Jennifer Corrin Care

Civil Procedure and Courts in the South Pacific

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FOREWORD

One of my favourite (and, I fear, too often repeated) observations is that the South Pacific is the largest village in the world. Although the numerous islands are scattered over a wide ocean separated by enormous distances, wherever you travel in the Pacific you will find faces recognisable from some previous journey amongst the islands. Conversations invariably include people and traverse events in far distant islands with the familiarity of close neighbours.

This is the more remarkable because of the extraordinarily rich diversity of culture and traditions—such a valuable feature of the Pacific—which still separates and distinguishes one island from another. Contacts between the various islands have been a continuing part of the history of the region and have left many common cultural strands but the differences have survived.

I am lucky enough to have had the opportunity of working in seven different Pacific jurisdictions since 1979 when I first arrived with my family to live and work as a Resident Magistrate in Fiji. Since then, the world in general and the Pacific in particular seems to have shrunk with the development of modern means of communication. The physical distance separating one island from another is no longer the factor that determines influence or contact. No island is further away than a telephone call. The internet allows one virtually instantly to tap a vast reservoir of information. Travel from island to island and country to country has never been easier. Travel into, and emigration from, the Pacific seems to increase every year. All this puts pressure on the diverse traditional cultures and values that have, for so long, been an essential part of the Pacific way of life.

Now new pressures and influences threaten that diversity. Pressures from outside the islands backed by television and multinational finance are rapidly eroding cultural values and traditions. Visitors bring their own cultures, their own values and, all too often, traditional values are carelessly abandoned for the tourist dollar.

This book is about another, and earlier, influence from outside the region which also resulted in critical changes to the lifestyle of the islands. The introduction of a legal system based on the common law was, in many countries, the result of an imposed regime from the colonial days. In others it was voluntarily adopted by the early governments based on the vision of the rulers of those days. Whatever the means by which it gained access, the result was profound change affecting, to a greater or lesser degree, every aspect of life.

The common law had grown from a seed planted many centuries before in the cold, northern atmosphere of a far distant island but, like so many of the people who brought it, it rapidly succumbed to the warm individuality and diversity of Pacific life. Across the region, the influences of the various cultures soon started to work their own individual modifications not so much of the laws themselves, based as they were on widely shared values, but on the method by which the laws are applied and enforced.

Now we are making full circle. As the world shrinks, we can no longer afford the luxury of isolation. We can continue to develop and enjoy the individuality of our own systems but we ignore those of others at our peril. With every passing year, it becomes more vital to know and understand the processes by which the law is applied by our neighbours. Practitioners are asked with increasing

frequency to advise on matters involving more that one country. Their need to access the judgments and rules of neighbouring courts increases almost daily.

The University of the South Pacific (USP) has been at the centre of such regional awareness and I have no doubt lawyers from all over the region are grateful for its work in this field.

I first met Jennifer Corrin Care in 1986 when she came to Solomon Islands and established a practice in Honiara. Her ability and determination soon forced a welcome improvement in the standard of work of other practitioners and it was with mixed feelings that I saw her leave to work at USP

She joined the University shortly after the Department (later to become the School) of Law was established and she soon became recognised throughout the region as an able and knowledgeable teacher. Her research into and knowledge of the laws and legal systems of the region is profound and has already resulted in a number of published works. I am happy that, since her move to the University of Queensland, her interest in the region has continued. I hope the result of her scholarship will be many more books devoted to the law of the Pacific.

In her latest book she has adopted a comparative approach to the manner in which the rules of procedure have developed and changed in the various island states. It provides practitioners with a useful tool. As the world shrinks, their fields widen and the pressures to provide immediate answers increase. A book like this gives them immediate access to a host of details which would otherwise be discovered only after a difficult and time consuming search through the jurisdictions of the region.

I would expect, very soon, to see this book on the desk of every lawyer with a Pacific-wide practice and I commend it to any student or practitioner who hopes to widen his future horizons to include the whole of this vast and fascinating village.

CHIEF JUSTICE GORDON WARD
Nuku'alofa, Tonga
March 2003

PREFACE

Civil procedure in the South Pacific is at an exciting stage of development. On 31 January 2003, new Rules came into force in Vanuatu, drafted on the basis of recommendations from the local Rules Committee. These Rules replaced the Western Pacific High Court (Civil Procedure) Rules 1964, which have dominated civil procedure in a number of South Pacific countries for the past 40 years. The Vanuatu Rules replace most of the archaic language present in the earlier Rules with plain English. They also introduce case management techniques and opportunities for settlement through conferences and mediation. The Rules also state their overriding objective, which is 'to enable the courts to deal with cases justly'. New Rules are also being drafted in Tuvalu, which will replace the High Court (Civil Procedure) Rules 1964 with a simpler and shorter set of Rules.

