [2002] WASC 179 at [32]. See further r. 1.2(2).

Court fees

4.12 (1) The fees set out in Schedule 1 are payable.

[4.12.1] A power to make rules does not imply an unlimited authority as to sums payable. It is arguable that the validity of any particular fee lies in the reasonableness of its relationship with the cost of administration or provision of the services to which the fee relates: *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580-1; 40 ALJR 317 at 319-20; *Elder's Trustee v Registrar of Probates for SA* (1917) 23 CLR 169 at 174. In reality however, court fees (which were originaly introduced to discourage trivial, vexatious and unmeritorious claims) are usually charged at a rate far below the real cost of using the system.

(2) However, if Vanuatu is a party to a Convention that provides that fees are not payable for particular proceedings, no fees are payable for those proceedings.

(3) The following provisions apply to the payment of fees:

(a) the fees are payable to an officer of the court; and

(b) a filing fee is payable at the time of filing; and

[4.12.2] **General observations** On 26 May 2008 the Chief Registrar notified that the accountant was now authorized to accept payments of fees at the Supreme Court Office. The previous method was notoriously cumbersome – an invoice was generated at the office, the fee paid elsewhere (at the Government cashier), the receipt returned to the office as proof of payment.

(c) if Schedule 1 fixes another time for paying another fee, the fee is payable at that time; and

(d) for a filing fee, the officer must write the amount of the fee, and the date and time it was paid, on the document; and

(e) for a filing fee, the officer must write the amount of the fee, and the date and time it was paid, on the document; and

(f) if a party fails to pay his or her trial fee by 14 days before the trial date, the judge may:

(i) order that the party is not to participate in the trial; or

(ii) make any other appropriate order; and

[4.12.3] **Discretionary considerations** The powers contained in this paragraph must be exercised according to the merits of each case: *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006 (order setting new date for payment of trial fee more appropriate in circumstances that defendant had already evidenced its seriousness by paying security for costs).

(g) if a trial is adjourned part heard, the judge may make an order about the proportion of any further trial fees to be paid by each party; and

(i) no fee is refundable.

Times for filing documents

4.13 (1) The following documents must be filed within the following times:

(a) the defendant's response must be filed and served within 14 days of the date of service of the claim;

(b) the defence must be filed within 28 days after the date of service of the claim, except if subrule (2) applies;

(2) The defendant may file a defence although he or she has not filed a response. However, if he or she did not file a response, the defence must be filed within 14 days of service of the claim.

[4.13.1] See also r. 4.4(3).

(3) If:

(a) the defence includes a counterclaim; and

(b) the claimant has filed a defence to the counterclaim;

the defendant may file and serve a reply.

(4) Each document must be served as set out in Part 5.

Late filing of documents

4.14 (1) A party may file a document after the time fixed by Rule 4.13.

[4.14.1] **Effect of late filing** The effect of r.18.10(1) is probably that a late filed document is an irregularity and the party filing it cannot take any further step in reliance on it until the irregularity is waived or the court exercises its jurisdiction under subrule (2): *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 323, 325; [1985] 1 WLR 513 at 520, 522.

(2) The court may decide whether or not the document is effective for the proceeding.

[4.14.2] **Discretion** See further r.18.10(2). This is a discretion which must be exercised judicially: *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 326; [1985] 1 WLR 513 at 523.

(3) In deciding whether a late filed document is effective, the court may have regard to:

(a) the reasons why the document was filed late; and

[4.14.3] **Mere slips, omissions, etc** A party should not be defeated because of any mere slip or omission, subject to questions of injustice: *Harkness v Bell's Asbestos* [1967] 2 QB 729 at 736; [1966] 3 All ER 843 at 845-6; [1967] 2 WLR 29 at 33.

(b) any additional expense or inconvenience incurred by the other parties to the proceeding, and the disadvantage to the first party if the late filing is not allowed.

[4.14.4] **Prejudice** Prejudice will be a highly important (and possibly all-important) consideration: *Gore-Booth v Gore-Booth* [1954] P 1 at 10; [1953] 2 All ER 1000 at 1005; [1953] 3 WLR 602 at 609; *Carmel Exporters v Sea-Land Services* [1981] 1 All ER 984 at 992; [1981] 1 WLR 1068 at 1077-8; [1981] 1 Lloyd's Rep 458 at 464; *Metroinvest Ansalt v Commercial Union Assurance* [1985] 2 All ER 318 at 326; [1985] 1 WLR 513 at 523.

(4) If the court decides the filing of the document is not effective, the court may:

(a) make any order that is appropriate for the proceeding; and

[4.14.5] Compare the range of orders available under r.18.10(2).

(b) make any order about the costs incurred by a party because of the late filing.

[4.14.6] **Costs** It is suggested that the party whose document is not validated should pay the costs of the application and any costs thrown away.

Renewal of claim

4.15 If a claim is not served within the 3 month period required by rule 5.3:

E *CPR* r7.6(1)
E *SCR* O6r8(2)

(a) the claimant may apply to the court to have the claim renewed; and

[4.15.1] **Policy** The policy of this rule is to ensure that claims are served. It is not appropriate or desirable that claims should remain dormant for indefinite periods. Accordingly, claims should not be renewed as a matter of course: *Battersby v Anglo-American Oil* [1945] KB 23 at 32; [1944] 2 All ER 387 at 391.

[4.15.2] **Time within which application to be made** There is no time limit within which a claimant may apply for the renewal of a claim and accordingly, it is possible for a claim to be renewed even where an applicable limitation period has expired. Of course, the expiry of a limitation period is a matter which the court ought to take into consideration: *Hewett v Barr* [1891] 1 QB 98 at 99; *Battersby v Anglo-American Oil* [1945] KB 23 at 32; [1944] 2 All ER 387 at 391; *Heaven v Road & Rail Wagons* [1965] 2 QB 355 at 361, 366; [1965] 2 WLR 1249 at 1255, 1259; [1965] 2 All ER 409 at 413, 416; *Van Leer Australia v Palace Shipping* (1981) 180 CLR 337 at 344, 346; 34 ALR 3 at 9, 11; 55 ALJR 243 at 246; *Irving v Carbines* [1982] VR 861 at 866.

[4.15.3] **Discretionary considerations** The discretion to renew claims is wide and unfettered. The court should exercise the discretion according to the demands of justice in the particular case and is likely to take into account such matters as the policy underlying the rule (*Brealey v Royal Perth Hospital* (1999) 21 WAR 79 at 81, 89; [1999] WASCA 158 at [1]. [44], [45]), length of delay, reasons for delay (*Baker v Bowkett's Cakes* [1966] 2 All ER 290 at 292-3; [1966] 1 WLR 861 at 866), conduct of the parties, applicable limitation periods, prejudice to the parties (*Jones v Jones* [1970] 2 QB 576 at 585; [1970] 3 WLR 20 at 28; [1970] 3 All ER 47 at 53) and the overriding objective generally. The claimant must show good reasons for the renewal but need not show "exceptional circumstances": *Melgren v Public Trustee* [1971] NZLR 681 at 687.

(b) if the claimant does not do this, the claim ceases to be of any effect.

[4.15.4] **Striking out** An order striking out the case under r.9.10 may follow: *Family Vanuapura v Supernativuitano Island Tribunal* [2007] VUSC 110; CC 20 of 2007.

[4.15.5] See further r.5.3.

SERVICE

Who serves a document

5.1 (1) If these rules require a document to be served, the party who filed the document is responsible for ensuring the document is served.

[5.1.1] **Obligation unaffected by court practice** Though notices are usually served by the court, that does not displace the obligations on parties under this rule to serve documents: *Dinh v Samuel* [2010] VUCA 6 at [39]-[40]l CAC 16 of 2009. This obligation is said to extend to informing the other parties of hearing dates when not indorsed on the application papers or heard in court/chambers: *Dinh v Samuel* at [41]-[42]; *VCMB v Dornic* [2010] VUCA 4; at [30]; CAC 2 of 2010.

(2) The party responsible for service may apply to the court for an order that the document be served by an enforcement officer or other person.

(3) The court may order that the document be served by an enforcement officer or other person if the court is satisfied that the circumstances of the proceeding require it.

[5.1.2] **Meaning of "enforcement officer"** There is no definition of "enforcement officer" in this part or in Part 20. The definition of "enforcement officer" in r.14.1 (being the sheriff or a police officer) is expressed to apply only to Part 14 but was probably also intended to apply here.

Service of claim

E *SCR* O10r1

5.2 The claim and response form must be served on the defendant personally, unless:

[5.2.1] **Service is basis of jurisdiction** The foundation of the court's jurisdiction over a defendant is usually said to be the personal service on him of the court's process: *Laurie v Carroll* (1958) 98 CLR 310 at 323, 324; 32 ALJR 7 at 10, 11.

(a) rule 5.9 applies (rule 5.9 deals with other ways of service); or

(b) the court orders that the claim may be served in another way.

[5.2.3] **Discretion to order alternative method of service** See r.5.9 as to the discretion to order substituted service. The power to order an alternative method of service must be applied in accordance with the overriding objective. In particular, the court must consider the high cost of litigation, the obstacles faced by those with limited means (and in particular those with limited means facing litigants with abundant means) and the need to ensure that cases proceed expeditiously. Applications advancing collateral purposes, for example, to secure a step ahead in a race to commence proceedings in this jurisdiction before they are commenced elsewhere, should not be granted: *Albon v Naza Motor Trading* [2007] EWHC 327 at [37], [44].

Time for serving claim

E *CPR* r7.5
E *SCR* O6r8

5.3 (1) The claim and response form must be served on the defendant within 3 months of the date on which the claim was filed.

(2) If a claim is not served within that period, it is no longer of any effect.

[5.3.1] It is difficult to see what this rule adds to r.4.15.

[5.3.2] **Striking out** An order striking out the case under r.9.10 may follow: *Family Vanuapura v Supernativuitano Island Tribunal* [2007] VUSC 110; CC 20 of 2007.

Address for service

E *SCR* O6r5(2)

5.4 (1) An address for service is the address at which documents in a proceeding (other than a claim) can be served on the party giving the address.

(2) Every document filed must state an address for service for the party filing the document.

(3) An address for service must be:

(a) within Vanuatu; and

[5.4.1] **Post boxes** It has been held in Australia that a post office box does not fulfil the requirements of an address for service: *Sarikaya v Victorian Workcover* (1997) 80 FCR 262 at 263. The lack of street addresses in Vanuatu and the consequent reliance on post office boxes casts doubt over the applicability of this decision.

(b) if the party is represented by a lawyer, the address of the lawyer's office.

[5.4.2] **Changes of lawyer** A frequent difficulty associated with this provision occurs when a lawyer ceases to act and no new lawyer commences to act, leaving the party unrepresented and with no address for service known to the other parties. In this situation it is suggested that the provisions of subr.(4) require the unrepresented party to notify the other parties of a new address for service. See further r.18.8.

(4) If a party's address for service changes, the party must give the Court and the other parties notice in writing of the new address. The notice must include:

(a) the number of the proceedings; and

(b) the names of the parties.

(5) The notice must be filed with the Court and served on each other party.

(6) Service of a document at the address given as the address for service is effective service unless a notice of change of address for service has been given to the party serving the document.

Service of other documents

E *CPR* r6.2(1)

5.5 A document other than a claim may be served:

(a) on a party personally; or

(b) by leaving it at the party's address for service; or.

(c) by sending it to the party's address for service:

(i) by prepaid post; or

[5.5.1] **Sworn statement as to service by post** To prove service, as for example in relation to default judgment, it is usual that the sworn statement depose that the post was prepaid: *Walthamstow Council v Henwood* [1897] 1 Ch 41 at 44.

(ii) by fax.

[5.5.2] As to service by fax see generally J G Starke "Practice Note: Service by fax conditions for valid service" 63 ALJ 500.

Time for serving other documents

5.6 (1) This rule does not apply to the service of a claim.

[5.6.1] **Time limit for claims** Claims must be served within three months: see rr.4.15, 5.3.

(2) All other documents must be served within the times required by rule 4.13.

[5.6.2] **Time limit for sworn statements** For sworn statements see also r.11.6.

Late service of documents

5.7 (1) A party may serve a document after the time fixed by rule 4.13.

(2) The court may decide whether or not the document is effective for the proceeding.

[5.7.1] See further rr.4.14, 18.10.

(3) In deciding whether a late served document is effective, the court may have regard to:

(a) the reasons why the document was served late; and

(b) whether the party is likely to be able to serve the document in the extra time; and

[5.7.2] As the party will already have been served by the time the court's discretion is invoked, it is difficult to understand para (b).

(c) any additional expense or inconvenience incurred by the other parties to the proceeding, and the disadvantage to the first party if the late service is not allowed.

[5.7.3] **Relevant considerations** It is suggested that wherever a document can be validated without unfairness to all concerned, it will be appropriate to do so: see for example *Outboard Marine v Byrnes* [1974] 1 NSWLR 27 at 30. Lengthy documents will usually strengthen the objection to their late service: See for example *R v Smith* (1875) LR 10 QB 604 at 608.

(4) If the court decides the service of the document is not effective, the court may:

(a) make any order that is appropriate for the proceeding; and

(b) make an order about the costs incurred by a party because of the late service.

What is personal service

5.8 (1) A document is served personally on an individual:

(a) by giving a copy of it to the individual; or

[5.8.1] **What amounts to personal service** As to personal service the common law was traditionally very strict – it required the process server to touch the person to be served with the document, describe the nature of the document, and offer the person served the opportunity to compare the service copy to the original, which the server would carry. Despite the relaxation of the common law effected by the rules, it is suggested that the courts will continue to apply a degree of strictness in matters of personal service, especially as to originating process.

[5.8.2] **Day or night** Service may be effected at any time of the day or night and on any day of the year: s.34, *Interpretation* [Cap 132].

[5.8.3] **Other situations** In Australia, under a provision that allowed a document to be "left with" the person served, it has been held that personal service will be effected when the person asks the server to leave the document somewhere or hand it to some other person who is with them at the time: *Ainsworth v Redd* (1990) 19 NSWLR 78 at 88.

(b) if the individual does not accept the document, by putting it down in the person's presence and telling the person what it is.

[5.8.4] **Meaning of "putting down"** It is not necessarily required that the document be put down on the floor and it is probably acceptable that the document be placed on any surface (including the person's lap) provided that it is left before or near the person to be served so that the person had immediate and unimpeded access to it: *Re Ditfort* (1988) 19 FCR 347 at 360; 83 ALR 265 at 277; *Re Elkateb* (2001) 187 ALR 479; [2001] FCA 1527 at [12].

[5.8.5] **Door locked against server** Personal service has also been held to be effected when the person to be served is seen in a room which is then locked against the server and the server pushes the document under the door, calling out its nature (*Graczyk v Graczyk* (1955) ALR (CN) 1077) or where the document is attached to the door and its nature is explained (*Re Hudson* (1990) 25 FCR 318 at 320).

[5.8.6] **What server is required to tell** The requirement that the server tell the person to be served "what the document is" is probably not very onerous. Where the document is not in a sealed envelope and is quite clear on its face, a very brief statement should suffice: *Re Elkateb* (2001) 187 ALR 479; [2001] FCA 1527 at [13]. Whenever documents are served in a sealed envelope, it is essential that the server announce the nature of the document: *Banque Russe v Clark* (1894) WN 203; *Re a Debtor (No 441 of 1938)* [1939] 1 Ch 251 at 257, 259; [1938] 4 All ER 92 at 96-7; *Ainsworth v Redd* (1990) 19 NSWLR 78 at 82.

(2) A document is served personally on a corporation:

(a) by giving a copy of the document to an officer of the corporation; or

[5.8.7] **Meaning of "officer"** An "officer" of a corporation includes a director, manager or secretary: s.1, *Companies* [Cap 191].

(b) by leaving a copy of the document at the registered office of the corporation; or

[5.8.8] **Only registered office** Service at any other office will be bad*: Wood v Anderston* (1888) 36 WR 918; 4 TLR 708; *Vignes v Smith* (1909) 53 SJ 716.

(c) if the corporation does not have a registered office in Vanuatu, by leaving a copy of the document at the principal place of business, or principal office, of the corporation in Vanuatu.

[5.8.9] **Meaning of "principal place of business"** The principal place of business does not include a mere agency: *Baillie v Goodwin* (1886) 33 Ch D 604 at 607; *Grant v Anderson* [1892] 1 QB 108 at 117-8; *Badcock v Cumberland Gap Park* [1893] 1 Ch 362 at 369-70; *Worcester Banking v Firbank* [1894] 1 QB 784 at 791; *Marks v Richards* (1913) 32 NZLR 1019 at 1030.

(3) A document is served personally on the State of Vanuatu or the Government of Vanuatu by leaving a copy of the document at the State Law Office during the business hours of that Office.

[5.8.10] **Location of State Law Office** The State Law Office is located on Rue Emmanuel Brunet in Port Vila, near the Prime Minister's Office, and its office hours are 7:30-11:30am and 1:30 to 4:30pm Monday-Friday. The practice of serving the Attorney-General or Solicitor-General after hours at their residences does not constitute good service, is discourteous and should be discouraged.

Substituted service

5.9 (1) If a party is unable to serve a document personally, the party may apply to the court for an order that the document be served in another way (called "substituted service").

[5.9.1] **Substituted service only an alternative to personal service** Substituted service is a substitute for personal service only. Accordingly, it is only available in situations in which personal service is available: *Sloman v New Zealand* (1875) 1 CPD 567; *Mighell v Sultan of Jahore* [1894] 1 QB 149 at 159-60, 161, 164; *Porter v Freudenberg* [1915] 1 KB 857 at 889-90**;** [1914-15] All ER Rep 918 at 933-4; *Sheahan v Joye* (1995) 57 FCR 389 at 397-8.

[5.9.2] **Meaning of "unable"** Substituted service may be ordered only where personal service has been "unable" to be effected and this inability is a threshold consideration to the exercise of the discretion to make an order under subr.(2): *Afro-Continental Nigeria v Meridian Shipping* [1982] 2 Lloyd's Rep 241 at 248; *Paragon v Burnell* [1991] Ch 498 at 507; [1991] 2 All ER 388 at 390; [1991] 2 WLR 854 at 862. The sworn statement in support of the application must describe the efforts which have been made to effect service. Alternatively, if it is obvious that attempting service would be futile, the reasons for such futility: *Ricegrowers Co-op v ABC Containerline* (1996) 138 ALR 480 at 482; *Unilever v PB Foods* [2000] FCA 798 at [13].

[5.9.3] **Evasion** Substituted service may be ordered where a defendant, knowing of the claim, leaves the jurisdiction to evade service (*Re Urquhart* (1890) 24 QBD 723 at 725; *Laurie v Carroll* (1958) 98 CLR 310 at 328; 32 ALJR 7 at 13) but not otherwise, unless the document is likely to reach the party to be served: see further [5.9.5].

(2) The court may order that the document be served:

[5.9.4] **Application and relevant considerations** The sworn statement in support of the application for substituted service should explain which method of service is

intended and why this method is likely to bring the document to the attention of the person to be served. The primary consideration is how the document can best be brought to the personal attention of the person to be served: *Re McLaughlin* [1905] AC 343 at 347. See further [5.9.5].

(a) by serving it on a chief or a minister of the church who lives in the area where it is believed the person named in the document is living; or

(b) by putting a notice in a newspaper circulating in the area where the person lives; or

(c) by arranging for an announcement about the document to be broadcast on the local radio; or

(d) in any other way that the court is satisfied will ensure that the person to be served knows about the document and its contents.

[5.9.5] **Relevance of probability** The proviso in this paragraph arguably conditions subr. (2) more generally – substitute service should not be ordered unless there is a probability of the document coming to the attention of the party to be served: *Macfarlane v Kidd* (1886) NZLR 4 SC 445 at 448; *Porter v Freudenberg* [1915] 1 KB 857 at 889-90**;** [1914-15] All ER Rep 918 at 933-4; *Sheahan v Joye* (1995) 57 FCR 389 at 397-8; *Haymarket v Smith* (1923) 40 WN (NSW) 87; *Chappell v Coyle* (1985) 2 NSWLR 73 at 85.

[5.9.6] **Examples** The court has a very wide discretion as to the method of substituted service. Substituted service has, for example, been ordered on a person's wife (*Bank of Whitehaven v Thompson* [1877] WN 45; *Kohn v Henderson* (1885) 3 NZLR 364 at 364), by attaching documents to a conspicuous place on land (*McKenzie v McKenzie* (1907) 26 NZLR 841 at 844) and on lawyers who have acted for the person to be served in the same subject matter (*Jay v Budd* [1898] 1 QB 12 at 16, 19).

Service on person under a legal incapacity

E *CPR* r6.6(1)

5.10 (1) A document to be served on a child must be served:

(a) if the child is a party to the proceeding and has a litigation guardian, on the litigation guardian; and

(b) if the child is not a party to the proceeding, on the child's parent or guardian, or on a person who appears to be acting in the position of the child's parent or guardian.

[5.10.1] **Schools** It may be that the head of a school or college at which the child is residing could be regarded as "acting in the position of" parent or guardian: see for example *Christie v Cameron* (1856) 2 Jur (NS) 635; 25 LJ Ch 488; 27 LTOS 166; 4 WR 589.

(2) If the child is a party to the proceeding but does not have a litigation guardian, the person wishing to serve the child must:

(a) apply to the court to appoint a litigation guardian for the child; and

(b) serve the document on the litigation guardian.

E *CPR* r6.6(1)

(3) A document to be served on a person with impaired capacity must be served:

(a) if the person is a party to the proceeding and has a litigation guardian, on the litigation guardian; and

(b) if the person is not a party to the proceeding, on the person's guardian, or on a person who appears to be acting in the position of the person's guardian.

[5.10.2] **Hospitals, etc** It may be that the head of a hospital or a medical officer could be regarded as "acting in the position of" guardian: see for example *Than v Smith* (1879) 27 WR 617; *Fore Street Warehouse v Durrant* (1883) 10 QB 471 at 473.

(3) If the person with impaired capacity is a party to the proceeding but does not have a litigation guardian, the person wishing to serve the person must:

(a) apply to the court to appoint a litigation guardian for the person; and

(b) serve the document on the litigation guardian.

Service relating to deceased estate

5.11 In a proceeding in which the estate of a deceased person is a party, all documents must be served on one of the legal representatives of the estate.

Service on partnership

5.12 (1) A claim against a partnership must be served:

[5.12.1] See r. 3.11 as to claims against partnerships.

(a) on a partner; or

(b) at the principal place of business of the partnership.

[5.12.2] **Meaning of "principal place of business"** The principal place of business does not include a mere agency: *Baillie v Goodwin* (1886) 33 Ch D 604 at 607; *Grant v Anderson* [1892] 1 QB 108 at 117-8; *Badcock v Cumberland Gap Park* [1893] 1 Ch 362 at 369-70; *Worcester Banking v Firbank* [1894] 1 QB 784 at 791; *Marks v Richards* (1913) 32 NZLR 1019 at 1030.

(2) If a claim is served as required by subrule (1), each partner who was a partner when the claim was issued is taken to have been served.

[5.12.3] **Examples** See *Ellis v Wadeson* [1899] 1 QB 714 at 718-9 as to deceased partners and *Lovell & Christmas v Beauchamp* [1894] AC 607 at 613-4; [1891-4] All ER 1184 at 1186-7 as to partners under a disability.

Evidence of service

5.13 (1) If a defendant files a response or a defence to a claim, the claimant need not file a sworn statement giving proof of service.

(2) If a party on whom another document is served does not subsequently file a document required by this rule to be filed, the party serving the first document cannot take any further action in the proceeding unless he or she files a sworn statement setting out details of the time and manner in which the first document was served.

(3) If a document is served under rule 5.9 (dealing with substituted service), the sworn statement must:

(a) for service on a chief, give details of how and when the claim was served on the chief; and

(b) for service through a newspaper or by radio, give details of the service, including a copy of the notice or the announcement; and

(c) for service in any other way, give details of how the document was served.

[5.13.1] **What sworn statement should contain** The sworn statement should contain full particulars of service, including the date, time, place and manner of service. If the document was served by post the type or class of postage should be stated. If served by facsimile, a transmission report should be attached. See also [5.5.2].

[5.13.2] **Minor defects in documents** Defects in photocopying, etc will probably not invalidate service in view of r.1.2: *Hanmer v Clifton* [1894] 1 QB 238 at 239-40; *Smalley v Robey* [1962] QB 577 at 582; [1962] 1 All ER 133 at 135; [1962] 2 WLR 245 at 249.

Service outside Vanuatu

E *CPR* r6.20
E *SCR* O11r1

5.14 (1) A party may apply to the Supreme Court for an order that a claim in the Supreme Court be served outside Vanuatu.

[5.14.1] **What application should contain** The application must be accompanied by a sworn statement in which full and frank disclosure must be made by the applicant (*GAF v Amchem* [1975] 1 Lloyd's Rep 601 at 608; *Sheldon v New Zealand Forest Products* [1975] 1 NSWLR 141 at 148) addressing the criteria described in subr. (2) (*Hyde v Agar ;* (1998) 45 NSWLR 487 at 502) and identifying a serious issue to be tried (*Seaconsar v Bank Markazi* [1994] AC 438 at 446, 457-8; [1993] 4 All ER 456 at 458, 467-8; [1993] 3 WLR 756 at 768; [1994] 1 Lloyd's Rep 1 at 10).

[5.14.2] **Discretion exercised cautiously** English authorities have said that this power ought to be exercised with great care and any doubt resolved in favour of the overseas party: *Vitkovice Horni v Korner* [1951] AC 869 at 883, 889; [1951] 2 All ER 334 at 340, 344; *The Hagen* [1908] P 189 at 201; [1908-10] All ER 21 at 26. The approach in the Australian authorities is, at least recently, less cautious, having regard to the greater reliability of modern communications and transport: *Agar v Hyde* (2000) 201 CLR 552; 173 ALR 665; 74 ALJR 1219; [2000] HCA 41 at [42]. For the approach in Vanuatu see *Solaise Hotel v Pacific Consultants* [1988] VUSC 17; [1980-1994] Van LR 385 which reflected the tone of the English authorities. As this case was decided in 1988 it is respectfully suggested the matter may benefit from fresh consideration in the light of technological developments since then.

(2) The court may order that the claim be served outside Vanuatu if:

E *CPR* r6.20(10)

(a) the claim concerns land in Vanuatu; or

(b) an Act of Parliament, deed, will, contract, obligation or liability affecting land in Vanuatu is sought to be interpreted, rectified, set aside or enforced; or

E *CPR* r6.20(1)

(c) the claim is against a person who is domiciled or ordinarily resident in Vanuatu; or

[5.14.3] **Irrelevance of location cause of action arose** To this paragraph it is irrelevant where the cause of action arose*: Williams v United States & Australasia Steamship Co* (1908) 25 WN (NSW) 43 at 45. Dealings in Vanuatu unconnected with the subject matter of the proceedings do not provide the requisite nexus: *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

[5.14.4] **Meaning of "domiciled"** A person is said to be domiciled where their habitation is fixed without any intention of moving from it: *Re Craignish* [1892] 3 Ch D 180 at 192. As to the distinction between "resident" and "ordinarily resident" see *Levene v Commissioners of Inland Revenue* [1928] AC 217 at 225, 232; [1928] All ER 746 at 750, 754. A corporation may be "ordinarily resident" in more than one place at the same time: *BHP Petroleum v Oil Basins* [1985] VR 725 at 739.

E *CPR* r6.20(12)

(d) the claim is for administration of an estate of a person who was domiciled in Vanuatu at the date of the person's death; or

(e) the claim is for the execution of a trust, the person to be served is the trustee, and the trust concerns property in Vanuatu; or

E *CPR* r6.20(5)

(f) the claim concerns a contract made in Vanuatu or governed by the law of Vanuatu; or

[5.14.5] **Ascertainment of place of contract** See *Commissioners of Inland Revenue v Muller* [1901] AC 217 at 223; *Brinkibon v Stahag Stahl* [1983] 2 AC 34 at 42; [1982] 1 All ER 293 at 296; [1982] 1 WLR 264 at 267.

[5.14.6] **Ascertainment of proper law** The expression "governed by" suggests that proper law of the contract must be Vanuatu law: *Amin Rasheed Shipping v Kuwait Insurance* [1984] AC 50 at 61; [1983] 2 All ER 884 at 888; [1983] 3 WLR 241 at 246; [1983] 2 Lloyd's Rep 365 at 367. As to ascertainment of the proper law see generally *R v International Trustee for Bond Holders* [1937] AC 500 at 529; [1937] 2 All ER 164 at 166; *Bonython v Commonwealth* [1951] AC 201 at 219; *Compagnie d'Armament Maritime v Compagnie Tunisienne de Navigation* [1971] AC 572 at 609; [1970] 3 All ER 71 at 96.

(g) the claim is based on a breach of contract committed in Vanuatu whether or not the contract was made in Vanuatu; or

[5.14.7] **Not necessary for contract to have been performed in Vanuatu** It is not necessary that the whole of the contract was to be performed in Vanuatu: *The Eider* [1893] P 119 at 131.

E *CPR* r6.20(8)(b)

(h) the claim is based on a tort committed in Vanuatu; or

[5.14.8] **Ascertainment of place of tort** As to the ascertainment of the place of commission of a tort see *Distillers Co (Biochemicals) v Thompson* [1971] AC 458 at

469; [1971] 1 All ER 694 at 700; [1971] 2 WLR 441 at 449; *George Munro v American Cyanamid* [1944] 1 KB 432 at 441; [1944] 1 All ER 386 at 390 (negligence).

E *CPR* r6.20(8)(a)

(i) the claim is for damage suffered in Vanuatu, whether or not the tort causing the damage happened In Vanuatu; or

(j) the claim is for an amount payable under an Act of Parliament to a government body in Vanuatu; or

(k) the proceeding is brought against a person in Vanuatu and the other person outside Vanuatu is a necessary party to the proceeding; or

[5.14.9] **Meaning of "necessary party"** A foreign defendant will be a necessary party if they could have been a proper defendant had they lived in Vanuatu: *Witted v Galbraith* [1893] 1 QB 577 at 579; *MacLaine, Watson & Co v Bing Chen* [1983] 1 NSWLR 163 at 167; *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

E *CPR* r6.20(2)

(l) the proceeding is for an injunction ordering the person to do or not do anything in Vanuatu (whether or not damages are also claimed); or

[5.14.9] **Reasonable possibility of injunction required** The addition of a prayer for an injunction will not necessarily bring the matter within the rule – there must be a reasonable possibility that the injunction will be granted: *Watson & Sons v Daily Record* [1907] 1 KB 853 at 859.

(m) for any other reason the court is satisfied that it is necessary for the claim to be served on person outside Vanuatu.

[5.14.10] See generally *Patunvanu v Government of Vanuatu* [2005] VUCA 18; CAC 10 of 2005.

(3) This rule also applies to service of a counterclaim and a third party notice.

(4) The court may give directions extending the time for serving the claim, and filing a response and defence to the claim.

(5) The claimant must also serve on the person a copy of the order and each sworn statement made in support of the order.

(6) The claimant must file a sworn statement giving proof of the service.

