PRELIMINARY

Citation and commencement

1 These Rules may be cited as the Court of Appeal Rules 1973 and shall come into operation on the first of July 1973.

[1.1] **History** The *Rules* were made on 28 February 1973 in exercise of the powers conferred upon the Rules Committee by s.22 of the *Western Pacific (Courts) Order in Council* 1961, which was itself made under the *Foreign Jurisdiction Act* 1890 (c.37). The validity of the *Order* appears to be beyond question: *Nyali v Attorney-General* [1956] 1 QB 1 at 14, 15.

[1.2] **Pre-Independence appeal** Prior to Independence, the applicable procedure in appeals would have depended on whether French or British original jurisdiction had been invoked. If the former, the procedure of the *Cour de Justice de Paix à Competence Etendue*, the *Cour d'Appel* (in Noumea) and subsequently the *Cour de Cassation* (in Paris) would have applied.

[1.3] **Rule making power** First, s.30(1), *Courts* [Cap 122] (repealed) and subsequently, s.66(3), *Judicial Services and Courts* [Cap 270], permitted the making of rules relating to "practice and procedure". In relation to the Court of Appeal this power has never been utilised, except incidentally.

[1.4] **Post-Independence application** No other appeal rules having been promulgated since Independence, the Court of Appeal has explained that the *Rules* continue to apply by reason of art.95(1) of the *Constitution* and are read with such adaptations as are necessary to bring them into conformity with the *Constitution*: *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997; *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998; *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [36].

[1.5] **Practice Direction** The Chief Justice issued an important practice direction dated 2 April 2004 which deals with a number of routine matters of practice and procedure in appeals. See further CPR [1.1.7].

[1.6] **No application to criminal appeal** In relation to criminal appeals, Parliament has covered the field of procedure with Part 11 of the *Criminal Procedure Code* [Cap 136] with the result that the *Rules* continue to have application only in relation to civil appeals.

[1.7] **Reopening a decision other than by appeal** There is a limited scope to reopen the decision of a primary judge, without appeal, in the inherent jurisdiction. Such action is contrary to the public interest in the finality of litigation and is likely to be taken only in exceptional circumstances: *Re Barrell Enterprises* [1972] 3 All ER 631 at 636; [1973] 1 WLR 19 at 24. There is a greater scope to recall or vary interlocutory orders than final decisions: *Mullins v Howell* (1879) 11 Ch D 763 at 766. There is also greater scope to recall or vary orders which have not yet been sealed. Consent orders may also be set aside: see for example *Ansons Pty Ltd v Merlex Corp Pty Ltd* [2001] WASC 204 at [9]; (2001) 162 FLR 443 at 457. It is difficult precisely to define the categories, which are not closed, in which the jurisdiction will be invoked. Examples usually involve some inadvertence or misunderstanding by counsel or the court (*Monaco v Arnedo Pty Ltd* (1994) 13 WAR 522 at 524), fraud or suppression of facts (*Cabassi v Vila* (1940) 64 CLR 130 at 147) or other serious injustice. See further CPR [12.10.1], [13.2.3].

Interpretation

2 In these Rules, unless the context otherwise requires-

"advocate" means a barrister or solicitor acting for an appellant or respondent to an appeal whether entitled to right of audience before the Court of Appeal or the High Court as the case may be;

[2.1] **Meaning of "advocate"** Compare with the definition of "lawyer" in r.20.1 *CPR* and see generally *Legal Practitioners* [Cap 119]. Only such persons as have rights of audience in Vanuatu may appear in its Courts and references in the *Rules* to "advocates" should now be understood to refer to such persons.

"appellant" includes a person who has been convicted and desires to appeal under these Rules; and where the Attorney-General to the Government of any territory is, or is deemed to be, a party to any proceedings and desires to appeal under these Rules, includes such Attorney-General;

[2.2] **Meaning of "appellant"** This aspect of the definition would seem to have no ongoing application since the enactment of Part 11 of the *Criminal Procedure Code* [Cap 136]. Any party to proceedings may appeal, subject to a right of appeal: *Beckett v Attwood* (1881) 18 Ch D 54 at 56-7.

"Court of Appeal" means the Fiji Court of Appeal;

[2.3] **Meaning of "Court of Appeal"** A Court of Appeal was established in Vanuatu under art.50 of the *Constitution*. References in the Rules to the Court of Appeal should now be understood to refer to its Vanuatu namesake.

"decision" includes any order, judgment or decree;

[2.4] **Meaning of "decision"** The definition probably derives from comments of the Privy Council in *Commonwealth v Bank of New South Wales* [1949] HCA 47; (1949) 79 CLR 497 at 625 as to the meaning of the word "decision" in the context of s.74 of the Australian Constitution which refers to an "appeal . . . from a decision of the High Court". Their Lordships said that it "is an apt compendious word to cover "judgements, decrees, orders and sentences". It was used in the comparable context of the *Judicial Committee Acts* (UK) of 1833 and 1943 as a general term to cover "determination, sentence, rule or order" and "order, sentence or decree". Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the "natural, obvious and prima-facie meaning of the word 'decision' is decision of the suit by the Court". Only "decisions" can be the subject of appeal. It does not seem to matter, however, whether the decision under appeal is properly an order, judgment or decree, provided it is one of them: *Ah Toy v Registrar of Companies* (1985) 10 FCR 280 at 281; 61 ALR 583.

[2.5] **"Decisions" and "orders"** The word "decision", though defined to include "order", is used in the *Rules* in contradistinction to the word "order" in relation to interlocutory matters. See for example r.21(1). This is slightly confusing as presumably it was intended to convey either that *final* "orders" are "decisions" or that interlocutory "orders" are treated as decisions *after* leave is granted . The use of the word "order" as a description of an interlocutory, as opposed to final, ruling is broadly in accordance with *Onslow v Inland Revenue* (1890) 25 QBD 465 at 466 ("a judgment is a decision obtained in an action, and every other decision is an order"). It is suggested that the real test As to differentiating between final (decisions) and interlocutory (orders) see *CPR* r.7.1.

[2.6] **"Decisions" compared to "reasons"** An appeal lies against decisions but not against the reasons for the decision: *Lake v Lake* [1955] P 336 at 343-4, 347; [1955] 2 All ER 538 a 541-2, 543. Accordingly, a party who has been granted (all) the relief sought in the proceedings cannot appeal against the decision, even if it is thought that the reasoning is incorrect.

[2.7] **Decisions compared to administrative acts** The court often takes steps in a purely administrative capacity. These are not appellable though they ma be reviewable under Part 17, *CPR*: *Re Dunn & The Morning Bulletin Ltd* [1932] St R Qd 1 at 15, 16.

"Governor" means the Governor of the Gilbert and Ellice Islands Colony;

[2.8] **Obsolescence of defined term** The Gilbert and Ellice Islands Colony became a British Protectorate in 1892 and a colony in 1916. The first Governor was appointed in 1972. On 1 January 1976 the islands comprising the colony were divided between two other colonies which subsequently became independent. The Gilbert Islands became the major part of Kiribati on 12 July 1979 and the Ellice Islands became Tuvalu on 1 October 1978. This definition would seem to have no ongoing application.

"High Commissioner" means Her Britannic Majesty's High Commissioner for the Western Pacific;

[2.9] **Obsolescence of defined term** This office was abolished on 2 January 1976.

"High Court" means the High Court of the Western Pacific;

[2.10] **Obsolescence of defined term** Prior to 1961 the (British) legal system in the Western Pacific (other than Fiji) was based upon the Pacific Order in Council 1893 (SRO & SI Rev VIII, 597) which vested executive and legislative power in the High Commissioner and created a High Commissioner's Court. By the Western Pacific (Courts) Order in Council 1961 (SI 1961 No.1506), the High Commissioner's Court was reconstituted with a Chief Justice and Puisne Judges and called the High Court of the Western Pacific. Appeals would lie from here to the Fiji Court of Appeal and thence to the Privy Council.

"record" means the aggregate of the papers relating to an appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before the Court of Appeal on the hearing of the appeal;

"Registrar of the High Court", in relation to an appeal, means Registrar of the High Court in the territory in which the proceedings giving rise to the appeal were instituted;

[2.11] **Meaning of "Registrar"** Sections 40 and 47 of the *Judicial Services and Courts Act* [Cap 270] provide for the appointment of registrars whose functions include administration of the Court of Appeal. References to the Registrar of the High Court should now be understood to be references to such registrars as may be appointed under the *Judicial Services and Courts Act*: *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006.

"respondent" includes any person who has been served with notice of appeal or who is entitled to be so served;

[2.12] **Proper respondents** Every party in the proceedings below whose rights are directly affected by the appeal should be made a respondent. See further r.19(4)(a).

"Senior Magistrate" means the Senior Magistrate of the Gilbert and Ellice Islands Colony;

[2.13] **Obsolescence of defined term** This definition would seem to have no ongoing application.

"sentence" includes any order of a court made on a conviction with reference to the person convicted;

[2.14] **Obsolescence of defined term** Generally, "sentence" means a judicial pronouncement fixing a term of imprisonment: *Achetaritei v The Queen* (1984) 53 ALR 85 at 91. It would seem that the verdict itself is not part of the sentence, merely its precursor. This definition would seem to have no ongoing application: See now ss.187 and Part 9, *Criminal Procedure Code* [Cap 136] and also [1.5].

"territory" has the meaning assigned to it by section 2 of the Western Pacific (Courts) Order in Council 1961.

[2.15] **Obsolescence of defined term** This definition would seem to have no ongoing application.