My effort to do justice to the new Vanuatu Rules in my commentary on them has been frustrated by the problem in obtaining a copy. Access to other primary material has also been a struggle at times. I am very grateful to those people who so kindly helped me in trying to overcome this problem, some of whom are acknowledged below. Evasiveness of South Pacific law materials is a difficulty well known to scholars in the region. The position has been greatly improved by the University of the South Pacific Law School's Pacific Laws Project but, understandably, civil procedure materials are not high on the agenda. It is hoped that readers will keep this in mind if they encounter any omissions in the law and practice discussed.

This book compares the main rules of procedure that govern the conduct of civil cases in countries of the South Pacific. It explains their practical application in the context of the courts in which they operate. The text focuses on the Rules operating in Fiji Islands, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The text deals with the procedure that governs the conduct of civil cases in some of the small island countries of the South Pacific. It also examines the courts in which the civil process takes place. The application of the rules of procedure is discussed through the medium of two civil scenarios, a personal injury claim and a claim for a simple debt. Sample court documents are based around these two cases. The text describes recent changes to the rules and suggests further changes. Legislative and case law developments and tactical considerations in the use of the rules are also discussed.

The book builds on an earlier work, *Civil Procedures of the South Pacific*, published in the Laws of the South Pacific series by the Institute of Justice and Applied Legal Studies at the University of the South Pacific. However, it is more than a second edition of that book, covering new areas, including the court hierarchies in countries of the region, appeal procedures and containing more commentary and analysis.

The book is designed for use by legal practitioners and anyone interested in civil procedure in the South Pacific region. It may also be of use to teachers and students of South Pacific civil procedure, both at degree level and in professional legal training programmes.

I have doggedly persisted in trying to use gender-neutral terms for registrars and regional members of the magistracy and judiciary, even though there are no female registrars or judges outside Fiji Islands.

The help of my research assistants, Rebecca Taube and Shasha Ingbritsen, is gratefully acknowledged. I would also like to thank Sharmaine Wells for providing support and good humour when it was most needed. A large number of people have assisted me in obtaining materials from the countries covered in this book. Particular thanks are due to Peter Murgatroyd and the library staff at USP's Emalus Campus Library, Chief Justice Ward and Justice Ford of Tonga, the Registrar of the High Court of Fiji Islands and Andrew Radclyffe, private solicitor of Solomon Islands.

This book is dedicated to my father, Edward John Corrin, who died in February 2003, a harsh critic but an inspiring example.

Jennifer Corrin Care
Senior Lecturer
University of Queensland
April 2003

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ABBREVIATIONS

Cooks	Cook Islands
CPR	High Court (Civil Procedure) Rules 1964
Dowl	Dowling
Dowl & Lo	Dowling & Lowndes
FLR	Fiji Law Reports
J Pac S	Journal of Pacific Studies
MCR	Magistrates Court Rules
NZ	Rules of the High Court of New Zealand
NZ	New Zealand
RSC	Rules of the Supreme Court of England and Wales
Sched	Schedule
SI	Solomon Islands
SILR	Solomon Islands Law Reports
SPLR	South Pacific Law Reports
TLR	Tongan Law Reports
USP	University of the South Pacific
Van	Vanuatu
VLR	Vanuatu Law Reports
WSLR	Western Samoan Law Reports

CHAPTER 1

INTRODUCTION

1 SUBJECT MATTER

This book deals with the procedure that governs the conduct of civil cases[1] in some of the small island countries of the South Pacific.[2] It also examines the courts in which the civil process takes place.