Sealed copy

5.15 If these rules require a copy of a filed document to be served, the copy must be a sealed copy.

[5.15.1] **General observations** See r.18.5(2). Due to delays associated with the checking and sealing of filed documents it is not uncommon for parties to serve unsealed copies on the other side at the same time as they are filed if there is some urgency. Sealed copies should be served when eventually returned by the court.

CONFERENCES

Application of Part 6

6.1 This Part applies only to the Supreme Court.

Conferences

6.2 (1) The purpose of conferences is to enable the judge to actively manage the proceeding.

[6.2.1] **Adjunct to r.1.4** This Part is an adjunct to r.1.4. See further r.6.4. The time taken for the resolution of civil proceedings can be substantially reduced by active case management: *Trade Practices Commission v Rank* (1994) 53 FCR 303 at 316; 123 ALR 551 at 562.

(2) The same judge must preside at all conferences held in a particular proceeding, if this is practicable.

[6.2.2] **Docket system** The so-called "individual docket system" is designed to ensure that judges will give early attention to a matter, making for closer involvement and greater efficiency: See generally C Sage *et al*, *Case Management Reform: A Study of the Federal Court's Individual Docket System*, 2002.

(3) A party need not attend a conference in person unless the judge orders him or her to attend.

[6.2.3] **Who may be ordered to attend** The reference to "him or her" in the subrule suggests that only parties who are natural persons may be ordered to attend.

[6.2.4] **Party participation** The rationale for the subrule is to enhance the likelihood of early negotiation and settlement of disputes and to assist the parties to understand the litigation process, especially their rights and obligations. In practice, such orders are very seldom made.

First conference between parties

6.3 (1) A judge will arrange a conference (called "Conference 1") between the parties when a defence has been filed by a defendant.

[6.3.1] **General observations** It is noted that there are sometimes delays of many months encountered at this stage of proceedings. It is suggested that a party experiencing delay at this stage should contact the registry to ascertain the identity of the docket judge and then write to the judge by way of application under subr.(3).

(2) The conference is to take place on the date the judge fixes. This must be a date after the date for filing the last reply in the proceeding.

(3) Any party can apply to a judge to fix a date for Conference 1 to be held.

(4) A judge may also arrange a conference at any other time.

[6.3.2] **Conference when defence not filed** Subrule (4) is often used to schedule conferences when the time for filing the defence is not complied with.

Purpose of Conference 1

E *CPR* r3.1(2)(m)

6.4 (1) The purpose of conference 1 is, as far as practicable, to enable the court to actively manage the proceeding by covering the matters mentioned in r. 1.4.

[6.4.1] See r.1.4(2) as to the content of active case management.

(2) At Conference 1, the judge may:

(a) deal with any interlocutory application (see Part 7), or fix a date for hearing them; and

[6.4.2] **Meaning of "any interlocutory application"** There are no limits on the range of interlocutory applications which may be so dealt with: *William v AHC (Vanuatu) Limited* [2008] VUCA 16; CAC 8 of 2008.

(b) make orders:

(i) adding or removing parties (see Part 3); and

(ii) about whether it is necessary to employ experts (see Part 11 dealing with evidence); and

(iii) for the medical examination of a party; and

[6.4.3] See further r.11.14.

(iv) about disclosure of information and documents (see Part 8); and

(v) that gives a party security for costs (see Part 15); and

(vi) that statements of the case be amended or that further statements of the case be filed; and

[6.4.4] **Statements of the case subsequent to reply** See further r.4.11. The reference to "further statements of the case" may be a reference to such statements as may be necessary subsequent to a reply. No express provision is made in the *Rules* for such documents which are seldom required. Under the former *Rules* a pleading subsequent to a reply was a rejoinder which was followed, if necessary, by a rebuttal and a surrebuttal.

(vii) about any other matter necessary for the proper management of the case.

Other conferences

6.5 (1) At the first Conference, a judge will set a date for a Trial Preparation Conference or other conferences unless, in the judge's opinion, the proceeding can be set down for trial without further conferences.

(2) At these conferences the judge:

(a) must check whether all orders made at previous conferences have been complied with; and

(b) if they have not been complied with, must make whatever orders are necessary to ensure compliance; and

(c) may vary existing orders, and make any other orders to give effect to the purposes of Conference 1; and

[6.5.1] **Extent of power to vary** The judge may not be limited to varying existing orders made at a conference and may vary other interlocutory orders if they can be shown to be mistaken: *Apia v Magrir* [2006] VUCA 10; CAC 04 of 2006 and 14 of 2006. Any interlocutory applications may be dealt with: *William v AHC (Vanuatu) Limited* [2008] VUCA 16; CAC 8 of 2008.

E *CPR* r3.1(2)

(d) may make any other orders necessary to continue the progress of the proceeding.

Trial Preparation Conference

6.6 (1) The purpose of the Trial Preparation Conference is:

[6.6.1] Court-generated documents often refer to "pre-trial conferences" rather than "trial preparation conferences".

(a) to identify precisely what are the issues between the parties; and

(b) to identify the evidence needed to prove these matters; and

(c) otherwise to ensure the matter is ready to be tried; and

(d) to see whether the matter can be resolved by alternative dispute resolution.

(3) At the Trial Preparation Conference, the parties should be in a position to:

[6.6.2] **Importance of conference** Lawyers appearing in the Trial Preparation Conference must be fully conversant with the case even if not intended to be counsel at the trial. The role of this conference is illustrated by *Government of Vanuatu v Mathias* [2006] VUCA 7; CAC 10 of 2006 in which a trial was derailed when insufficient earlier attention was given to the framing of the issues between the parties.

(a) assist the judge in finally determining the issues; and

(b) tell the judge the number of witnesses each proposes to call, and any special considerations about the taking of evidence; and

(c) give estimates of the time the hearing is likely to take; and

[6.6.3] **Importance of time estimates** In order to avoid part-heard cases and to promote efficiencies in listing, it is absolutely essential that lawyers give realistic and informed estimates of the likely duration of a hearing.

(d) agree on facts that have been admitted (and which will therefore not need to be proved); and

(e) discuss whether expert witnesses will be called; and

(f) report on compliance with orders made at earlier conferences; and

(g) deal with any other matters that can reasonably be dealt with before the trial.

(4) In particular, at the Trial Preparation Conference the judge may:

(a) fix dates for the exchange of proofs of evidence and agreed bundles of disclosed documents, if this has not been done; and

[6.6.4] **Meaning of "proof of evidence"** There is no definition of "proof of evidence" and, though it is a term known to lawyers, was probably used in error. Presumably this is a reference to the sworn statement in place of evidence in chief required by r.11.3.

E *CPR* r3.1(2)

(b) give directions for the further preparation for trial; and

(c) if possible, decide any preliminary legal issues that need to be resolved before the trial, or fix a date for hearing these; and

(d) fix a date for the trial.

[6.6.5] **Trial other than at the appointed date/time** The judge should not commence a trial before the listed start time unless all parties are present and agree: *Palaud v Commissioner of Police* [2009] VUCA 10; CAC 6 of 2009.

Time for compliance with orders made at conferences

6.7 When the judge makes an order at a conference, the judge must also:

(a) fix the date and time within which the order is to be complied with; and

(b) record the order in writing.

Effect of non-compliance with orders made at conferences

6.8 (1) If:

(a) A party does not comply with an order made at a conference by the time fixed for complying; and

(b) another party incurs expense because of this;

the judge may order costs against the non-complying party or his or her lawyer.

[6.8.1] **Against whom order may be made** The reference to "his or her" lawyer suggest that this option is available only against an individual party, however such an interpretation would lead to an absurdity.

[6.8.2] **When order against lawyer should be made** Lawyers have a duty to facilitate the progress of case management: see also r.1.5. The court should not hesitate to make appropriate costs orders against a lawyer where it is clear that their behaviour has led to needless expense: See for example *Unioil v Deloitte (No2)* (1997) 18 WAR 190 at 194; *Whyte v Brosch* (1998) 45 NSWLR 354 at 355. See further rr.15.26, 15.27, 15.28; *Kaukare v Cai* [2009] VUSC 11; CC 93 of 2008 (also noting the "gross lack of courtesy").

(2) If a party or his or her lawyer has failed to comply with an order made at a conference without reasonable excuse, the judge may order that the party's claim or defence be struck out.

[6.8.3] **When claim or defence should be struck out** A compliant party has the right to expect that the court will uphold the integrity of the process by appropriate orders against a defaulting party. The discretion conferred by the subrule is not confined, however striking out is appropriate only where there has been significant repeated non-compliance: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006; see also *Lenijamar v AGC* (1990) 27 FCR 388 at 396-7; 98 ALR 200 at 208-9; *Australian Securities Commission v Macleod* (1994) 54 FCR 309 at 314; 130 ALR 717 at 721-2. In all other situations r.18.11 is applicable: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006.

[6.8.4] **No springing order** The court must consider whether there is a reasonable excuse ifor non-compliance and it is not, therefore, possible to make self-executing (aka "springing") orders: *Government of of Vanuatu v Carlot* [2003] VUCA 23; CAC 19 of 2003. See further r.18.11.

(3) A judge may set the proceeding down for trial although some orders made at a conference have not been complied with.

Agreed facts

6.9 If the parties agree on facts at a conference, the judge must direct one of the parties to write down the agreed facts and send a copy to the court and to each other party.

Telephone conferences

E *CPR* r3.1(2)(d)

6.10 A conference may be held by telephone if the judge and all parties are able to participate.

[6.10.1] **Relevant considerations** This is a discretionary matter. Telephone conferences are unlikely to be suitable for complex, difficult or long applications, however, no arbitrary time limits ought to be imposed: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. Though seldom considered, telephone conferences for Santo-based litigation would be especially useful as they would avoid the costs associated with travel. See further rr.1.4(2)(j), (k), 11.8.

Conference not to be in open court

6.11 A conference is not to be held in open court unless:

(a) it is in the public interest that the conference be held in open court; or

(b) the judge is of the opinion for other reasons that the conference should be held in open court.

[6.11.1] See further r.7.4 and compare r.12.2.

INTERLOCUTORY MATTERS

What is an interlocutory order

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

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

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

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

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

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

[7.1.5] **General observations** This rule should be read together with rr.7.2 (to which it is complementary) and 7.7 (in respect of which it is redundant).

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

Applying for an interlocutory order during a proceeding

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

[7.2.1] **Meaning of "proceeding"** The word "proceeding" is very wide and includes everything from the moment the court's jurisdiction is first invoked until final judgment is enforced or performed: *Poyser v Minors* (1881) 7 QBD 329 at 334*; Re Shoesmith* [1938] 2 KB 637 at 648, 652. See further r.7.7(a).

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

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

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

(4) A written application must:

E *CPR* r23.6

(a) state what the applicant applies for; and

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

E *CPR* r22

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

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

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

Service of application

E *CPR* r23.4(1)

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

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

E *CPR* r23.11

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

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

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

E *CPR* r23.7(1)

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

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

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

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

Hearing of interlocutory application made during a proceeding

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

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

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

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

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

Application for interlocutory order before a proceeding is started

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

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

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

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

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

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

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

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

(2) The application must:

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

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

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

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

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

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

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

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

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

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

Urgent interlocutory applications

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

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

(a) the application is for urgent relief; and

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

(c) the court considers it appropriate:

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

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

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

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

Interlocutory orders

7.7 A party may apply for an interlocutory order:

(a) at any stage:

(i) before a proceeding has started; or

(ii) during a proceeding; or

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

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

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

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

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

7.8 (1) In this rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) the court is satisfied that:

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

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

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

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

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

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

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

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

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

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

(5) The application must:

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

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

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

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

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

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

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

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

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

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

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

(v) any possible defences to the claim.

(d) in any case, set out:

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

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

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

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

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

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

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

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

(f) have with it:

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

(ii) a draft freezing order.

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

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

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

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

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

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

(6) The sworn statement must include the following:

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

(a) why the applicant believes:

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

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

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

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

(d) in any case:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The court may make a seizing order:

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

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

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

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

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

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

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

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

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

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

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

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

(4) An application for a seizing order must:

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

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

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

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

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

(f) have with it:

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

(ii) a draft seizing order.

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

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

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

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

(5) The sworn statement must include the following:

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

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

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

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

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

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

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

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

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

(6) The seizing order must include provisions about:

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

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

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

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

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

(e) access to buildings vehicles and vessels; and

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

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

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

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

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

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

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

(7) The seizing order may also:

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

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

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

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

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

Receivers

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) describe the defendant's property; and

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

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

(6) The order appointing the receiver must:

(a) specify the receiver's duties; and

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

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

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

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

(e) contain anything else the court requires.

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

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

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

Service of order

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

(a) the defendant; and

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

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

DISCLOSURE

Division 1 – Disclosure of Documents in the Supreme Court

Application of Division 1

8.1 This Division applies only in the Supreme Court.

Duty to disclose documents

8.2 (1) A party must disclose a document if:

[8.2.1] **Meaning of "document"** See r.20.1 and [20.1.5].

E *CPR* r31.6(a)

(a) the party is relying on the document; or

E *CPR* r31.6(b)

(b) the party is aware of the document, and the document to a material extent adversely affects that party's case or supports another party's case.

[8.2.2] **Extent of obligation** The mandatory obligation to give disclosure probably extends to any document which may fairly lead to a line of inquiry which might in turn affect a party's case: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 63; *Mulley v Manifold* (1959) 103 CLR 341 at 345; 33 ALJR 168 at 169. Disclosure of material going solely to credit is not required: *George Ballantine v F E R Dixon* [1974] 1 WLR 1125 at 1132; [1974] 2 All ER 503 at 509. The obligation to give disclosure is otherwise to be interpreted widely: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 62; *Seidler v John Fairfax* [1983] 2 NSWLR 390 at 392; *F Hoffman-La Roche v Chiron Corporation* (2000) 171 ALR 295 at 296.

[8.2.3] **Obligation not confined by admissibility** Disclosure is not limited to admissible documents: *Compagnie Financiere v Peruvian Guano* (1882) 11 QBD 55 at 63; *The Consul Corfitzon* (1917) AC 550 at 553; *O'Rourke v Darbishire* [1920] AC 581 at 630; [1920] All ER 1 at 18; *Merchants & Manufacturers Insurance v Davies* [1938] 1 KB 196 at 210; [1937] 2 All ER 767 at 771.

(2) A party that is not an individual is aware of a document if any of its officers or employees are aware of it.

[8.2.4] **Meaning of "officer"** The meaning of "officer" is likely, in the context of a company, to be the same as that contained in s.1, *Companies* [Cap 191]: *Microsoft v CX Computer* (2000) 187 ALR 362 at 369; [2002] FCA 3 at [34].

Disclosure limited to documents within party's control

E *CPR* r31.8(1)

8.3 (1) A party is only required to disclose a document that is or has been within the party's control.

(2) A document is or has been in a party's control if:

E *CPR* r31.8(2)(a)

(a) the document is or was in the party's physical possession; or

[8.3.1] **Meaning of "control"** The word "control" usually signifies something greater than mere physical possession, however this limb of the definition of "control" would seem to include all forms of physical custody over documents of whatever duration or nature, including as agent or servant: *Bovill v Cowan* (1870) LR 5 Ch 495 at 496; *Swanston v*

Lishman (1881) 45 LT 360; *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No 2)* [1974] AC 405 at 429; [1973] 3 WLR 268 at 280-1; [1973] 2 All ER 1169 at 1180-1; *Rochfort v TPC* (1982) 153 CLR 134 at 140; 43 ALR 659 at 662; 57 ALJR 31 at 32.

E *CPR* r31.8(2)(b)

(b) the party has or has had the right to possess it.

[8.3.2] **Duty to make enquiries** It is necessary for parties to make enquiries to identify and disclose all documents caught by r.8.2 but which are no longer in the party's control. The obligation extends to making enquiries from the person in whose control the documents now are: *Taylor v Rundell* (1841) 41 ER 429 at 433; *Mertens v Haigh* (1863) 46 ER 741 at 742; *Palmdale Insurance v L Grollo* (1987) VR 113; *Re McGorm* (1989) 86 ALR 275 at 278; 20 FCR 387 at 389. The scope of the enquiries which should be made will depend on the circumstances of the case having regard to the need for disclosure in order to dispose fairly of the issues between the parties, or to save costs in the proceedings. The enquiries must be reasonable, but do not extend to the oppressive: *Re McGorm* (1989) 86 ALR 275 at 278; 20 FCR 387 at 389.

[8.3.3] **Meaning of "right"** The party must have a past or present legal right to obtain it (*Lonrho v Shell (No 2)* [1980] 1 WLR 627 at 635) and not merely some future right (*Taylor v Santos* (1998) 71 SASR 434 at 439, 442).

[8.3.4] **Parent companies** As to disclosure from parent companies see: *Douglas-Hill v Parke-Davis* (1990) 54 SASR 346 at 350; *Linfa v Citibank* [1995] VR 643 at 647, 651; *Solartech v Solahart* [1997] WASC 2; *Taylor v Santos* (1998) 71 SASR 434 at 439, 442. As to where a company is the alter-ego of an individual see *B v B* [1978] Fam 181 at 190; [1978] 3 WLR 624 at 632; [1979] 1 All ER 801 at 809.

Copies

8.4 (1) A party need only disclose a copy of a document if the copy has been changed from the original or a previous copy in any way, whether by adding, removing, changing or obliterating anything.

[8.4.1] **Changed document is new document** Such alteration of a document gives rise, in substance, to a separate and independent document. The widespread use of self-adhesive notes and similar tags would seem to involve an "addition" to documents.

E *CPR* r31.9(1)

(2) A document that has been copied need not be disclosed if the original or another copy has already been disclosed.

[8.4.2] **Documents "copied" in different medium** The wide definition of "copy" in Part 20 may give rise to issues in relation to copies in a different medium to the original.

How to disclose documents

E *CPR* r31.10

8.5 (1) A party discloses documents by:

[8.5.1] **Purpose of rule** The provisions below are designed to enable the court to see whether the rules as to disclosure have been complied with, and the extent of that compliance, without disclosing the actual contents of the documents: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700.

(a) making a sworn statement that:

[8.5.2] **Appropriate deponent** The appropriate deponent is the party. A sworn statement verifying a list of documents cannot be made by a person holding a power of attorney for the party: *Clauss v Pir* [1988] Ch 267 at 273; [1987] 3 WLR 493 at 498; [1987] 2 All ER 752 at 756. As to corporate parties see subr. (3).

(i) lists the documents; and

[8.5.3] **List is conclusive unless deficiency is patent** The list is conclusive unless it appears from the sworn statement itself or from admissions in the statements of the case or elsewhere that the list is incomplete: *Jones v Monte Video Gas* (1880) 5 QBD 556 at 558, 559; *British Association of Glass Bottle Manufacturers v Nettlefold* [1912] AC 709 at 714; [1911-13] All ER Rep 622 at 624.

E *CPR* r31.10(6)(b)

(ii) states that the party understands the obligation to disclose documents; and

[8.5.4] **Duty of lawyers to advise clients as to obligations** Lawyers have an important responsibility to ensure that their clients understand the obligation of disclosure. Many litigants (including businesspeople) do not have a good understanding of this obligation. It is not enough for a lawyer merely to tell the client what is required and then to turn a blind eye. If a lawyer concludes that the list is incomplete but the client does not provide documents to enable the list to be completed, the lawyer ought to withdraw from the case: *Myers v Elman* [1940] AC 282 at 302, 322; [1939] 4 All ER 484 at 497, 511.

E *CPR* r31.10(c)

(iii) states that, to the best of the party's knowledge, he or she has disclosed all documents that he or she must disclose

(iv) for documents claimed as privileged, states that the documents are privileged, giving the reasons for claiming privilege; and

[8.5.5] **Mere assertion of privilege insufficient** It is not enough merely to state that documents are privileged - the sworn statement must state the ground of privilege and verify the facts upon which any claim of privilege is founded: *Gardner v Irwin* (1879) 4 Ex D 49 at 53.

(b) filing and serving a copy of the statement on each other party.

E *CPR* r31.10(2)

(2) The statement must be in Form 11 and must:

(a) identify the documents; and

[8.5.6] **Extent of "identification" required** The requirement as to identification is imposed in order that the court can enforce production of discovered documents with certainty: *Taylor v Batten* (1878) 4 QBD 85 at 87-8; *Budden v Wilkinson* [1893] 2 QB 432 at 438; *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700. It is not intended that the description should be so detailed that the other party should be able to know the contents of the document from the description, only that the other party should be able to decide which documents they will need to inspect (*Hill v Hart-Davis* (1884) 26 Ch D 470 at 472; *Cooke v Smith* [1891] 1 Ch 509 at 522; *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700) and to assess claims of privilege (*J N Taylor v Bond Mitchell & Oates* (1991) 57 SASR 21). There is no rule requiring that the date of the document be specified, or the maker: *Gardner v Irwin* (1879) 4 Ex D 49 at 53.

[8.5.7] **Bundles** It is permitted to identify the documents according to bundles if the bundles are sufficiently identified otherwise: *Bewicke v Graham* (1881) 7 QBD 400 at 410; *Hill v Hart-Davis* (1884) 26 Ch D 470 at 472; *Taylor v Batten* (1878) 4 QBD 85 at 88; *Cooke v Smith* [1891] 1 Ch 509 at 522; *Budden v Wilkinson* [1893] 2 QB 432 at 438; *Milbank v Milbank* [1900] 1 Ch 376 at 383-4; [1900-3] All ER 175 at 177-8; *Command Energy v Nauru Phosphate* [1998] VSC 162.

E *CPR* r31.10(3)

(b) list them in a convenient order and as concisely as possible; and

[8.5.8] **Meaning of "convenience"** It is unclear whose convenience is at issue. The dictates of convenience may also differ from case to case. Where disclosure is voluminous, the parties ought to negotiate an acceptable format or obtain appropriate orders ahead of time. There is nothing to suggest that the list must be chronological.

[8.5.9] **Costs** If the list is "inconvenient" or is not "concise" the party may be ordered to pay costs: See for example *Hill v Hart-Davis* (1884) 26 Ch D 470 at 472 (descriptions too prolix).

(c) include documents that have already been disclosed; and

(d) list separately all documents claimed as privileged; and

[8.5.10] **Waiver of privilege** The failure to list a privileged document separately will not amount to a waiver but giving inspection of it will: *Re Briarmore Manufacturing* [1986] 3 All ER 132 at 134; [1986] 1 WLR 1429 at 1431; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406. See further r.8.6.

(e) if the party claims a document should not be disclosed on the ground of public interest, include that document, unless it would damage the public interest to disclose that the document exists.

[8.5.11] **Obligation to list subject to public interest** The provisions for identification and listing should be applied to claims for public interest privilege so far as that may be done consistently with the maintenance of the privilege: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 265; [1980] 3 All ER 475 at 500; [1980] 3 WLR 668 at 700. See further r.8.11.

E *CPR* r31.10(7)

(3) For a list of documents from a person who is not an individual, the sworn statement must also:

(a) be made by a responsible officer or employee; and

[8.5.12] **Meaning of "officer"** The meaning of "officer" is likely, in the context of a company, to be the same as that contained in s.1 of the *Companies Act* [Cap 191]: *Microsoft v CX Computer* (2000) 187 ALR 362 at 369; [2002] FCA 3 at [34].

(b) give the name and position of the person who identified the individuals who may be aware of documents that should be disclosed; and

(c) give the name and position of the individuals who have been asked whether they are aware of any of those documents.

[8.5.13] **Additional requirements for corporate deponents** The requirements of paragraphs (b) and (c) are more onerous than equivalent requirements elsewhere: See generally *Stanfield Properties v National Westminster Bank* [1983] 2 All ER 249 at 250-1; [1983] 1 WLR 568 at 571.

(4) If a party claims a document should not be disclosed on the grounds of public interest, the party must make an application under rule 8.11.

(5) A party who believes a list is not accurate, or that documents claimed as privileged are not privileged, may apply for an order to correct the list.

[8.5.14] **Inaccuracy must be patent** The inaccuracy or deficiency of the list must be apparent from the list itself, from documents in it or from admissions elsewhere: see for example *Kent Coal Concessions v Duguid* [1910] AC 452 at 453 (balance sheets were discovered but not the books from which they were compiled). See further r.8.9.

[8.5.15] **When supporting sworn statement required** If an inaccuracy/deficiency is not apparent, the application will require a supporting sworn statement deposing to the existence of the missing documents: *Edmiston v British Transport Commission* [1956] 1 QB 191 at 192; [1956] 2 WLR 21 at 22; [1955] 3 All ER 823 at 826. See further r.8.9.

(6) A party need not list the documents if the court orders otherwise at a conference.

Mistaken disclosure of privileged document

8.6 If a privileged document is disclosed to a lawyer, he or she must not use it if, because of the way and circumstances it was disclosed, a lawyer would realise that:

(a) the document is privileged; and

(b) it was disclosed by mistake.

[8.6.1] **Waiver of privilege** The mistaken production of privileged documents usually amounts to a waiver attaching to them: *Re Briarmore Manufacturing* [1986] 3 All ER 132 at 134 [1986] 1 WLR 1429 at 1431; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406. Where, however, disclosure is made in circumstances in which the mistake is obvious, the lawyer may not use them: see further *Guinness Peat Properties v Fitzroy Robinson Partnership* [1987] 2 All ER 716 at 730; [1987] 1 WLR 1027 at 1046; *Meltend v Restoration Clinics* (1997) 75 FCR 511 at 518, 522, 526; (1997) 145 ALR 391 at 398, 402, 406.

Inspecting and copying disclosed documents

8.7 (1) A party (the "inspecting party") may inspect and ask for copies of the documents on a list served by another party except:

[8.7.1] **Inspection by agent** The right to inspect includes the right to inspect by an agent: *Norey v Keep* [1909] 1 Ch 561 at 565. If it is intended that an expert should inspect, an order to this effect should be sought: *Swansea Vale Rwy v Budd* (1866) LR 2 Eq 274 at 275**.**

[8.7.2] **Copies in other media** It is uncertain whether a copy of an electronic or other non-paper document is to be made in the same medium or, for example, by way of a printout.

[8.7.3] **Use of copies** The use of such copies must be limited to the conduct of the proceedings and must not be misused such as by dissemination otherwise than for the purpose of the proceedings, which may be a contempt: *Attorney-General v Times Newspapers Ltd* [1974] AC 273. See further r.8.16(1).

(a) documents that are no longer in the other party's control; or

[8.7.4] **Documents which may be acquired** A party may, however, be required to produce a document not in its control when the party may acquire it by request: *Rafidain Bank v Agom* [1987] 3 All ER 859 at 862, 864; [1987] 1 WLR 1606 at 1611, 1613.

(b) documents that are privileged.

(2) The inspecting party:

(a) must give the other party reasonable notice; and

(b) if he or she wants a copy of a document, must pay the reasonable costs of copying the document.

Duty of disclosure continuous

E *CPR* r31.11(1)

8.8 (1) The duty to disclose documents continues throughout a proceeding.

[8.8.1] **Duty of disclosure continuous** The effect of this rule is to require a party to give disclosure of documents that may have come into the party's control after disclosure had originally been provided and also of documents that were already in the party's control but were not disclosed through inadvertence or otherwise.

(2) If a party becomes aware of documents that must be disclosed, the party must disclose the documents as required by rule 8.5.

(3) The party must disclose the documents:

(a) within 7 days of becoming aware of the documents, and in any case before the trial starts; or

(b) if the party becomes aware of the documents after the trial has started, as soon as practicable after becoming aware of the documents.

E *CPR* r31.12

Disclosure of specific documents

8.9 (1) A party may apply for an order to disclose the documents described in the application.

[8.9.1] **When application may be made** Such an application may apparently be made at any time. See further r.8.5(5).

(2) The documents may be identified specifically or by class.

[8.9.3] **How class to be identified** An order made under this rule is not in the nature of an order for general disclosure, but of disclosure of a specified document or class of documents. The document or class of documents should be clearly described in the application and the court must be quite certain that such documents exist before making an order.

(3) The court may order disclosure of the documents if the court is satisfied that disclosure is necessary to:

[8.9.4] **Significance of "necessity"** The concept of "necessity" probably reflects the policy of active case management: *Commonwealth v Northern Land Council* (1991) 103 ALR 267 at 291; (1991) 30 FCR 1 at 24. Accordingly, whilst this rule may be used to cure omissions in the list of documents, it will not operate automatically in that way as the criteria in paragraphs (a) and (b) make clear.

(a) decide the matter fairly; or

(b) save costs.

[8.9.5] **Examples** For a discussion of these criteria, especially "fairness" see: *Percy v General Motors-Holden's* [1975] 1 NSWLR 289 at 292; *Technomin v Geometals* (1991) 5 WAR 346 at 352; *Trade Practices Commission v CC (No4)* (1995) 131 ALR 581 at 590-1; (1995) 58 FCR 426 at 437.

(4) The court must consider:

[8.9.6] **List not exhaustive of relevant criteria** The discretion is wider than the list below: See for example *Murex v Chiron* (1994) 55 FCR 194 at 199-200; 128 ALR 525 at 529-30.

(a) the likely benefit of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(5) The court may order that the documents be disclosed in stages.

Application to dispense with or limit disclosure

8.10 (1) A party may apply for an order:

(a) to dispense with disclosure; or

(b) that particular documents not be disclosed.

(2) The court may order that a party need not disclose some or any documents if the court is satisfied that:

(a) the documents are not relevant to the issues between the parties; or

[8.10.1] **Relationship to r.8.2** The relationship between this test of "relevance" and the test for disclosure contained in r.8.2 is not clear. Logic suggests that "relevance" ought to be a narrower test so as to limit an otherwise needlessly wide disclosure obligation. By using the term "issues between the parties" (which is defined in r.4.1(2)(c) in connection with statements of the case) this rule seems to refer to the nature of the issues rather than the subject matter of the proceedings.

[8.10.2] **Judicial review** Disclosure may not be necessary in applications for judicial review because of the nature of the issues raised, particularly where reasons for the decision are available: *R v Inland Revenue Commissioners* [1989] 1 All ER 906 at 915; *Hart v Deputy Commissioner of Taxation* (2002) 49 ATR 656; 2002 ATC 4445; [2002] FCA 606 at [9].

(b) disclosure is not necessary to decide the matter fairly; or

[8.10.3] **Significance of "fairness"** The "right" to disclosure is subject to overriding considerations of fairness: *Index Group v Nolan* [2002] FCA 608 at [7]. See also *Kent v SS 'Maria Lusia'* [2002] FCA 629.

[8.10.4] **Fairness and judicial review** Disclosure may not be necessary for the fair disposal of issues in applications for judicial review: *R v Inland Revenue Commissioners* [1989] 1 All ER 906 at 915; *Hart v Deputy Commissioner of Taxation* (2002) 49 ATR 656; 2002 ATC 4445; [2002] FCA 606 at [9].

(c) the costs of disclosure would outweigh the benefits; or

[8.10.5] **Disclosure unduly burdensome** This provision operates to relieve a party where there may be undue financial hardship in searching for and obtaining documents where the value of those documents is marginal.

(d) for any other reason, the court is satisfied that the documents need not be disclosed.