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GENERAL

Constitution of Court of Appeal

3 The constitution of the Court of Appeal shall be governed by the law for the time being in force in Fiji.

[3.1] **Court of Appeal created by Constitution** The constitution of the Court of Appeal is now governed by art.50 of the *Constitution* which provides that two or more judges of the Supreme Court sitting together constitute a Court of Appeal. The law for the time being in force in Fiji is of no continuing relevance to Vanuatu.

Commencement of appeals

4 Appeal, including applications for extension of time within which to file an appeal, shall ordinarily be filed with a Registrar of the High Court.

[4.1] **Meaning of "appeal"** The word "appeal" is not defined and is capable of bearing different meanings. It is generally understood to refer to the right of entering a superior court and invoking its aid and interposition to redress the error of the court below: *Attorney-General v Sillem* (1864) 10 HL Cas 704 at 724; 11 ER 1200.

[4.2] **Where appeal to be filed** A registry of the Court of Appeal was established by s.24, *Courts Act* [Cap 22] which continues to be operative under s.47(4), *Judicial Services and Courts Act* [Cap 270]. All documents pertaining to appeals should be filed in the registry where Registrars appointed under s.47 of the latter will attend to them. See further [2.7].

[4.3] **Right of appeal** Neither this rule nor any other rule creates a right of appeal, which may only be found in statute: *Brysten v Dorsen* [1997] VUCA 3; CAC 5 of 1997; *A-G v Sillem* (1864) 10 HL Cas 704 at 720; 11 ER 1200 at 1207; *Colonial Sugar Refining Co v Irving* [1905] AC 369 at 372; *National Telephone v Postmaster-General* [1913] 2 KB 614; [1913] AC 546; *Victorian Stevedoring and General Contracting Pty Ltd v Dignan* [1931] HCA 34*;* (1931) 46 CLR 73 at 108; *South Australian Land Mortgage and Agency Co Ltd v The King* [1922] HCA 17*;* (1922) 30 CLR 523 at 553; *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616 at 619-20; cf *Berry v Saolo* [2007] VUSC 10; CC 71 of 2000 (where Tuohy J refers, perhaps unintentionally, to the *Rules* as the source of the right). The appellate jurisdiction of the Court of Appeal is conferred by s.48, *Judicial Services and Courts* [Cap 270].

Appellant confined to grounds of appeal

E *RSC* O59r3(3)
E *RSC* O59r10(4)

5 The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of objection not stated in his notice of appeal, but the Court of Appeal shall not be confined to the grounds so stated:

[5.1] **Appellant confined to grounds of appeal** The appellant should be strictly confined to its grounds of appeal: *Osborne & Co v Anderson* [1905] VLR 427 at 436. If additional or different grounds to those stated in the notice of appeal are intended to be relied upon, the appellant should make an application under r.24 on notice.

[5.2] **Court of Appeal not confined to grounds of appeal** The Court is not confined to the grounds of appeal and will exercise its freedom where the facts or law are found in such a way that it appears that the decision below should not be left unvaried: See for example *A-G v Simpson* [1901] 2 Ch 671 at 713-20; *Rutherford v Riutherford* [1922] P 144 at 153-4, 156, 160; [1923] AC 1 (appeal *sub nom Rutherford v Richardson*); *Re Whiston* [1924] 1 Ch 122 at 132, 134-5; *Hanson v Wearmouth Coal Co* [1939] 3 All ER 47 at 55; *MAM Mortgages Ltd v Cameron Bros* [2002] QCA 330 at [7]. It is suggested that the Court should exercise caution in its preparedness to entertain appeal points outside those stated, in which connection the observations of Kirby J in *Gipp v R* [1998] HCA 21; 194 CLR 106; 155 ALR 15 at [133] are particularly apposite:

To permit such a course might discourage accuracy in the performance by legal representatives of their professional responsibilities. It would sanction departure from the requirements of precision in the specification of grounds of appeal and in the argument of appeals, compliance with which is essential to the efficient discharge of the responsibilities of appellate courts. Most importantly, it would overlook the nature of the process provided by statute. This is an appeal, disposing of identified grounds of appeal, not a roving judiciary enquiry to discover and correct error in the trial, undiscovered or uncomplained about by those representing the appellant.

See also r.27.4. As to appeals on points not raised below see [19.4].

Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal unless the respondent has had sufficient opportunity of contesting the case on that ground either in writing or by appearance in person or by advocate.

[5.3] **When new appeal ground may be argued** For a practical example see *Telecom Vanuatu Ltd v Minister for Infrastructure and Public Utilities* [2007] VUCA 8; CAC 32 of 2006 (under the sub-heading "A further contention", where the Court of Appeal noted the short notice given to the respondents and the circumstances that the ground was not argued, and not the subject of specific evidence, below*). Wilson v Liverpool City Council* [1971] 1 All ER 628 at 632-3; [1971] 1 WLR 302 at 307. As to reliance on points not argued below see [19.4].

Application of High Court Rules

6 Subject to these Rules, the Western Pacific High Court (Civil Procedure) Rules for the time being in force shall apply to proceedings in and before the Court of Appeal in civil causes or matters.

[6.1] **Residual application of Civil Procedure Rules** As the *Western Pacific High Court (Civil Procedure) Rules* are no longer in force in Vanuatu the *Civil Procedure Rules* 2002 should probably be the source of any procedural issue not provided for in these *Rules*. Generally speaking, where there are no applicable appeal procedures, it is the duty of the appeal Court to lay down the appropriate procedure: *Smith v Williams* [1922] 1 KB 158 at 165. See further [1.4].

Application of practice and procedure in England

7 Where no other provision is made by these Rules, or by any other enactment, the jurisdiction, power and authority of the Court of Appeal and the judges thereof shall be exercised-

(a) in civil causes or matters, according generally to the course of the practice and procedure for the time being observed by and before Her Majesty's Court of Appeal in England; and

[7.1] **Residual application of acts, rules and practice directions** It is suggested that the *Judicial Services and Courts Act* [Cap 270] (as to jurisdiction) and the *CPR* (as to procedure - itself made pursuant to an enactment) will apply where there is no applicable provision in these *Rules*. Indeed, the former displaces these *Rules* as to matters of jurisdiction. See also *Suinakawala v R* [1981] SBFJCA 2; [1980-1981] SILR 135 in relation to paragraph (b) (but relevant also to civil matters) which held that a UK statute relating to the effective date of sentences was a substantive enactment and not in the general course of practice and procedure. It is inaccurate to characterise a practice direction as a "provision made by these rules" or "by any other enactment" as it is made in the court's inherent jurisdiction. Nevertheless, it is

suggested that whatever superficial tension exists between this provision and the practice direction will be resolved in favour of the applicability of the latter, perhaps also based on the reasoning in *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997.

(b) in criminal proceedings, according to the general course of practice and procedure for the time being observed by and before Her Majesty's Court of Appeal (Criminal Division) in England.

[7.2] **Obsolescence of rule** This provision would seem to have no ongoing application since the enactment of Part 11 of the *Criminal Procedure Code* [Cap 136].

Adjournment of hearing

8 If for any reason it appears to the Court of Appeal right to adjourn an appeal, the Court of Appeal shall have full power to do so upon such terms and for such times as to it shall seem fit.

[8.1] **Reasons for adjournment** The usual case-management and prejudice considerations will apply. Adjournments of appeal ought to be based on some good ground and will not automatically be granted, even by consent: *Unilever Computer Services Ltd v Tiger Leasing SA* [1983] 2 All ER 139; [1983] 1 WLR 856. Adjournments sought only for the convenience of counsel may be refused: *Bracknell Forest Borough v N* (2006) *Times*, 6 November.

Enlargement of time

E *RSC* O3 r5(4)

9 The Court of Appeal, or a judge thereof, or a judge of the High Court, or, in the case of the Gilbert and Ellice Islands Colony, a judge of the High Court or the Senior Magistrate, may enlarge the time prescribed by the Rules for the doing of anything to which these Rules apply.

[9.1] **Time limits not a mere formality** The time limits contained in the *Rules* are not lightly to be overlooked: *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998. Enlargements of time should be sought promptly. See further *CPR* r.18.1.

[9.2] **Appeal out of time** Permission to appeal out of time is entirely discretionary: *Laho Ltd v QBE Insurance (Vanuatu) Ltd* [2003] VUCA 26; CAC 15 of 2003 (applying *Norwich & Peterborough Building Society v Steed* (1991) 1 All ER 888). There are no rigid or exhaustive criteria. The appropriate factors to be taken into account include length of delay, reasons for delay, prospects of success and the degree of prejudice that might arise: *Laho Ltd v QBE Insurance (Vanuatu) Ltd* (applying *CM Van Stillevoldt BV v E1 Carriers Inc* [1983] 1 All ER 699; [1983] 1 WLR 297; *Norwich v Peterborough*), cf *Nalau v Mariango* [2007] VUSC 55; CC 106 of 2005; *Berry v Soalo* [2007] VUSC 10; CC 71 of 2000 (Tuohy J twice referring to the "interests of justice" apparently without considering *Laho*). There may also be reasons of public interest to extend time to appeal, such as when important questions are raised: *Neel v Blake* [2004] VUCA 6; CAC 33 of 2003; *Nalau v Mariango* [2007] VUSC 55; CC 106 of 2005 at [4]. Where the delay is short and there is an acceptable excuse, the merits may not assume much prominence: *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 2 All ER 517 at 521; [1985] 1 WLR 942 at 947-8 (3 days); *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998 (1 day); *PSC v Isom* [2010] VUCA 9 at [9]; CAC 23 of 2009 (7 days due to inadvertence of lawyer). The merits of the case are, in most situations, examined only broadly: *R v Secretary of State for the Home Department; Ex Parte Mehta* [1975] 2 All ER 1084 at 1088; [1975] 1 WLR 1087 at 1091. The fact that subsequent decisions of an appellate court show the original decision to be wrong is not by itself a good reason for extension: *Craig v Phillips* (1887) 7 Ch D 249; *Esdaile v Payne* (1889) 40 Ch D 520 at 533-5; *Re Wigfull* [1919] 1 Ch 52; *Re Berkeley* [1945] Ch 1 at 3-4 (leave granted); *Piening v Wanless* (1968) 117 CLR 498 at 506; *Wilson v Liverpool CC* [1971] 1 All ER 628 at 632-3; [1971] 1 WLR 302 at 306-8; *Property and Reversionary Investment Corp v Templar* [1977] 1 WLR 1223 at 1224-5; [1978] 2 All ER 433 at 435-6 (leave granted). An application may be refused even where prejudice can be cured by costs: *Revici v Prentice Hall Inc* [1969] 1 All ER 772 at 774; [1969] 1 WLR 157 at 159-60.