Civil cases are to be distinguished from those in the public law area which have a constitutional or administrative law base and from criminal cases where the initiator of the process is typically the state and the consequences of the action are a deprivation of liberty or property in favour of the state. By contrast, in civil cases, the disputants are private parties and the claim is personal to the parties, as is the remedy, which is usually expressed in monetary terms. Matrimonial and family law disputes and land matters are all within the general description of civil cases, but are not the prime topic of this text. Family law cases are to a significant degree dealt with in accordance with specific procedures prescribed by legislation. Land matters in most countries of the region are dealt with in accordance with special procedures and/or by special adjudicatory bodies.[3]

All courts exercising civil jurisdiction are governed by specific rules of procedure. This book concentrates on the rules of procedure of the superior courts of the countries of the region (that is to say the courts usually identified as the 'High Court' or the 'Supreme Court'). It also deals with the rules of procedure that govern appeals from superior courts.[4]

The rules in the inferior courts are often very similar to the rules in the superior courts of the same jurisdiction. They also frequently provide that in the absence of a particular rule on a point, the rule applicable in the superior court is to be applied.[5] In Vanuatu, uniform rules have recently been made which govern civil proceedings in the Supreme Court and the magistrates' court.[6]

Civil court action should always be the last resort for dispute resolution and factors relevant to the decision to commence proceedings are discussed in Chapter 2. The court structure, which is the framework within which the procedural rules operate, is described in detail in Chapter 3. The practical application of the rules of

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1 A typical example of a civil case is a claim in contract against a person for breach of their obligations, or a claim in tort by an injured person against a tortfeasor.

2 The main courts and civil rules discussed are those of the member States of the University of the South Pacific. These are Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. Marshall Islands is the most recent country to become a member but, as its civil procedure follows the American system, it is referred to in this work only by way of occasional comparison.

3 For example, the Land Court in Tonga and the Land and Titles Court in Samoa.

4 See Chapter 14. The rules of procedure that govern judicial review are not discussed.

5 For example, O4 Magistrates' Court (Civil Procedure) Rules (SI); O3 r8 Magistrates' Court Rules Cap 14 (Fiji); Magistrates' Court Act Cap 11 (Tonga). See also *Surji v Native Land Trust Board*, unreported, High Court, Fiji, Civ App 12/1994,19 June 1997, pp 4–5.

6 Civil Procedure Rules 2002. The Rules do not apply to constitutional petitions brought under the Criminal Procedure Code (Van) s 218, or any proceeding for which rules are provided by statute: r1.6(2).

procedure within the courts is discussed in ensuing chapters through the medium of a simulated personal injury action (Joseph Wale's case) and a simulated debt collection action (Outboards Plus Ltd's case). Although set in Solomon Islands and Fiji, certain documents forming part of the proceedings have been drafted as if the action was taking place in other jurisdictions of the region, in order to give an example of a particular document. Joseph Wale's proof of evidence, contained in Sample Document A at the end of this chapter, sets the scene for the personal injury action. Sample Document C, in Chapter 2, is a letter of demand, which reveals the facts of Outboards Plus Ltd's case.

Tactical considerations in the use of the rules are also discussed. Additionally, the text looks at the reasons for particular rules. At its widest, examination of those reasons requires a consideration of the principles of natural justice. This is contextualised in the interwoven discussion as to whether the rules are effective in achieving justice. Do they, for example, ensure that proper notice is given to the other party and that the case is dealt with in a fair, orderly and expeditious manner? In *Queensland v JL Holdings Pty Ltd*,[7] the High Court of Australia held that the 'ultimate aim of a court is the attainment of justice'.[8] This leads on to another pervasive theme of this work. Although alternative methods of dispute resolution are not specifically examined, they are relevant throughout. At all stages of examination of the rules it is important to ask, 'Is there a better way to resolve this dispute?'.

Professional ethics are important to civil procedure. Practitioners owe a duty to the court, to their client and to fellow practitioners. These considerations form part of any discussion of the subject.

2 DEFINITION OF CIVIL PROCEDURE

Civil procedure is part of adjectival law, as distinct from substantive law. The latter defines legal rights and liabilities, whereas the former regulates the means of enforcing or defending those rights and liabilities through the courts. The other part of adjectival law is evidence. The law of evidence regulates the proof of rights and liabilities. Although generally outside the scope of this text, rules of evidence will be referred to where useful or necessary to help understand how civil procedure operates.

Civil procedure is the law that governs the conduct of litigation in civil cases. It governs the process from the commencement of legal action to judgment, any appeal from that judgment and the process of enforcement through the court, if that is necessary. Thus, it governs the documents to be used to start a case; the steps to be taken along the way (the principal purpose of which is, purportedly, to define the issues in dispute and ensure that only claims with some merit come before the court); the conduct of hearings and trials; and subsequent action in relation to the judgment. As explained in Chapter 5, there are a number of ways to initiate proceedings and the procedural route to be followed subsequently will differ according to the method of initiation. The most common way to commence an action is by writ of summons; accordingly, this text concentrates on actions commenced by writ.