Public interest

E *CPR* r31.19(1)

8.11 (1) A party may apply for an order dispensing with the disclosure of a document on the ground that disclosure would damage the public interest.

[8.11.1] **Public interest in private documents** See further r.8.5(2)(e). Public interest privilege is not only available to state documents and may apply to private documents if their disclosure would be injurious to the public interest: *Asiatic Petroleum v Anglo-Persian Oil* [1916] 1 KB 822 at 830; [1916-7] All ER Rep 637 at 640.

(2) The application must:

(a) identify the document, unless to disclose its existence would itself be against the public interest; and

(b) set out the reasons why disclosure would be against the public interest.

[8.11.2] **Meaning of "public interest"** Disclosure must be "against the public interest". It is not enough that the documents be "confidential" or "official": *Robinson v South Australia (No 2)* [1931] AC 704 at 714; [1931] All ER Rep 333 at 337.

[8.11.3] **Sworn statement in support** The application, if made on behalf of Government, should usually be supported by a sworn statement by the responsible Minister or other senior public servant sufficiently familiar with the contents.

(3) If the court considers that disclosure of a document could damage the public interest but no-one has raised the matter, the court must:

(a) tell the parties; and

(b) fix a date for a conference or hearing to decide the question.

[8.11.4] **No waiver** The court owes a duty to the public to ensure that such matters are fully investigated. The privilege can be raised by any party but cannot be waived by any party: *Buttes Gas & Oil v Hammer* (No3) [1981] QB 223 at 264; [1980] 3 All ER 475 at 499; [1980] 3 WLR 668 at 699; *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 436; [1983] 1 All ER 910 at 917; [1983] 2 WLR 494 at 526.

(4) The court may:

(a) require the person to produce the document to the court so the court is able to decide whether disclosure of the document would damage the public interest; and

[8.11.5] **Inspection** The court may test the claim to privilege by inspecting the documents but should not do so unless a strong positive case is made out against the privilege: *Burmah Oil v Governor of the Bank of England* [1980] AC 1090 at 1117; [1979] 3 All ER 700 at 711; [1979] 3 WLR 722 at 733.

(b) ask a person who is not a party to make representations about whether or not the document should be disclosed.

Documents referred to in statements of the case

E *CPR* r31.14(1)

8.12 (1) A party may inspect and ask for a copy of a document mentioned in a statement of the case, sworn statement, expert's report or document filed in the court.

[8.12.1] **General mention sufficient** It is not necessary that such a document be specifically identified – it is enough if it is generally described: *Smith v Harris* (1883) 48 LT 869.

[8.12.2] **Meaning of "sworn statement"** The reference to sworn statements probably includes documents described in exhibits or annexures to sworn statements: *Re Hinchcliffe* [1895] 1 Ch 117 at 120.

(2) The party must:

(a) give reasonable notice to the party who mentioned the document; and

(b) pay the reasonable costs of copying the document.

E *CPR* r31.16

Disclosure before proceedings start

8.13 (1) A person may apply for an order for disclosure of documents before proceedings have started.

[8.13.1] **Fishing** This rule may be said to permit "fishing" but not "trawling": *CGU Insurance v Malaysia International Shipping* [2001] 187 ALR 279 at 286; [2001] FCA 1223 at [25]. The rule is designed to enable a party to ascertain whether he has a case against another. It is a beneficial rule which ought to be given a full interpretation: *Paxus v People Bank* (1990) 99 ALR 728 at 733. It is not, however, designed to secure for the applicant all the benefits of disclosure to which he would be entitled during proceedings and the width of the order will be tailored accordingly: *SmithKline Beecham v Alphapharm* [2001] FCA 271 at [19]; *Jovista v FAI* [1999] WASC 44 at [7].

(2) The application must have with it a sworn statement setting out the reasons why the documents should be disclosed.

[8.13.2] **Disclosure will inform decisions as to future proceedings** The application should make it clear that a decision as to whether, and against whom, to commence proceedings depends upon the disclosure sought. There is no need to establish that a party will take action - only that the party is considering it. The grounds for alleging that the applicant and the party against whom the application is made are likely to be parties ought to be explained: *Dunning v Board of United Liverpool Hospitals* [1973] 2 All ER 454 at 460; [1973] 1 WLR 586 at 593.

(3) The court must consider:

(a) the likely benefits of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(4) The court must not order documents to be disclosed unless the court is satisfied that:

(a) the person in possession and control of the document has had an opportunity to be heard; and

(b) the applicant and person in possession and control of the document are likely to be parties to the proceedings; and

[8.13.3] **Rule not for identification of third parties** The rule does not contemplate that these provisions are to be used to identify parties other than those in possession and control of the documents: *Aitken v Neville Jeffress Pidler* (1991) 33 FCR 418 at 423-4.

(c) the documents are relevant to an issue that is likely to arise in the proceedings; and

[8.13.4] **Consideration of defence** See further [8.13.1]. This is likely to include consideration of the strength and availability of defences: *CGU v Malaysia International Shipping* [2001] 187 ALR 279 at 285; [2001] FCA 1223 at [21].

[8.13.5] **Evidence in support must point to possible case** The evidence in support of the application need not disclose a *prima facie* case but must sufficiently point to a case and it is not enough for the applicant merely to assert that there is a case: *Stewart v Miller* [1979] 2 NSWLR 128 at 140; *Quanta Software v Computer Management Services* [2000] FCA 969 at [24]; (2000) 175 ALR 536 at 541-2.

(d) disclosure is necessary to decide the proceedings fairly or to save costs.

(5) The order may state the time and place of disclosure.

E *CPR* r31.17

Disclosure by someone who is not a party

8.14 (1) A party may apply for an order that documents be disclosed by a person who is not a party to the proceedings.

[8.14.1] **Discretion exercised cautiously** This jurisdiction ought to be exercised with caution: *Richardson Pacific v Fielding* (1990) 26 FCR 188 at 190; *Evans Deakin v Sebel* [2001] FCA 1772 at [11].

(2) The application must have with it a sworn statement setting out the reasons why the documents should be disclosed.

[8.14.2] **What sworn statement should contain** The application must specify the documents sought with a high degree of precision, since non-parties will be unlikely to comprehend the dispute as fully as the parties.

(3) The court must consider:

(a) the likely benefits of disclosure; and

(b) the likely disadvantages of disclosure; and

(c) whether the party who would have to disclose the documents has sufficient financial resources to do so.

(4) The court must not order documents be disclosed unless the court is satisfied that:

(a) the person in possession and control of the document has had an opportunity to be heard; and

[8.14.3] **Pre-application discussion** The party and the non-party should usually attempt to resolve the issue before a formal application is made: *Jovista v FAI General Insurance Co Ltd* [1999] WASC 44 at [7].

(b) the documents are relevant to an issue in the proceedings; and

(c) disclosure is necessary to decide the proceedings fairly or to save costs.

(5) The order may state the time and place of disclosure.

Failure to disclose documents

E *CPR* r31.21

8.15 (1) A party who fails to disclose a document may not rely on the document unless the court allows it.

[8.15.1] See generally *Roberts v Oppenheim* (1884) 26 Ch D 724 at 735.

(2) If a party fails to disclose a document as required by this Part:

(a) another party may apply for an order that the person disclose the document; and

[8.15.2] See further rr.8.5(5), 8.9.

(b) if the party fails to disclose the document within 7 days of the date of service of the order, the court may strike out the non-disclosing party's claim or defence.

[8.15.3] **Discretion exercised cautiously** The court has a discretion whether to make an order under this rule which will be exercised cautiously: *Samuels v Linzi Dresses Ltd* [1981] QB 115 at 126; [1980] 1 All ER 803 at 812; [1980] 2 WLR 836 at 845. It may not be appropriate to strike out the claim or defence unless the court is satisfied that the party is attempting to avoid disclosure (*Mosser v PGH* (1964) 82 WN (Pt 1) (NSW) 147) or the omission or neglect is culpable (*James Nelson v Nelson Line* [1906] 2 KB 217 at 227).

[8.15.4] **Claim/defence struck out may not be re-filed** Where a claim or defence is struck out under this rule, it is not permitted to file another without leave of the court: *KGK v East Coast Earthmoving* [1984] 2 Qd R 40 at 43.

E *CPR* r31.22

Use of disclosed documents

8.16 (1) A party to whom a document is disclosed may only use the document for the purposes of the proceeding unless the document has been:

[8.16.1] **Implied undertaking not to misuse documents** There is said to be an implied undertaking to this effect: See generally *Riddick v Thames Board Mills* [1977] 3 All ER 677 at 688; [1977] QB 881 at 896; [1977] 3 WLR 63 at 75; *Church of Scientology of California v Department of Health* [1979] 3 All ER 97 at 113, 116; [1979] 1 WLR 723 at 743, 746; *Rank Film Distributors v Video Information Centre* [1982] AC 380 at 442; [1981] 2 All ER 76 at 81; *Crest Homes v Marks* [1987] 1 AC 829 at 853-4; [1987] 3 WLR 293 at 297-8; [1987] 2 All ER 1074 at 1078.

(a) read to or by the court; or

(b) referred to in open court.

[8.16.2] **General observations** This is consistent with the general principle that proceedings ought to be conducted in the public domain.

(2) A party, or person in possession or control of a document, may apply for an order restricting or prohibiting use of the document even if it has been:

(a) read to or by the court; or

(b) referred to in open court.

(3) The court may make an order restricting or prohibiting use of the document if it is satisfied that the benefits of restricting or prohibiting the use of the document outweigh the benefits of allowing the document to be used.

Agreed bundle of documents

8.17 (1) The originals of all documents to be used at the trial must be brought to the trial.

[8.17.1] **Secondary evidence of documents** If the original is not brought to trial, secondary evidence of its contents may be adduced.

(2) The documents to which the parties have agreed must be gathered together, indexed and numbered.

(3) If the parties do not agree about the disclosure of some documents or their use at the trial, the party in possession of the documents must bring the documents to the trial.

Division 2 – Disclosure of Information in the Supreme Court

Application of Division 2

8.18 This Division applies only in the Supreme Court.

Written questions

8.19 With the court's permission, a party may ask another party a set of written questions.

[8.19.1] **Function of written questions** The original purpose of such questions (formerly known as "interrogatories") was to prove some material fact necessary to a cause of action or defence by tendering the question and the answer, so diminishing the burden of proof: *A-G v Gaskill* (1882) 20 Ch D 519 at 528; [1881-5] All ER 1702 at 1706; *Kennedy v Dodson* (1895) 1 Ch 334 at 341; [1895-9] All ER 2140 at 2144. The modern function of written questions is much wider and includes (1) obtaining admissions to support the case of the questioning party (2) obtaining admissions which damage the case of the party to be questioned (3) requesting further and better particulars of a claim or defence; and (4) seeking accounts from a fiduciary: See for example *WA Pines v Bannerman* (1979) 41 FLR 175 at 190; (1979) 30 ALR 559 at 574.

[8.19.2] **General observations** Written questions may be asked only with the permission of the court and serious thought should be given to whether it is necessary to resort to this often controversial process. The application may be made at any time (see for example *Disney v Longbourne* (1876) 2 Ch D 704 at 705) but it would be exceptional for questions to be asked before the issues between the parties are defined by the statements of the case. The most convenient time to ask written questions is after disclosure and inspection. For a general description of permissible written questions see *Daybreak Pacific Limited v Donaldson* [2006] NZHC 957 at [25].

[8.19.3] **Only one set of questions** The general rule is that only one set of questions may be asked, however there are exceptions: See for example *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 30; [1881-5] All ER 814 at 826 (clarification of answers); *Boake v Stevenson* [1895] 1 Ch 358 at 360 (discovery of additional facts).

[8.19.4] **Judicial review** Written questions are not necessarily appropriate in all cases; their role in judicial review is likely to be very limited as factual issues will be narrow: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

Permission to ask written questions

8.20 (1) A party may make an oral application for permission at a conference, telling the judge the matters the question will cover.

[8.20.1] **Function of permission** The requirement to seek permission to ask written questions recognises the need for judicial control of the process having regard to experience in other jurisdictions in which unsupervised use of the process is prone to abuse and overuse: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

[8.20.2] **When right to object preserved** Where the judge is told only the nature of the matters the question will cover, the grant of permission does not foreclose the making of an objection later: *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006.

(2) A party may make a written application only if it is not practicable to make an oral application at a conference.

(3) The questions must be attached to the written application

[8.20.3] **When right to object foreclosed** It is suggested that the principle in *Cyclamen v Port Vila* [2006] VUCA 20; CAC 20 of 2006 (that permission does not foreclose the right of later objection) ought to be confined to oral applications. Where a written application with draft questions is the subject of a grant of leave, it would be unusual to permit a party to argue the same points twice.

(4) The written application must be filed and served on the other party at least 3 days before the hearing date.

Service of questions

8.21 The set of written questions must be served on the party to whom they are directed and on all other parties.

Time for answering

8.22 (1) A person who is asked written questions must answer them.

[8.22.1] **How questions to be answered** Questions must be answered to the best of one's knowledge and belief, even where complete precision is impossible. This obligation includes an obligation to make reasonable enquiries of servants or agents or such other sources of knowledge as may be reasonably available for the purpose of answering: *Lyell v Kennedy (No 2*) (1884) 9 AC 81 at 85-6; [1881-5] All ER 807 at 809-10; *Bank of Russian Trade v British Screen* [1930] 2 KB 90 at 96; *Daybreak Pacific Limited v Donaldson* [2006] NZHC 957 at [25].

(2) The written questions must be answered:

(a) within 14 days of the questions being served on the party; or

(b) within the period fixed by the court.

Form of answer

8.23 (1) The questions must be answered in writing.

(2) The answers must:

(a) set out each question followed by the answer; and

(b) be verified by a sworn statement made by the party answering the questions.

[8.23.1] **Answers as exhibit** This is so that the question and answer is capable of forming a discrete exhibit which can be tendered.

[8.23.2] **What sworn statement should contain** The sworn statement should make it clear that the deponent has made all proper enquiries without going into the precise details: *Stanfield Properties v National Westminster Bank* [1983] 2 All ER 249 at 250-1; [1983] 1 WLR 568 at 571.

(3) The answer must:

(a) answer the substance of each question, without evasion or resorting to technicalities; or

[8.23.3] **Meaning of "evasion"** Answers ought to be "specific and substantial": *Parker v Wells* (1881) 18 Ch D 477 at 485. The more specific a question, the more specific the answer should be: *Gordon & Co v Bank of England* (1884) 8 Jur 1132; *Earp v Lloyd* (1858) 70 ER 24. Answers should be precise and rigorously drafted: *Kupresak v Clifton Bricks (Canberra) Pty Ltd* (1984) 57 ACTR 32 at 34. Answers should be given in an "open and helpful way, not in a clever and grudging way": *Aspar Autobarn Cooperative Society v Dovala Pty Ltd* (1987) 16 FCR 284 at 286; 74 ALR 550 at 552.

[8.23.4] **Partly objectionable question** Where a question is partly objectionable and partly unobjectionable, a full answer ought to be given to the unobjectionable part and

an objection raised against the objectionable part: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 286; (1987) 74 ALR 550 at 552.

(b) object to answering the question.

[8.23.5] **How objection to be made** The objection is part of the answer and must be raised separately in answer to each question. The failure to object at the time of answering is usually a bar to raising a subsequent objection.

Objections

8.24 (1) An objection must:

(a) set out the grounds for the objection; and

(b) briefly state the facts on which the objection is based.

(2) A person may object to answering a written question only on the following grounds:

(a) the question does not relate to a matter at issue, or likely to be at issue, between the parties; or

[8.24.1] **Meaning of "matter at issue"** The meaning of "matter at issue" may be narrow and directed only toward matters directly at issue and not the surrounding questions: *Sharpe v Smail* (1975) 49 ALJR 130 at 133; (1975) 5 ALR 377 at 381; cf *Marriott v Chamberlain* (1886) 17 QBD 154 at 163; [1886-90] All ER 1716 at 1720. This requirement is to prevent "fishing" for some other cause of action or a cause of action against a third person. See generally *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287; (1987) 74 ALR 550 at 554.

[8.24.2] **Significance of "issue between the parties"** The requirement that there be an issue "between the parties" may mean that questioning of a co-defendant is not permitted (in the absence of a counterclaim): *Buxton & Lysaught v Buxton* [1977] 1 NSWLR 285 at 288. A third party may be permitted to question a claimant: *Barclays Bank v Tom* [1923] 1 KB 221 at 224; [1922] All ER 279 at 280.

[8.24.3] **Questions confined to factual matters** Questions are usually confined to matters of fact and not to the evidence by which the facts will be proved: *Re Strachan* [1895] 1 Ch 439 at 445 but see also *Rofe v Kevorkian* [1936] 2 All ER 1334 at 1337, 1138. Questions about documents are permitted and are often useful to ascertain facts regarding authorship, receipt, location, the meaning of annotations and codes, etc. Questions as to states of mind are permitted where that is a material fact: *Plymouth Mutual v Traders' Publishing* [1906] 1 KB 403 at 413.

(b) the question is not reasonably necessary to enable the court to decide the matters at issue between the parties; or

[8.24.4] **Meaning of "reasonably necessary"** It is impossible to define what questions might be "reasonably necessary" and this will depend on the circumstances of each case. Questions which exceed the legitimate requirements of the case will not be permitted: *White v Credit Reform Association* [1905] 1 KB 653 at 659.

[8.24.5] **Questions as to credit** Questions which are merely cross-examination as to credit are usually disallowed: *Allhusen v Labouchere* (1878) 3 QBD 654 at 661.

(c) there is likely to be a simpler and cheaper way available at the trial to prove the matters asked about; or

[8.24.6] **Discretion** The allowance of questions is discretionary. Leave may be refused generally or in respect of specific questions in these circumstances.

(d) the question is vexatious or oppressive; or

[8.24.7] **Meaning of "vexatious"** The meaning of "vexatious" is that which is contained in the dictionary and refers to the purpose of causing trouble or annoyance: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287; (1987) 74 ALR 550 at 554.

[8.24.8] **Meaning of "oppressive"** The word "oppressive" refers to situations in which far too much is expected of the party questioned: *Aspar Autobarn v Dovala* (1987) 16 FCR 284 at 287-8; (1987) 74 ALR 550 at 555.

(e) privilege.

[8.23.9] **Particularisation of claim to privilege** Claims to privilege must be made with sufficient particularity to show that the matter is clearly privileged: *Lyell v Kennedy (No 1)* (1883) 8 AC 217 at 227; [1881-5] All ER 798 at 803; *Triplex v Lancegaye (1934) Ltd* [1939] 2 KB 395 at 403; [1939] 2 All ER 613 at 617.

[8.24.10] **Self-incrimination** This may include the privilege against self-incrimination where the proceedings may expose a party to a penalty or criminal prosecution: *Fisher v Owen* (1878) 8 Ch D 645 at 651, 654; *R v Deputy Commissioner of Taxation* (1987) 13 FCR 389 at 394-5; 71 ALR 86 at 91.

(3) The objection is to be dealt with at a conference.

(4) If the judge agrees with the objection, the question need not be answered.

[8.24.10] **Amendment to cure objectionable question** It may be that the case management considerations would permit the court to allow a party to amend a question where it might be permissible in a different form rather than disallow it altogether: *Nast v Nast & Walker* [1972] 2 WLR 901 at 907; [1972] 1 All ER 1171 at 1175; [1972] Fam 142 at 151.

Failure to answer written questions

8.25 (1) If a person does not answer, or does not give a sufficient answer, to a written question, the court may order the person to:

[8.25.1] **Meaning of "sufficient"** The meaning of sufficient ought to be approached by comparison with r.8.23(3). An answer is not insufficient only because the party seeking an answer did not get the answer expected. Neither is an answer insufficient because it is or may be untrue: *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 19, 21. An answer will be insufficient if it does not deal with the point raised in the question or deals only with part of the question or evades the question. An answer which includes irrelevant matters is also insufficient: *Peyton v Harting* (1874) LR 9 CP 9 at 10, 11, 12; *Taylor v New Zealand Newspapers* [1938] NZLR 198 at 203. Applications under this rule should make clear why an answer is said to be insufficient: *Anstey v North & South Woolwich Subway* (1879) 11 Ch D 439 at 440.

(a) answer the question; or

(b) attend court to answer the question on oath.

[8.25.2] **Oral examination exceptional** The power to compel oral examination is very seldom used and special circumstances must usually be evident: *Lawson & Harrison v Odhams* [1949] 1 KB 129 at 137; [1948] 2 All ER 717 at 721.

[8.25.3] **Scope of oral examination** The scope of oral examination ought to be confined to obtaining a proper answer to those questions which were not answered: *Litchfield v Jones* (1884) 54 LJ Ch 207.

(2) If the person does not comply with the order, the court may:

(a) order that all or part of the proceedings be stayed or dismissed; or

(b) give judgment against the person; or

(c) make any other order the court thinks fit.

[8.25.4] **Discretion exercised cautiously** The court has a wide discretion which will be exercised cautiously: *Samuels v Linzi Dresses* [1981] QB 115 at 126; [1980] 1 All ER 803 at 812; [1980] 2 WLR 836 at 845. The power to dismiss or strike out will usually be used only where the defaulting party has acted wilfully and with full knowledge (*Haigh v Haigh* (1885) 31 Ch D 478 at 484) or where trying to avoid its obligations (*Kennedy v Lyell* [1892] WN 137; *Danvillier v Myers* [1883] WN 58).

(3) Subrule (2) does not affect the power of the court to punish for contempt of court.

Division 3 – Disclosure of Documents in the Magistrates' Courts

Application of Division 3

8.26 This Division applies only in the Magistrates Court.

Disclosure of documents

8.27 (1) A party to a proceeding must disclose the documents the party intends to rely on at the trial.

(2) A party discloses a document by giving a copy of the document to each other party at least 14 days before the trial.

Disclosure of particular documents

8.28 (1) A party may apply for an order that another party disclose particular documents.

(2) The magistrate may order that the documents be disclosed if the magistrate is satisfied that:

(a) the documents are relevant to the issues between the parties; or

(a) disclosure is necessary to decide the matter fairly; or

(a) for any other reason the magistrate is satisfied that the documents should be disclosed.

(3) If the magistrate orders that documents are to be disclosed. He or she may also order that Division 1 applies to the extent ordered.

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ENDING A PROCEEDING EARLY

Default by defendant

9.1 If a defendant:

(a) does not file and serve a response or a defence within 14 days after service of the claim; or

(b) files a response within that time but does not file a defence within 28 days after the service of the claim:

[9.1.1] **Restatement of applicable time limits** See further rr.4.4(1), (3), 4.13(1)(a), (2) prescribing the time for filing a response (or defence in lieu) and r.4.13(1)(b) prescribing the time for filing a defence after first filing a response.

[9.1.2] **Rule not limited to claims for debt or damages** This rule is not, despite the contrary impression, confined to cases of the type contemplated by rr.9.2 or 9.3: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [58], [64]; *National Bank of Vanuatu v Tasaruru* [2005] VUSC 3; CC 217 of 2004.

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the claimant may file a sworn statement (a "proof of service") that the claim and response form was served on the defendant as required by Part 5.

[9.1.3] **Proof of service a precondition to default judgment** The proof of service is an important precondition to the entry of default judgment. It is critical that the proof of service is in proper form and is properly executed. It should state precisely where and when service of the claim was effected. Parties are often seen to file proof of service as a matter of course, before the other party is in default. It is suggested that this is a wasteful practice.

Default – claim for fixed amount

9.2 (1) This rule applies if the claim was for a fixed amount.

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[9.2.1] **Proper characterisation of claim** Problems arise when claimants fail properly to distinguish between claims for fixed amounts and other claims: See for example *VCMB v Dornic* [2009] VUCA 43; CAC 18&19 of 2009. The distinction derives from the former English rules in which a substantially identical distinction is made which is itself drawn from the distinction between what could be recovered in a suit under the old *indebitatus assumpsit* count and what could not. Similar distinctions, usually involving the words "liquidated and "unliquidated" are commonly to be found in rules of court in Commonwealth and other jurisdictions. Where a claim can be precisely calculated or otherwise fixed, default judgment should be sought under this rule. Where the claim is for general damages (even though these are required to be specified by r.4.10) or the amount of the claim must otherwise be assessed, the application for default judgment should be made under r.9.3. A claim for a specific sum (whether general or special, with or without calculations, particulars, etc) does not convert what is in substance an unliquidated claim into a liquidated (ie. fixed) claim: *Knight v Abbott* (1883) 10 QBD 11; *Lagos v Grunwaldt* [1910] 1 KB 41 at 48; *Abbey Panel & Sheet Metal Co v Barson Products* [1948] 1 KB 493 at 498-9. A judgment for an unliquidated claim entered as a liquidated claim is usually considered an irregularity and set aside *ex debito justitiae*: *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436;*Armitage v Parsons* [1908] 2 KB 410 at 417.

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(2) After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for the amount of the claim together with interest and costs. The request must be in Form 12.

[9.2.2] **Snapping judgment** Before seeking default judgment a party should, as a matter of professional courtesy, give warning to the other side, particularly where it is known that lawyers will be acting or that the proceedings are likely to be defended. See also *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009.

[9.2.3] **Application must be in writing** The application must, despite subr.7.2(2), be made in writing under this subrule: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [78].

(3) In the Magistrates Court, the request may be made orally.

(4) The court may give judgment for the claimant for:

[9.2.4] **Default judgment discretionary** The use of the word "may" highlights that there is no entitlement to default judgment, which is discretionary, and may be refused if there is some reason to suspect that injustice will result: *Charles v Shepherd* [1892] 2 QB 622 at 624-5; *Lombank v Cook* [1962] 3 All ER 491 at 493, 496, 498; [1962] 1 WLR 1133 at 1134, 1138, 1140; *Brenner v Johnson* [1985] VUSC 8; [1980-1994] Van LR 180; *Airtrade v Center Garage* [2001] VUSC 17; CC 25 of 1999. Accordingly, it follows that a court, when considering whether to pronounce default judgment ought to do more than merely verify the fact of default. A detailed analysis of the claim need not be undertaken on such an application and evidence need not necessarily be heard. The court should, however, confirm that the claim appears to disclose a proper cause of action and that the remedy sought appears to be properly calculated. *Charles v Shepherd* [1892] 2 QB 622 at 624-5; *Johnsen v Duks* [1963] NSWR 730 at 732; *Lombank v Cook* [1962] 3 All ER 491 at 493, 496, 498; *ANZ Bank v Dinh* [2005] VUCA 3; CAC 27 of 2005; *Lambu v Torato* [2008] PGSC 34 at [75], [82], [119].

(a) the amount claimed by the claimant; and

(b) interest from the date of filing the claim at a rate fixed by the court; and

[9.2.5] **Common law entitlement to pre-judgment interest** Curiously, no other part of the *Rules* deals with pre-judgment interest. There is no general common law entitlement to pre-judgment interest and, absent a statutory basis, the power to award pre-judgment interest should not be assumed. It is unlikely that this rule alone could be sufficient to confer such an entitlement. At common law there was, in the absence of any contract, only a very limited range of cases in which interest could be awarded: *London, Chatham & Dover Rwy Co v South Eastern Rwy Co* [1893] AC 429 at 434; *President of India v La Pintada* [1985] AC 104 at 129-31; [1984] 2 All ER 773 at 789-90; [1984] 3 WLR 10 at 29-31. In the equitable jurisdiction there was always a wider jurisdiction: *Johnson v R* [1904] AC 817 at 822; *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, 397; [1975] 2 WLR 389 at 393-4, 401-3; [1975] 1 All ER 849 at 855-6, 863-4. In appropriate cases it may be possible to award interest as a head of damage where a party has been kept out of funds to which they were entitled: See for example *Hadley v Baxendale* (1854) 9 Ex 341 at 354; [1843-60] All ER 461 at 465; 156 ER 145 at 151; *Hungerfords v Walker* (1989) 171 CLR 125 at 151, 152, 165; 84 ALR 119 at 134, 135, 145; 63 ALJR 210 at 219, 225.

[9.2.6] **Statutory entitlement to pre-judgment interest** There is no domestic legislation which confers a right to pre-judgment interest. The conventional wisdom seems to be that s.3 of the *Law Reform (Misclellaneous Provisions) Act* 1934 (UK) (as it stood prior to amendment by the *Administration of Justice Act* 1982) applies as an act of general application as at Independence. The *Law Reform Act* provides that interest may run from the time the cause of action arose whereas the rule provides only for interest from the date the claim was filed. It is unusual that a default judgment may carry interest only from the date of filing but a judgment after a hearing my carry interest from the date the cause of action arose. It is suggested that this discrepancy arises from the failure to harmonise the *Rules* and the Act and not as a result of any particular planning.

[9.2.7] **Calculation and rate** The approach to the calculation of pre-judgment interest is compensatory rather than punitive - to award what would be the amount that a person could receive from a normal bank investment during the relevant period: *Richard Lo v Sagan* [2003] VUCA 16; CAC 27 of 2003; *Air Vanuatu v Molloy* [2004] VUCA 17; CAC

19 of 2004; *Enterprise Roger Brand v Hinge* [2005] VUCA 21; CAC 13 of 2005. Under s.3(1)(a) of the *Law Reform (Misclellaneous Provisions) Act* 1934 (UK), the court may award interest at such rate as it thinks fit. This is conventionally 5% (as it was under O42 r16 of the Old Rules) however there would appear to be a wide and inexplicable variety of rates still claimed and, sometimes, awarded. The Court of Appeal has recently reiterated that 5% is the appropriate rate: *VCMB v Dornic* [2009] VUCA 43; CAC 18 of 2009. Interest awards do not compound: s.3(1)(a), *Law Reform (Miscellaneous Provisions) Act* 1934 (UK).

[9.2.8] **Interest on general damages** General damages are awarded in current money as at the date of trial and so it is not appropriate to award interest on such items as pain and suffering, loss of amenity, etc: *Alphonse v Tasso* [2007] VUSC 54 at [57]; CC 21 of 2005; *Commissioner of Police v Garae* [2009] VUCA 9 at [31]; CAC 34 of 2008.

(c) costs in accordance with Part 15.

(5) Default judgment must not be given in the Magistrates Court before the first hearing date.

(6) The claimant must serve a copy of the judgment on the defendant.

(7) If the defendant does not apply within 28 days of service to have the judgment set aside under rule 9.5, the claimant may:

[9.2.9] **No limitation period** This time frame does not create a limitation period for bringing an application to set aside a default judgment, which may be made at any time under subr.9.5(2): *Kontos v Laumae Kabini* [2006] VUSC 45; CC 110 of 2005.

(a) file a sworn statement that the judgment was served on the defendant as required by Part 5; and

(b) apply to the court for an enforcement order.

Default – claim for damages

9.3 (1) This rule applies if the claim was for an amount of damages to be decided by the court.

[9.3.1] **Proper characterisation of claim** See further [9.2.1]. An application for default judgment in respect of a claim which is partly fixed and partly to be determined should be brought under this rule: *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [19].

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(2) After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for an amount to be determined by the court. The request must be in Form 13.

[9.3.2] **Application must be in writing** The application must, despite subr.7.2(2), be made in writing under this subrule: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [78].

(3) In the Magistrates Court, the request may be made orally.