[9.3] **Respondent's notice out of time** The discretion to permit a respondent's notice to be filed out of time is exercised along similar lines to the discretion to permit an appeal out of time: Where the respondent seeks to affirm the decision below (r.23.2) as opposed to vary it (r.23.1), the discretion might be more readily exercised: *VCS Ltd v Magmasters Ltd* [1984] 3 All ER 510 at 511; [1984] 1 WLR 1208 at 1209.

[9.4] **How application to be made** It is common for applications to be made to the Court of Appeal, thus avoiding two separate considerations of the merits: *KGK Constructions Pty Ltd v East Coast Earthmoving* [1985] 2 Qd R 13 at 18. Alternatively, the application could be made to a single judge of the Supreme Court.

[9.5] **What application should contain** The applicant will need to give a good explanation for the delay and address other relevant factors, such as prejudice, and be able to show that the appeal is arguable**:** *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-43; 153 ALR 276 at 283-8. There must be some material upon which the court may exercise its discretion: *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935; [1965] 1 WLR 8 at 12. The stringency of these requirements is likely to be a function of the length of delay.

[9.6] **Costs** As is the case where any indulgence in sought, costs of the application will generally be borne by the applicant, unless the respondent was invited to consent and unreasonably refused.

Fees (First Schedule)

10 (1) The fees prescribed in the First Schedule shall be the fees payable in respect of civil proceedings in the Court of Appeal.

[10.1] **Obsolescence of rule** The fees prescribed in Schedule 1 have since been displaced, most recently by those prescribed in Schedule 1, *Civil Procedure Rules*.

(2) No fee shall be payable in criminal proceedings in the Court of Appeal.

[10.2] **Obsolescence of rule** This rule would seem to have no ongoing application since the enactment of Part 11 of the *Civil Procedure Code* [Cap 136].

Judgments

11 Upon the final determination of an appeal the Registrar of the Court of Appeal shall, as soon as may be, transmit to the Registrar of the High Court a certified copy of the judgment of the Court of Appeal.

[11.1] **Obsolescence of rule** This rule would seem to have no ongoing application. It is conventional for the Court of Appeal to issue judgments with written reasons at the conclusion of sittings and to make these available to the parties.

Appeal from decisions of Registrar of Court of Appeal

12 Any person aggrieved by anything done or ordered by the Registrar of the Court of Appeal, other than anything done or ordered under the direction of the President of the Court of Appeal, may apply to have the act, order or ruling complained of set aside to a judge of the Court of Appeal who may give such directions or make such orders thereon as he shall think fit; and every such application shall be made by notice of motion supported by affidavit.

[12.1] **Obsolescence of rule** It is suggested that this rule has no continuing application. Even if it could be read to apply to a Registrar appointed under s.47, *Judicial Services and Courts Act* No 54 of 2000, there is no statutory provision for appeals from actions

of the Registrar. Indeed, neither does there seem to be any scope for a Registrar to act judicially, except perhaps in relation to r.13. As the Court of Appeal noted in *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997, in relation to the powers of the Registrar under r.22, the *Rules* were drafted when an entirely different structure of courts and court administration was in place.

Taxation of costs

13 The Registrar of the Court of Appeal shall be the taxing officer.

[13.1] **Obsolescence of rule** No suitable power seems to be granted to the Registrar under the *Judicial Services and Courts Act* [Cap 270] and accordingly, it is doubtful whether the Registrar could properly conduct a taxation of costs. It is unknown whether this rule has been invoked (or ignored) since the *Civil Procedure Rules* came into force. It is suggested that the application of the reasoning in *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997, in relation to the powers of the Registrar under r.22, leads to the result that the Registrar is no longer invested with such power.

Service

14 (1) Service, where required by these Rules, shall be effected by the Registrar of the High Court in accordance with the rules prescribed therefor by the Western Pacific High Court (Civil Procedure) Rules; any document requiring to be so served may be forwarded by registered post by the Registrar of the Court of Appeal to the Registrar of the High Court.

[14.1] **Obsolescence of rule** In practice, service of documents is effected by the party filing them. See Practice Direction 2 April 2004 (paragraphs 6 and 14) as to the service of documents leading to and including the appeal book.

Provided that in the event of the party or person to be served or his representative for acceptance of service, being in Fiji or elsewhere beyond the jurisdiction of the High Court, service shall be effected in the same manner as is prescribed for service of process by the Supreme Court of Fiji.

[14.2] **Obsolescence of rule** It is suggested that this rule is no longer appropriate to be applied.

(2) The Registrar of the Court of Appeal may require any party on behalf of whom service is required to provide as a condition of such service, such number of copies as he may require for service and filing.

[14.3] **Number of copies to be filed** Whilst a specific number of copies is no longer required to be filed as a condition of service, service must be effected on all parties to the appeal. Practice Direction 2 April 2004 (paragraph 14) requires that six copies of the appeal book be filed. The same number of copies of outlines of submission, lists of authority, etc should be filed.

(3) Notwithstanding anything hereinbefore contained, the Court of Appeal or any judge thereof may, in any case, make such orders and give such directions to service as may be required.

[14.4] **Orders as to mode of service** It is suggested that this rule should be utilised to overcome the deficiency of appropriate service provisions in these *Rules*.

Sittings in chambers

E *RSC* O59 r14(7)

15 Except in proceedings involving the decision of an appeal, the Court of Appeal or a judge thereof may sit and act in chambers.

[15.1] **When appropriate** This rule is obviously designed for convenience and to overcome the conclusion in *Re Agricultural Industries Ltd* [1952] 1 All ER 1188 at 1189 that there is no such power. Applications for leave to appeal (r.21) are conventionally heard in chambers. Applications to amend grounds of appeal or to extend or revoke leave, if made to a single judge prior to the appeal sittings, might conveniently be disposed of in chambers.

Non-compliance with rules may be waived by the Court of Appeal

16 (1) Non-compliance on the part of an appellant or respondent in any proceeding, whether civil or criminal with any of the provisions of these Rules shall not prevent the further prosecution of the appeal or response if the Court of Appeal or a judge thereof considers that such non-compliance was not wilful and that the same may be waived or remedied by amendment or otherwise; and the Court of Appeal or a judge thereof may in such manner as it or he thinks fit direct such appellant or respondent, as the case may be, to remedy such non-compliance, and thereupon the appeal or the response shall proceed.

[16.1] **Rules not a mere formality** Non-compliance should not lightly be overlooked: *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998. See further r.18.10(2) *CPR*. It is important to note that waiver of compliance is not the same as dispensing with the requirements of the *Rules*. The former is permitted, the latter is, in the absence of a specific enabling power, not permitted: *Doyle v Commonwealth* (1985) 156 CLR 510 at 518; (1985) 60 ALR 567 at 573.

[16.2] **Irregularity stands until excused** Non-compliance producing an irregularity probably stands until an order is made under this rule, with the result that the party responsible may not rely upon it in the meantime: *Metroinvest Ansalt v Commercial Union Assurance Co* [1985] 2 All ER 318 at 323-5; [1985] 1 WLR 513 at 520-3.

[16.3] **Discretionary considerations** A party should not be defeated by mere technicalities, etc and the court should rectify such errors if it can do so without injustice: *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 at 736; [1966] 3 All ER 843 at 845-6; *Metroinvest Ansalt v Commercial Union Assurance Co* [1985] 2 All ER 318 at 323-5; [1985] 1 WLR 513 at 520-3.

[16.4] **Waiver of requirement to obtain leave to appeal** It appears that the rule has been used to waive this requirement: *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006.

(2) Any direction given pursuant to the provisions of paragraph (1) shall be communicated, as soon as may be, by the Registrar of the Court of Appeal to any party concerned who was not present or represented when the direction was given in the manner prescribed by rule 14.

CIVIL APPEALS

Wrong ruling as to stamp

E *RSC* O59r11(5)

17 The Court of Appeal shall not grant a new trial or reverse any decision of any ruling of the High Court that the stamp upon any document or instrument is sufficient or that the document or instrument does not require to be stamped.