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7 (1997) 71 ALJR 294.
8 *Ibid*, p 296.

2.1 The relationship between procedure and substantive law

Whilst adjectival law can be distinguished from substantive law, this does not mean that the two are completely separate. They constantly interact and, to be effective, procedure has to be flexible enough to accommodate changes in substantive law. To put it another way, a dynamic legal system requires that procedure keeps pace with developments in substantive law. Historically, this has been shown to be true: before the reform of civil procedure in England,[9] procedure was so rigid and technical that it inhibited the development of substantive law.[10] The common law required a different form of writ for each form of action. A cause of action would not be recognised if it did not fall within the scope of an existing writ.

Although form is no longer more important than substance, it is still important to comply with the rules of civil procedure. The consequences of failure to do so are discussed in paragraph 3.7 below.

2.2 The adversarial system and the inquisitorial system [11]

In common law countries, such as the countries under discussion, the judicial system is based on the adversarial system. This is as contrasted with the inquisitorial system which prevails in civil law countries such as France.
The main features that distinguish the adversarial system are:

- the conduct of the action is left in the hands of the parties;
- the main judicial function is concentrated in one continuous hearing, that is, the trial;[12]
- evidence is adduced at the instance of the parties, for example, through the examination of witnesses and production of documents as exhibits at trial;
- there is generally no sanction if the rules of court are not complied with, unless the other party applies for one to be imposed.

In the inquisitorial system, a judge is assigned the case at the outset and takes an active role. It is the judge who controls the procedure, calls evidence and directs the steps to be taken.

Some case management strategies have been introduced in Fiji Islands and Vanuatu, but the rules of civil procedure currently operating in the region are mainly rules designed for the adversarial system.[13] They govern the parameters within which the parties are free to run the case themselves. If they fail to do justice to their client's case the court will not necessarily assist. The extent of judicial intervention often depends on the individual

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9 A process which commenced with the Unification of Process Act in 1832 and culminated in the Judicature Acts 1873–75.

10 The full rigours of the forms of action were evaded by use of fictions. See further Maitland, *The Forms of Action at Common Law,* 1968, Cambridge: CUP.

11 For further discussion of the adversarial system see David, 'Reforms to the Adversarial Process in Civil Litigation' (1995) 69 ALJ 705 and Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 ALJ 428.

12 Traditionally civil cases had to be tried before a jury. Since the Common Law Procedure Act 1854 provided for trial by judge alone with the consent of both parties, jury trial has been virtually superseded in England by trial by judge alone. Tonga is the only country of the region where trial by jury is still available for civil cases, O23 r2(2) Tonga Rules.

13 For a definition of 'case management', see below.

judge. For example, in *Pacific Commercial Bank Ltd v Nonumalo,*[14] the defendant failed to plead or argue that the claim was statute-barred under the Limitation Act 1975. Although the judge was aware that the Act might apply, he merely noted that he had not been asked to consider it and the plaintiff succeeded in enforcing a potentially statute-barred claim.

One of the questions which arises during a consideration of the courts and civil procedure is whether the adversarial system is appropriate in the South Pacific. The fused profession and size of the local Bars, members of which are normally general practitioners, can result in a significant imbalance. For example, if a party can afford to bring in a specialist from overseas, that specialist may be able to manipulate the rules to the client's advantage. The adversarial system is also out of tune with cultural values of consensus and community decision-making.[15]

In England and some other Commonwealth countries, there has been a slight shift towards a more inquisitorial system.[16] Changes designed to streamline court procedure have been introduced. To some extent, these changes take the conduct out of the hands of the parties and place it in the hands of the court. This is often referred to as 'case management'. This shift is reflected in the Fiji Rules, which provide for a pre-trial conference in some cases and specifically allow the judge to call the parties into chambers before trial with a view to settlement.[17] More recently, Vanuatu has gone further than any other regional country by completely replacing the civil procedure rules.[18] The new Rules put an onus on the courts to 'actively manage cases'. Techniques for case management include conferences and referral to mediation.[19] In spite of these reforms, the adversarial system still dominates civil procedure.