(4) The court may:

(a) give judgment for the claimant for an amount to be determined; and

(b) either:

(i) determine the amount of damages; or

(ii) if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages.

(5) Default judgment must not be given in the Magistrates Court before the first hearing date.

(6) The claimant must serve on the defendant:

(a) a copy of the judgment; and

(b) if a conference is to be held to determine the amount of damages, a notice stating the date fixed for the conference.

Deciding the amount of damages

9.4 (1) A determination of the amount of damages must be conducted as nearly as possible in the same way as a trial.

(2) However, the court may give directions about:

(a) the procedures to be followed before the determination takes place; and

(b) disclosure of information and documents; and

(c) filing of statements of the case; and

(d) the conduct of the determination generally.

(3) After damages have been determined, the claimant must file judgment setting out the amount of damages and serve a copy of the judgment on the defendant, unless the defendant was present when the damages were determined.

(4) The judgment may be enforced in the same way as a judgment given after a trial.

Setting aside default judgment

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9.5 (1) A defendant against whom a default judgment has been signed under this Part may apply to the court to have the judgment set aside.

[9.5.1] **Inherent jurisdiction** There was formerly an inherent jurisdiction to set aside an irregular judgment *ex debito justitiae*. So, a judgment on a claim which was not in fact served (eg. *White v Weston* [1968] 2 QB 647 at 659, 662; [1968] 2 All ER 842 at 846, 848; [1968] 2 WLR 1459 at 1465, 1467; *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [10]) or which is an abuse of process (eg. *Deputy Commissioner of Taxation v*

Abberwood (1990) 19 NSWLR 530 at 533) or a fraud (eg. *Wyatt v Palmer* [1899] 2 QB 106 at 110) should be set aside without detailed consideration of the merits of the defence: See for example *Brenner v Johnson* [1985] VUSC 8; 1 Van LR 180 at 181-3; *Barlow v Than* [1987] VUSC 18; [1980-1994] Van LR 315; *Tari v Harvey* [2006] VUSC 19; CC 163 of 2005. The continued existence of this inherent jurisdiction was put in doubt by the Court of Appeal in *ANZ Bank v Dinh* [2005] VUCA 3; CAC 27 of 2004 where the court overlooked an irregularity, describing it as "mere technicality of no substance". Subsequently, in *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [30] Treston J concluded that the effect of this decision was that even where a judgment was irregular it remained necessary to consider the merits of the defence in accordance with subr.(3)(b). Also, in *VCMB v Dornic* [2009] VUCA 43; CAC 18&19 of 2009 the court declined even to deal with an application to set aside default judgment in the inherent jurisdiction. The difficulty generated by this situation is that it creates an unfair advantage (and a strong temptation) to a claimant entering irregular judgment by requiring defendants to establish a good defence even in circumstances where a judgment was unfairly obtained. It is respectfully suggested that the matter may not be settled.

(2) The application:

(a) may be made at any time; and

[9.5.2] **Effect of delay in making application** Delay in applying to set aside a default judgment is not fatal but may be taken into consideration in the exercise of the court's discretion: *Evans v Bartlam* [1937] AC 473 at 480; [1937] 2 All ER 646 at 650. Delay coupled with significant prejudice may be compelling: *Harley v Samson* (1914) 30 TLR 450; *National Australia Bank v Singh* [1995] 1 Qd R 377 at 380.

(b) must set out the reasons why the defendant did not defend the claim; and

(c) must give details of the defendant's defence to the claim; and

[9.5.3] **Method of giving details** A common way to satisfy this paragraph is to attach a draft defence to the application. This may also save time in connection with subr.(4)(a). It is not, however, a requirement – especially in simple cases: *Eruiti Island Village v Traverso* [2009] VUSC 9 at [4]; CC 222 of 2005.

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

[9.5.4] **Condescension to particulars by appropriate deponent** The sworn statement should condescend to particulars of the nature of the defence: *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004.The deponent should, if possible, be someone personally connected with the matters giving rise to the defence and the reasons why judgment was allowed to be entered.

(e) must be in Form 14.

(3) The court may set aside the default judgment if it is satisfied that the defendant:

[9.5.5] **Relevant considerations** Other matters may be taken into account in the exercise of discretion, but the court must be satisfied of at least the matters (a) and (b): *Brenner v Johnson* [1985] VUSC 8; 1 Van LR 180; *Nelson v A-G* [1995] VUCA 1; CAC 7 of 1995; *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004; *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [82]; The court may also set aside a default judgment in its inherent jurisdiction if the justice of the case so requires: See [9.5.1].

(a) has shown reasonable cause for not defending the claim; and

[9.5.6] **Meaning of "reasonable cause"** It is necessary that the reasons advanced for not defending the claim be "good" reasons: *Temakon v Vanuatu Commodities* [2007] VUSC 20; CC 26 of 2004 at [17]. There may be some scope for taking into account the nature and strength of a defence advanced under paragraph (b) when considering what would constitute "reasonable cause" under this paragraph in the circumstances of a particular case: *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004.

(b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.

[9.5.7] **Meaning of "arguable"** It is necessary only to show that the defence is "arguable", not that it is likely to succeed. See also [9.5.1]. See for example *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [18].

(4) At the hearing of the application, the court must:

(a) give directions about the filing of the defence and other statements of the case; and

(b) make an order about the payment of the costs incurred to date; and

[9.5.8] **Usual costs orders** It is suggested that the distinction between "regular" and "irregular" judgments is useful in deciding the costs consequences of a successful application under this rule. If the judgment was "irregular" the proper order for costs should be that the party entering the default judgment pay the costs of the application. If the judgment is "regular" the proper order for costs should be that the party applying to set aside the judgment pay the costs of the application and those thrown away.

(c) consider whether an order for security for costs should be made; and

[9.5.9] **Where proposed defence is shadowy** The court may impose security if the proposed defence is shadowy: *Richardson v Howell* (1892) 8 TLR 445 at 446.

(d) make any other order necessary for the proper progress of the proceeding.

(5) These Rules apply to the proceeding as if it were a contested proceeding.

Summary judgment

E *CPR* r24.2, 24.4
E *SCR* O14r 1

9.6 (1) This rule applies where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claimant's claim.

[9.6.1] **Parties to whom procedure is available** This procedure is expressed to be available only to claimants and, due to the definition of "claimant", may not be available to counterclaimants, support for which proposition might be found in *Narai v Foto* [2006] VUSC 77; CC 175 of 2004 at [19] in the context of security for costs. It is suggested that there is no good reason why a claimant could not make an application in respect of one of several defendants: *Stainer v Tragett* [1955] 1 WLR 1275 at 1283; [1955] 3 All ER 742 at 748. Subrule (7) suggests that an application may be made in respect of a part of a claim.

[9.6.2] **Meaning of "real prospect"** The test propounded by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92 was whether the prospect is realistic rather than fanciful. This test has been adopted by the Court of Appeal: *Bokissa v RACE* [2003] VUCA 22; CAC 21 of 2003.

(2) The claimant may apply to the court for summary judgment.

[9.6.3] **Application may be made at any time** The application may be made at any time, however, it is appropriate that such applications be made as soon as possible after the defence is filed as the policy underlying the summary judgment procedure is to uphold indisputable claims at an early stage and so avoid the costs, etc associated with full proceedings: *Swain v Hillman* [2001] 1 All ER 91 at 92. The court may be disinclined to exercise its discretion in favour of an applicant who has delayed.

(3) An application for summary judgment must:

(a) be in Form 15; and

[9.6.4] **Application to be in writing** The application may not be made orally under subr.7.2(2) but must be made in writing under this subrule: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006. See also *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006. Although strict compliance with forms is not required (see r.18.9), that part of Form 15 which contains the date of first hearing is necessary to be included and completed for the form to be effective: *Hapisai v Albert* [2008] VUSC 3; CC 107 of 2007 at [23], [3], [11]. See further subr.(4)(b).

(b) have with it a sworn statement that:

E *CPR* r22.1

(i) the facts in the claimant's claim are true; and

[9.6.5] **Content of sworn statement** Only the facts necessary to the cause of action need to be verified. If the statement of the case is properly drawn, the sworn statement will be very simple and may refer to the statement of the case: *May v Chidley* [1894] 1 QB 451 at 453; *Roberts v Plant* [1895] 1 QB 597 at 605. If the statement of the case is found to contain deficiencies, it may be amended at or before the summary judgment hearing: *Cegami Investments Ltd v AMP Financial Corp (NZ) Ltd* [1990] 2 NZLR 308 at 314. Any important documents should be exhibited or the relevant parts reproduced in the body of the sworn statement: *Scott v Public Trustee* [1942] VLR 206; [1942] ALR 303. If the claimant knows of some particular matter which the defendant is likely to raise by way of defence but which is unsustainable, the claimant ought to anticipate it and deal with it. Of course, the claimant cannot be expected to anticipate defences of which it has no notice: *Greenbank Ltd v Haas* [2000] 3 NZLR 341 at [19].

(ii) the claimant believes there is no defence to the claim, and the reasons for this belief.

[9.6.6] **Onus** The claimant bears the onus of satisfying the court that there is no defence: *Gemeinwirtschaft v City of London Garage* [1971] 1 All ER 541 at 549; *Singh v Kaur* (1985) 61 ALR 720 at 722.

[9.6.7] **What sworn statement should contain and by whom made** The application will be defective if the deponent fails to depose to this belief. The conventional form of words is "I verily believe that there is no defence to this action". Where the claim seeks damages to be assessed, the deponent should swear that there is no defence "except as to the amount of damages": *Dummer v Brown* [1953] 1 QB 710 at 721; [1953] 2 WLR 984 at 992; [1953] 1 All ER 1158 at 1164. The statement should be made by the claimant, not by its lawyer: *National Bank of Vanuatu v Tambe* [2007] VUSC 105; CC 237 of 2007 at [2].

E *CPR* r24.5(2)

(4) The claimant must:

(a) file the application and statement; and

(b) get a hearing date from the court and ensure the date appears on the application; and

[9.6.8] **General observations** See also [9.6.4]. Unfortunately, getting a hearing date from the court is easier said than done. Delays at this stage are common.

(c) serve a copy of the application and sworn statement on the defendant not less than 14 days before the hearing date.

E *CPR* r24.5(1)

(5) The defendant:

(a) may file a sworn statement setting out the reasons why he has an arguable defence; and

[9.6.9] **What sworn statement should contain** This should deal specifically with the claim and must "condescend to particulars": *Wallingford v Directors of the Mutual Society* [1880] 5 AC 685 at 699, 704; *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004. It should also depose to the belief that there is a "good defence". The defendant will not later be limited to the defences raised in this sworn statement: *Ray v Newton* [1913] 1 KB 249 at 258. The court will not look closely at factual disputes and will not need to be satisfied of the truth of the assertions contained in the sworn statement, but it is important that these assertions are unequivocal: *Local Courier Service Pty Ltd v Kesha* (1995) PRNZ 690.

(b) must serve the statement on the claimant at least 7 days before the hearing date.

E *CPR* r24.5(3)(b)

(6) The claimant may file another sworn statement and must serve it on the defendant at least 2 days before the hearing date.

[9.6.10] **When further sworn statement should be filed** There will be no purpose in filing another sworn statement if the defendant's sworn statement has disclosed a defence with a reasonable prospect of success. A mere contradiction by the claimant would be pointless as the court cannot resolve factual inconsistencies on sworn statements in a summary fashion. The purpose of filing additional sworn statements is, generally, to cure any defect or omission in the original sworn statement or to show why a defence of which the claimant had no previous notice is unsustainable.

(7) If the court is satisfied that:

E *CPR* r24.2(a)(ii)

(a) the defendant has no real prospect of defending the claimant's claim or part of the claim; and

[9.6.11] **Basis on which court determines application** See further [9.6.2]. It must be remembered that it is not the purpose of the summary judgment procedure to conduct a mini-trial by attempting to evaluate conflicting factual evidence. Rather, it eliminates those defences which are not fit for trial at all: *Swain v Hillman* [2001] 1 All ER 91 at 94-5 (approved by the Court of Appeal in *Bokissa Investments v RACE Services* [2005] VUCA 22; CAC 21 of 2003). That does not mean, however, that the court has to accept everything said by a party in the sworn statements. In some cases it may be clear that there is no real substance in factual assertions, particularly if contradicted by contemporary documents or independent evidence: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341. In such situations, issues which are dependent upon those factual assertions may be summarily disposed of to save the cost and delay of trying an issue the outcome of which is inevitable: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [95]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Equant v Ives* [2002] EWHC 1992 (Ch) at [16]; *ED&F v Patel*

[2003] EWCA Civ 472 at [10]. Generally, the simpler the case, the better a candidate for summary judgment: *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244; [1965] 2 All ER 871 at 874**;** *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [93]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125.

[9.6.12] **Part claims** It is clearly suggested that summary judgment is available as to part of a claim. The word "claim" is not co-extensive with "cause of action" and the court is entitled to give summary judgment as to liability and as to quantum, where both are indisputable: *Australian Guarantee Corp (NZ) Ltd v McBeth* [1992] 3 NZLR 54 at 59.

E *SCR* O14r3(1)
E *CPR* r24.2(b)

(b) there is no need for a trial of the claim or that part of the claim, the court may:

[9.6.13] **When there is a "need for trial"** It may be that this paragraph merely makes allowance for subr.(9), however there are several rare circumstances which, under the former English rule, have been said to provide a reason for continuing to trial: See for example *Daimler v Continental Tyre & Rubber* [1916] 2 AC 307 at 326; [1916-7] All ER 191 at 197; *Miles v Bull* [1969] 1 QB 258 at 266; [1968] 3 All ER 632 at 637-8; [1968] 3 WLR 1090 at 1096; *Bank fur Gemeinwirtschaft v City of London Garages* [1971] 1 WLR 149 at 158; [1971] 1 All ER 541 at 548.

[9.6.14] **Residual discretion** The use of the word "may" suggests that, even if the criteria in paras (a) and (b) are satisfied, there is nevertheless a discretion as to whether summary judgment will be given. Although the discretion appears to be unlimited, it is likely that it is of the most residual kind and will only rarely be used to refuse judgment: *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 2 All ER 508 at 515; *Pemberton v Chappell* [1987] 1 NZLR 1 at 5. See for example *Waipa District Council v Electricorp* [1992] 3 NZLR 298 (pending judicial review claim which might result in basis of liability being quashed).

(c) give judgment for the claimant for the claim or part of the claim; and

[9.6.15] As to part claims see [9.6.12].

E *CPR* r24.6(b)

(d) make any other orders the court thinks appropriate.

E *CPR* r25.14

(8) If the court refuses to give summary judgment, it may order the defendant to give security for costs within the time stated in the order.

[9.6.16] **Circumstances justifying order for security** Security may be ordered if the proposed defence satisfies the "reasonable prospect" test but is "shadowy" (*Van Lynn v Pelias* [1968] 3 WLR 1141 at 1146; [1968] 3 All ER 824 at 827; [1969] 1 QB 607 at 614), suspicious *(Lloyd's Banking Co v Ogle* (1876) 1 Ex D 262 at 264; *Wing v Thurlow* (1893) 10 TLR 53; *Fieldrank Ltd v Stein* [1961] 1 WLR 1287 at 1289; [1961] 3 All ER 681 at 683) or where the case is very nearly one where summary judgment ought to be given (*Ionian Bank v Couvreur* [1969] 1 WLR 781 at 787; [1969] 2 All ER 651 at 656; *M V Yorke Motors v Edwards* [1982] 1 WLR 444 at 450; [1982] 1 All ER 1024 at 1028).

(9) The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law.

[9.6.17] **Scope of limitation under rule** See further [9.6.2], [9.6.10]. This subrule should not be read to limit summary judgment only to those exceptional cases or those in which the facts are entirely free of dispute: *Miller v Garton Shires* [2006] EWCA Civ 1386 at [11].

[9.6.18] **Area of developing law** It is not appropriate to award summary judgment on a case which raises issues in a developing area of law: *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298 at [2], [62], [76]; *Equitable Life Assurance v Ernst & Young* [2003] EWCA Civ 1114 at [40].

[9.6.19] **Requirement to identify circumstances in which subrule is invoked** If there is said to be such a matter of fact or law which militates against summary judgment, this ought to be precisely identified and not baldly asserted: *Kalsakau v Dinh* [2005] VUCA 7; CAC 6 of 2004.

[9.6.20] **Meaning of "difficult question of law"** Whether a "difficult question of law" is raised is a matter for the court which should grant summary judgment if it is satisfied that the defence is really unarguable: *Cow v Casey* [1949] 1 KB 474 at 481; *European Asian Bank v Punjab & Sind Bank* (No2) [1983] 2 All ER 508 at 516; 1 WLR 645 at 654.

[9.6.21] **Effect of counterclaim** The fact that a defendant might have a good counterclaim or set-off does not necessarily mean that leave to defend ought to be given: *Rotherham v Priest* (1879) 49 LJQB 104. Where there is a good set-off or counterclaim (unless wholly unrelated to the claim), the court may give summary judgment on the claim but stay enforcement until the set-off or counterclaim is dealt with.

Offers of settlement, Supreme Court

9.7 (1) A party to a proceeding in the Supreme Court may make an offer of settlement by sending Form 16 to the other party to the proceeding.

[9.7.1] **Relationship to Calderbank letters** The procedure under this rule is independent of the possibility of making a "Calderbank" offer (see *Calderbank v Calderbank* [1975] 3 All ER 333 at 342-3; (1976) Fam 93 at 105-6; [1975] 3 WLR 586 at 596-7). See further r.15.11 as to costs consequences.

(2) The offer is without prejudice to the first party's case.

(3) If the parties agree on settlement:

(a) both parties must sign the settlement form; and

(b) the party who made the offer must file the form and serve a copy on the other party.

(4) The terms of settlement must be complied with as set out in the settlement form.

(5) If a proceeding is settled under this rule, the court must:

(a) note on the file that the matter has been settled; but

(b) must not enter judgment in favour of the claimant.

(6) If the terms of the settlement are not complied with as set out in the settlement form, the other party may file an application for judgment.

[9.7.2] **Terms upon which judgment may be obtained** Presumably the judgment for which the innocent party can apply is judgment on the terms of settlement rather than on the original action. This is suggested by subr.(9). On this assumption, the important difference between settlement under this rule and by other methods is here illustrated – a party may avail itself of a summary procedure to remedy a breach of the settlement rather than having to return to court with fresh proceedings as upon a settlement by contract. There may be difficulty determining whether a party has "complied" in complex cases or where the other party contests the breach. Subrule (9) makes no provision for how the court may proceed in this situation.

(7) An application for judgment must:

(a) be in Form 17; and

(b) have with it a sworn statement that the party has not complied with the terms of the settlement as set out in the settlement form.

(8) The applicant must:

(a) file the application and statement; and

(b) get a hearing date from the court and ensure the date appears on the application; and

(c) serve a copy of the application and sworn statement on the other party not less than 14 days before the hearing date.

(9) If the other party does not appear on the hearing date, the court may give judgment for the applicant in accordance with the settlement as set out in the settlement form.

(10) If:

(a) a party offers to settle under this rule but the other party refuses the offer; and

(b) the other party is successful but for less than the amount offered on the offer to settle claim form, or for less advantageous terms than the terms offered on the offer to settle claim form;

the court may award costs against the other party.

[9.7.3] **Costs discretionary** The word "may" preserves the court's discretion, as in assessing the appropriate consequences of a "Calderbank" offer. See further [15.11.2] as to the measurement of success.

Settlement, Magistrates Court

9.8 (1) If the parties to a proceeding in the Magistrates Court decide to settle, they may tell the magistrate.

(2) The magistrate must:

(a) record the case as being settled; and

(b) note in the file the details of settlement; and

(a) not enter judgment for any party.

(3) If either party does not comply with the settlement, the other party may apply to the court for the case to be re-opened, whether or not the magistrate has struck the case out under subrule (5).

(4) The magistrate may re-open the case if he or she is satisfied that the party has not complied with the settlement.

(5) If the parties did not tell the magistrate they settled the case, the magistrate may:

(a) set the case aside for 6 months; and

(b) strike the case out under rule 9.10, if nothing has been heard from either party after 6 months.

Discontinuing proceeding

9.9 (1) The claimant may discontinue his or her claim at any time and for any reason.

(2) To discontinue the claimant must:

(a) file a Notice of Discontinuance in Form 18; and

(b) serve the notice on all other parties.

(3) If there are several defendants:

(a) the claimant may discontinue against one or some only,

(b) and the claimant's claim continues in force against the others.

(4) If the claimant discontinues:

(a) the claimant may not revive the claim; and

[9.9.1] **No non-suit** The rules displace the option of a "non-suit": *Inter-Pacific Investments v Sulis* [2007] VUSC 21; CC 8 of 2006.

(b) a defendant's counterclaim continues in force; and

(c) the party against whom the claimant discontinued may apply to the court for costs against the claimant.

[9.9.2] **Usual costs order** The usual consequence of discontinuance would be an order for costs and this result is automatic under rules of court in many other jurisdictions. Parties considering discontinuance would be well advised to give thought to negotiating the terms of discontinuance with the other side.

Striking out

9.10 (1) This rule applies if the claimant does not:

[9.10.1] **Inherent jurisdiction** This rule is additional to the court's inherent power to dismiss a proceeding for want of prosecution, as to which see generally *Allen v Sir Alfred McAlpine* [1968] 2 QB 229 at 245, 258; [1968] 2 WLR 366 at 370, 382; [1968] 1 All ER

543 at 547, 555; *Birkett v James* (1978) AC 297 at 318; [1977] 3 WLR 38 at 46; [1977] 2 All ER 801 at 804. There is also an inherent jurisdiction to strike out a case as an abuse of process which may be shown by a party's inactivity: *Grovit v Doctor* [1997] 1 WLR 640 at 647-8; [1997] 2 All ER 417 at 424**;** *Arbuthnot Latham Bank* v *Trafalgar Holdings* [1998] 1 WLR 1426 at 1436-1437; [1998] 2 All ER 181 at 191-2.

(a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or

(b) comply with an order of the court made during a proceeding.

[9.10.2] **Relevant considerations** The court has a general discretion to strike out a case where there has been a failure of compliance with a rule or order. That does not mean that in applying the overriding objective a court will necessarily or usually strike out proceedings under this rule: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940; *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005. Blatant and persistent disregard of orders is likely to lead to an order under this rule: *Kere v Kere* [2004] VUSC 88; CC 153 of 2002. The common law principles relating to striking out for want of prosecuction are not binding as to this rule but may continue to be generally relevant as to the dictates of justice: *Nasser v United Bank of Kuwait* [2001] EWCA Civ 1454 at [27], [29].

(2) The court may strike out a proceeding:

[9.10.3] **Order is interlocutory in nature** Such an order is interlocutory in nature, with the result that leave is required to appeal: *Miller v National Bank of Vanuatu* [2006] VUCA 1; CAC 33 of 2005; cf orders made under r.18.11.

(a) at a conference, in the Supreme Court; or

(b) at a hearing; or

(c) as set out in subrule (3); or

[9.10.4] **Requirement of notice** The apparently unqualified discretion conferred by this rule should in fact be read together with r.18.11. Only in the circumstances mentioned in paragraph (d) can the court strike out a proceeding without notice. In all other cases, the procedure laid down above or in r.18.11 must be followed: *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005.

(d) without notice, if there has been no step taken in the proceeding for 6 months.

[9.10.5] **General observations** This power appears to be very seldom invoked. It is uncertain whether this is intended or because case management systems within the court fails to identify such proceedings. It is not uncommon for parties to write to the court, inviting them to strike out proceedings. It is suggested that this is not inappropriate, provided that the letter is copied to the claimant, who will then undoubtedly display a flurry of activity.

(3) If no steps have been taken in a proceeding for 3 months, the court may:

(a) give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and

[9.10.6] **General observations** Such notices are very rare. It is uncertain whether this is intended or because case management systems within the court fails to identify such proceedings. It is not uncommon for parties to write to the court, inviting them to schedule an appearance. It is suggested that this is not inappropriate, provided that the letter is copied to the claimant, which will then undoubtedly display a flurry of activity.

(b) if the claimant does not appear, or does not show cause, strike out the proceeding.

(4) After a proceeding has been struck out, the Registrar must send a notice to the parties telling them that the proceeding has been struck out.

MEDIATION

Purpose of this Part

10.1 (1) This part deals with assisting the court to refer matters for mediation

(2) This Part does not prevent the parties to a proceeding from agreeing to or arranging mediation otherwise than under this Part.

[10.1.1] **Other sources of mediation powers** See further r.1.4(2)(e) and (f). Compare also the mediation framework provided by: *Trade Disputes* [Cap 162], Part III; *Island Courts* [Cap 167], s.20; *Ombudsman* [Cap 252], s.13; *Maritime* [Cap 131], s.150. See also the powers of mediation exercisable by a Master under s.42, *Judicial Services and Courts* [Cap 270].

What is mediation

10.2 For this Part, "mediation" means a structured negotiation process in which the mediator, as a neutral and independent party, helps the parties to a dispute to achieve their own resolution of the dispute.

[10.2.1] **Meaning of "mediation"** Mediation is qualitatively different from the process of formal adjudication. Within the above general definition there may be a wide variety of methods. These may be broadly classified as process-oriented or substance-oriented. In the former it is assumed that parties hold the solution to their dispute and the mediator is the facilitator of that process, not an authority figure providing substantive advice or pressure to settle. In the latter the mediator is often an authority figure who evaluates the case based upon experience and offers recommendations on how it ought to be resolved: See R Amadei and L Lehrburger, "The World of Mediation: A Spectrum of Styles" (1996) 51 *Dispute Resolution Journal* 62. Within these classifications there are many additional and overlapping variants: See J Wade, "Mediation - The Terminological Debate" (1994) 5 *Australian Dispute Resolution Journal* 204. Note that arbitration, now dealt with under the provisions of s.42B – F, *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008), is not yet the subject of any specific rules of court.

[10.2.2] **Objectives of mediation** The objectives of mediation are made clear by this rule: *Australian Competition and Consumer Commission v Lux* [2001] FCA 600. Mediation is not simply an occasion for each side to give consideration, with the assistance of the mediator, to the strength of its legal case and concomitantly to the extent to which it may be willing to compromise on its formal legal position. Rather, it is an opportunity for the parties to resolve their dispute according to wider and more flexible options when compared with those available to a court were their dispute litigated: *Dunnett v Railtrack* [2002] 1 WLR 2434 at [14]; [2002] 2 All ER 850 at [14]; *Hopeshore v Melroad Equipment* [2004] FCA 1445 at [30] - [32]; [2004] 212 ALR 66. The point of mediation is that there be some give and take on both sides and neither party enters mediation with any prescriptions: *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600 at [28].

[10.2.3] **Importance of mediation** Mediation is an important feature of modern litigation and in extra-curial remarks the Chief Justice has stated that alternative dispute resolution is also "consistent with traditional methods of dispute resolution that predated the introduction of the formalised system of justice": cited in G Hassall, "Alternative Dispute resolution in Pacific Island Countries" [2005] JSPL 1.

Referral by court

10.3 (1) The court may by order refer a matter for mediation if:

[10.3.1] **Source of power** Section 42A(1), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that the court may refer a matter to mediation, subject to the *Rules*. This proviso is important because the *Rules* are currently much more restrictive than s.42A.

(a) the judge considers mediation may help resolve some or all of the issues in dispute; and

(b) no party to the dispute raises a substantial objection.

[10.3.2] **Mediation voluntary** It is made clear below that mediation is entirely voluntary and cannot be ordered, conducted or continued against the will of any party. In these circumstances, it is difficult to understand why mediation is conditioned on the fiction of a "substantial objection" when in fact, any objection will preclude mediation, regardless of its merits. Section 42A(2), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that the mediation referral may be made with or without the consent of the parties. Given the proviso in subs.(1) that the referral may be made "subject to the rules of court" (see [10.3.1]), it would seem that there can be no referral without consent until the *Rules* are amended accordingly.

(2) For subrule (1), a substantial objection includes:

(a) that the parties do not consent to mediation; or

[10.3.3] **Necessity of consent** The role of the court is limited to encouragement and facilitation: See generally *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [9]; [2004] 1 WLR 3002; [2004] 4 All ER 920 and r.1.4(2)(e) and (f). See further [10.3.2].

[10.3.4] **Refusal to mediate may sound in costs** Despite the lack of power to require the parties to mediate, an unreasonable refusal may sound in costs: *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803 at [25], [27]; *Dunnett v Railtrack* [2002] 1 WLR 2434 at [15]; [2002] 2 All ER 850 at [15]; *Leicester Circuits v Coates Brothers* [2003] EWCA Civ 333; *Cullwick v Ligo* [2003] VUSC 60; CC 51 of 2003 (no order as to costs where parties failed to make good use of internal mediation system). There is no presumption that refusal to mediate is always unreasonable: *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [16]; [2004] 1 WLR 3002; [2004] 4 All ER 920. As to what may amount to an unreasonable refusal see for example *Capolingua v Phylum Pty Ltd* (1989) 5 WAR 137.

(b) that the dispute is of its nature unsuitable for mediation; or

[10.3.5] **Indications and contraindications to mediation** For a detailed description and consideration of the factors which might be taken into account see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [17] – [23]; [2004] 1 WLR 3002; [2004] 4 All ER 920. Note that different jurisdictions have developed various approaches to referral, for example the New South Wales Supreme Court in its 1995 Steering Committee report recommended developing positive criteria for referral to various ADR processes and produced a checklist of factors favouring mediation: (1) Whether the matter is complex or likely to be lengthy (2) Whether the matter involves more than one plaintiff or defendant (3) Whether there are any cross claims (4) Whether the parties have a continuing relationship (5) Whether either party could be characterised as a frequent litigator or there is evidence that the subject matter is related to a large number of other matters (6) Whether the possible outcome of the matter may be flexible and where differing contractual or other arrangements can be canvassed. Poor compliance rates in similar types of matters could be considered in respect of this factor (7) Whether the parties have a desire to keep a matter private or confidential (8) Whether a party is a litigant in person (9) Whether it is an appropriate time for referral (10) Whether the dispute has a number of facets that may be litigated separately at some time (11) Whether the dispute has facets that may be the subject of proceedings other jurisdictions.

(c) anything else that suggests that mediation will be futile, or

unfair or unjust to a party.

[10.3.6] **Additional contraindications** The fact that a party may be a government agency performing public interest functions does not necessarily make mediation inappropriate: *Australian Competition and Consumer Commission v Lux* [2001] FCA 600 at [30] - [31]; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at [34]; [2004] 1 WLR 3002; [2004] 4 All ER 920.

(3) In particular, a judge may make a mediation order at a conference.

[10.3.7] **When mediation order may be made** It is difficult to see how this subrule expands (or limits) the availability of a mediation order given that it is permissive and also given the unrestricted nature of subr. (1). The power to refer a matter to mediation in s.47A(1) is unrestricted as to time.

(4) The mediator may be, but need not be, a person whose name is on a list of mediators.