[17.1] **Scope of rule** Section 16, *Stamp Duties* [Cap 68] provides that certain instruments chargeable with stamp duty cannot be received in evidence unless the duty is paid into court, subject to certain exceptions. A ruling by the court that an instrument is not chargeable or that sufficient duty has been paid, leading to the reception of the instrument into evidence, attracts this rule. Note that the rule does not apply to the wrongful rejection of an instrument. The rule does not in terms preclude appeals on this basis, only the grant of a new trial or the reversal of a decision, leaving intact the residue of the court's powers (eg. to vary). Judicial consideration of the English equivalent rule suggests that no appeal whatsoever lies from such a ruling: *Blewitt v Tritton* [1892] 2 QB 327; *Mander v Ridgway* [1898] 1 QB 501; *Lowie v Dorling* (1905) 74 LJQB 794.

Conditions precedent to appeal

18 Subject to the provisions of rule 16, the Court of Appeal shall not entertain any appeal made under the provisions of this Part unless the appellant has fulfilled all of the conditions of appeal as hereinafter set out:

[18.1] **Meaning of "shall not entertain"** The requirement that the Court of Appeal not entertain any appeal does not suggest that the appeal is in any way invalid, only that it cannot be allowed to progress beyond a certain point. Where exactly that point may be is uncertain. It may be that an appeal is entertained from the date of service of the notice of appeal: *Excise Commissioners v Hubbard Foundation Scotland* [1982] STC 593.

[18.2] **Meaning of "conditions of appeal"** The "conditions of appeal" are presumably the filing of a (compliant) notice of appeal, within time and with leave (if required) and the payment of the appeal fee.

Provided that, notwithstanding the generality of the foregoing, the Court of Appeal may in its discretion for cause shown entertain an appeal under the provisions of this Part upon any terms it may consider just.

[18.3] **Relationship to r.16** The requirement to obtain leave to appeal, presumably one of the "conditions of appeal", has been waived pursuant to s.16: *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006. It is suggested that this proviso should operate as an independent and perhaps stricter power to waive compliance, however, in practice there is unlikely to be much difference in the criteria to be applied under each rule.

Notice of appeal

E *RSC* O59r3(1)

19 (1) An appeal to the Court of Appeal shall be by way of rehearing and shall be brought by notice of motion (in these Rules referred to as "notice of appeal".

[19.1] **Right and nature of appeal** There is no right of appeal at common law, appeal being entirely a creature of statute: *Brysten v Dorsen* [1997] VUCA 3; CAC 5 of 1997; *A-G v Sillem* (1864) 10 HL Cas 704 at 720; 11 ER 1200 at 1207; *National Telephone v Postmaster-General* [1913] 2 KB 614; [1913] AC 546; *Victorian Stevedoring and*

General Contracting Pty Ltd v Dignan [1931] HCA 34*;* (1931) 46 CLR 73 at 108; *South Australian Land Mortgage and Agency Co Ltd v The King* [1922] HCA 17*;* (1922) 30 CLR 523 at 553; *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* [1976] HCA 62; (1976) 135 CLR 616 at 619-20. Under the Western Pacific (Courts) Order in Council 1961, appeal from the High Court lay "in accordance with the Rules of Court". At the time, those were the *Court of Appeal Rules (No 2)* 1956 (see Part 6). Those were replaced with the present *Rules* in 1973. Accordingly, the nature of appeal could formerly be discovered principally by reading the *Rules*: *R v Ome* [1980] SBFJCA 3; [1980-1981] SILR 27. Now, it is necessary to look to post-independence legislation to identify the nature of the appeal: *Brysten v Dorsen* [1997] VUCA 3; CAC 5 of 1997; *McCullin v Crawford* (1921) 29 CLR 186 at 193; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at 203. The *Rules* themselves cannot create a right to, nor identify the nature of, an appeal, absent a statutory basis: *Brysten v Dorsen* [1997] VUCA 3; CAC 5 of 1997; *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 at 372 (cf *Berry v Saolo* [2007] VUSC 10; CC 71 of 2000 where Tuohy J refers to the *Rules* as the source of the right); *Colonial Sugar Refining Co v Irving* [1905] AC 369 at 372.

[19.2] **Appellate jurisdiction under Judicial Services and Courts Act** Section 48 of the Act relevantly provides (with emphasis added):

> *(1) Subject to the provisions of this Act and any other Act, the Court of Appeal has* ***jurisdiction to hear and determine appeals from judgements of the Supreme Court****.*
>
> *(2) …*
>
> *(3) For the purpose of hearing and determining an appeal from the Supreme Court, the Court of Appeal:*
>
> *(a) may exercise such powers as may be prescribed by or under this Act or any other law; and*
>
> *(b) has the powers and jurisdiction of the Supreme Court; and*
>
> *(c)* ***may review the procedure and the findings (whether of fact or law) of the Supreme Court****; and*
>
> *(d)* ***may substitute its own judgement for the judgement of the Supreme Court****.*

The predecessor to the above provisions was s.26, *Courts* [Cap 122] which relevantly provided (with emphasis added):

> *(2) On every such appeal the procedure and the findings, whether of fact or law, of the Court appealed from* ***shall be subject to review by the appellate Court which shall be entitled to substitute its own judgment or opinion thereon*** *save that the appellate Court shall not interfere with the exercise by the Court appealed from of a discretion conferred by any written law unless the same was manifestly wrong.*

Neither Act specifically defines the nature of appeal, however similar powers have been interpreted to confer a right of appeal by way of re-hearing: *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [36] (applying *Re Coldham; Ex Parte Brideson (No 2)* [1990] HCA 36; (1990) 170 CLR 267 at [12]; *Cole* [*sic*, Coal] *& Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194; 174 ALR 585 at [17]. As to appeal from the Supreme Court exercising appellate jurisdiction from decisions of a magistrate, see s.30, *Judicial Services and Courts* and *Toara v Erakor Island Resort Ltd* [2008] VUCA 14; CAC 14 of 2008.

[19.3] **Meaning of "by way of rehearing"** In *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [37] the Court of Appeal adopted the description of an appellate court's function upon an appeal by way of re-hearing contained in *Devries v Australian National Railways Commission* [1993] HCA 78 at [2]; (1993) 177 CLR 472 at 480-1:

> *In a case where it appears that a challenged finding of fact has, to a significant extent, been based on the trial judge's observation of the demeanour of the witnesses, the members of an appellate court are inevitably placed in a position of real disadvantage compared with the trial judge. Even in such a case, however, the 'court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions' [The Glannibanta (1876), 1 PD 283 at p 287, per James LJ, Baggallay JA and Lush J referred to by Dixon CJ and Kitto J in Paterson v Paterson (1953) 89 CLR 212 at p 219]. The appellate duty in such a case cannot, in our view, be explained in*

any short exhaustive formula [footnote omitted]. It was correctly identified by Lindley MR, Rigby and Collins LJJ in Coghlan v Cumberland [[1898] 1 Ch 704 at pp 704 – 705] in a passage which has been referred to with approval in many cases in this Court [references omitted] and 'adopted as a governing authority' [Dearman v Dearman (1908) 7 CLR 549 at p 553 per Griffith CJ]. Their Lordships said:

> *'Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeking and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.'"*

[19.4] **General principles applicable to appeals** Although the court has a duty to re-hear the case and to make up its own mind, it will not interfere unless it comes to the conclusion that the judgment under appeal is wrong: *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [38]; *VBTC v Malere* [2008] VUCA 2; CAC 3 of 2008. The burden of satisfying the court of an error below is upon the appellant: *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323 at 325; *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326. Appeals as to disputed questions of fact are rarely overturned unless it is clear that there are special circumstances: *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [38] – [40]; *Watt v Thomas* [1947] AC 484; [1947] 1 All ER 582; *Voulis v Kozary* (1975) 180 CLR 177 at 190; (1975) 7 ALR 126 at 139. Lawyers should avoid simple credibility appeals which do not state the special circumstances relied upon as there may follow an indemnity costs order: *Telstra Corp Ltd v Smith* (1998) Aust Torts Rep 81-487 at 65,261. An appeal cannot, except in exceptional circumstances, be based on a point not argued below: *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; 41 ALR 255 at 261 (point involving evidence); *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71 (point not involving evidence); see for example *Telecom Vanuatu Ltd v Minister for Infrastructure and Public Utilities* [2007] VUCA 8; CAC 32 of 2006. Some recent English authorities refuse to consider points not raised below in furtherance of the overriding objective (esp. rr.1.2(2)(d) and 1.4(2)(b), (c)): *ANZ Banking Corp Ltd v Sociéte Générale* [2000] EWCA Civ 44; [2000] 1 All ER 682 at [21]. Appeals from discretionary decisions on practice and procedure are dealt with according to the same philosophy underlying the requirement of leave (see r.21). The Court of Appeal will be reluctant to interfere unless satisfied that the discretion has miscarried or that there has been a miscarriage of justice: *Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042 at 1046 per Lord Diplock; *Benard v Hakwa* [2004] VUCA 15; Civil Appeal Case 13 of 2004 (as to costs).

[19.5] **Form of notice of motion** No form is prescribed by the *Rules* and no general form of notice of motion is provided by the former *Rules*. A wide variety of styles are exhibited and accepted. It is suggested that an appropriate preamble would be: "Take notice that the Court of Appeal will be moved by way of appeal at the next sittings of the court for orders that, *etc*". If the appeal is brought pursuant to a grant of leave, then it is conventional to recite this, for example, "Take notice that pursuant to leave given by… on… the Court of Appeal will be moved, *etc*". The form is not, in any event, the essence of the right of appeal: *Catlow v Accident Compensation Commission* [1989] VR 214 at 216-7. It seems unlikely, however, that the mere expression of an intention to appeal will suffice: *Re West Jewell Tin Mining Co* (1878) 8 Ch D 806; *Collins v Vestry of Paddington* (1880) 5 QBD 368 at 374. If a form is so defective that it cannot reasonably be considered a proper notice then time may be enlarged under r.9 in an appropriate case: *Bates v Taylor* (1893) 19 VLR 120.