[10.3.8] **Any person may be a mediator** In other words, any person may be a mediator. See further the definitions of "person" in Part 20 and in Schedule 2 of the *Interpretation Act* [Cap 132]. Section 47A(1), *Judicial Services and Courts* [Cap 270] (inserted by Act 26 of 2008, Gazetted 30 June 2008) provides that a referral may be made to a "master, deputy master or mediator" and defines "mediator" in subr.(5) as the person appointed to mediate under the *Rules*. Accordingly, s.47A does not operate as a restriction on who may be a mediator. Rather, any person can (continue to) be a mediator.

[10.3.9] **Under-utilisation of mediation** Mediation is said to be under-utilised partly because of the absence of qualified mediators: S Farran & E Hill, "Making Changes With Rules in the South Pacific: Civil Procedure in Vanuatu" (2005) 3(2) *JCLLE* 27 at 48-9. It is suggested that mediation is also under-utilised because the courts do not have the resources to conduct mediation with the result that the parties must bear the cost of a private mediator.

Who may be mediators

10.4 (1) The Chief Justice may keep a list of persons whom the Chief Justice considers to be suitable to be mediators.

(2) The list may state whether a person may be a mediator for the Supreme Court or the Magistrates Court, or both.

[10.4.3] **Any person may be mediator** It is difficult to see how this rule expands (or limits) the choices as to mediators given the terms of r.10.3(4). See further [10.3.8].

Content of mediation order

10.5 (1) The mediation order must set out enough information about:

(a) the statements of the case; and

(b) the issues between the parties; and

(c) any other relevant matters;

to tell the mediator about the dispute and the present stage of the proceeding between the parties.

(2) The court may include in the order directions about:

(a) the mediator's role; and

(b) time deadlines; and

(c) any other matters relevant to the particular case.

Mediation voluntary

10.6 (1) Attendance at and participation in mediation sessions are voluntary.

(2) A party may withdraw from mediation at any time.

[10.6.1] **General observations** See further r.10.3(1)(b), (2)(a). The provisions of s.47A(2) and (3)(a) of the Judicial Services and Courts Act [Cap 270] are, for the reasons discussed in [10.3.1] and [10.3.2], ineffective without amendment to the *Rules*.

Mediator's role

10.7 During the mediation, the mediator may see the parties together or separately and with or without their lawyers.

Mediator's powers

10.8 (1) A mediator may:

(a) ask a party to answer questions; and

(b) ask a party to produce documents or objects in the party's possession; and

(c) visit places and inspect places and objects; and

(d) ask a party to do particular things; and

(e) ask questions of an expert witness to the proceeding.

[10.8.1] **Source and nature of mediator's powers** Given that mediation is entirely voluntary and that a party can withdraw from mediation at any time, these powers are largely symbolic. In practice, a mediator's powers are a function of the imagination of the mediator and the consent of the parties. Curiously, the new amendments to *Judicial Services and Courts* [Cap 270] (No 26 of 2008, Gazetted 30 June 2008), which imply a future in which mediation may be non-consensual, does not contain any elaboration of the powers of the mediator or statutory basis for rules in that connection. Presumably the use of the word "ask" (as opposed to "require") suggests that, even in a non-consensual mediation, these "powers" are quite limited. The alternative construction would appear to be massively precipitous.

(2) A mediator may at any time ask for guidance and directions from the court.

Settlement

10.9 (1) If a settlement is reached it must be:

[10.9.1] **Meaning of "settlement"** When speaking of a "settlement" important questions arise as to whether and when the same becomes binding. The ordinary law of contract in its application to settlements requires that at least its essential or critical terms have been agreed upon: *Pittorino v Meynert* [2002] WASC 76 at [111].

(a) written down, signed and dated by the mediator and the parties; and

[10.9.2] **Signature by lawyer** Although a party's lawyer has ostensible authority to sign a settlement on behalf of a party (*Waugh v H B Clifford* [1982] Ch 374 at 387; [1982] 2 WLR 679 at 690; [1982] 1 All ER 1095 at 1105), it is probably wise to ensure that the parties themselves sign the settlement, if only to avoid arguments of the kind raised (but not upheld) in *Von Schulz v Morriello* [1998] QCA 236. Note that the new s.47A(3)(d) does not refer to signing by the parties and so this requirement is additional.

(b) filed with the court.

[10.9.3] **Obsolescence of paragraph** The new s.47A(3) does not contain this requirement.

(2) The court may approve the settlement and may make orders to give effect to any agreement or arrangement arising out of mediation.

(3) These orders do not constitute a judgment against a party.

[10.9.4] **Obsolescence of subrule** The new s.47A(3)(e) provides that a signed record of a "settlement" is enforceable as an order of the Supreme Court. Of course, the parties may alternatively invite the court to make consent orders for judgment reflecting a mediated or otherwise negotiated outcome. The effect of the new provision, having regard to the proviso in subs.(1) (see [10.3.1]) is uncertain.

(4) This rule does not affect the enforceability of any other agreement or arrangement that may be made between the parties about the matters the subject of mediation.

[10.9.5] **Other agreements** See generally *Pittorino v Meynert* [2002] WASC 76 (application to set aside settlement based on duress, etc). The effect of s.47A(3)(e) on this provision is uncertain.

Costs of mediation

10.10 The costs of a mediator are to be paid by each party equally, unless the parties agree otherwise.

Proceeding suspended during mediation

10.11 If a matter is referred to mediation by the court under this Part, the proceeding about that matter is suspended during the mediation.

Privileged information and documents

10.12 (1) Anything said during mediation, or a document produced during mediation, has the same privilege as if it had been said or produced during a proceeding before the court.

(2) Evidence of anything said during mediation is not admissible in a proceeding before a court.

(3) A document prepared for, or in the course of or as a result of, mediation is not admissible in a proceeding before a court.

[10.12.1] **Legislative foundation of rule** The efficacy of the above provisions is yet to be tested. It has been noted that, when they were made, these were matters of substantive law without legislative foundation: S Farran & E Tarrant, "Making Waves and Breaking the Mould in Civil Procedure in the Pacific: The New Civil Procedure Rules of Vanuatu" (2002) 28(2) *Commonwealth Law Bulletin* 1108 at 1119. Now, the new s.47A(3)(b) and (f) to the Judicial Services and Courts Act [Cap 270] provide a legislative basis for subrules (1) and (2). Curiously, however, there is no attempt in the rectify the absence of statutory cover for documents, as in subr.(3).

(4) Subrules (2) and (3) do not apply to evidence or a document if the parties to the mediation, or persons identified in the document, consent to the admission of the evidence or document.

Secrecy

10.13 A mediator must not disclose to any person who is not a party to a mediation information obtained during the mediation except:

(a) with the consent of the person who gave the information; or

(b) in connection with his or her duties under this Part; or

(c) if the mediator believes on reasonable grounds that disclosing the information is necessary to prevent or minimise the danger of injury to a person or damage to property; or

(d) if both parties consent; or

(e) if disclosing the information is required by another law of Vanuatu.

[10.13.1] **Legislative foundation of rule** Unfortunately, the new s.47A, *Judicial Services and Courts* [Cap 270] did not attend to providing a statutory basis for this rule, without which it is of doubtful effect.

Liability of mediators

10.14 A mediator is not liable for anything done or omitted to be done during mediation if the thing was done in good faith for the purposes of the mediation.

[10.14.1] **Obsolescence of rule** The protection afforded by such a rule is dubious absent legislative support, which was absent until recently. Even wider legislative protection is now extended by s.47A(4), *Judicial Services and Courts* [Cap 270] thus rendering this rule otiose.

Unsuccessful mediations

10.15 If a mediation is unsuccessful, no inference may be drawn against a party because of the failure to settle the matter through mediation.

[10.15.1] See, however, [10.3.4] as to the possible costs consequences of an unreasonable refusal to mediate.

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EVIDENCE

Definition for this Part

11.1 In this Part:

"document" includes an object.

[11.1.1] **Confusion arising from different definitions** See further r.20.1 for the general definition of a "document". The definition in this rule creates much confusion: See for example its effect on r.11.5(3).

How to give evidence – Magistrates Court

11.2 (1) Evidence in the Magistrates Court is to be given orally.

(2) However, a magistrate may order that evidence in a particular case, or particular evidence, be given by sworn statement.

[11.2.1] **Applicable criteria** Such an order may not be appropriate where motive or credibility is in issue: *Bonhote v Henderson* [1895] 1 Ch 742 at 749; *Constantinidi v Ralli* [1935] Ch 427 at 436-8; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545.

How to give evidence – Supreme Court

11.3 (1) Evidence in chief in the Supreme Court is to be given by sworn statement.

[11.3.1] **Purpose** This modern practice is designed to promote efficiency and reduce surprise: *Wang v Consortium Land* [2000] WASC 265 at [14], [15]. The consequence that the public does not hear the evidence may be overcome by appropriate order: *Hammond v Scheinberg* [2001] NSWSC 568 at [2], [6]; 52 NSWLR 49 at 50, 52 as to which see further r.12.2.

(2) However, a judge may order that evidence in a particular case, or particular evidence, be given orally.

[11.3.2] **Applicable criteria** Such an order may be appropriate where motive or credibility is in issue (*Bonhote v Henderson* [1895] 1 Ch 742 at 749; *Constantinidi v Ralli* [1935] Ch 427 at 436-8; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545) or where a witness declines to provide a sworn statement.

[11.3.3] **Supplementation of sworn statement** It is not uncommon for a party to request to supplement a sworn statement with some brief examination-in-chief. It is suggested that the overriding objective is consistent with the application of a liberal approach so long as incurable prejudice is not occasioned.

Content of sworn statement

11.4 (1) A sworn statement may contain only:

(a) material that is required to prove a party's case, and references to documents in support of that material; and

(b) material that is required to rebut the other party's case, and references to documents in support of that material.

[11.4.1] **Facts not argument** With very few exceptions, the function of the sworn statement is to give evidence of fact. Legal arguments and conclusions ought to be raised in submissions, not in sworn statements: *Gleeson v J Wippell* [1977] 3 All ER 54 at 63; [1977] 1 WLR 510 at 519.

(2) In particular, a sworn statement must not contain material, or refer to documents, that would not be admitted in evidence.

[11.4.2] **Law of evidence applies equally to sworn statements** The same rules applying to oral evidence at trial apply to written evidence contained in a sworn statement. Accordingly, it is very important to ensure that sworn statements are drawn carefully and by someone who understands the issues between the parties. Correspondingly, it is very dangerous to fail to take a proper and timely objection to a sworn statement.

[11.4.3] **Time and mode of objection** Although it is possible to make objection to inadmissible material in a sworn statement without a formal application to strike it out, a formal application brought on well before the hearing is the better course where a large quantity of material is to be attacked: *Savings & Investment Bank v Gasco Investments* [1984] 1 WLR 271 at 278; [1984] 1 All ER 296 at 302. This also has the advantage of affording relief against the necessity to prepare answering material which might subsequently become unnecessary. Consideration should be given to removing the whole document from the court file so that the party can first put their evidence in order: *Rossage v Rossage* [1960] 1 All ER 600 at 601; [1960] 1 WLR 249 at 251**;** *Re J* [1960] 1 All ER 603 at 605-6; [1960] 1 WLR 253 at 257.

[11.4.4] **Scandalous material** Sworn statements containing inadmissible material which is also scandalous may be removed from the court file or sealed, as occurred in *Spaulding v Kakula Island Resorts* [2008] VUSC 72; CC 29 of 2008).

[11.4.5] **Costs against lawyer** A lawyer who files sworn statements contrary to the rules may be ordered to pay the costs associated with them personally: *Re J L Young Manufacturing* [1900] 2 Ch 753 at 755. Where a lawyer discovers that a sworn statement he has filed is in fact false, he must remedy the matter at the earliest opportunity if he continues to act: *Myers v Elman* [1940] AC 282; [1939] 4 All ER 484.

[11.4.6] **Statements of information or belief in interlocutory matters** There is no provision in the rules which permits the court to accept statements of information or belief in interlocutory matters, as is common elsewhere. The court might, however, receive such statements in its inherent jurisdiction: *Vinall v De Pass* [1892] AC 90 at 92, 97-8.

Attachments and exhibits to sworn statements

11.5 (1) A document may only be attached to a sworn statement after disclosure if the document has been disclosed.

(2) Documents referred to in a sworn statement must be:

(a) attached to the statement; and

[11.5.1] **Originals to be attached** The original sworn statement should attach the original attachments. Photocopies of attachments should be used only when the original document is unavailable and, of course, in service copies of the sworn statement.

(b) identified by the initials of the person making the statement and numbered sequentially.

(3) A sworn statement may refer to a thing other than a document (an "exhibit").

[11.5.2] **Exhibits part of sworn statement** An exhibit is considered part of the sworn statement: *Re Hinchcliffe* [1895] 1 Ch 117 at 120.

(4) The sworn statement must state where the exhibit may be inspected.

(5) The party making the sworn statement must ensure that the exhibit is available at reasonable times for inspection by other parties.

(6) If a person makes more than one sworn statement, the numbering of the attachments and exhibits must follow on from the previous statement.

Service of sworn statement

11.6 A sworn statement must be filed and served on all other parties to the proceeding:

(a) if the court has fixed a time, within that time; or

(b) for a sworn statement to be used during a trial, at least 21 days before the trial; or

(c) for a sworn statement that relates to an application, at least 3 days before the court deals with the application.

[11.6.1] **Late evidence not automatically excluded** The failure to file and/or serve a sworn statement within the applicable time may have serious consequences but may not lead automatically to the exclusion of such evidence according to the principle in *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006. It remains to be seen precisely to what extent case management principles may affect late sworn statements. See further r.18.10.

Use of sworn statement in proceedings

11.7 (1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled inadmissible.

[11.7.1] **Filed evidence admitted subject to ruling otherwise** The rule is expressed in the present tense so that immediately upon filing and service the sworn statement "becomes" evidence, regardless of subsequent events, such as the deponent's failure to attend to be cross examined: *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006. See further [11.7.7].

[11.7.2] **Time for making objection** A party who objects to any material in a sworn statement should make clear their objection before the sworn statement is relied upon: *Gilbert v Endean* (1878) 9 Ch D 259 at 268-9. It is courteous (and may avoid delays) to notify the other side of proposed objections to sworn statements in advance.

[11.7.3] **Statements made in attachments** It does not necessarily follow that a statement contained in an attachment is deemed to be included in the sworn statement (and therefore evidence for all purposes): *Re Koscot Interplanetary* [1972] 3 All ER 829 at 835.

(2) The sworn statement need not be read aloud during the trial unless the court orders.

[11.7.4] **Not necessary to read sworn statements** Though not strictly necessary, a deponent (especially if present to be cross-examined) is sometimes called upon to identify their sworn statement by way of evidence-in-chief.

(3) A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.

[11.7.5] **Nature and scope of rule** It is unlikely that this subrule is intended to displace the traditional rules as to cross-examination or re-examination by confining both to the content of the sworn statement. Cross-examination is not limited to the content of the sworn statement and may extend to any relevant matter, including the credibility of the deponent: *Muir v Harper* (1900) 25 VLR 534 at 535-6. The usual rule as to re-examination is that it is confined to the scope of cross-examination. The rule in *Browne v Dunn* will continue to operate: *West v Mead* [2003] NSWSC 161 at [93]-[100].

[11.7.6] **Cross-examination of deponents in interlocutory proceedings** The subrule appears to confer an absolute right, subject to the formal requirements in subr.(4). See however *Iririki v Ascension* [2007] VUSC 57; CC 70 of 2007 at [5] (cross-examination on interlocutory sworn statements refused - requires "exceptional circumstances"); cf *Kontos v Laumae Kabini* [2008] VUSC 23; CC 110 of 2005 at [4] (cross-examination on interlocutory sworn statements allowed - "in line with the overriding objective"); *Kalmet v Lango* [1997] VUSC 39; CC 161 of 1996 (cross-examination in judicial review refused - requires "exceptional circumstances").

[11.7.7] **Failure to attend to be cross-examined goes to weight** The failure of a witness to attend to be cross-examined is a matter going to weight, not to admissibility: *Dinh v Polar Holdings* [2006] VUCA 24; CAC 16 of 2006; *Kelep v Sound Centre* [2008] VUSC 13; CC 37 of 2007 at [8], [9]. Accordingly, the court is not entitled to simply ignore a sworn statement in these circumstances. In deciding how much weight to attach to a sworn statement untested by cross-examination the court may have regard to the nature of the evidence in question and the particular circumstances: See for example *Kelep v Sound Centre* [2008] VUSC 13; CC 37 of 2007 at [9]; *Re Smith & Fawcett* [1942] 1 Ch 304 at 308; [1942] 1 All ER 542 at 545 (questions of motive/good faith); *Re O'Neil (deceased)* [1972] VR 327 at 333 (death of deponent). See further r.12.6(2).

[11.7.8] **Cross-examination in judicial review** See generally *Kalmet v Lango* [1997] VUSC39; CC 161 of 1996, especially as to cross-examination in judicial review proceedings.

(4) A party who wishes to cross-examine a witness must give the other party notice of this:

(a) at least 14 days before the trial; or

(b) within another period ordered by the court.

[11.7.9] **Consequences of failure to give notice** The failure of a party to give such notice within time or at all does not automatically disentitle a party from cross-examining a witness. In these situations, the court will have regard to principles of fairness and case management. See further r.12.3 as to adjournment.

Giving evidence by telephone, video or in other ways

[11.8.1] **Origin of rule** Much of the scheme and content of this rule appears to derive from the detailed consideration given by Coventry J to these issues in *Tari v Minister of Health* [2002] VUSC 42; CC 36 of 2001.

E *CPR* r32.3

11.8 (1) The court may allow a witness to give evidence by telephone, by video or by another form of communication (called "evidence by link") if the court is satisfied that it is not practicable for the witness to come to court to give oral evidence or to be cross-examined.

(2) The court may do this whether the witness is in or outside Vanuatu.

(3) The application for evidence to be given by link must:

(a) be in writing; and

(b) have with it a sworn statement setting out:

(i) the name and address of the witness and the place where he or she will be giving evidence; and

(ii) the matters the witness will be giving evidence about; and

(iii) why the witness cannot or should not be required to come to court, and any other reason why the evidence needs to be given by link; and

(iv) the type of link to be used and the specific facility to be used; and

(v) any other matter that will help the court to make a decision.

[11.8.2] **Onus on applicant** In practical terms, the party making the application bears the onus of satisfying the court of the appropriateness of the order sought: *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1; [2001] NSWSC 651 at [25].

(4) The court must take the following into account in deciding whether to allow the evidence to be given by link:

(a) the public interest in the proper conduct of the trial and in establishing the truth of a matter by clear and open means; and

(b) the question of fairness to the parties and balancing their competing interests; and

(c) any compelling or overriding reason why the witness should come to court; and

(d) the importance of the evidence to the proceeding; and

(e) whether or not the reason for seeking the evidence to be given by link is genuine and reasonable, having regard to:

(i) how inconvenient it is for the witness to come to court; and

(ii) the cost of the witness coming to court, particularly in relation to the amount claimed in the proceeding; and

(iii) any other relevant matter; and

(f) whether the link will be reliable and of good quality; and

(g) whether or not an essential element in the proceeding can be decided before the evidence is given; and

(h) whether the kind of link will make examination of the witness difficult; and

(i) for evidence to be given by telephone, that it is not practicable for the witness to give evidence in a way that allows for the witness to be identified visually; and

(j) any other relevant matter.

[11.8.3] **Contraindications** Specific factors militating against evidence by link may include where there may arise important issues of credit (*Edge Technology v Wang* [2000] FCA 1459 at [11]; *Australian Medical Imaging v Marconi Medical Systems* (2001) 53 NSWLR 1 at 5; [2001] NSWSC 651 at [27]; *Xia v Santah* [2003] NSWSC 807 at [6] *cf Tetra Pak v Musashi* [2000] FCA 1261 at [21] – [22]), where a large volume or complex documents will be deployed in court (*Australian Medical Imaging v Marconi Medical Systems* (2001) 53 NSWLR 1 at 5; [2005] NSWSC 651 at [27]) or generally long/complex matters: *Commissioner of Police v Luankon* [2003] VUCA 9; CAC 7 of 2003. See further r.1.4(2)(k).

(5) For evidence given by telephone:

(a) if practicable, a fax machine should be available at each end of the link; and

(b) the court must be satisfied, when the evidence is being given:

(i) of the identity of the witness; and

(ii) that the witness is giving evidence freely.

(6) The court may take into account a certificate by a magistrate, police officer or chief who was present when the witness gave telephone evidence that:

(a) the person was present when the witness gave the evidence; and

(b) the person knows the witness; and

(c) the witness seemed to give the evidence freely.

(8) The certificate must be in Form 19.

(9) For evidence given by video or another link showing the witness:

(a) the witness should sit at a plain table or desk, with only the required documents and exhibits in front of him or her; and

(b) the link should show a reasonable part of the room but still be close enough to enable the court to see the witness clearly and assess him or her; and

(c) no-one else should be in the room with the witness except a technical person to help with the link.

(10) The court may end the giving of evidence by link if the court considers:

(a) the quality of the link is unacceptable; or

(b) to continue would cause unfairness to a party.

(11) The court may give directions about giving evidence by link, including about:

(a) which party is to arrange and pay for the link; and

(b) when and where the evidence will be given by the witness and heard by the court; and

(c) the stage of the hearing when the evidence will be given.

(12) Evidence taken by link for the purpose of a proceeding is taken to be evidence given in court during the proceeding.

Giving evidence before trial

11.9 (1) A party may apply to the court for an order that a witness give evidence before trial.

[11.9.1] **Early commencement of trial** Nothing in this rule should be read as permitting the trial judge to commence the trial early by hearing a witness, unless all parties are present and agree: *Palaud v Commissioner of Police* [2009] VUCA 10; CAC 6 of 2009.

(2) The court may order that the witness give evidence if the court is satisfied that:

(a) the witness can give evidence that will be relevant to the person's case; and

[11.9.2] **What sworn statement should contain** The sworn statement in support of the application should state that the deponent is aware of the evidence proposed to be given by the witness and, if qualified, state the opinion that the evidence is relevant: *Smith v Smith* [1975] 1 NSWLR 725 at 731; 25 FLR 38 at 44; 5 ALR 444 at 451.

(b) the witness's evidence is admissible; and

(c) the witness will not be available to give evidence at the trial because:

(i) of the witness's state of health; or

(ii) the witness is leaving Vanuatu either permanently or for an extended period of time.

(3) The witness:

(a) must give the evidence to the court, in the presence of the lawyers for each party, if any; and

(b) may be cross-examined and re-examined.

(4) Evidence given under this rule has the same value as evidence given during a trial.

Evidence by children

11.10 (1) If a child is required to give evidence, the court must take whatever steps are necessary to enable the child to give evidence without intimidation, restraint or influence.

[11.10.1] **Time considerations** This rule confers a power and an obligation upon the court, which may act upon its own initiative. The parties should identify any issues likely to arise under this rule well before the hearing and should bring them to the attention of the court to obtain appropriate directions. The power will usually be exercised before the witness gives evidence though it may also be exercised during the course of evidence if appropriate circumstances present themselves: See generally *Question of Law Reserved (No 2 of 1997)* [1998] SASC 6563.

[11.10.2] **Meaning of "child"** See r.20.1 for the definition of "child". As to competency of child witnesses at common law see *R v Brazier* (1779) 1 Leach 199 at 200; 168 ER 202 at 202-3.

(2) In particular the court may:

(a) allow the child to give evidence screened from the rest of the court (but not from the judge); and

[11.10.3] **Purpose of rule** Child witnesses may be especially fearful of confronting certain people in court, even in civil proceedings. Experience in other jurisdictions suggests that children who give evidence in this way were less anxious and more effective. Indeed, in some jurisdictions this is the usual way for children to give evidence.

(b) sit in a place other than the court-room; and

[11.10.4] **Purpose of rule** The design of court building may intimidate child witnesses. Long periods waiting in the building, inappropriate waiting facilities and the crowding together of hostile parties and strangely costumed lawyers, sometimes even the media, can elevate a child's anxiety. Children may therefore be more effective witnesses if their evidence is heard elsewhere, in less formal surroundings.

(c) allow only the parties' lawyers to be present while the child gives evidence; and

[11.10.5] **Purpose of rule** The presence of members of the public in the courtroom may cause distress to child witnesses, particularly where personal or embarrassing evidence is to be given.

(d) appoint a person to be with the child while the child gives evidence; and

[11.10.6] **Identity and role of companion** So-called court companions may provide emotional support to the child. The court companion is often a parent, family member or trusted friend. In other jurisdictions there are also a range of specialist counsellors who may perform this task. It is suggested that it is not appropriate for a person who is also involved or a witness in the proceedings act as court companion. The court companion usually sits next to the child so as to confer support by their physical presence, but the companion may sometimes be required to sit elsewhere in the courtroom. All aspects of the function of this provision are within the discretion of the judge. It is not the function of the court companion to prepare the witness to give evidence, coach them or generally discuss their evidence prior to giving it. This activity runs the risk of contaminating the evidence and it is suggested that judges should specifically warn against such practices in advance.

(e) do anything else that may assist the child to give evidence.

[11.10.7] **Cross-examination** The language and formalities of the courtroom are highly confusing for children and this problem is especially acute in cross-examination. It is suggested that the court should be alert to this possibility and ensure that child understand the questions asked of them and are not harassed or intimidated by tone of voice, aggression, difficult language or other unfair or abusive treatment. Children may require frequent breaks during cross-examination.

Evidence by other vulnerable persons

11.11 If the court is satisfied that a witness may be unable to give evidence without intimidation, restraint or influence, the court may take any of the steps set out in rule 11.10 to ensure the witness is able to give evidence without intimidation, restraint or influence.

[11.11.1] **Time considerations** This rule confers a power and an obligation upon the court, which may act upon its own initiative. The parties should identify any issues likely to arise under this rule well before the hearing and should bring them to the attention of the court to obtain appropriate directions. The power will usually be exercised before the witness gives evidence though it may also be exercised during the course of evidence if appropriate circumstances present themselves: See generally *Question of Law Reserved (No 2 of 1997)* [1998] SASC 6563.

[11.11.2] **Meaning of "vulnerable persons"** There is no definition of "vulnerable persons". Presumably this includes anyone who is a competent witness for whom the giving of evidence is likely to be particularly traumatic, such as a victim of violence or sexual abuse. Other classes of potential "vulnerability" are more problematical. Perhaps the protection of this rule could extend to the elderly or the intellectually disabled, however the influence of cultural differences or other peculiar susceptibilities is uncertain.

Expert witnesses

11.12 (1) A party who intends to call a witness to give evidence as an expert must:

(a) tell every other party; and

(b) give them a copy of the witness's report.

[11.12.1] **Purpose of rule** The purpose of this rule is, clearly, to avoid surprise and to give each party the opportunity to consider the expert evidence and, if necessary, to answer with additional expert evidence.

[11.12.2] **Uncertainty** Paragraph (b) generates uncertainty. First, there is no underlying obligation for an expert witness to bring any particular "report" into existence other than by sworn statement under r.11.3. Second, if an expert witness did bring such a report into existence it is almost certainly protected by legal professional privilege until tendered – is this rule intended to be a derogation of that privilege? Third, what must be contained in such a "report"?

[11.12.3] **Validity of rule** To the extent that the rule purports to require that a privileged document be produced to other parties, its validity should not be assumed: See *Worrall v Reich* [1955] 1 QB 296 at 300; [1955] 2 WLR 338 at 341; [1955] 1 All ER 363 at 366; *Circosta & Ors v Lilly* (1967) 61 DLR 2d 12 at 15; *Causton v Mann Egerton (Johnsons) Ltd* [1974] 1 WLR 162 at 169; [1974] All ER 453 at 459.

(2) In the Magistrates Court, this must be done at least 21 days before the trial date, or if the report is a response to an existing report, within 14 days of the trial date or such other date approved by the court.

(3) In the Supreme Court, this must be done at Conference 1.

[11.12.4] **Timing issues** The timing of this requirement is likely to be difficult or impossible in most cases. For example, if a claimant gives notice to a defendant at Conference 1 of his intention to call an expert witness and then provides a copy of the same, how is a defendant to be expected simultaneously to provide answering expert evidence? There are also situations in which a claimant will be unable to comply with this time frame; such as when an expert's report depends upon the examination of some document or thing in the possession of the defendant and not yet available to be examined. It is suggested that the court should deal with issues of expert evidence whenever they arise in a manner that is fair to all parties and without regard to artificial and unrealistic schedules. Obviously, parties should draw the court's attention to the likelihood that expert evidence will be required at the earliest time.

(4) A party may only call one expert witness in a field unless the court orders otherwise.

Court-appointed experts

11.13 (1) The court may appoint a person as an expert witness if a question arises that needs an expert to decide it.

[11.13.1] **Inherent jurisdiction** There is also an inherent jurisdiction to appoint a court expert: *Badische Anilin v Levinstein* (1883) 24 Ch D 156 at 166-7; *Colls v Home & Colonial Stores* [1904] AC 179 at 192; [1904-7] All ER 5 at 14.

[11.13.2] **Applicable criteria** Appointment of a court expert is an encroachment on the adversarial system and it is suggested that it may not be appropriate in all cases, despite the admonitions in Part 1. Most lawyers have strong reservations about the use of court experts, usually because the parties themselves are better placed to know what kind of expert evidence is required and from which kind of expert. A court expert may be appropriate where this would involve a significant saving of costs: See further r.1.2(2)(c)(iii); *Newark v Civil & Civic* (1987) 75 ALR 350 at 351. There is, however, no good reason to suppose that a cost saving will always result from the appointment of a court expert as such an expert is likely to expend greater time in attendances. It would not be appropriate to appoint a court expert merely to assist one side obtain expert evidence (at the partial expense of another): *Gale v NSW Minister for Conservation* [2001] FCA 1652.

[11.13.3] **Whether contemporary test differs from earlier** There may be a wider role for court-appointed experts under the new *Rules* than in the past. In *Daniels v Walker* [2000] 1 WLR 1382 at 1387 Lord Woolf suggested that a joint expert should be a first step and then if a party required additional expert evidence, that could be permitted in the court's discretion. It is suggested that such an approach involves high costs to the parties and should be adopted with caution. Lord Woolf also acknowledged, in his final report (at 141), the difficulty where there are a number of "schools" of thought within a discipline. In such cases the court is deprived of the opportunity of hearing fully representative expert evidence and of seeing it tested in the adversarial method.

(2) The court may:

(a) direct the expert to inquire into the question and report back to the court within the time the court specifies; and

(b) give the expert instructions about the terms of reference and the report.

[11.13.4] **Use of report** Upon receipt of the report, the court is bound to consider it and may allow cross-examination of the author. The court is not obliged to accept the report and may accord it such weight as is it considers appropriate: *Non-Drip Measure v Strangers* [1942] RPC 1 at 24-5; *Trade Practices Commission v Arnotts (No 4)* (1989) 21 FCR 318; (1989) 89 ALR 131 at 135.

(3) The expert's costs are payable by the parties equally unless the court orders otherwise.

(4) If the court appoints an expert, a party may not call another person as an expert witness in that field unless the court orders otherwise.

Medical evidence

11.14 (1) In a claim for damages for personal injury, the defendant can request that the claimant be examined by a medical practitioner chosen by the defendant.