[19.6] **Civil Appeal Statement** The effect of Practice Direction 2 April 2004 (paragraph 1) is to require a Civil Appeal Statement to be filed with the Notice of Appeal. The filing of both documents triggers the listing of a status conference.

E *RSC* O59r3(2)

(2) Notice of appeal may be given either in respect of the whole or in

respect of any specified part of the decision of the Court below.

[19.7] **Costs** Lawyers should ensure that appeals are drawn as narrowly as possible to draw attention to the real areas of contention and focus the deployment of party and judicial resources. Costs orders ought to reflect the range of issues on which the parties were successful and a widely drawn appeal exposes the appellant to wider potential liability for costs.

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(3) In addition to complying with rule 5, every notice of appeal shall specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make.

[19.8] **Whether grounds of appeal to be stated** Curiously, this provision (unlike its former English counterpart) does not in terms require the *grounds of appeal* to be specified in the notice, only the orders sought on appeal. This seems likely to have been a drafting error as the appellant is, by r.5, confined to the grounds of appeal – so it follows that the grounds must be stated. Note also the requirement in r.23(1) to state grounds in a respondent's notice which would be anomalous if an appellant were not first similarly obliged.

[19.9] **How grounds of appeal to be stated** Grounds of appeal should be simply and shortly stated: *Sansom v Sansom* [1956] 3 All ER 446; [1956] 1 WLR 945. It is not sufficient, however, merely to say that the judge "erred" or "misdirected himself" or was "wrong in law" or some other such generality, without stating how or in what manner the error, misdirection, etc took place: *Pfeiffer v Midland Rwy* (1886) 18 QBD 243; *Taylor v John Summers & Sons Ltd* (1957) 1 WLR 1182 at 1184-5; *Motor Accidents Board v Coutts* [1984] VR 790 at 794-8; *Australian Telecommunications Corp v Lambroglou* (1990) 12 AAR 515; *Victoria v Bacon* [1998] 4 VR 269 at 285-6; *Nine Nepalese Asylum Seekers, R (On the Application Of) v Immigration Appeal Tribunal* [2003] EWCA Civ 1892 at [6] (such a notice of appeal described as an abuse); *Kirin v Paroda* [2004] PGNC 177.

[19.10] **Striking out notice of appeal** The Court of Appeal has an inherent power to strike out a notice of appeal where it is plainly incompetent, frivolous, vexatious or otherwise an abuse of process: *Aviagents Ltd v Balstravest Investments* Ltd [1966] 1 All ER 450 at 452, 453; [1966] 1 WLR 150 at 154, 155; *Victoria v Bacon* [1998] 4 VR 269 at 290; *Burgess v Stafford Hotel Ltd* [1990] 3 All ER 222 at 228-9; [1990] 1 WLR 1215 at 1223; *Zoia v Commonwealth Ombudsman* [2007] FCA 245; 45 AAR 121 at [9] *et seq*.

(4) Every notice of appeal shall be filed with the Registrar of the High Court who shall-

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(a) cause a copy thereof to be served, as soon as may be, upon every person directly affected by the appeal; and

[19.11] **Meaning of "every person directly affected"** A party served with originating process in the court below should probably be regarded as such a person, whether or not the party appeared or played an active role in the proceedings: *Gillooly v Gillooly* [1950] 2 All ER 1118 at 1118-9. A third party is not: *Re Salmon* (1889) 42 Ch D 351 at 360-3. Where a claim against several defendants in the alternative succeeded against only some of them, an appeal should be served on all the defendants: *Purnell v Great Western Rwy* (1876) 1 QBD 636 at 641. Similarly, where there is a statutory or other right of contribution between defendants, all should be served: *Hopgood v Willan* [1938] 2 All ER 196 at 199. All potential beneficiaries under s disputed estate should be served: *Hunter v Hunter* (1876) 24 WR 504. See generally the discussion in *Re Trade Practices Commission v Milreis Pty Ltd* (1978) 18 ALR 17 at 22-3.

[19.12] **By whom service effected** In practice, service is now effected by the appellant. See further r.14(1).

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(b) forward the original notice to the Registrar of the Court of Appeal.

[19.13] **Obsolescence of rule** The notice of appeal is now filed with the Registrar of the Court of Appeal and no further transmission, other than service, is required. Practice

Direction 2 April 2004 (paragraph 3) provides that the Registrar will transmit the Supreme Court file to the conference judge which file will include the notice of appeal.

(5) For the purpose of service under paragraph (4), the Registrar of the High Court may require the appellant, as a condition precedent to filing, to provide such number of copies of the notice of appeal as may be required for service and filing.

[19.14] **Obsolescence of rule** See further r.14(2) and commentary.

Time for appealing

20 Except where by Ordinance otherwise provided and subject to rule 21, any notice of appeal, whether from an interlocutory or final decision of the High Court, shall be filed with the Registrar of the High Court within thirty days after the decision complained of, calculated from the date on which the judgment or order of the High Court was signed, entered or otherwise perfected.

[20.1] **From when time calculated** Time begins to run on the day on which the decision is delivered: *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998. As the appeal is from the (interlocutory) order or (final) decision rather than the reasons and the rule specifically refers to thirty days after the decision…", it follows that time starts to run even where reasons for decision have not yet been delivered. See for example *Jonas v William* [2002] VUSC 63; CC 11 of 2001. See further [2.4], [2.5].

[20.2] **Validity of notice filed out of time** See [9.2] as to enlargement of time to appeal. A notice of appeal filed outside the time specified by this rule does not institute a valid appeal: *VIDA v Jezabelle Investments* [2009] VUCA 33; CAC 33 of 2009.

Leave to appeal required in interlocutory matters

21 (1) No notice of appeal against any interlocutory order of the High Court, whether made at first instance or in exercise of its appellate jurisdiction, in any civil case or matter shall be filed unless leave to appeal has first been obtained from a judge of the High Court, or in the case of the Gilbert and Ellice Islands Colony, a judge of the High Court or the Senior Magistrate, or, if such leave be refused, from the Court of Appeal.

[21.1] **Whether decision interlocutory or final** This is a legal test which can be difficult to apply. For a full discussion see r.7.1 *CPR* and annotations. A decision on liability with quantum still to be decided will not be final until damages are assessed. A decision on a preliminary issue framed under r.12.4 *CPR* will, however, be regarded as final: *PSC v Nako* [2009] VUCA 7; CAC 31 of 2009 (applying *White v Brunton* [1984] 2All ER 606.

[21.2] **No appeal against interlocutory order without leave** An appeal which requires leave cannot validly be instituted without it: *Benard v Vanuatu Investment Promotion Authority* [2003] VUCA 3; CAC 29 of 2003; *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006 (where the point was conceded); *White v Brunton* [1984] QB 570; [1984] 2 All ER 606 (where it was said that there is no jurisdiction without leave). A purported appeal against an interlocutory order may be, if filed without leave, a nullity (*Coles v Wood* [1981] 1 NSWLR 723) or an irregularity (*Cumbes v Robinson* [1951] 2 KB 83; [1951] 1 All ER 661). It cannot be entertained: See r.18. It must be made to the primary judge or another judge. On the other hand, the Court of Appeal sometimes circumvents this rule in two ways but without stating any guiding principle, other than expediency. The first is to ignore the rule completely as appears to have been done in *Livo v Boetara Trust* [2002] VUCA 10; CAC 4 of 2002 and *Hurley v Law Council* [2000] VUCA 10; CAC 12 of 1999. The second is to invoke r.16 as was explained in *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006.

[21.3] **From whom initial application for leave to be made** The rule seems clear – the application is made to a (single) judge of the Supreme Court – that this is "plain" was acknowledged in *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006. On the other hand, there are a number of instances in which the Court of Appeal has granted leave without leave first having been sought from the judge below and refused: See for example *Livo v Boetara Trust* [2002] VUCA 10; CAC 4 of 2002 ("the most expedient course"); *Government of Vanuatu v Iaukas* [2007] VUCA 21; CAC 40 of 2007. It is difficult to reconcile such decisions with the plain words of the rule. See also *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; CAC 7 of 1997 as to the possible application of r.16.

[21.4] **Renewal of application for leave upon refusal** The refusal of leave ends the application: *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006. Whether characterised as a (second) application for leave or a (first) application for leave to appeal against the first refusal, the Court of Appeal may itself grant leave: *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998. Alternatively, is seems the Court of Appeal might be persuaded to waive the requirement of leave under either or both of rr.16 and 18: *Tari v Harvey* [2006] VUCA 8; CAC 9 of 2006.