[11.14.1] **No power to require submission** There is no power at common law nor under statute law to require a person to submit to a medical examination against their will in these circumstances. Accordingly, the rule refers to a "request" which, if declined, leads to the consequences described in subr.(2).

[11.14.2] **Meaning of "examination"** There is no definition of "examination" which leads to doubt as to the extent of the same, especially as to whether an examination might involve penetration of the skin, etc. The authorities illustrate attempts to balance the rights of the parties against personal liberty, risk, etc. For a "narrow" approach see for example *W v W (No 4)* [1964] P 67 at 78; [1963] 2 All ER 841 at 845; [1963] 3 WLR 540 at 548 (blood test); *Pucci v Humes* (1970) 92 WN (NSW) 378 at 382 (injection of liquid into spinal column under general anaesthetic); *Aspinall v Sterling Mansell* [1981] 3 All ER 866 at 868 (patch testing). For a "wide" approach see for example *Prescott v Bulldog Tools* [1981] 3 All ER 869 at 875 (audiological tests); *Grant McKinnon v Commonwealth* [1998] FCA 1456 (risk of inhaling pollution to attend medical appointment in city) *Perpetual Trustees v Naso* (1999) 21 WAR 191 at 193, 196; [1999] WASCA 80 at [15] (tests, injections, psychiatric examinations); *Crofts v Queensland* [2001] QSC 220 (MRI scan under general anaesthetic).

(2) If the claimant does not attend and allow the examination without reasonable excuse, the court may:

(a) order the proceedings be stayed until the claimant does so; or

[11.14.3] **Inherent jurisdiction** Such a rule probably falls within the inherent jurisdiction to stay proceedings whenever just and reasonable: *Edmeades v Thames Board Mills* [1969] 2 QB 67 at 71-2; [1969] 2 All ER 127 at 129-30; [1969] 1 Lloyd's Rep 221 at 223**;** *Starr v National Coal Board* [1977] 1 All ER 243 at 248, 254, 256; [1977] 1 WLR 63 at 69, 75, 77.

(b) take the circumstances of the claimant's refusal into account when considering the claimant's evidence.

[11.14.4] **Interests to be balanced** In deciding which course to take, the court must balance the claimant's right to personal liberty against the defendant's right to defend against the claim: *Starr v National Coal Board* [1977] 1 All ER 243 at 249; [1977] 1 WLR 63 at 70; *Stace v Commonwealth* (1988) 49 SASR 492 at 495.

Summons to give evidence and produce documents

11.15 (1) The court may order that a summons be issued requiring a person to attend court to give evidence, or to produce documents.

[11.15.1] **History** Such a summons was formerly called a subpoena (literally "under penalty") and was either a subpoena *ad testificandum* (to give evidence) or a subpoena *duces tecum* (to produce documents). The power to issue subpoenas originally derived from the inherent jurisdiction. It is likely that a summons under this rule is equivalent in substance to the former subpoena: *BNP Paribas v Deloitte* [2003] EWHC 2874 at [6] (Comm); [2004] 1 Lloyd's Rep 233 at 234-5; *Tajik Aluminium v Hydro Aluminium* [2005] EWCA Civ 1218 at [19] – [25].

[11.15.2] **Applicable criteria** The authorities are not overly prescriptive about the criteria in which a summons will be issued, provided that a legitimate forensic purpose is served. The extent of assistance which the party seeking the summons is likely to derive is obviously relevant, as are case management considerations. An indiscriminately wide summons, seeking documents or evidence of doubtful relevance at great inconvenience or risk to a third party, may not readily attract the grant of leave: *Australian Gas Light Co v ACCC* [2003] ATPR 41-956 at [8].

[11.15.3] **Inherent jurisdiction to set aside** There is an inherent jurisdiction to set aside a summons upon application or on its own motion: *Raymond v Tapson* (1882) 22 Ch D 430 at 434-5; *Purnell Bros v Transport Engineers* (1984) 73 FLR 160 at 175; *Oakes v Kingsley Napley* [1999] EWCA Civ 1389; *Fried v NAB* [2000] FCA 911 at [18]; (2000) 175 ALR 194 at 198. A summons will be set aside if it appears to the court that it is irrelevant, speculative, fishing or oppressive: *Senior v Holdsworth* [1976] QB 23 at 35; [1975] 2 WLR 987 at 994; [1975] 2 All ER 1009 at 1016.

(3) The order may be made:

(a) at a conference; and

(b) at a party's request or on the court's initiative.

[11.15.4] **Application to be supported by evidence and draft** An application by a party should normally be supported by a sworn statement and draft summons. The applicaion should specify the relevant issues which justify the making of the order, the manner in which the party to be summoned may help and, if a summons to produce, the reason why the documents might be necessary.

(4) The summons must:

(a) give the full name of the witness; and

[11.15.5] **Proper recipient** Serious consideration ought to be given to the proper recipient - as to partnerships see *Lee v Angas* (1866) LR 2 Eq 59 at 63-4; *New Ashwick v IAMA Ltd (No1)* [2000] SASC 416 at [18]; as to unincorporated associations see *Rochfort v TPC* (1982) 153 CLR 134 at 140; 43 ALR 659 at 662; 57 ALJR 31 at 32; as to employees see *Eccles v Louisville Rwy* [1912] 1 KB 135 at 145-6, 148; as to companies see *Penn-Texas v Murat Anstalt (No 2)* [1964] 2 QB 647 at 663-4; [1964] 2 All ER 594 at 599; [1964] 3 WLR 131 at 140-1.

(b) if it is a summons to produce documents, clearly identify the documents; and

[11.15.6] **Extent of identification** Documents may be identified as a class if the class is sufficiently clear in all the circumstances: *Burchard v Macfarlane* [1891] 2 QB 241 at 247; [1891-4] All ER 137 at 141; *Lucas Industries v Hewitt* (1978) 45 FLR 174 at 192; (1978) 18 ALR 555 at 573; *Berkeley Administration v McClelland* [1990] FSR 381 at 382; [1990] 2 QB 407; [1990] 2 WLR 1021; [1990] 1 All ER 958; *Re Perpetual Trustee v Commissioner for ACT Revenue* (1993) 29 ALD 817 at 820-821. It should be borne in mind, however, that a summons is usually addressed to a layperson and so should contain a description of the documents or class of documents in plain language: *Southern Pacific Hotel Services v Southern Pacific Hotel Corp* [1984] 1 NSWLR 710 at 720. A summons which places too onerous a burden on the witness to decide which documents relate to issues between the parties is liable to be set aside as oppressive: *Finnie v Dalglish* [1982] 1 NSWLR 400 at 407; *Re Asbestos Cases* [1985] 1 WLR 331 at 337-8; [1985] 1 All ER 716 at 721; *Panayiotou v Sony* [1994] Ch 142 at 151; [1994] 2 WLR 241 at 248; [1994] 1 All ER 755 at 762-3; *Chapman v Luminis* [2001] FCA 1580 at [44]; *Tajik Aluminium v Hydro Aluminium* [2005] EWCA Civ 1218 at [25] - [27].

(c) state when and where the witness is to attend court; and

[11.15.7] **Return of summons before trial** Consideration ought to be given to whether to make the summons to produce documents returnable at the trial or before. Although it is usually desirable that a person should produce documents in advance of the trial, it is usually undesirable that the person should give oral evidence in advance of it: *Charman v Charman* [2005] EWCA Civ 1606 at [24]; [2006] 1 WLR 1053. At least one object of early return of a summons is to appraise the parties of the strengths and weaknesses of their case at an early stage, hence, no narrow view as to the legitimacy of early return ought to be taken: see *Khanna v Lovell White Durrant* [1995] 1 WLR 121 at 123.

(d) be in Form 20.

Service of summons

11.16 A summons under rule 11.15 must be served personally, unless the court orders otherwise.

Travel expenses

11.17 (1) At the time of service, the person must be given enough money to meet the reasonable costs of travelling to comply with the order.

[11.17.1] **Meaning of "costs of travelling"** Often called "conduct money". It is uncertain whether the cost of "travelling" may, as in other jurisdictions, also include the reasonable costs of accommodation, meals, etc where the witness is summoned sufficiently far from home.

[11.17.2] **No allowance otherwise** There is no provision in the rules for the payment of expenses associated with attending to give evidence otherwise, even of an expert nature. There is said to be a duty (at least upon citizens) to aid in the administration of justice and so there can be no recovery for loss attributable to a summons outside that provided by the rules: *Collins v Godefroy* (1831) B & Ad 950 at 952; 109 ER 1040 at 1040; *Megna v Marshall* [2004] NSWSC 191 at [7]; (2004) 60 NSWLR 664 at 665. As to costs of compliance with a summons to produce documents see r.11.18(3).

[11.17.3] **Consequences of failure to pay** The failure to pay travel expenses may cause much difficulty but should not be a ground for ignoring the summons: *Pyramid v Farrow Finance* (1995) 1 VR 464. If travel expenses are not tendered at the time of service, the witness should immediately draw attention to that failure and the party issuing the summons would be well advised to tender the anticipated expenses without delay or at least to give an appropriate undertaking.

(2) However, if the summons is not served personally, it is sufficient if the person is reimbursed the reasonable costs of travelling to comply with the order when the person attends court in answer to the summons.

(3) A person who gives evidence without being summoned is entitled to be reimbursed his or her reasonable costs of travelling to give the evidence as if the person had been summoned.

Producing documents or objects

11.18 (1) A person summoned to produce documents may do so by giving the documents to the court office at the place stated in the summons.

[11.18.1] **Alternative procedure** The traditional procedure was to call on the summons in open court and for the person summoned to produce the documents, if there were no objections or applications to set aside the summons. A production of documents and objects in this way is an admission of their existence in the possession of the person summoned and that they match the description in the summons: *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 502; 118 ALR 392 at 407. If there is an objection by the person summoned (which may be advanced personally or by counsel) then the grounds would be stated and the court should arrange to deal with the issues. If a person responding to the subpoena stated that there are no documents to produce, it was within the court's discretion to determine whether the documents exist and whether they are in the possession of that person. Some examination of the person by the issuing party may be allowed for that purpose: *Trade Practices Commission v Arnotts (No2)* (1989) 21 FCR 306 at 314. It may still be necessary to utilise the traditional procedure in cases where the production might be opposed or otherwise controversial, as there is no other way for the issues to be raised and ventilated where the documents are merely handed in.

(2) The court officer must give the person a receipt for the documents.

(3) If a person who is summoned to produce documents is not a party, the person is entitled to be paid or reimbursed the reasonable costs of producing the documents.

[11.18.2] **Purpose and scope of rule** This subrule is clearly intended to compensate a person summoned to produce documents for the expense or loss reasonably incurred in complying: *Fuelxpress v LM Ericsson* (1987) 75 ALR 284 at 285. The subrule is otherwise silent as to the types of costs which may be recovered. Examples might include: The costs (at usual charge-out rates) of staff required to search, collate, copy, etc the documents (*Deposit & Investment v Peat Marwick Mitchell* (1996) 39 NSWLR 267 at 289, 291-2); The costs of preserving the confidentiality of any documents (*Charlick v Australian National Rwys* (1997) 149 ALR 647 at 649-51; *Hadid v Lenfest* (1996) 65 FCR 350 at 353; (1996) 144 ALR 73 at 76**);** Legal costs associated with checking the validity of a widely drawn summons (*Deposit & Investment v Peat Marwick Mitchell* (1996) 39 NSWLR 267 at 277, 289, 292).

Failure to comply with summons

11.19 (1) Failure to attend court as required by a summons to attend and give evidence, or produce documents, without a lawful excuse is contempt of court.

(2) A person who fails to attend court as required by a summons to attend and give evidence, or produce documents, without a lawful excuse may be dealt with for contempt of court.

[11.19.1] **Excuses** Such lawful excuses may include the failure to tender travel expenses (*Frenchman v Frenchman* [1997] EWCA Civ 1304; *Donnelly v Archer* [2003] FCA 197 at [15]) or the failure to allow reasonable time for compliance (*Bidald v Miles* [2005] NSWSC 977 at [6]). An unacceptably careless attitude to inquiries (esp. by a lawyer) which led to documents failing to be produced probably would not afford an excuse: *Ditfort v Calcraft* (1989) 98 FLR 158 at 172.

[11.19.2] **Setting aside summons** Prudent witnesses should apply to set aside the summons or attend as required and make objection at that time. Objections based on privilege can be raised after the witness is sworn. A person who is summoned and whose application to set aside the summons is refused may, even though not a party to the substantive proceedings, bring an appeal: *Senior v Holdsworth; Ex parte Independent Television News* [1976] 2 QB 23 at 32; [1975] 2 All ER 1009 at 1015.

Evidence taken in Vanuatu for use in proceedings outside Vanuatu

[11.20.1] **Hague Convention and validity of rule** The scheme of this rule borrows from the scheme of the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (18 March 1970) to which Vanuatu is **not** a party. Neither France nor Britain extended the Convention to the New Hebrides. Absent any applicable convention, letters rogatory might be used on the basis of comity. There is, however, a real question as to whether there is a sufficient statutory basis for this rule and therefore its validity should not be assumed.

11.20 (1) Evidence taken in Vanuatu for use in a proceeding outside Vanuatu can only be taken in accordance with this rule.

(2) If the court receives a letter of request from a court in another country asking that evidence be taken in Vanuatu for use in proceedings in the other country, the evidence must be taken in accordance with this rule.

(2) The letter of request must have with it a sworn statement by an officer of the court of the other country verifying the letter of request.

(3) The court is to give effect to the letter by:

(a) issuing a summons to the person named in the letter to appear and give evidence or produce documents or both; and

(b) hearing the witness's evidence orally; and

(c) making a written record of the evidence; and

(d) sending this to the court in the requesting country.

(4) The written record must be signed by the judge before whom the evidence is given and sealed.

(5) A person who gives evidence under this rule is to be treated as if the person is giving evidence in proceedings in the Supreme Court.

[11.20.2] **Example** See generally *First American v Zayed* [1998] 4 All ER 439; [1999] 1 WLR 1154.

Evidence taken outside Vanuatu for use in proceedings in Vanuatu

[11.21.1] See [11.20.1].

11.21 (1) A party to a proceeding may apply to have evidence in the proceeding taken from a witness outside Vanuatu.

(2) The application must have with it a sworn statement that:

(a) the person's evidence is relevant and admissible; and

(b) the evidence cannot be obtained from a person in Vanuatu.

(3) If the court is satisfied that:

(a) the person's evidence is relevant and admissible; and

(b) the evidence cannot be obtained from a person in Vanuatu; and

(c) there is an arrangement between Vanuatu and the country concerned for the taking of evidence in that country for use in civil proceedings in Vanuatu;

the court must issue a letter of request addressed to a court in the other country asking that the court take the witness's evidence.

[11.21.2] **Meaning and nature of "letter of request"** The expression "letter of request" is used in the Hague Evidence Convention, to which Vanuatu is not a party. This expression has become interchangeable with "letter rogatory" which, absent any applicable convention, is perhaps better evocative of the exact provenance of such a letter which may need to be forwarded through diplomatic channels.

(4) The written record must be signed by the judge before whom the evidence is given and sealed.

(5) A person who gives evidence under this rule is to be treated as if the person is giving evidence in proceedings in the Supreme Court.

TRIAL

Conduct of trial

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

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

(3) At the trial:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trial in open court

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

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

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

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

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

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

Adjournment

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

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

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

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

Preliminary issues

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

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

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

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

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

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

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

Court may hear evidence early

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

Giving of evidence

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

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

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

Referee

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

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

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

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

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

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

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

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

(d) inspect objects and places; and

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

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

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

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

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

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

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

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

Hearing of question of law only

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

Failure to attend

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Re-opening a proceeding

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

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

Judgment

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

[12.11.1] See further r.13.2.

JUDGMENT

Judgment

13.1 (1) The court gives judgment in a proceeding by:

(a) setting out the relevant evidence; and

[13.1.1] **How and what evidence to be set out** There is no rule that requires every item of evidence to be set out, only that evidence upon which the case turns so that the parties can follow the process of reasoning and see that conflicts in the evidence have been understood: *Soulemezis v Dudley* (1987) 10 NSWLR 247 at 259; *Thatcher v Bryant* [1998] EWCA Civ 948; *Maynard v Dabinett* [1999] NSWCA 295 at [1], [16]; *Bailey v Warren* [2006] EWCA Civ 51 at [90]. Provided that references to evidence are clear, it is said to be unnecessary to detail, or even summarise, the evidence in question: *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [21]; [2002] 1 WLR 2409 at 2417; [2002] 3 All ER 385 at 394. The obligation in Vanuatu may be very much less stringent than elsewhere, as indicated by *Commissioner of Police v Garae* [2009] VUCA 9; CAC 34 of 2008 where the Court of Appeal upheld findings of liability in which very little of the evidence upon which the court determined liability was set out.

(b) stating its findings of the facts as found; and

[13.1.2] **How and what findings to state** There is no rule that requires a finding to be made on every factual matter, only those essential to the outcome: *Robertson v Luganville Municipal Council* [2001] VUCA 14; CAC 9 of 2001; *Soulemezis v Dudley* (1987) 10 NSWLR 247 at 271, 280; *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [21]; [2002] 1 WLR 2409 at 2417-8 [2002] 3 All ER 385 at 394; *Merer v Fisher* [2003] EWCA Civ 747 at [21].

[13.1.3] **Factual inferences** Factual Inferences derived from circumstantial evidence should be clearly stated and the evidence on which they are based clearly set out: *Metropolitan Properties v Lannon* [1969] 1 QB 577 at 599; [1968] 3 WLR 694 at 707; cf *Commissioner of Police v Garae* [2009] VUCA 9; CAC 34 of 2008.

(c) stating its findings of law and the application of these to the facts; and

[13.1.4] **How and what findings to state** There is no requirement to reach findings of law on every issue; only upon those necessary to the final conclusion: *Eagil Trust v Piggott-Brown* [1985] 3 All ER 119 at 122; *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [19]; [2002] 1 WLR 2409 at 2417; [2002] 3 All ER 385 at 393; *Fletcher Construction v Lines MacFarlane & Marshall (No 2)* (2002) 6 VR 1 at 44; [2002] VSCA 189 at [164]. The court may decide the case in a particular way which does not require the determination of a particular submission. In such cases, the submission is not required to be mentioned or may be mentioned only in passing: *Fletcher Construction v Lines MacFarlane & Marshall (No 2)* (2002) 6 VR 1 at 43; [2002] VSCA 189 at [157]. *Digi-Tech v Brand* [2004] NSWCA 58 at [286] – [290]; *Telecom Vanuatu v Minister for Infrastructure* [2007] VUCA 8; CAC 32 of 2006.

(d) giving the reasons for those decisions; and

[13.1.5] **Purpose** The duty to give reasons is a function of due process, and therefore, of justice: *Picchi v Public Prosecutor* [1996] VUCA 9; CrimAC 4 of 1996; *Flannery v Halifax* [2000] 1 WLR 377 at 381; [2000] 1 All ER 373 at 377; *Public Prosecutor v Atis Willie* [2004] VUCA 4; CrimAC 2 of 2004; *Melsul v Bule* [2005] VUCA 8; CAC 3 of 2004. Parties must be able to know exactly why they have won or lost: *VBTC v Malere* [2008] VUCA 2; CAC 3 of 2008.

[13.1.6] **Extent of duty** There is no requirement that reasons be especially long or elaborate, however a recitation of facts and/or a summary of applicable legal principles followed by an unexplained outcome will not suffice: *Melsul v Bule* [2005] VUCA 8; CAC 3 of 2004; *VBTC v Malere* [2008] VUCA 2; CAC 3 of 2008 (recitation of

calculations in pleading). Judges are expected to set out the process of reasoning in an informative, systematic and logical manner: *Watt v Thomas* [1947] AC 484 at 487; [1947] 1 All ER 582 at 586; *Knight v Clifton* [1971] Ch 700 at 721; [1971] 2 All ER 378 at 392-3; [1971] 2 WLR 564 at 580; *Sharman v Evans* (1977) 138 CLR 563 at 565, 572; 13 ALR 57 at 59, 65; *Eagil Trust v Piggott-Brown* [1985] 3 All ER 119 at 122; *Soulemezis v Dudley* (1987) 10 NSWLR 247 at 249; *Charleston v Smith* [1999] WASCA 261 at [36], [61] – [62]; *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [16]; [2002] 1 WLR 2409 at 2417-8; [2002] 3 All ER 385 at 393; *Digi-Tech v Brand* [2004] NSWCA 58 at [286] – [290]. See generally Sir Harry Gibbs, "Judgment Writing" (1993) 67 ALJ 494. Reasons which are unintelligible are the equivalent of no reasons at all: *Save Britain's Heritage v No.1 Poultry* [1991] 1 WLR 153 at 166; [1991] 2 All ER 10 at 23. The low watermark of the duty to give reasons must surely be *Commissioner of Police v Garae* [2009] VUCA 9 at [12], [14]; CAC 34 of 2008 in which the Court of Appeal held, very charitably, that it was "clear" that the trial judge had accepted the evidence for the claimant in circumstances where that evidence was not set out, nor the reasons for preferring one set of evidence over the other.

[13.1.7] **Credit assessments** Findings of fact which depend upon credit assessments of witnesses can and should be reasoned: *Government Insurance Office v Evans* (1990) 21 NSWLR 564 at 577. It may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon: *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [19]; [2002] 1 WLR 2409 at 2417-8; [2002] 3 All ER 385 at 393; *Neel v Blake* [2004] VUCA 6; CAC 33 of 2003. Interesting examples are provided by *Pio v Worwor* [2009] VUSC 25 at [5]; CC 189 of 2005 (where Clapham J referred to the "quick movements of the eyes and demeanour" of the witness) and *Solomon v Turquoise* [2008] VUSC 64 at [43]-[44]; CC 163 of 2006 & 29 of 2007.

[13.1.8] **Expert evidence** The judge should provide an explanation as to why the evidence of one expert is accepted and the other is rejected. It may be that the evidence of one or the other accorded more satisfactorily with facts as found or it may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation, it should be made clear: *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [20]; [2002] 1 WLR 2409 at 2417-8; [2002] 3 All ER 385 at 393-4.

[13.1.9] **Final and interlocutory judgment** The rule does not differentiate between the requirements of final judgments and interlocutory judgments. Conventionally, certain kinds of judgment are seldom accompanied by extensive reasons (eg. costs, adjournments, etc). It may be that the requirements of this rule are flexible according to the nature and importance of the interlocutory decision: *Housing Commission v Tatmar Pastoral* [1983] 3 NSWLR 378 at 386; *Eagil Trust v Piggott-Brown* [1985] 3 All ER 119 at 122; *Apps v Pilet* (1987) 11 NSWLR 350 at 352; *Colonial Mutual v Donnelly* 82 FCR 418 at 432-3; 154 ALR 417 at 430-1; *Flannery v Halifax* [2000] 1 WLR 377 at 382; [2000] 1 All ER 373 at 378; *Roy Morgan Research Centre v Commissioner of State Revenue* [2001] HCA 49 at [33]; (2001) 207 CLR 72; 75 ALJR 1342; 181 ALR 307; *LL & PL & SDP* [2005] FamCA 715 at [35].

[13.1.10] **Revision of reasons** Judges may revise reasons (especially those delivered ex tempore) to correct errors or matters of expression and ensure that the reasons reflect the judge's intention: *Bromley v Bromley* [1965] P 111 at 115; [1964] 3 WLR 666 at 669; [1964] 3 All ER 226 at 228. It is not possible, however, to make alterations of substance to published reasons: *Bar-Mordecai v Rotman* [2000] NSWCA 123 at [194]; *Livo v Wuan* [2005] VUCA 6; CAC 12 of 2005.

[13.1.11] **Formatting considerations** Judgments should be produced in a format which enables the determination to be clearly understood and analysed, with the reasons set out in manageable paragraphs and subparagraphs, with cross-headings where appropriate: *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342 at [4]. Numbered paragraphs, first used widely by Tuohy J seem to be increasingly used and ought to be promoted to facilitate ease of reference.

(e) making orders as a consequence of those decisions.

(2) The judgment must set out the entitlement of a party to payment of money or to any other form of final relief.

[13.1.12] **Reasons for remedies** The obligations elsewhere in this rule (to set out evidence and give reasons, etc) apply as much in relation to the remedies as to liability: *Commissioner of Police v Garae* [2009] VUCA 9 at [21], [22], [25]; CAC 34 of 2008.

[13.1.13] **Specification of time for compliance** If any part of the judgment requires an act to be done, the judgment should state the time within which it is to be done: *Gilbert v Endean* (1878) 9 Ch D 259 at 266.

(3) The court may give judgment and make an order at any stage of a proceeding.

[13.1.14] **Pre-determination** Nothing in this rule should be read as permitting the trial judge to pre-determination of any question before hearing relevant evidence: *Palaud v Commissioner of Police* [2009] VUCA 10; CAC 6 of 2009.

(4) A copy of the judgment must be given to the parties and made available to the public.

Time of giving judgment

13.2 (1) In the Supreme Court, a judge may:

(a) give judgment as soon as the trial ends; or

(b) give his or her decision, and give judgment at a later time; or

[13.2.1] **Duty to give judgment promptly after decision** There has been said to be a common law duty to give judgment very soon after a decision has been pronounced: *Palmer v Clarke* (1989) 19 NSWLR 158 at 173.

[13.2.2] **Moment from which judgment effective** The decision is effective from the moment it is pronounced: *Holtby v Hodgson* (1889) 24 QBD 103 at 107.

[13.2.3] **Inherent jurisdiction to revoke** Until an order has been perfected, the court retains control over its judgment and its decision, and can permit argument to be reopened. Accordingly, it may modify or even reverse a decision to which it has already come, and which it has communicated to the litigants. This will be exceptional: *Bastow v Bagley* [1961] 3 All ER 1101 at 1103; [1961] 1 WLR 1494 at 1497; *Dietz v Lennig* [1969] 1 AC 170 at 184; [1967] 2 All ER 282 at 286; [1967] 3 WLR 165 at 172; *Re Barrell Enterprises* [1972] 3 All ER 631 at 636; [1973] 1 WLR 19 at 24; *Compagnie Noga v Abacha* [2001] EWHC (QB) B1 at [14]-[17] (survival of jurisdiction under overriding objective), [41]-[42]. A court cannot usually review its own decision outside the appeal process: *Livo v Wuan* [2005] VUCA 6; CAC 12 of 2005; *Berry v Soalo* [2007] VUSC 10; CC 71 of 2000. For an exception in which r.1.7 was invoked to reopen a perfected costs order made on the basis of only pro-forma submissions see *William v William* [2005] VUCA 25; CAC 21 of 2005.

[13.2.4] **Revision of reasons between judgment and decision** Although possible, it is not good practice to enlarge (or vary) reasons between judgment and decision to a large extent: *Swanson v Public Prosecutor* [1998] VUCA 9; CrimAC 6 & 11 of 1997 (60 page oral judgment followed by 174 page written judgment).

(c) give his or her decision and judgment at a later time.

(2) The judgment must be in writing or be written down as soon as practicable.

[13.2.5] **Duty to give judgment promptly** Long delays in delivering judgment can cause concern and suspicion amongst litigants who lose, while those who win may feel they have been deprived of justice for too long. Long delays should not occur without compelling reasons and, if there are such, it would be prudent for a judge to refer to them briefly: *Rolled Steel v British Steel* [1986] Ch 246 at 310; [1985] 2 WLR 908 at 960; [1985] 3 All ER 52 at 96 (8 months); *Goose v Wilson Sandford* [1998] EWCA Civ 245 at [112] – [113] (20 months); *Cobham v Frett* [2002] UKPC 49 at [34]; [2001] 1 WLR 1775 at 1783 (12 months). Authority in England and Australia would consider 10

months an excessive period of reservation, even for the most complex trials or appeals: *Aon Risk Services v ANU* [2009] HCA 27 at [152]. In that case a delay of 10 months on an application for an amendment of the claim was described as "alien to every axiom of modern litigation." It was also explained that such delays were particularly inappropriate in commercial litigation and that the whole purpose of case management is undermined if judgments, particularly interlocutory judgments, are not prompt. See also *Rexam Australia v Optimum Metallising* [2002] NSWSC 916 at [29].As to possible constitutional implications of judicial delay, see *Boodhoo v AG of Trinidad and Tobago* [2004] UKPC 17 at [12], [14]; [2004] 1 WLR 1689.

(3) In the Magistrates Court, the magistrate must as far as practicable give judgment at the end of the trial and fix the amount of costs at the same time.

Filing or order

13.3 (1) If a judge or a magistrate writes the terms of an order on a file or on a document in a file, then until the order is filed the writing is sufficient proof that the order was made and of its date and terms.

(2) In subrule (1), "filed" means written in a separate document, signed by the judge or magistrate and sealed.

Suspension of enforcement

13.4 Filing an appeal against a judgment does not affect the enforcement of the judgment unless:

(a) the party appealing applies for a suspension; and

(b) the court grants a suspension.

[13.4.1] **Relevant considerations** Enforcement may be suspended pending an appeal. This is not automatic. The court will need to be satisfied that there are appropriate circumstances and that the appeal is not designed to cause delay: *Croney v Nand* [1999] 2 Qd R 342 at 348-9. Appropriate circumstances might include: Where enforcement could ruin the enforcement debtor (*Linotype-Hell Finance v Baker* [1993] 1 WLR 321 at 323; [1992] 4 All ER 887 at 888), the possibility that money paid over will not be able to be repaid if the appeal is successful (*The Annot Lyle* [1886] 11 P 114 at 116), enforcement would render the appeal nugatory (*Polini v Gray* [1879] 12 Ch D 438 at 445, 446; *Commissioner of Taxation v Myer (No1)* (1986) 160 CLR 220 at 223; 64 ALR 325 at 327; 60 ALJR 300 at 301; 86 ATC 4222 at 4224). See further r.26, *CoAR*. For suspension of enforcement of money orders see r.14.10. For suspension of enforcement of non-money orders see r.14.40.

Enforcement of foreign judgments

13.5 (1) A person who wishes to enforce a judgment of a foreign court in Vanuatu (a "foreign judgment") may file a claim in the Supreme Court under Part 2.

[13.5.1] **Validity of rule** The Foreign Judgments (reciprocal enforcement) Ordinance 1963 does not apply to Vanuatu: *In re the Foreign Judgments (Reciprocal Enforcement) Ordinance* [1997] VUSC 2; CC 146 of 1996. In the absence of any other (or subsequent) legislative basis for the enforcement of foreign judgments it is difficult to see how the rules could be a sufficient basis for the creation of any rights under a foreign judgment. In England, for example, s.31 of the *Civil Jurisdiction Act* 1982 provides such a basis. There does not appear to be any Vanuatu counterpart.

Accordingly, the validity of this rule should not be assumed, a point which does not seem to have been raised in subsequent cases.

[13.5.2] **Limitation period** The claim is in the nature of a contract action and attracts the same limitation period: *Bank of Montreal v Prescott* [2000] VUSC 53; CC 53 of 1999.