[21.5] **Criteria relevant to grant of leave** The purpose of requiring leave is, obviously, to reduce the number of interlocutory appeals: *Adam P Brown Male Fashions Pty Ltd v Philip Morris In*c (1981) 148 CLR 170 at 177; (1981) 35 ALR 625 at 629; *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; CAC 7 of 1997. See also *Kaminski v Somerville College* [1999] EWCA Civ 1169 as to the effect of the overriding objective on procedural appeals. Accordingly, the grant of leave will not be automatic and the circumstances justifying leave will be rare: *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; CAC 7 of 1997; *Noall v Atkinson* [1999] VUCA 7; CAC 3 of 1999. The discretion to grant leave is unfettered and all the circumstances of the case may be relevant. Although there are no rigid or exhaustive criteria, the policy of reducing the number of interlocutory appeals has led to the emergence of certain well-known principles, Leave to appeal interlocutory orders will not generally be granted unless there are reasonable prospects of success (ie. a real issue to be resolved): *Ebbage v Ebbage* [2001] VUCA 7; CAC 7 of 2001 at [33]; *Atel v Massing* [2001] VUCA 20; CAC 22 of 2001; *Ifiria Wharf and Stevedoring v Kaspar* [2006] VUCA 4; CAC 29 of 2005; *Soalo v Berry* [2007] VUCA 2; CAC 3 of 2007; *Snoopy's Stationery v Minister of Education* [2009] VUSC 2; CC 209 of 2007. It is not enough, however, that a decision be attended by sufficient doubt as to its correctness or, indeed, wrong: *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; CAC 7 of 1997. There must be some real detriment in terms of substantive rights not remediable through the trial process: *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; CAC 7 of 1997; *Atel v Massing* [2001] VUCA 20; CAC 22 of 2001; *Stone v Kelly* [2002] NZCA 48 at [16]. Leave to appeal purely hypothetical or academic questions will not be given: *R v Home Secretary, ex parte Wynne* [1993] 1 WLR 115 at 120; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356. Alternatively, there must be a point of some importance at issue: *Soalo v Berry* [2007] VUCA 2; CAC 3 of 2007 ("the significance of the issues to the parties"); *Joli v Joli* [2003] VUCA 27; CAC 11 of 2003; *Melsul v Bule* [2005] VUCA 8; CAC 3 of 2004; *Duduni v Vatu* [2003] VUCA 15; CAC 28 of 2003 ("error of process"); *Remy v Palaud* [2005] 23; CAC 15 of 2005; *Stone v Kelly* [2002] NZCA 48 at [16]. Applications involving interlocutory decisions which have the practical effect of finally determining the rights of a party may give rise to a prima entitlement to leave: *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572 at [1], [43], [99].

[21.6] **Limited grant of leave** Leave to appeal may be granted as to some proposed grounds of appeal and refused as to others: *Sanderson v Blyth Theatre Co* [1903] 2 KB 533. Of course, there is nothing preventing the appellant from renewing the application for leave in the Court of Appeal in respect of that part of the application that was refused.

[21.7] **Whether leave can be granted by consent** Leave to appeal was granted by consent by the Court of Appeal in *Joli v Joli* [2003] VUCA 27; CAC 11 of 2003 and, in substance if not in form, in *Government of Vanuatu v Iaukas* [2007] VUCA 21; CAC 40 of 2007. Strictly speaking, this is a matter of jurisdiction and cannot be determined by consent: *White v Brunton* [1984] QB 570; [1984] 2 All ER 606. It is suggested that the court should take consent into consideration when exercising its discretion, but the issue is ultimately a matter for the court, as the Court of Appeal mentioned in *Benard v Vanuatu Investment Promotion Authority* [2003] VUCA 3; CAC 29 of 2003.

[21.8] **Revocation of grant of leave** Leave may be revoked at any time. In *Societe Civil Familiale v Ohlen Ltd* [1999] VUCA 1; CAC 13 of 1999 leave was revoked when it became clear that the basis of the appeal was contrary to expectation and could not in fact be adequately ventilated as the necessary pleadings and evidence below were deficient. Leave may also be revoked if the court granting it was misled: See for example *Angel Airlines SA v Dean & Dean* [2006] EWCA Civ 1505 at [28] *et seq*.

[21.9] **Saving up complaints regarding interlocutory orders** If interlocutory orders made during proceedings affect the final judgment, it is possible to challenge these orders generally at the same time as the appeal, without obtaining leave: *Noall v Atkinson* [1999] VUCA 7; CAC 3 of 1999; *Sugden v Lord St Leonards* (1876) 1 PD 154 at 208-9; *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22 at [4], [6], [8], [44], [51]; (2002) 209 CLR 478 at 482-4, 494, 497; (2002) 188 ALR 353 at 354-355, 364, 366.

[21.10] **No appeal further to "appeal" from Master to Judge** The scheme contemplated by the recently-enacted s.42(4), Judicial Services and Courts [Cap 270] is that certain procedural issues can be decided by a Master or Deputy Master. A party dissatisfied by such a decision may appeal by way review *de novo* to a single Judge of the Supreme Court, but no further appeal is possible. Though the availability of a review *de novo* probably saves this administrative delegation of judicial function from infringing arts.47(1) and 49(1), (2) of the *Constitution*, however the limitation of further appeal seems a clear infringement of art.50 because the jurisdiction exercised by a single judge hearing an appeal from a procedural decision of a Master is not an appellate jurisdiction. Rather, it is the reclamation of an original jurisdiction from where it was conditionally delegated: *Tourism Holdings Australia Pty Ltd v Commissioner for Taxation* [2005] NTCA 3 at [16]-[17], [20]; *Totev v Sfar* [2008] FCAFC 35 at [9]-[13].

(2) Every application for leave to appeal under this rule shall be by summons in chambers to be filed with the Registrar of the High Court or with the Registrar of the Court of Appeal, as the case may be, within the period prescribed in rule 20 for the filing of notice of appeal.

[21.11] **Form of application** It is suggested that an application for leave ought to include a draft notice of appeal, without which it would be difficult or impossible for the court to address the merits of the proposed appeal.

Provided that upon the filing of an application for leave to appeal time within which, if leave be granted, the notice of appeal shall be filed shall be extended by such period as a judge of the High Court, the Senior Magistrate, or a judge of the Court of Appeal, as the case may be, shall consider appropriate having regard to all the circumstances.

Appeal fee and security for costs

22 (1) The appellant shall-

(a) forthwith upon the filing of any notice of appeal, pay to the Registrar of the High Court the fee prescribed for the filing of such notice; and

(b) upon request of the said Registrar made at any time after the filing of the notice of appeal-

(i) deposit with the Registrar such sum as the Registrar shall assess as the probable expenses of the preparation, certification and copying of the record; and

(ii) deposit such further sum, or give security therefor to the satisfaction of the Registrar, as the Registrar may fix as security for the prosecution of the appeal and for the payment of all such costs as may be ordered to be paid by the appellant.

(2) In the event of non-compliance with the provisions of paragraph (1), or in the event of any security required to be given not being given, or being given in part only, within the time directed or within such extended time as may be allowed in accordance with rule 9, all proceedings in the appeal shall be stayed, unless the Court of Appeal shall otherwise order, and the appeal shall be listed for the next sessions of the Court of Appeal for a formal order of dismissal.

[22.1] **Power to make order for security** The Court of Appeal has explained that r.22 should no longer be invoked: *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997. The reasoning was that the powers conferred on the Registrar (of the High Court) are no longer exercised by the Registrar (of the Court of Appeal of Vanuatu). Instead, it was suggested that O65 r4 of the former *Rules* ought to be applied. The new counterpart to O65 r4 is r.15.18 of the *Civil Procedure Rules*. It is doubtful whether, strictly speaking, this could properly apply to appeals, however, there would seem to be no reason why the Court of Appeal could not make an order for security for costs in its inherent jurisdiction. See further CPR [15.18.1].

Cross appeals and respondent's notice

E *RSC* O59r6(1)

23 (1) A respondent who, not having appealed from the decision of the High Court desires to contend on the appeal that the decision of that court ought to be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect to the Registrar of the High Court, specifying the grounds for that contention and the precise form of order which he proposes to ask the Court of Appeal to make, or to make in that event, as the case may be.

[23.1] **Modification of common law** This rule removes a respondent's common law entitlement to support the decision below on different grounds without notice: *David Syme & Co Ltd v Lloyd* (1985) 1 NSWLR 416 at 420-1, 427; 59 ALR 159 at 164, 168.

[23.2] **Cross appeal** Notice under this subrule should be given when it is desired to obtain additional or changed orders to those made below.

[23.3] **Whether additional leave required** If leave is granted to appeal an interlocutory order, there is room for doubt as to whether the respondent requires leave to file a respondent's notice in the nature of a cross-appeal. The *Rules* are, like rules in many other jurisdictions, silent on the issue. There are authorities pointing in different directions: Compare *Crombie v Uniting Church* (1997) 17 WAR 291 at 307 and *Commissioner of State Revenue v The Muir Electrical Co* [2003] VSCA 112 at [26] – [28] and n.27. It is respectfully suggested that the former view, that separate leave is not required, is more compelling. In particular, the reasoning applied in the latter case is based on "special leave" applications which are a much higher threshold and reflect policy considerations which are much more restrictive. In *Telecom Vanuatu Ltd v Minister for Infrastructure and Public Utilities* [2007] VUCA 8; CAC 32 of 2006 notices were filed under subrules (1) and (2) in relation to interlocutory decisions without a specific grant of leave – no issue was taken by the court or the appellant.

E *RSC* O59r6(1)

(2) A respondent who wishes to contend on the appeal that the decision of the High Court should be affirmed on other grounds other than those relied upon by that court shall give notice to that effect to the Registrar of the High Court specifying the grounds for that contention.

[23.4] **Notice of contention** Notice under this subrule should be given when it is not desired to add to or change any orders below, but to support the outcome by reference to grounds upon which the primary judge did not rely.

[23.5] **Cross appeal combined with contention** Where a respondent wishes to add to or vary some orders *and* to support others on grounds different to those upon which the primary judge relied, it is suggested that there is no reason why notice pursuant to subrules (2) and (3) cannot be given in a single document, provided that it is sufficiently clear.

E *RSC* O59r6(2)

(3) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of an appeal, to contend that the decision of the High Court should be varied upon grounds not specified in a notice given under this rule, to apply for any relief not so specified or to support the decision of the High Court upon any ground not relied upon by that court or specified in such notice.

[23.6] See further r.5.

E *RSC* O59r6(3)

(4) Any notice given by a respondent under this rule (in these Rules referred to as a "respondent's notice") shall be filed with the Registrar of the High Court within twenty one days after service upon him of the notice of appeal, and such Registrar shall as soon as may be upon payment of the prescribed fee cause a copy thereof to be served upon all parties directly affected by the contentions of such respondent.

[23.7] See [9.3] as to enlargement of time to file a respondent's notice.

(5) For the purpose of service under paragraph (4), the Registrar of the High Court may, as a condition precedent to service, require the respondent to provide such number of copies of the respondent's notice as he may require for the purpose of serving and filing.

Amendment of notice of appeal or respondent's notice

E *RSC* O59r7

24 A notice of appeal or a respondent's notice may be amended at any time by or with the leave of the Court of Appeal, upon such terms as the Court of Appeal may consider just.

[24.1] **Discretion** The discretion to permit amendment is at large. Leave to amend will commonly be granted. It may be refused where the proposed amendments cannot benefit the appeal (*Burns v Grigg* [1967] VR 871 at 872) or are unjust (*Introvigne v Commonwealth* (1980) 48 FLR 161 at 169).

[24.2] **Manner and time of making application** It is highly inconvenient when such applications are made for the first time during the hearing of the appeal and, wherever possible, an application to amend should be made (or at least foreshadowed, with particulars) well in advance of the hearing. The application should include a draft of the proposed amended notice.

[24.3] **Where reasons for decision delayed** If the reasons for decision are not readily available and the time limit in r.20 is in danger of expiry, it is suggested that the best course is to file the notice of appeal in the most complete form possible and then apply for leave to amend later. See for example the difficulty faced by the applicant in *Jonas v William* [2002] VUSC 63; CC 11 of 2001.

Preparation of record

25 (1) The Registrar of the High Court shall be responsible for the preparation of the record; and such Registrar may in his discretion exclude from the record all documents (more particularly such as are purely formal) that are not relevant to the

subject matter of the appeal, and generally reduce the bulk of the record as far as may be practicable, taking especial care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents:

Provided that the documents omitted to be copied shall be enumerated in a list to be placed after the index to or at the end of the record.

(2) After completion of the preparation of the record the Registrar of the High Court shall cause one copy thereof to be made which he shall certify under his hand and the seal of the High Court to be a true copy of the original record and five copies thereof, which shall not be so certified, and shall forward the same to the Registrar of the Court of Appeal; and except by order of the Court of Appeal or a judge thereof or of a judge of the High Court no original document shall be transmitted to the Registrar of the Court of Appeal.

[26.1] **Obsolescence of rule** Practice Direction 2 April 2004 contains detailed directions which effectively replace subrules (1) and (2).

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(3) The Registrar of the High Court shall on application by any party to an appeal and at the cost of such party provide him with a copy of the record prepared for the appeal or any part thereof.

(4) Subject to the provisions of paragraph (3), the cost of the preparation, copying and certification of the record for the appeal shall be borne by the appellant as costs in the appeal.

Stay of proceedings or execution

26 (1) Except so far as the Court of Appeal or a judge thereof, or a judge of the High Court, or in the case of the Gilbert and Ellice Islands Colony the Senior Magistrate thereof, may direct-

(a) an appeal shall not operate as a stay of execution or of any proceedings pursuant to any decision of the High Court; and

[27.1] See r.13.4, *CPR* as to the grounds for suspension of execution by the Supreme Court. See also rr.14.10, 14.40, *CPR*.

[27.2] **Inherent jurisdiction** In addition to this rule, the Court of Appeal has inherent jurisdiction to grant a stay. The exercise of both jurisdictions are probably independent of whether a single judge already granted or refused a stay: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 692.

(b) no intermediate act or proceeding shall be invalidated by an appeal.

(2) On appeal, interest for such time as execution has been delayed by an appeal shall be allowed unless the Court of Appeal otherwise orders.

[27.3] **Interest** As to post-judgment interest see CPR, [14.8.1].

General powers of Court of Appeal

E *RSC* O59r10

27 (1) In relation to an appeal, the Court of Appeal shall have all of the powers and duties as to amendment, extension of time or otherwise as has the High Court.

[27.1] **Examples** See also s.48(3)(d), *Judicial Services and Courts* [Cap 270]. These powers are now set out in the *Civil Procedure Rules* 2002. For example, the Court of Appeal may add or remove parties (*Performing Right Society v London Theatre of Varieties* [1922] 2 KB 433 at 450), amend statements of the case (*R v Kensington Income Tax Commissioners* [1914] 3 KB 429; *British and French Trust Corp v New Brunswick Rwy Co* [1937] 4 All ER 516 at 530) and sit *in camera* (*In Re Agricultural Industries Ltd* [1952] 1 All ER 1188).

(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner.

[27.2] **Discretion** The court's discretion is at large except where the proviso below operates. It is suggested that this discretion ought to be exercised by reference to the public interest in the finality of litigation and to the appellate function of the Court of Appeal.

[27.3] **Evidence of course of trial** Where the appeal relates to some procedure or occurrence during the course of the trial, an sworn statement describing the same should be prepared, filed and served well ahead of the trial, for inclusion in the appeal book.

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds.

[27.4] **Meaning of "hearing on the merits"** It has been held that a summary judgment was a hearing on the merits in *Langdale v Danby* [1982] 3 All ER 129; [1982] 1 WLR 1123.

[27.5] **Meaning of "special grounds"** It is impossible to state, definitively, what constitutes "special grounds": *Re Chennell* (1878) 8 Ch D 492 at 505. The classical summary of the relevant factors is set out by Denning LJ in *Ladd v Marshall* [1954] 3 All ER 745 at 1491: "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly. The evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible." The sworn statement in support of an application made under the rule should address these matters or any others relied upon. These principles continue to be applied in England since the overriding objective came into force, albeit perhaps with less rigidity: *Yukong Line Ltd v Rendsburg Investments Corp* [2000] EWCA Civ 358 at [53], [57]; *Gillingham v Gillingham* [2001] EWCA Civ 906 at [19] – [20], [35] – [36].

[27.6] **Matters occurring after hearing** The exception does not necessarily allow all evidence of matters occurring after trial: *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284. There is no precise formula to guide the exercise of the discretion, it being a function of discretion and degree: *Mulholland v Mitchell* [1971] AC 666 at 676, 679, 681; [1971] 1 All ER 307 at 309-11; 313, 314-5. Evidence which substantially affects a basic assumption made at the trial is usually allowed: *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949; [1969] 1 WLR 1023 at 1035 (incorrect assumption at trial about dismissal of plaintiff); *Mulholland v Mitchell* [1971] AC 666; [1971] 1 All ER 307 (serious deterioration in health requiring special care); *Barder v Calouri* [1988] 1 AC 20 (death of children and suicide of spouse after consent orders in divorce proceedings); *Jenkins v Liversey* [1985] AC 424 (failure to disclose intention to remarry and fact of remarriage shortly after matrimonial proceedings).

(3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment or make any order which ought to have been given or made, and to make such further or other orders as the case may require.

[27.7] **Drawing inferences of fact** A distinction is to be drawn between evidence of a witness which is evaluated by a court and an inference of fact to be drawn from such facts as are found. The Court of Appeal will be reluctant to interfere with the former as the primary judge had the advantage of seeing the credibility of the witness tested: *Watt v Thomas* [1947] AC 484; [1947] 1 All ER 582. This rule is directed to the latter in which connection the Court of Appeal may form its own opinion: *Mersey Docks & Harbour Board v Proctor* [1923] AC 253 At 258; *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326 at 327.

[27.8] **No augmentation of enforcement powers** The words "such further or other orders as the case may require" have been held not to enlarge the powers to enforce orders: *Cox v Hakes* (1890) 15 App Cas 506 at 531.

(4) The power of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such notice; and the Court of Appeal may make any order, on such terms as it may think just, to ensure the determination on the merits of the real question in controversy between the parties.

[27.9] **Court may alter parts of judgment not appealed from** See further [5.2].

[27.10] **Examples of orders relating to other parties** The rule enables the Court of Appeal to make orders relating to parties who have not appealed, as for example in *Hanson v Wearmouth Coal Co* [1939] 3 All ER 47 at 55 (order of contribution); *Re Whiston* [1924] 1 Ch 122 (appeal by certain beneficiaries upheld and declaration and leave to appeal given to non-appealing beneficiaries).

[27.11] **Inherent power to unravel** This rule complements the inherent power to unravel the consequences of the decision below which have been given effect: *Nykredit Mortgage Bank Plc v Edward Erdman Group (No 2)* [1998] 1 All ER 305 at 307, 314..

(5) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.

Applications

E *RSC* O59r14

28 Any application to a judge of the High Court or in the case of the Gilbert and Ellice Islands Colony, the Senior Magistrate, or to a judge of the Court of Appeal shall be by summons in chambers and subject to such directions in relation thereto as such judge or the Senior Magistrate may think fit to issue.

Additional security and interim orders

29 The Court of Appeal may, in its discretion, require security for the costs of any appeal or for the performance of any orders to be made on or in relation to any appeal in addition to such security for costs as may have been required under rule 22.