(2) The claim must set out the following:

(a) the foreign judgment is for a fixed amount; and

(b) the foreign court had jurisdiction over the person against whom the judgment was made; and

(c) the foreign judgment is final and conclusive; and

(d) the amount payable under the judgment that has not been paid; and

(e) regarding an appeal:

(i) the time for an appeal has ended and no appeal has been lodged; or

(ii) an appeal was lodged but it was unsuccessful.

(3) The claim must have with it a sworn statement that:

[13.5.3] **Evidence Act 1851** Compare with the provisions of s.7 of the *Evidence Act* 1851 (UK) which applied to Vanuatu immediately prior to independence.

(a) supports the claim; and

(b) verifies the foreign judgment.

(4) The claim must also have with it a sworn statement by a lawyer practising in the foreign country that:

[13.5.4] **Evidence Act** 1851 Compare with the provisions of s.7 of the *Evidence Act* 1851 (UK) which applied to Vanuatu immediately prior to independence.

(a) sets out his or her qualifications to give evidence on the law of the foreign jurisdiction; and

(b) confirms the foreign judgment is valid, final and conclusive.

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ENFORCEMENT OF JUDGMENTS AND ORDERS

Division 1 – General

Definitions for this Part

14.1 (1) In this Part:

"enforcement conference" means a conference referred to under rule 14.3 or 14.37;

"enforcement creditor" means a person entitled to enforce a money order;

"enforcement debtor" means a person required to pay money under a money order;

"enforcement officer" means the sheriff or a police officer;

"enforcement order" means an order made under rule 14.3, 14.4, 14.7 or 14.37;

"exempt property" means property that cannot be divided among a bankrupt's creditors under the bankruptcy laws of Vanuatu as in force from time to time;

"judgment debt" means the amount payable under a money order and the costs of gaining the order;

"money order" means an order of the court for the payment of an amount of money;

[14.1.1] **Whether order for costs a "money order"** Presumably an order for the payment of specified costs under Part 15 is a money order. Indeed there is authority to suggest that a party in whose favour a costs order has been made and who has delivered a bill of costs which has not yet been determined is entitled to an order for the payment of money: *Wilkie v Wilkie (No2)* [1905] VLR 104 at 106; *Tubby Trout v Sailbay (No 2)* (1996) 63 FCR 530 at 533.

"non-money order" means an order of the court other than a money order.

(2) In the application of this Part to the Magistrates Court, a reference to an enforcement conference is a reference to an enforcement hearing.

Enforcement of judgments

14.2 (1) Judgments are enforced by enforcement orders and enforcement warrants as set out in this Part.

[14.2.1] **Enforcement a matter of procedure** Enforcement is, generally speaking, a matter of procedure and, therefore, a proper matter for rules of court: *WT Lamb v Rider* [1948] 2 KB 331 at 337; [1948] 2 All ER 402 at 407. On the other hand, a number of the procedures in this part purport to affect third party rights and, to that extent, their validity should not be assumed absent any specific enabling provision in legislation.

[14.2.2] **Difference between enforcement and other orders** Enforcement is designed to enforce judgments, not to obtain additional or merely ancillary orders: *Iaiofa v Natapei* [2010] VUSC 16; CC 11 of 2010.

(2) An enforcement order must be in Form 21.

(3) An enforcement warrant to enforce a money order must be in Form 22.

(4) An enforcement warrant to enforce a non-money order must be in Form 23.

[14.2.3] **Separate warrants for money/non-money components** It appears that separate warrants might be required in order to enforce a judgment which contains both money and non-money components.

Division 2 – Enforcement of judgments to pay money (money orders)

Procedure after judgment for claimant – money orders

14.3 (1) Immediately after giving a judgment that includes a money order, the court must ask the enforcement debtor how he or she proposes to pay the money and must either:

[14.3.1] **General observations** It is unfortunate that the court seldom complies with this obligation, a failure which inevitably leads to a wasteful later application for an enforcement order, rather than one being made immediately under paragraph (a). Judges have also been observed to be highly resistant to requests to immediately convert their awards (especially for fixed costs) into enforcement orders. No reasons have ever been given for this disinclination.

(a) make an enforcement order for the payment of the judgment debt; or

(b) fix a date for an enforcement conference to examine the enforcement debtor about how he or she proposes to pay the amount of the judgment debt.

[14.3.2] **Costs assessment at enforcement conference** It is common (and it is certainly convenient) for the enforcement conference and an assessment of costs to occur simultaneously: See for example the orders in *Dinh v Kalpoi* [2005] VUSC 10; CC 19 of 2003; *Silas v A-G* [2003] VUSC 51; CC 68 of 2002.

[14.3.3] **General observations** See further r.14.5(2) as to fixing the date for an enforcement conference. In practice, enforcement conferences are seldom convened unless a party requests one.

(2) When the court fixes the date for the enforcement conference, the court must tell the enforcement debtor to:

(a) come to court on the date fixed for the conference; and

(b) bring with him or her sufficient documents to enable him or her to give a fair and accurate picture of his or her financial circumstances.

(3) If the enforcement debtor is not present, the court must:

(a) fix a date for an enforcement conference; and

(b) issue a summons in Form 24 against the enforcement debtor requiring the enforcement debtor to:

(i) come to court on the date fixed for the enforcement conference; and

(ii) bring with him or her sufficient documents to enable him or her to give a fair and accurate picture of his or her financial circumstances.

Agreement about payment

14.4 (1) If the parties agree about paying the judgment debt, the court may make an enforcement order in the terms of the agreement.

(2) The order may:

(a) fix a date by which the enforcement debtor will pay the judgment debt; or

(b) if the parties have agreed on payment by instalments, set out the dates and amounts of the instalments; or

(c) make another order about payment.

[14.4.1] **Consequences of agreement about payment** This is a useful provision which confers the status of an enforcement order upon any compact between the parties. This means that if a party defaults the other party can proceed directly to seek a warrant without further ado.

Enforcement conference

14.5 (1) The purpose of the enforcement conference is to find out how the enforcement debtor proposes to pay the amount of the judgment debt.

[14.5.1] See further [14.7.2].

(2) The date fixed for the enforcement conference must be:

(a) within 28 days after the date of the money order; or

(b) if it is not possible to fix a date within that period, as soon as practicable after that period.

[14.5.2] **General observations** In practice, enforcement conferences are seldom convened unless a party requests one. There appears to be no time limit within which a party might seek an enforcement conference.

(3) The enforcement debtor must attend the conference.

[14.5.3] **Corporate debtors** It is not clear who must attend if the enforcement debtor is not a natural person.

(4) The court may issue a summons to another person to attend the conference and give evidence about the enforcement debtor's affairs.

[14.5.4] **Scope of power** Presumably this power could be used to require officers (and even former officers) of a company or other entity to be examined. It is uncertain to what extent this subrule could or should be used to compel the examination of third parties otherwise. that the usual rule is that where the enforcement debtor is a natural person, he or she is the only person who may be examined: *Irwell v Eden* (1887) 18 QBD 588 at 589; *Hood Barrs v Heriot* [1896] 2 QB 338 at 342. See further r.14.7(2).

Enforcement conference warrant

14.6 If the enforcement debtor does not appear at the conference in answer to a requirement under rule 14.2 or a summons, the court may issue a warrant for his or her arrest if the court is satisfied that the enforcement debtor:

(a) was present when the court fixed the date for the enforcement conference, or was personally served with, or otherwise received, the summons; and

(b) did not have sufficient cause for not attending the conference.

Examination of enforcement conference debtor

14.7 (1) At the enforcement conference, the enforcement creditor may ask the enforcement debtor about his or her financial affairs and how he or she proposes to pay the judgment debt.

[14.7.1] **Nature of examination** The examination is likely to take the form of a cross-examination and may be very severe. The enforcement debtor will be required to answer all relevant questions and provide details which might enable the enforcement creditor to recover the judgment debt: *Republic of Costa Rica v Strousberg* (1880) 16 Ch D 8 at 12. The examination may extend to overseas assets: *Interpool v Galani* [1988] QB 738 at 742; [1987] 2 All ER 981 at 984; [1987] 3 WLR 1042 at 1045.

[14.7.2] **Ambit of examination** The ambit of the examination is likely to be fairly wide, but is not without limits. It is not proper to seek information which may be useful in an action between the enforcement creditor and third parties: *Watkins v Ross* (1893) 68 LT 423 at 425. In *McCormack v NAB* (1992) 106 ALR 647 at 649 it was said that the examination is concerned only with the manner in which the enforcement debtor might satisfy the debt, not with other methods by which the debt might be satisfied.

[14.7.3] **Legal representation** It is uncertain whether legal representation of the enforcement debtor at an examination would be permitted: See for example *Jensen & Harwood v Registrar of the Magistrate's Court* [1977] 1 NZLR 165 at 168.

[14.7.4] **Further examination** A further examination may perhaps be ordered in special circumstances, subject to considerations of oppression: *Sturges v Countess of Warwick* (1914) 30 TLR 112; *Brown v Stafford* [1944] 1 KB 193 at 198, 199; [1944] 1 All ER 172 at 176.

(2) The enforcement creditor may also examine any other person summonsed to attend the conference.

[14.7.3] See further r.14.5(4).

(3) The court must then:

(a) if the parties have agreed on payment, make an enforcement order in the terms of the agreement; or

(b) make an enforcement order about how the enforcement debtor will pay; or

(c) issue an enforcement warrant; or

(d) make another order about the payment.

Amount recoverable on enforcement

14.8 (1) The costs of enforcing a money order are recoverable as part of the order.

(2) Interest on the amount of the order is recoverable as part of the order.

[14.8.1] **Post-judgment interest** Simple interest may be recovered on judgment debts under s.17, 1 & 2 Vic c.110, *The Judgment Act*, 1838. This Act applies under art.95(2) of the *Constitution*: *Naylor v Foundas* [2004] VUCA 26; CAC 8 of 2004. As to pre-judgment interest see [9.2.5]-[9.2.7]. The rate is, apparently, the same: *Commissioner of Police v Garae* [2009] VUCA 9 at [31]; CAC 34 of 2008.

Enforcement period

14.9 (1) An enforcement creditor may enforce an enforcement order at any time within 6 years after the date of the order.

[14.9.1] **Scope of time limit** This limitation is expressed to operate only in relation to *enforcing* an order. As there appears to be no limitation upon *obtaining* an order, and as r.14.7(3) does not appear to import any discretion in the making of an enforcement order, and as the court seldom makes an enforcement order within the time specified by r.14.5(2), it follows that the true limitation period on the enforcement of judgments may be much longer, subject of course to s.3(4), *Limitation* [Cap 212].

(2) An enforcement creditor must get the court's leave to enforce an enforcement order if:

(a) it is more than 6 years since the enforcement order was made; or

(b) there has been a change in the enforcement creditor or enforcement debtor, by assignment, death or otherwise.

(2) The court may grant leave if it is satisfied:

(a) that the amount is still owing; and

(b) if more than 6 years has passed, about the reason for the delay; and

[14.9.2] **Nature of reason for delay** Note that this rule does not, in terms, require that the court be satisfied that there was some *good* reason for the delay – only that the court be satisfied what the reason was. It is suggested that a purposive interpretation should apply to require the party to satisfy the court of some good reason for the delay.

(c) if there has been a change, that the change has happened; and

(d) that the enforcement creditor is entitled to enforce the order; and

(e) that the enforcement debtor is liable to pay the money.

Suspension of enforcement

14.10(1) An enforcement debtor may apply to the court for an order suspending the enforcement of an enforcement order.

(2) The application must be:

(a) supported by a sworn statement; and

(b) be filed and served on the enforcement creditor at least 7 working days before the application is to be heard.

(3) The court may:

(a) suspend the enforcement of all or part of the order because facts have arisen or been discovered since the order was made or for other reasons; and

[14.10.1] **Fresh evidence** This may enable the court to consider matters which would have prevented the original order being made: *London Building Society v De Baer* [1969] 1 Ch 321 at 334; [1968] 2 WLR 465 at 474; [1968] 1 All ER 372 at 379.

[14.10.2] **Discretion** There is a broad discretion to suspend enforcement for such period (see for example *Marine & General Mutual Life Assurance Society v Feltwell Drainage Board* [1945] KB 394 at 398) and on such terms (eg. as to repayments) as is just. The well-established general rule, however, is that the court should not deprive a person of the fruits of victory: *The Annot Lyle* [1886] 11 P 114 at 116. The circumstances said to justify a suspension and the balance of convenience will be closely examined. Delay is likely to be an important consideration: *Hehei v ANZ* [2004] VUCA 7; CAC 35 of 2003.

[14.10.3] **Partial suspension** A partial suspension may be appropriate where, for example, there is a cross-demand for a sum less than the judgment: See for example *Re Sgambellone* (1994) 53 FCR 275 at 282; (1994) 126 ALR 71 at 78.

[14.10.4] **Suspension on terms** A suspension may be granted upon terms. Examples include payment of part of the judgment (*Doyle v White City Stadium Ltd* [1935] 1 KB 110), the provision of security (*Rosengreens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198), the repayment of costs paid (*Attorney-General v Emerson* (1889) 24 QBD 56).

[14.10.5] **Suspension after execution** A suspension may be granted even if the warrant has been executed: *Hehei v ANZ* [2004] VUCA 7; CAC 35 of 2003.

(b) make other orders it considers appropriate, including another enforcement order.

Division 3 – Enforcement warrants generally (money orders)

Enforcement warrant

14.11(1) An enforcement creditor may apply for the issue of an enforcement warrant if the enforcement debtor does not comply with the enforcement order.

(2) However, if an enforcement warrant is in force to enforce payment under a money order, no other enforcement warrant may be issued for the money order.

[14.11.1] **No division** An enforcement creditor cannot usually divide the judgment and proceed on several instances of enforcement for separate amounts: *Forster v Baker* [1910] 2 KB 636 at 641-2. See further r.14.11(2).

Procedure to apply for Enforcement Warrant

14.12(1) The enforcement creditor must file:

[14.12.1] **Service** The rule does not mention service and it seems that the application may be *ex parte*: *ANZ v Gaua* [2003] VUSC 95; CC 2 of 2001.

(a) an application in Form 25; and

(b) a copy of the enforcement order; and

(c) 2 copies of the form of warrant; and

(d) a sworn statement made not earlier than 2 business days before the application and setting out:

(i) the date of the enforcement order; and

(ii) the amount payable under the order; and

(iii) the date and amount of any payment made under the order; and

(iv) the costs of previous enforcement; and

(v) the interest due at the date of the statement; and

(vi) any other details needed to work out the amount payable under the enforcement order at the date of the statement, and how the amount is worked out; and

(vii) the daily amount of future interest; and

(viii) any other information needed for the warrant.

(2) The court may require the enforcement debtor and enforcement creditor to attend a conference if the court is of the view that a hearing is required.

Form of warrant

14.13(1) An enforcement warrant must state:

[14.13.1] **Strict adherence required** Despite r.18.9, deficiencies of form in matters of coercive enforcement are more likely to be fatal: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(a) the enforcement debtor's name; and

(b) the date the warrant ends; and

(c) the amount recoverable under the warrant, including:

(i) costs of the enforcement; and

(ii) the amount of interest; and

(d) anything else these rules require; or

(2) If the warrant is for seizure and sale of property, the court must give the warrant to an enforcement officer.

[14.13.2] It is difficult to see what this subrule might add to r.14.16(1), (2).

[14.13.3] **Choice of enforcement officer** This choice is for the court, however the Sheriff should usually be appointed, particularly where real property is concerned, unless there were circumstances suggesting that a particular police officer should be so appointed: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

[14.13.4] **Enforcement warrant given under subsection (3)** A warrant purportedly issued to the enforcement creditor for seizure and sale of property will not be valid: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(3) In any other case, the court must give the warrant to the enforcement creditor.

Enforcement throughout Vanuatu

14.14(1) An enforcement warrant is enforceable throughout Vanuatu.

(2) An enforcement warrant issued in one district of the Magistrates Courts is enforceable in any other district.

(3) However, before enforcing the warrant in another district, the person enforcing it must take the warrant to the office of the Magistrate's Court in that district for sealing by that office.

Deceased enforcement debtor

14.15 If the enforcement debtor has died, only the assets of his or her estate can be the subject of the warrant.

Division 4 –Enforcement warrant for seizure and sale of property

Property that may be seized under enforcement warrant

14.16(1) The court may issue an enforcement warrant authorising an enforcement officer to seize and sell all real and personal property (other than exempt property) in which an enforcement debtor has a legal or beneficial interest.

(2) The court must give the warrant to an enforcement officer to be enforced.

[14.16.1] It is difficult to see what this subrulre might add to r.14.13(2).

[14.16.2] **Choice of enforcement officer** This choice is for the court, however the Sheriff should usually be appointed, particularly where real property is concerned, unless there were circumstances suggesting that a particular police officer should be so appointed: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

[14.16.3] **Enforcement warrant given under subsection (3)** A warrant purportedly issued to the enforcement creditor for seizure and sale of property will not be valid: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(3) The enforcement officer may seize the property listed in the warrant and must store it safely until it is sold.

[14.16.4] **When property may be seized** The enforcement officer may seize property at any time of the day or night (*Brown v Glenn* (1851) 16 QB 254 at 257; 117 ER 876 at 877) and from any place (*Quinlan v Hammersmith* (1988) 153 JP 180; [1989] RA 43). There is uncertainty as to the enforcement officer's rights of entry upon private premises which, according to general principle, must be strictly in accordance with authority: *Great Central Rwy Co v Bates* [1921] 3 KB 578 at 582. The common law rule was that an enforcement officer has a right of entry but not a right to force entry: *Curlewis v Laurie* [1848] 12 QB 640 at 646; 116 ER 1009 at 1012. There is much older case law of doubtful continued application on the subject of rights of entry in different circumstances and it is difficult to be satisfied of what exactly is lawful. There may be a trend against all but the most regular means of entry: See for example *Southam v Smout* [1964] 1 QB 308 at 329; [1963] 3 All ER 104 at 113; [1963] 3 WLR 606 at 619.

[14.16.5] **Extent of search for property** In finding items suitable for seizure, an enforcement officer ought to use "reasonable diligence" in searching: *Mullet v Challis* [1851] 16 QB 239 at 242-3; 117 ER 870 at 871. It may be necessary to make repeat visits if insufficient property is able to be seized on a first visit or if more property is later discovered.

[14.16.6] **How much should be seized** The enforcement officer should seize only enough to cover the debt: *Pitcher v King* [1844] 5 QBD 758 at 766-7; 114 ER 1436 at 1439.

[14.16.7] **Enforcement officer may receive payment and return property** The enforcement officer can receive the enforcement debt and if the enforcement debtor tenders the whole sum before goods are sold, the enforcement officer should return the seized property: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008;*Taylor v Baker* (1677) 3 Keb 788 at 788; 89 ER 338 at 338; *R v Bird* (1679) 2 Show 87 at 87; 89 ER 811 at 811; *Brun v Hutchinson* (1844) 2 D&L 43; 13 LJQB 244. A failure to do so could amount to a conversion: *West v Nibbs* (1847) 4 CB 172 at 187; 136 ER 470 at 476. This is because neither an enforcement officer nor an enforcement creditor has any interest in the property of the enforcement debtor – only an authority to deal with it: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(4) If there are several enforcement warrants against the same enforcement debtor, the enforcement officer must deal with them in the order they were issued.

Order of seizing and selling property

14.17 The enforcement officer must seize and sell property:

(a) in the order that appears to the enforcement officer to be best for promptly enforcing the warrant without undue expense; and

[14.17.1] **Whose expense to be considered** It is not clear whether the rule is directed to the expense of the debtor or the enforcement officer/creditor.

(b) subject to paragraph (a), in the order that appears to the enforcement officer to be best for minimising hardship to the enforcement debtor and his or her family.

Sale by public auction

14.18(1) Unless the court orders otherwise, the enforcement officer must sell the seized property by public auction.

[14.18.1] **Observations on property in hands of enforcement officer** The purpose of seizure is to sell the property seized, which the enforcement officer must promptly prepare to do. If the enforcement debtor is unwilling or unable to sign any necessary documentation, the Court may authorise the enforcement officer (or some other person) to do so on behalf of the enforcement debtor: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.The enforcement officer does not become the owner of the seized property: *Marchand v BHP* [2000] VUSC 49; CC 12 of 2000. Neither does the enforcement officer have any interest in the property (as would a mortgagee) – merely an authority to deal with it: *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008. The goods cannot be handed over to the enforcement creditor and the court has no power to make such an order: *VCMB v Dornic* [2010] VUCA 4 at [14]-[16]; CAC 2 of 2010. Both the judgment creditor and the judgment debtor may, however, buy seized property at the sale: *Re Rogers* (1874) 9 Ch App 432 at 444, 445. The enforcement officer cannot retain the goods and pay the enforcement creditor with his own money: *Waller v Weedale* (1604) Noy 107 at 107; 74 ER 1072 at 1072.

[14.18.2] **Once sufficient funds are realised** Once the sale has realised sufficient funds to discharge the whole of the debt and associated costs (plus perhaps a small margin for error), the sale should probably cease, despite the mandatory words of the rule: *Batchelor v Vyse* (1834) 1 M & Rob 331 at 333; 174 ER 113 at 114; *Gawler v Chaplin* (1848) 2 Exch 503 at 507; 154 ER 590 at 592.

(2) The auction must be held:

(a) as soon as is practicable; and

[14.18.2] **Liability for delay** The enforcement officer could become liable in damages for an unreasonable delay: *Aireton v Davis* (1833) 9 Bing 740 at 745; 131 ER 792 at 794.

(b) at the place, and in the circumstances, most likely to get the best price for the property.

[14.18.3] **Reserve price** There is probably no requirement to set a reserve price: *Bealy v Sampson* (1688) 2 Vent 93 at 95; 86 ER 328 at 329. Other unduly restrictive conditions should not be imposed: *Hawkins v Walround* (1876) 1 CPD 280; 24 WR 824.

[14.18.4] **Advice regarding circumstances of sale** The circumstances most likely to obtain the best price might be a subject on which the enforcement officer should take advice in the case of specialist property: *American Express v Hurley* [1985] 3 All ER 564 at 574.

(3) The enforcement officer must do everything practicable to ensure the property is sold for the best price obtainable.

[14.18.5] **Highest bidder not necessarily the best price** The best price is not necessarily that offered by the highest bidder where this is well under value: *Keightley v Birch* (1814) 3 Camp 520 at 523-4; *Neumann v Bakeaway* [1983] 1 WLR 1016 at 1023. It may be necessary for sale to be attempted several times before a proper decision can be made to accept a bid well under the known value of the property. An enforcement officer may become liable in damages for negligence in the conduct of a sale: *Bales v Wingfield* (1843) 4 A&E 580; 114 ER 1016n.

Advertising sale

14.19(1) The enforcement officer must arrange for an advertisement of the auction:

(a) to be published in a newspaper circulating in the area, if there is one, or to be broadcast on the radio; and

(b) to be available at the nearest court office and police station.

[14.19.1] **Rule establishes minimum advertising requirements** These should requirements of this rule should be read as minimum requirements and a more extensive advertising campaign may be required to discharge the duty to obtain the best possible price: See for example *American Express v Hurley* [1985] 3 All ER 564 at 574 (advertising in specialist press).

(2) Unless the property is perishable, the advertisement must be published between 2 and 4 weeks before the auction.

Postponing sale

14.20(1) The court may order that the sale be postponed to a date the court specifies, on application by the enforcement creditor or the enforcement officer.

(2) The postponement extends the enforcement warrant if it would otherwise end before that date.

Accounting for proceeds of sale

14.21(1) As soon as practicable after the sale, the enforcement officer must pay the proceeds of the sale to the court.

(2) The court must:

(a) first, pay the enforcement officer the costs of enforcing the warrant; and

(b) then pay any balance, up to the amount of the enforcement warrant, to the enforcement creditor; and

(c) then pay any balance remaining to the enforcement debtor.

[14.21.1] **Method of sale** The provisions of this rule apply regardless of the method of sale: *VCMB v Dornic* [2010] VUCA 4 at [16]; CAC 2 of 2010.

Division 5 –Enforcement warrants for redirection of debts and earnings

Debts that may be redirected

14.22(1) A court may issue an enforcement warrant requiring a third person to pay to an enforcement creditor a debt that is:

[14.22.1] **History** These provisions are elsewhere called “attachment” or “garnishee” proceedings (from the Norman French, a “garnishee” referring to someone obliged to provide a creditor with money to pay off a debt: *Choice v Jeromnimon* [1981] QB 149 at 154; [1981] 1 All ER 225 at 226).

[14.22.2] **Absence of clear statutory basis** The jurisdictional basis for making such an order usually lies in statute and the effectiveness of this rule should not be assumed absent a clear statutory mandate. The effect of the warrant would seem to be to create a legal relationship, whether of debtor/creditor or *sui generis* between the judgment creditor and third parties; see also r.14.23(2).

[14.22.3] **Meaning of "debts"** The rule can be invoked only in relation to "debts" which term probably does not include wages/salary accruing (*Hall v Pritchett* (1877) 3 QBD 215 at 217) or income from trust funds (*Webb v Stenton* (1883) 11 QBD 518 at 524-5, 528; [1881-5] All ER 312 at 315, 316) but see r.14.28 in relation to earnings.

(a) certain and payable; and

(b) payable to the enforcement debtor; and

(c) specified in the warrant.

(2) In deciding whether to issue the warrant, the court must consider whether, if the debt is paid to the enforcement creditor:

(a) the enforcement debtor has adequate means to pay:

(i) the necessary living expenses of the enforcement debtor and his or her family; and

(ii) any other known liabilities; and

[14.22.4] **Preference** The warrant may not be issued if it will have the effect of preferring one creditor over another: *Prichard v Westminster Bank* [1969] 1 WLR 547 at 549; [1969] 1 All ER 999 at 1001.

(b) unreasonable hardship would be imposed on the enforcement debtor ; and

[14.22.5] **Example** An example might be where the judgment debtor might be forced to pay the debt a second time in a foreign jurisdiction: *Martin v Nadel* [1906] 2 KB 26 at 30.

(c) it is appropriate to issue the warrant, having regard to the nature and the amount of the debt.

Service of warrant

14.23(1) The warrant does not take effect until it is served on the third person.

(2) When the warrant is served, the third person must pay the debt to the enforcement creditor, in accordance with the warrant.

Other debtor disputes liability

14.24 If the third person claims the debt is not payable to the enforcement debtor, the third person may apply to the court for directions.

[14.24.1] **Applicant not to question validity of the warrant** This rule should not permit the other debtor to dispute the validity, etc of the warrant, only the debt to which it

relates.. The other debtor could, presumably, raise any matter which might have been raised against a claim by the enforcement debtor, such as set-off: See for example *Tapp v Jones* (1875) LR 10 QB 591 at 593.

Regular redirection of debts

14.25(1) If:

(a) the enforcement debtor has an account with a financial institution; and

[14.25.1] **Joint accounts** The rule makes no provision for joint accounts. At common law a joint account was not attachable to satisfy a debt of one joint account-holder: *Hirschorn v Evans* [1938] 2 KB 801 at 813, 815; [1938] 3 All ER 491 at 496, 498.

(b) another person ("the depositor") regularly pays money into the account:

the court may issue an enforcement warrant directing the institution to make regular payments to the enforcement creditor of amounts equal to the amounts paid into the account by the depositor.

(2) As well as the matters required to be in a warrant by rule 14.13, an enforcement warrant issued under this rule must state:

(a) the institution's name; and

(b) details of the enforcement debtor's account; and

(c) the amount to be paid; and

(d) the enforcement creditor's name and address; and

[14.25.2] **Importance of accuracy** The above details must be stated accurately: *Koch v Mineral Ore* (1910) 54 SJ 600. The general strictness applying to matters of enforcement was well illustrated by the Court of Appeal in *Financière du Vanuatu Ltd v Morin* [2008] VUCA 4; CAC 5 of 2008.

(e) how the amount is to be paid to the enforcement creditor.

Service of warrant for regular redirection

14.26(1) An enforcement warrant for the regular redirection of debts must be served personally on the enforcement debtor and the financial institution.

(2) The enforcement warrant does not come into effect until 7 days after service on the financial institution.

Payment under warrant

14.27(1) The financial institution must:

(a) deduct the amount specified in the warrant within 2 days after each regular deposit is made; and

(b) pay the amount as specified in the warrant; and

(2) The enforcement debtor:

(a) must ensure sufficient funds are in the account to cover the deduction; and

(b) must not encourage the depositor to stop making the deposits, or do anything else to hinder the regular redirections.

(3) The enforcement debtor must tell the enforcement creditor if:

(a) the depositor fails to make a deposit; or

(b) the enforcement debtor changes his or her account.

Enforcement warrant for redirection of earnings

14.28(1) A court may issue an enforcement warrant requiring particular earnings of the enforcement debtor to be paid by the enforcement debtor's employer to the enforcement creditor.

(2) When it issues the warrant, the court must also fix:

(a) the amount of each deduction; and

(b) the minimum amount to be available to the employee as take-home pay.

(3) In deciding whether to issue the warrant and fixing the amount of each deduction and the amount of take-home pay, the court must consider whether:

(a) the enforcement debtor is employed by the employer; and

(b) the enforcement debtor has adequate means to pay:

(i) the necessary living expenses of the enforcement debtor and his or her family; and

(i) any other known liabilities; and

(c) unreasonable hardship would be imposed on the enforcement debtor.

(4) In deciding whether to issue the warrant and fixing the amount of each deduction and the amount of take-home pay, the court

must consider whether:

(a) the enforcement debtor's name; and

(b) the name of the employer; and

(c) the total amount to be deducted under the warrant; and

(d) the amount to be deducted each pay day; and

(e) the minimum amount to be available to the employee as take-home pay; and

(f) the name and address of the enforcement creditor, and how the amount is to be paid to the creditor.

Service of warrant for redirection of earnings

14.29(1) The enforcement warrant must be served personally on the enforcement debtor and on his or her employer.

(2) The enforcement creditor must also serve on the employer a notice in Form 26 telling the employer of the effect of the order and what the employer must do.

Payment under warrant for redirection of earnings

14.30(1) On each pay day while the enforcement creditor is employed by the employer, the employer must:

(a) deduct the amount specified in the warrant from the enforcement debtor's earnings (unless the amount remaining to be paid is less); and

(b) pay the amount to the person specified in the warrant; and

(c) give the enforcement debtor a notice giving details of the deduction.

(2) In spite of subrule (1), if the amount to be deducted would leave the employee with less than the take-home pay fixed by the court, the employer must deduct a lesser amount that will leave the employee with the take-home pay the court fixed.

(3) A deduction made under a warrant satisfies, to the extent of the deduction, the employer's obligation to pay the enforcement debtor's wages.

If person is not enforcement debtor's employer

14.31 If a person served with a warrant for the redirection of an

enforcement debtor's earnings is not, or stops being, the debtor's employer, the person must notify the court as soon as practicable.

Setting aside an enforcement warrant for the regular redirection of debts or earnings

14.32(1) The enforcement creditor or enforcement debtor may apply for an enforcement warrant for the redirection of debts or earnings to be set aside, suspended or varied.

(2) The order setting aside, suspending or varying the warrant must be served on:

(a) the enforcement creditor, unless he or she is the applicant; and

(b) the enforcement debtor, unless he or she is the applicant; and

(c) the debtor, the institution or the enforcement debtor's employer, as the case requires.

Division 6 –Other enforcement warrants for money orders

Enforcement warrants for charging orders

14.33 The Supreme Court may issue an enforcement warrant charging all or part of the enforcement debtor's legal or equitable interest in any of the following property:

[14.33.1] **Absence of clear statutory basis** The jurisdictional basis for making such an order usually lies in statute and the effectiveness of this rule should not be assumed absent a clear statutory mandate.

(a) the enforcement debtor; and

(b) each other person who has an interest in the property; and

(c) the person who issued or administers the property; and

(d) for partnership property, each of the partners.

Service of enforcement warrant charging property

14.34 To have effect on a person, the warrant must be served personally on:

(a) the enforcement debtor; and

(b) each other person who has an interest in the property; and

(c) the person who issued or administers the property; and

(d) for partnership property, each of the partners.

Effect of warrant

14.35(1) An enforcement warrant charging property entitles the enforcement creditor to the same remedies as the enforcement creditor would have had if the charge over the property had been made by the enforcement debtor in favour of the enforcement creditor.

(2) However, the enforcement creditor must not do anything to enforce the remedies until 3 months after the latest service under rule 14.34.

(3) After being served with the warrant, the enforcement debtor must not sell, transfer or otherwise deal with the property.

(4) The court may set aside or restrain a sale, transfer or other dealing in contravention of subrule (3), unless this would prejudice the rights or interests of a genuine purchaser without notice.

(5) After being served with the warrant, the person who issued or administers the property must not sell, transfer or otherwise deal with the property.

Appointment of receivers

14.36(1) The Supreme Court may issue an enforcement warrant appointing a receiver.

[14.36.1] **Absence of clear statutory basis** The jurisdictional basis for making such an order usually lies in statute and the effectiveness of this rule should not be assumed absent a clear statutory mandate. The power to appoint a receiver to a company in certain circumstances is contained in the *Companies Act* [Cap 191].

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

(a) the amount of the enforcement debt; and

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

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

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

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

(5) As well as the material required by rule 14.13, the enforcement warrant must:

(a) specify the receiver's duties; and

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

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

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

(e) contain anything else the court requires.

(6) While the receiver is appointed, his or her powers operate to the exclusion of the enforcement debtor's powers.

Division 7 – Enforcement of non-money orders

Procedure after judgment for claimant – non-money orders

14.37(1) Immediately after giving a judgment that includes a non-money order, the court must ask the person against whom the order is made how he or she proposes to comply with the order and must either:

[14.37.1] See [14.3.1].

(a) make an enforcement order; or

(b) fix a date for an enforcement conference to examine the person about how he or she proposes to comply with the non-money order.

(2) When the court fixes the date for the enforcement conference, the court must tell the person to:

(a) come to court on the date fixed for the conference; and

(b) bring with him or her sufficient information to enable him or her to tell the court how he or she proposes to comply with the order.

(3) If the person is not present, the court must:

(a) fix a date for an enforcement conference; and

(b) issue a summons in Form 27 against the person requiring the person to:

(i) come to court on the date fixed for the enforcement conference; and

(ii) bring with him or her sufficient information to enable him or her to tell the court how he or she proposes to comply with the order.

Agreement about compliance

14.38 If the parties agree about how the person required to comply with the order proposes to do so, the court may make an enforcement order in the terms of the agreement.

Possession of customary land

14.39 The court must not make an enforcement order for the possession of customary land except after hearing a claim under rule 16.25.

Suspension of enforcement

14.40(1) A person against whom an enforcement order is made may apply to the court for an order suspending the enforcement of the order.

[14.40.1] **By whom application may be made** Only the person against whom the order is made may apply to have it suspended: *Panketo v Natuman* [2005] VUSC 131; CC45 of 2002.

(2) The application must be:

(a) supported by a sworn statement; and

(b) be filed and served on the person in whose favour the order is made at least 7 working days before the application is to be heard.

(3) The court may:

[14.40.2] See further annotations to r.14.10(3).

(a) suspend the enforcement of all or part of the order because facts have arisen or been discovered since the order was made or for other reasons; and

(b) make other orders it considers appropriate, including another enforcement order.

Enforcement throughout Vanuatu

14.41(1) An enforcement warrant is enforceable throughout Vanuatu.

(2) An enforcement warrant issued in one district of the Magistrates Court is enforceable in any other district.

(3) However, before enforcing the warrant in another district, the

person enforcing it must take the warrant to the office of the Magistrate's Court in the second district for sealing by that office.

Deceased enforcement debtor

14.42 If the enforcement debtor has died, only the assets of his or her estate can be the subject of a warrant.

Issue and service of enforcement warrant

14.43(1) A person applying for an enforcement warrant to enforce a non-money order must file:

(a) an application that has with it 2 copies of the warrant; and

(b) a sworn statement stating that the person against whom the order was made has not complied with the order, and in what way he or she has not complied.

(2) Unless the court orders otherwise, the warrant must be issued without a hearing.

(3) The court must give the warrant to an enforcement officer to be enforced.

(4) If there are several enforcement warrants under different non-money orders, the enforcement officer must deal with them in the order in which they were issued.

Form of warrant

14.44 An enforcement warrant for a non-money order must state:

(a) the name of the person who must comply with the order; and

(b) the date, within 1 year of the date of the warrant, that the warrant ends; and

(c) what the warrant authorises; and

(d) any other details these rules require.

Return of enforcement warrant

14.45 If the enforcement officer:

(a) enforces the warrant; or

(b) is unable after doing all that is practicable to enforce the warrant, the enforcement officer must:

(c) write on the warrant what has been done; and

(d) file a copy of the endorsed warrant in the court; and

(e) give a copy to the person who obtained the warrant.

Enforcement warrant for possession of land

14.46(1) A court may issue an enforcement warrant for possession of land.

(2) The warrant authorises an enforcement officer to enter on the land described in the warrant and deliver possession of the land to the person named in the warrant as being entitled to possession of the land.

(3) The warrant must:

(a) be served personally on the person against whom the order was made, and on anyone else who seems to be in possession of the land; and

(b) be displayed prominently at the entrance to the land.

(4) The warrant cannot be enforced until 7 days after the display and the latest service.

Enforcement warrant for delivery of goods

14.47(1) A court may issue an enforcement warrant for the delivery of goods if:

(a) the order for the delivery of the goods does not give the person against whom the order is made the option of keeping the goods and paying the assessed value of the goods; or

(b) the order does give the person that option but the person does not choose to pay for the goods.

(2) The warrant authorises an enforcement officer to seize the goods and give them to the person who is entitled to them under the order.

(3) If the order gives the person the option for keeping the goods and paying the assessed value of the goods and the person chooses to do that, the order may be enforced in the same way as a money order.

Order to do or not do an act

14.48(1) This rule applies to an order if:

(a) it is a non-money order; and

(b) it requires a person to do an act within a specified time; and

(c) the person does not do the act within the time.

(2) This rule also applies to an order that requires a person not to do an act and the person does not comply with the order.

(3) The order may be enforced in one or more of the following ways:

(a) by punishing the person for contempt;

(b) seizing the person's property;

(c) if the person is a body corporate, punishing an officer for contempt or seizing the officer's property.

(4) The court may also enforce an order to do an act by:

(a) appointing another person to do the act; and

(b) ordering the person required to do the act to pay the costs and expenses caused by not doing the act.

(5) The costs and expenses may be recovered under an enforcement warrant for a money order.

Division 8 – Claim by third party

Notice of Claim

14.49(1) A person (the "third party") who claims ownership of goods or money seized under an enforcement warrant must notify the sheriff in writing of the claim.

(2) The notice may be given to the sheriff personally or by filing it in an office of the court.

(3) The sheriff must not sell or otherwise dispose of the goods or money for 7 days after being given the notice.

Application by third party

14.50(1) The third party must file an application within 7 days of giving

notice to the sheriff.

(2) The application must:

(a) describe the goods or money; and

(b) state where they were when they were seized; and

(c) state why the third party claims the goods or money; and

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

(3) The application and sworn statement must be served on the person on whose behalf the enforcement warrant was issued.

(4) The court may require the third party to give security for the costs of the proceeding.

(5) An enforcement debtor may not make an application under this Division.

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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.

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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JUDICIAL REVIEW

Application of Part 17

17.1 This Part applies only to the Supreme Court

[17.1.1] **Judicial review only in Supreme Court** See generally *Enock v David* [2003] VUCA 19; CAC 25 of 2003. Magistrates should beware claims which seek judicial review, in substance if not in form.

Definitions for Part 17

17.2 In this Part:

"decision" means a decision, an action or a failure to act in relation to the exercise of a public function or a non-public function;

[17.2.1] **Status of intermediate decisions** Questions may arise as to whether intermediate decisions are reviewable: See generally *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11; 64 ALJR 462. See further [17.2.5] as to "public" functions. In *Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005 what might be described as an intermediate decision was held not to be a proper subject for review and also raised the possibility that an applicant might lack the necessary standing required by r.17.8(3)(b) on the basis that an intermediate decision does not have the effect of *directly* affecting the person's interests. On the other hand, in *Japhet v Mata* [2010] VUSC 17; CC 187 of 2007 at [11]-[17] the delay of registration of an instrument under the *Land Leases Act* pending investigation was held to be a "decision" within the meaning of the rule. See further [17.8.3].

"decision-maker" means a person who made a decision;

"declaration" means an order declaring an enactment to be of no effect;

[17.2.2] **Scope of remedy** This is a narrower remedy than a declaration in equity which is not mentioned in rr.17.4 or 17.9(1)(a) and which may not be intended to be available, unlike in other Commonwealth jurisdictions: *Barnard & Ors v National Dock Labour Board & Ors* [1953] 2 QB 18 at 41; [1953] 1 All ER 1113 at 1119; [1953] 2 WLR 995 at 1009. As to the position under the former *Rules* see *Nelson v A-G* [1998] VUSC 58; CC 17 of 1995. The precise terms of Part 17 were not considered in any detail in *Enock v David* [2003] VUCA 19; CAC 25 of 2003 yet the Court of Appeal proceeded on the assumption that declarations of the rights of the parties more generally would be available in judicial review applications, stating that the rule "recognises that where a review of the decision of another body is sought, whether it is a body with public functions or body or decision-maker with non-public functions, the likely remedy to be granted will be a declaration about the rights of the parties". Likewise in *Port Vila Town Island Council of Chiefs v Tahi* [2008] VUSC 21; CC 160 0f 2007 Tuohy J, without considering the issue, granted a declaration going beyond this definition.

"enactment" means an Act of Parliament or subsidiary legislation, orders or by-laws made by a person empowered by an Act to do so;

[17.2.3] **Difficulty generated by definition** This definition is perhaps unfortunate - if an enactment is *ultra vires* a power contained in an Act it would seem a proper subject for review, however the definition apparently excludes such an enactment with the absurd result that neither r.17.4(1)(a) nor r.17.9(1)(a) is activated.

"judicial review" means a review of the lawfulness of an enactment or a decision;

[17.2.4] **Nature of judicial review** It must be emphasised that judicial review is limited by legal error. Judicial review is not an appeal on the merits of a decision. Judicial review is a supervisory jurisdiction but does not permit the court to usurp the function of the decision-maker by making a substantive decision of its own: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143-4, 154; 1982 1 WLR 1155 at 1160-1, 1173; *Lawson v Housing NZ* [1997] 2 NZLR 474 at 486; *Apisai v Simon* [2002] VUCA 42; CAC 17 of 2002; *Vanuatu Maritime Authority v Athy* [2006] VUCA 12; CAC 27 of 2006. Unfortunately, there are several examples where the Supreme Court has engaged in thinly disguised merits review and the Court of Appeal has been unmoved: See for example *Isom v PSC* [2009] VUSC 130; CC 216 of 2005, upheld on appeal *PSC v Isom* [2010] VUCA 9; CAC 23 of 2009.

"mandatory order" (formerly called a writ of mandamus) means an order that a person do something;

"non-public function" means a function whose exercise can infringe proprietary or contractual rights or jeopardise a person's status or livelihood;

[17.2.5] **Public and non-public judicial review** The availability of judicial review for "non-public functions" may be an enlargement of the common law of judicial review to which extent the rules are not effective: *Everett v Griffiths* [1924] 1 KB 941 at 947-8; *Cyclamen v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [44]. That a Minister was acting for the Government and carrying out governmental functions does not automatically confer upon a decision a public law quality: *R v Department for Constitutional Affairs* [2006] EWHC 727 (Admin); *Cyclamen Ltd v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [42]. Not every decision of Government is amenable to judicial review: *Taurakoto v Batic* [1993] VUSC 3; [1980-94] Van LR 620; *R v National Assembly for Wales* [2006] EWHC 2167 (Admin); *Cyclamen Ltd v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [32].

"prohibiting order" (formerly called a writ of prohibition) means an order that a person not do something;

"quashing order" (formerly called a writ of certiorari) means an order that the decision of a decision-maker is quashed;

Application of the rest of these Rules to judicial review

17.3 The rest of these Rules apply to a claim for judicial review subject to the rules in this Part.

Claim for judicial review

17.4 (1) A person claiming judicial review may file a claim claiming:

E *CPR* r54.3(1)(a)

(a) a declaration about an enactment; or

[17.4.1] **Limited declaratory power** See further [17.2.2]. It is suggested that implied limitation against seeking declarations other than about enactments does not reflect the common law as to which see further [17.4.2]

E *CPR* r52.2(a), (b), (c)

(b) a mandatory order, a prohibiting order or a quashing order about a decision.

[17.4.2] **Mandamus** Despite the modern architecture of this Part, the law of judicial review is unreformed in Vanuatu. Many other jurisdictions have codified the common law to ameliorate some of the many ancient limitations and technicalities. It must be borne in mind that the provisions of this Part are not, to the extent that they may purport to modify the substantive common law, necessarily effective.

[17.4.3] **No mixing of proceedings** This rule suggests that a claim for judicial review is limited to the remedies described in paragraphs (a) and (b) with the result that claims for remedies of any other kind must be commenced in a separate general claim under Part 2. See further [2.2.2], [17.4.1]. This seems to be tacitly accepted so far.

(2) The claim must name as defendant:

(a) for a declaration, the Attorney General; and

[17.4.4] **When Attorney General to be named** It is necessary to name the Attorney General *only* when seeking a declaration about an enactment: *Edmanley v Police Service Commission* [2005] VUSC 159; CC 218 of 2005. Unfortunately, many practitioners name the Attorney General as a matter of course.

(b) for an order about a decision, the person who made or should have made the decision.

(3) 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

[17.4.5] **Importance of sworn statement** The importance of compliance with this rule was emphasised by the Court of Appeal in *Cyclamen Ltd v Port Vila Council* [2006] VUCA 20; CAC 20 of 2006 where it was explained that the sworn statement is intended to identify each of the decisions under challenge and the facts necessary to enable a determination of the lawfulness of the decisions. All material matters must be placed before the court: *R v Horsham DC; Ex parte Wenman* [1994] 4 All ER 681 at 710.

(c) be in Form 34

Time for filing claim

17.5 (1) The claim must be made within 6 months of the enactment or the decision.

[17.5.1] **Validity of time limitation** It is doubtful whether the rule-making power permits such a rule and accordingly, its validity should not be assumed. The public interest in good administration requires, however, that claims for judicial review be made promptly so that issues as to the validity of decisions do not linger: *O'Reilly v Mackman* [1983] 2 AC 237 at 280-1; [1982] 3 WLR 1096 at 1106; [1982] 3 All ER 1124 at 1130-1; *Avock v Vanuatu* [2002] VUCA 44; CAC 22 of 2002; *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 at [11]. See further r.17.8(3)(c) which is probably valid and is unaffected by any doubt as to the validity of this rule.

(2) However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.

[17.5.2] **Criteria relating to extension** In *Avock v Vanuatu* [2002] VUCA 44; CAC 22 of 2002 the Court of Appeal referred to a "heavy onus" upon a person seeking leave (under the former rules) to commence a judicial review application 4 months out of time. The court refused to extend time in *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 (4 months out of time) and in *Maliu v Molitamata Village Land Tribunal* [2009]

VUSC 52; CC 28 of 2008 (4 years, no good explanation). A claim which was 1 month out of time was permitted (unopposed) in *Ishmael v President of Vanuatu* [2006] VUSC 78; CC 173 of 2005 noting that the delay was modest, there was no prejudice to the defendants and no other remedy was available to the claimants. The general importance of the point in issue may justify an extension if it is of genuinely public importance and such cases are likely to be exceptional: *R v Secretary of State for Home Dept; Ex parte Ruddock* [1987] 2 All ER 518 at 521; *R v Collins; Ex Parte MS* [1997] EWCA Civ 2019.

Serving claim

17.6 (1) The claim and sworn statement must be served on the defendant within 28 days of filing.

(2) The claim and sworn statement must also be served:

(a) on any other person who is directly affected by the claim; within 28 days of filing; and

(b) on any other person the court orders to be included as a party, within 28 days of the order.

Response

17.7 (1) The defendant must file a defence within 14 days of service of the claim.

(2) Any other person served with the claim who wants to take part in the judicial review must file a defence within 14 days of service of the claim.

(3) The defence must be served on the claimant within 14 days of service of the claim.

(4) With the defence the defendant and other person must file:

(a) detailed grounds for disputing or supporting the claim; and

[17.7.1] **Meanng of "detailed grounds"** What form the "detailed grounds" ought to take is uncertain. The requirement suggests something beyond an ordinary defence. It is anomalous that, even before the conference under r.17.8 (when the court considers whether the threshold is met), the defendant is required to detail its defence to a greater extent than in the defence itself. It is common for this requirement to be overlooked by parties and ignored by the court, provided that a defence is filed. Perhaps the rule should be read conservatively to avoid bare denials and as requiring no more than that "detailed grounds" of defence be found *in* the defence.

(b) a sworn statement supporting those grounds.

[17.7.2] **Reconsideration by claimant** Lawyers for claimants should reconsider the merits of the claim for judicial review once they have received the defendant's evidence: *R v Horsham DC; Ex parte Wenman* [1994] 4 All ER 681 at 710.

Court to be satisfied of claimant's case

17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in subrule (3).

[17.8.1] **Purpose** This prevents time being wasted by misconceived claims. The court will not look deeply into the merits beyond satisfying itself of the requirements below. For examples of claims which were struck out see *Kalpoi v Sope* [2004] VUSC 33; CC 53 of 2003; *Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005; *Lord Mayor v Minister of Internal Affairs* [2009] VUSC 114; CC 115 of 2009.

(3) The judge will not hear the claim unless he or she is satisfied that:

[17.8.2] **Onus of satisfying judge** The onus of satisfying the court is upon the claimant: *In re Application by Coombe* [1988] VUSC 16; [1980-1994] Van LR 383.

(a) the claimant has an arguable case; and

[17.8.3] **When no arguable case** The same principles as apply to striking out cases disclosing no reasonable cause of action will apply here: *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53. If a decision is not justiciable then there is no arguable case: *Curtis v Minister of Defence* [2002] 2 NZLR 744. See further [17.8.1] for examples.

(b) the claimant is directly affected by the enactment or decision; and

[17.8.4] **Meaning of "directly"** It is uncertain exactly how "direct" must be the effect of the enactment/decision. The question of locus standi is a matter going to the jurisdiction of the court and is not a mere formality: *R v Secretary of Social Services, ex parte Child Poverty Action Group* [1989] 1 All ER 1047 at 1056. The test in this paragraph may be more stringent that that traditionally applied at common law (which remains the applicable substantive law), as to which see *IRC v National Federation of Small Businesses* [1982] AC 617 at 640, 656; [1981] 2 WLR 722 at 736-7, 751; [1981] 2 All ER 93 at 103-4, 115; *Stephens v Police Service Commission* [1995] VUSC 1; CC 11 of 1995. An intermediate decision may not be sufficient (*Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005) nor may a mere loss of prestige (*Emelee v Lini* [2004] VUSC 89; CC 2 of 2004).

[17.8.5] **Effect of rule on general law of *locus standi*** To the extent that the rule purports to introduce a new test of locus standi, its validity should not be assumed: See *IRC v National Federation of Small Businesses* [1982] AC 617 at 629, 631, 645, 647-8; [1981] 2 WLR 722 at 726, 728, 741, 743; [1981] 2 All ER 93 at 96, 97, 107, 109; *TK v Australian Red Cross Society* (1989) 1 WAR 335 at 340.

E *CPR* r54.5

(c) there has been no undue delay in making the claim; and

[17.8.6] **Relationship to r.17.5** This appears to be independent of the time limit in r.17.5 and leads to the conclusion that an application for judicial review could be defeated upon this ground even if brought within time or within time as extended: *Kalpokas v Natapei* [2004] VUSC 55; CC 86 of 2004; *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 at [21]; *R v Dairy Produce Quota Tribunal; Ex parte Caswell* [1990] UKHL 5; [1990] 2 AC 738. Undue delay is not to be gauged simply by locating the earliest practicable opportunity and adding a short time for lawyers to advise and launch proceedings. It is crucially affected by the potential or actual effects of the passage of time on others: *R v Lichfield DC* [2001] EWCA Civ 304 at [37]. On the other hand, even delay without accompanying prejudice may preclude the grant of the exceptional forms of relief in r.17.9 which should not be made available to those who sleep on their rights: *R v Senate of University of Aston* [1969] 2 All ER 964 at 976, 979.

(d) there is no other remedy that resolves the matter fully and directly.

[17.8.7] **Meaning of "fully and directly"** It is uncertain precisely how "full and direct" the proposed alternative remedy must be to preclude judicial review. This formula may be more stringent that that traditionally used at common law (which remains the applicable substantive law): See for example *R v Bank of England* (1819) 2 B & Ald 620 at 622; 106 ER 492 at 493; *R v Stepney* [1902] 1 KB 317 at 321; *R v Dunsheath* [1951] 1 KB 127 at 131-2; [1950] 2 All ER 741 at 743; *R v Board of Trade* [1965] 1 QB 603 at 615, 623; [1964] 2 All ER 561 at 566, 571; [1964] 3 WLR 262 at 269, 276; *R v Commissioner of Police, ex parte Blackburn* [1968] 2 QB 118 at 144, 149; [1968] 1 All ER 763 at 774, 777; [1968] 2 WLR 893 at 910, 913-4.

[17.8.8] **Alternative remedies precluding review** The existence of a statutory appeal procedure will usually preclude judicial review: *R v Birmingham CC* [1993] 1 All ER 530 at 537. The possibility of an alternative claim for damages based on the same matters as the claim for judicial review might preclude judicial review: *Telecom v Minister for Infrastructure* [2007] VUCA 8; CAC 32 of 2006. On the other hand, a remedy which is doubtful, partial, cumbersome or inaccessible is unlikely to be regarded as a real alternative: See for example *Fisher v Keane* (1878) 11 Ch D 353 at 360; *Lawlor v Post Office Workers* [1965] Ch 712 at 734; [1965] 2 WLR 579 at 596; [1965] 1 All ER 353 at 363; *Bimson v Johnson* (1957) 10 DLR (2d) 11 at 34-5; *R v Board of Vistors of Hull Prison; Ex parte St Germain* [1979] QB 425 at 456, 465; *R v Inland Revenue Commrs; Ex parte Preston* [1985] AC 835 at 862.

[17.8.9] **Claimant should deal with viable alternative remedies** If there is an apparently viable alternative remedy, the claimant's sworn statements ought to address this and explain why, in the particular circumstances of the case, judicial review is nevertheless thought to be appropriate: *R v Horsham DC; ex parte Wenman* [1994] 4 All ER 681 at 710.

(4) To be satisfied, the judge may at the conference:

(a) consider the papers filed in the proceeding; and

(b) hear argument from the parties.

[17.8.10] **No requirement to hear evidence** The judge is not required to hear the claimant's evidence: *Loparau v Sope* [2005] VUCA 4; CAC 26 of 2004.

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out.

[17.8.11] **Striking out claim an interlocutory decision** Such a decision is interlocutory in nature and requires leave to appeal therefrom: *Vanuatu Maritime Authority v Athy* [2006] VUCA 12; CAC 27 of 2006.

Orders the court may make

17.9 (1) After hearing a claim, the court may make any of the following orders:

(a) an order declaring that the enactment being challenged is of no effect;

[17.9.1] See further [17.2.2], [17.4.1].

(b) a mandatory order, requiring the person named in the order to take the actions stated in the order;

(c) a prohibiting order, prohibiting the person named in the order from taking the action stated in the order;

(d) a quashing order, that the decision is quashed.

[17.9.2] **Remedies discretionary** Remedies are discretionary and may be withheld even if the claimant demonstrates a relevant error of law: *Leigh v National Union of Railwaymen* [1970] Ch 326 at 333-4; [1970] 2 WLR 60 at 65-6; [1969] 3 All ER 1249 at 1252. The grounds for discretionary refusal to grant relief may overlap considerably with those in r.17.8(3). Relief may also be refused where there is no longer a live or significant issue: *R v Inner London Education Authority* [1986] 1 WLR 28 at 50; [1986] 1 All ER 19 at 36; *Telecom v Minister for Infrastructure* [2007] VUCA 8; CAC 32 of 2006.

[17.9.3] **Damages not available** Damages are not a remedy available through judicial review: *Freedman v Petty* [1981] VR 1001 at 1032; *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at 730. See further [17.4.3].

E *CPR* r54.19(2)

(2) If the court makes a quashing order, the court may also:

(a) send the matter back to the decision-maker; and

(b) direct the decision-maker to reconsider the matter and make a new decision in accordance with the court's decision.

[17.9.4] **Costs** A successful application for judicial review should ordinarily be accompanied by costs (on the standard basis): *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999.

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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].

TRANSITIONAL

Interpretation

19.1 In this Part:

"commencement date" means the date on which the new Rules come into operation;

[19.1.1] The commencement date was 31 January 2003. See r.18.16.

"continuing proceeding" means a proceeding started before the commencement date.

Application of these Rules to new proceedings

19.2 These Rules apply to a proceeding started on and after the commencement date.

Application of these Rules to continuing proceeding

19.3 (1) These Rules apply to a continuing proceeding to the exclusion of the old Rules.

(2) In the application of these Rules to a continuing proceeding:

(a) every step to be taken in the proceeding on and after the commencement date must be taken under these Rules; and

(b) the court may give all directions necessary for the application of these Rules to the proceeding.

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DEFINITIONS

Definitions

E *CPR* r2.3

20.1 The words listed below have the meaning given to them:

[20.1.1] **Application of other specific definitions** As the *Rules* are a "statutory order" within the meaning of s.12, *Interpretation* [Cap 132], it follows from s.15(2) that the definitions contained in *Judicial Services and Courts* [Cap 270] also apply, unless otherwise provided. Section 1(1) of the latter contains a number of definitions.

[20.1.2] **Application of Interpretation Act** Section 1(1) of the *Interpretation Act* [Cap 132] causes the Act to apply to the *Rules* more generally. Specifically, s.2 imports the definitions contained in the Schedule.

"agreed documents" means documents that both parties agree should be disclosed;

"application" means an application made in a proceeding;

"applicant" means the person who makes an application;

"assets", for a person, includes any tangible or intangible property in which the person has a legal or equitable interest;

[20.1.3] **Meaning of "assets"** See also the definitions of "property" and "immovable property" in the Schedule to the *Interpretation Act* [Cap 132]. As to the goodwill of a business see *Darashah v UFAC* (1982) 79 LSG 678.

E *CPR* r2.3(1)

"child" means a person under 18 years of age;

[20.1.4] **Application of definition to company** The wide definition of "person" in Schedule 2 to the *Interpretation Act* [Cap 132] could lead to the absurdity that a company less than 18 years old is a "child".

[20.1.5] As to the procedural consequences of childhood, see rr.3.8 and 11.10.

E *CPR* r2.3(1)

"claimant" means the person filing the claim;

"conference" means a conference held under Part 6;

"copy", of a document, means anything into or onto which the contents of the document have been copied by any means, directly or indirectly;

E *CPR* r2.3(1)

"defendant" means a person against whom a claim is filed;

"disclose", for a document, means state that the document exists and identify it;

"document" includes anything in or on which information is recorded by any means;

[20.1.6] **Application of definition to magnetic/electronic media** The definition is probably wide enough to include audio tape recordings (*Snow v Hawthorn* [1969] NZLR 776 at 777; *Grant v Southwestern & County Properties* [1975] Ch 185 at 198; [1974] 2 All ER 465 at 475; [1974] 3 WLR 221 at 232; *Australian National Airlines Commission v*

Commonwealth (1975) 132 CLR 582 at 594; 6 ALR 433 at 444; 49 ALJR 338 at 344), video tapes (*Konig v Casino Canberra* [2000] ATSC 67; *Boyes v Colins* (2000) 23 WAR 123 at 127, 135, 148; [2000] WASCA 344 at [1], [33], [93]) and computer files (*Derby v Weldon (No9)* [1991] 2 All ER 901 at 906; [1991] 1 WLR 652 at 658). Compare the definitions of "document" and "writing" in the Schedule to the *Interpretation Act* [Cap 132].

"evidence by link" means evidence given by telephone, by video or by another means of communication;

E *CPR* r2.3(1)

"lawyer" means a person entitled to practice in Vanuatu as a barrister and solicitor;

[20.1.7] See generally *Legal Practitioners* [Cap 119].

"list" means the list of documents mentioned in rule 8.5;

E *CPR* r2.3(1)

"litigation guardian" means a person appointed by the court to represent a person under a legal incapacity in a proceeding;

"old rules" means the High Court (Civil Procedure) Rules 1964 and the Magistrates' Courts (Civil Procedure) Rules 1976 as in force immediately before the commencement of these Rules;

[20.1.8] **History** These were made by the Western Pacific High Commission pursuant to the *Western Pacific (Courts) Order in Council* 1961 which was made under the *Foreign Jurisdiction Act* 1890 (UK).

"partnership proceeding" means a proceeding started by or against a partnership including a proceeding against the partnership by one of the partners;

"person" includes the State of Vanuatu and the Government of Vanuatu;

[20.1.9] See also the definition of person in Schedule 2, *Interpretation* [Cap 132].

"person under a legal incapacity" means a child or a person with impaired capacity;

[20.1.10] See also definition of "child" and r.3.8(1).

"person with impaired capacity" means a person who is not capable of making the decisions required to be made by a party to a proceeding to be able to conduct the proceeding;

[20.1.11] **Test for impairment** The test is whether the party is capable of understanding, with proper explanation from a lawyer, the issues on which decisions need to be made during the course of proceedings: *Masterman-Lister v Brutton* [2003] 3 All ER 162; [2003] 1 WLR 1511; [2002] EWCA Civ 1889 at [55], [57], [64], [68]. [75]. There remains a difference of opinion as to whether this test is to be applied subjectively or objectively: see for example *Brown v Trustee in Bankruptcy* [1999] FCA 1569; (1999) 95 FCR 177 at [16]-[18].

"proof of service" means a sworn statement setting out details of the time and manner in which a document was served on a person;

“sealed”, for a document, means sealed with the seal of the court concerned;

[20.1.12] See further s.64, *Judicial Services and Courts* [Cap 270] and r.18.5.

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