[29.1] See further [22.1].

Notice of hearing

30 The Registrar of the Court of Appeal shall, upon obtaining the directions of the President thereof, cause notice of the date of the hearing of any appeal to be served upon the parties to the appeal in accordance with these rules.

[30.1] **Obsolescence of rule** The practice is that the date for the hearing is set at the call-over on the first day of the Court of Appeal sittings. The Registrar will, prior to that time, inform the parties that the appeal features in the list of appeals to be heard in those sittings.

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Provided that in the event of an appellant or respondent being present in person in Fiji by an advocate, or being outside the jurisdiction of the High Court, the Registrar of the Court of Appeal may, in his discretion, serve notice of the date of the hearing directly upon that party or upon his advocate.

Powers of Court of Appeal as to new trials

E *RSC* O59r11

31 (1) If upon the hearing of an appeal it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for that court, if it thinks fit, to order that the decision of the High Court be set aside and that a new trial shall be had.

[31.1] **Circumstances under which new trial ordered** It has been said that an order for a new trial is a "deplorable" result: *Kakhyl v Labouchere* [1908] 2 KB 325 at 327. Accordingly, the court will be keen to avoid such an outcome, if possible. The circumstances under which a new trial will be ordered are not closed. Examples of the common categories of error leading to a new trial include: Excessive or otherwise unfair intervention by the trial judge (*Jones v National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155); failure to resolve evidentiary conflict (*Bray v Palmer* [1953] 2 All ER 1449; [1953] 1 WLR 1455); party taken by surprise (*Isaacs v Hobhouse* [1919] 1 KB 398 at 409); misconduct by a party or lawyer (*Stern v Friedman* [1953] 2 All ER 565; [1953] 1 WLR 969); discovery of fresh evidence not previously ascertainable (*Hip Foong Hong v Neotia & Co* [1918] AC 888); irregularity or slip in the course of the trial (*Germ Milling Co Ltd v Robinson* (1886) 3 TLR 71).

[31.2] **Differently constituted court** Ordinarily, a new trial will be conducted by the original trial judge. There may, however, be special circumstances which will lead the Court of Appeal to direct a new trial before a different judge: *Steedman v Baulkham Hills Shire Council (No 2)* (1993) 31 NSWLR 562.

[31.3] **Nature of new trial** The new trial is completely independent of the first trial. Accordingly, the arguments and positions taken by the parties in the first trial can be revisited in the second: See for example *Venn v Tedesco* [1926] 2 KB 227 at 237 (point not originally pleaded); *Smith v Stroud* (1926) 42 TLR 372 (abandoned counterclaim); *Horton v Horton* [1960] 1 All ER 503; [1960] 1 WLR 987 (election to call no evidence).

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(2) A new trial shall not be ordered on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has thereby been occasioned.

[31.4] **Meaning of "substantial wrong or miscarriage of justice"** Each case will need to be evaluated according to its own circumstances: *Bray v Ford* [1896] AC 44 at 50. A party must be seen to have been deprived of a genuine chance upon a substantial element of the case: *Bray v Ford* [1896] AC 44 at 47-8, 53. It will be very difficult to make out this ground where the only complaint is that irrelevant evidence was admitted: *Nominal Defendant v Clements* (1960) 104 CLR 476 at 496.

(3) A new trial shall may be ordered on any question without interfering with the finding or decision on any other question; and if it appears to the Court of Appeal that any such wrong or miscarriage as is referred to in paragraph (2) affects part only of the matter in question, or one or some only of the parties, the Court of Appeal may order a new trial as to that part only, or as to that party or those parties only, and give final judgment as to the remainder.

[31.5] **Partial re-trial** There may arise circumstances where it is appropriate to order a new trial, but only as to specific issues. See for example *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15 at 273 (insufficient factual findings below to make calculations); *New South Wales v Deren* [1999] NSWCA 22 at [133], (where the outcome as to some issues could not change); *Bass v TCN Channel Nine* [2003] NSWCA 118 at [145] – [146] (trial judge erroneously excluded reply of malice and upheld defence of qualified privilege – limited re-trial as to malice and quantum of damages – finding of defamation preserved).

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Parties not appearing may file argument in writing

32 (1) An appellant may embody in a record of appeal a statement that he does not intend to appear personally or by representation at the hearing together with a statement in writing of his arguments in support of the appeal; and in such event it shall not be necessary for him to attend or be represented at the hearing unless the Court of Appeal shall so order and the Court of Appeal shall have regard to such arguments.

(2) Subject to the provisions of paragraph (1), if, on any day fixed for the hearing of an appeal, the appellant does not appear in person or by representation, the appeal may be dismissed.

(3) If the appellant appears, and any respondent fails to appear, either in person or by representation, the appeal shall proceed in absence of such respondent, unless the Court of Appeal for sufficient reason sees fit to adjourn the hearing thereof.

(4) In answer to any appeal, a respondent may, instead of appearing in person or by representatives before the Court of Appeal, file with the Registrar of the High Court not less than 14 days before the date fixed for the hearing of the appeal, a statement to the effect that he does not intend to appear in person or by representation at the hearing together with a statement in writing of his arguments in answer to the appeal; and the Registrar of the High Court shall forward the same to the Registrar of the Court of Appeal and shall cause a copy thereof to be served upon the appellant, or his advocate, if any, and on every other respondent, or his advocate, if any, and in such event the Court of Appeal shall have regard to such arguments.

(5) Where any argument in writing is advanced pursuant to the provisions of paragraph (1) or (4) there shall be no right of reply in any opposing party, but the Court of Appeal may in its discretion call upon any party to the appeal to submit original or further argument in writing within such time as the Court of Appeal may direct.

(6) Where any appeal is dismissed or allowed under the provisions of paragraph (2) or (3) the party who was absent may apply, within thirty days after the communication to him of the dismissal or allowance of the appeal, to the Court of Appeal for the rehearing of the appeal and where it is shown that there was sufficient reason for the absence of such party the Court of Appeal may, in its discretion, order that the appeal be restored for hearing upon such terms as to costs or otherwise as the Court of Appeal shall think fit.

(7) Notwithstanding anything contained in rule 15, where any decision of the Court of Appeal is made in the absence of all parties to the appeal, it shall not be necessary for the judgment of the Court of Appeal to be delivered in open court but it shall be sufficient if the judgment be reduced to writing and a copy thereof served upon each of the parties to the appeal or his advocate, if any.

(8) The provisions of this rule shall apply mutatis mutandis to the hearing of any cross-appeal.

[32.1] **Under-utilisation of rule** The provisions of this rule were obviously designed to accommodate the large geographical area covered by colonial administration and the difficulty and expense associated with travel and communication. Today, this rule is seldom, if ever, invoked. There is, however, a modern trend in the highest courts of appeal to place increased reliance on written argument where the court would be overburdened by uncontrolled oral argument. This can be an effective and economical means of conducting an appeal and it is suggested that parties always give consideration the appropriateness of allowing the court to decide the appeal "on the papers".

Costs and witness allowances

33 (1) Costs allowed in the Court of Appeal shall be taxable according to the scales for the time being in force in the Court of Appeal.

[33.1] **Obsolescence of rule** There do not appear to be any such scales. The Court of Appeal usually pronounces costs orders on the day appointed for the delivery of decisions. There is usually no opportunity given to counsel to make submissions on costs and it is difficult reliably to identify any principles associated with costs except a general disinclination to make any award. The "usual rules" of costs are said to apply to appeals (See for example *Inter-Pacific Investment Ltd v Sulis* [2007] VUCA 26; CAC 4 of 2007), however effort is rarely made to identify the real extent of success or failure of an appeal (See *Alexander v Rayson* [1936] 1 KB 169 at 191) and costs are frequently left to lie where they fall. On those occasions where costs are awarded, they are often fixed, also without opportunity for counsel to address, in which connection see CPR [15.7.1].

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(2) The allowance for witnesses before the Court of Appeal shall be according to the scales for the time being in force in the Court of Appeal.

[33.2] **Obsolescence of rule** There do not appear to be any such scales.

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Certification of final determination of civil appeals

34 (1) In the final determination of an appeal, or the determination of any interlocutory application, under this Part, the Registrar of the Court of Appeal shall-

(a) notify the Registrar of the High Court of the decision of the Court of Appeal and also any orders or directions made or given by the Court of Appeal in relation to the appeal or to any matter connected therewith, in such manner, having regard to the urgency thereof, as he considers most convenient; and

(b) in any event send to the Registrar of the High Court one certified copy of the judgment of the Court of Appeal.

[34.1] **Notification to primary judge** The manner in which the primary judge is notified of the outcome of appeals is no longer accurately described by this rule. Though it may safely be assumed that the primary judge is in fact made aware of the results of appeals, the mechanism by which this is done is not transparent.

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(2) Except where any party to an appeal was legally represented at the appeal or was himself present in person at the hearing of the appeal and at the delivery of the judgment in the same, the Registrar of the High Court shall, upon receipt of notice of the result of the appeal from the Registrar of the Court of Appeal, notify each of the parties to the appeal in accordance with the notification so received.

[34.2] **Obsolescence of rule** Subr.(2) would seem to have no ongoing application.

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TRANSITION AND REVOCATION OF PREVIOUS RULES

Transition

67 **Any appeal under the Court of Appeal Rules (No 2), 1956, revoked by these Rules, shall be deemed for all purposes to have been commenced under these Rules and the provisions of these Rules shall apply thereto.**

Revocation of previous Rules

68 **The Court of Appeal Rules (No 2), 1956, are revoked.**

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