3 RULES OF COURT

3.1 Points of commonality

There is no common set of rules of procedure for the countries of the region. Whilst they follow familiar patterns (based broadly on either the Supreme Court Rules of England and Wales or the High Court Rules of New Zealand) and often contain individual rules which are identical or at least similar, the rules do differ. Historically, there was a point of commonality in those countries within the jurisdiction of the Western Pacific High Commission and the High Court (Civil Procedure) Rules 1964 promulgated within that system[20] are, by virtue of 'existing law' provisions,[21] still the most widely

14 [1980–93] WSLR 529.
15 See Behrendt, L, *Aboriginal Dispute Resolution,* 1995, Sydney: Federation Press, p 55, for a discussion of this in an Australian context.
16 For a recent comment on the English reforms see Zander, M, "The High Price of the Woolf Reforms' (2002) *The Times* Law Section, 30 April, p 5.
17 O34r2.
18 Civil Procedure Rules 2002 (Van).
19 Civil Procedure Rules 2002 (Van), Pts 6 and 10.
20 These rules were made pursuant to the power conferred by s 22, Western Pacific (Courts) Order in Council, 1961.
21 See s 5, Constitution of Kiribati 1975; s 76, Constitution of Solomon Islands 1978; s 176, Constitution of Tuvalu 1986.

used rules in the region. They provide the base for the civil procedure of the courts of Kiribati, Solomon Islands and Tuvalu. Until 31 January 2003, they were also employed in Vanuatu.[22]

3.2 Origin

The rules of procedure, as the names of the contemporary legislative texts indicate, are subordinate legislation. They are typically made under statutory authority (for example, the High Court Rules of Fiji are made under the authority of the Supreme Court Act)[23] and by a rule-making body which involves the judiciary and which is identified specifically for this purpose.[24] The rules of procedure for the superior courts are therefore, in constitutional terms, legislation of a low level. The level at which they are promulgated, however, belies their importance within the legal system. In all cases, the High Court or Supreme Court Rules have a great practical significance. In addition to the rules of civil procedure which provide the basic code for the courts of a country, the law relating to civil procedure can be found in statutes and in constitutions of the countries of the region. Beyond the constitutions, Acts of Parliament and subordinate legislation, civil procedure is also found in judicial precedents both of the courts in the region and of the courts of England (of which most of the courts may be seen as the lineal successors).[25] Superior courts also possess inherent jurisdiction to ensure that justice is administered according to law. This is a residual source of power which can be drawn upon whenever it is just and equitable to do so and provided that such exercise does not contravene applicable rules or statutes.[26]

The High Court (Civil Procedure) Rules 1964 were promulgated towards the end of the existence of the Western Pacific High Commission. By constitutional form, the rules are sub-delegated legislation made under the authority of the Western Pacific (Courts) Order in Council 1961, which in turn was made under the authority of the Foreign Jurisdiction Act 1890 of the UK.[27] Because these rules are still used in three countries of the region, they are taken as the starting point of this text. The other bodies of civil procedure rules that are covered by this text are the High Court Rules 1988 of Fiji,[28] the Supreme Court Rules 1991 of Tonga, the Supreme Court (Civil Procedure) Rules 1980 of Samoa and the Civil Procedure Rules 2002 of Vanuatu. Where appropriate, comparison between these sets of rules is made with the rules of other countries in the region. This is done especially where they differ in a significant way from patterns followed in the jurisdictions from which the primary examples are taken.

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22 Art 93, Constitution of Vanuatu 1980. See now Civil Procedure Rules 2002 (Van).
23 Cap 13.
24 For example, in Solomon Islands and Vanuatu, it is the Rules Committee.
25 See Corrin Care *et al*, *Introduction to South Pacific Law*, 1999, London: Cavendish Publishing, pp 64–80, for an explanation of the status of common law and equity in the region.
26 See further, Jacob, 'The Inherent Jurisdiction of the Court' (1970) CLP 23. See also *The State v Rokotuiwai*, unreported, High Court, Suva, Crim Cas HAC0009/1995, 31 March 1998.
27 In the case of Solomon Islands, additional authority was conferred on the Chief Justice by the Foreign Judgments (Reciprocal Enforcement) Ordinance 1963 (SI). See O44 (CPR).
28 Brought into force by LN 37/1988 (Fiji), which revoked the Supreme Court Rules 1968.

3.3 Reforms

Apart from the Vanuatu Rules, the regional rules are in urgent need of reform. They contain archaic language and, in some cases, refer to offices which no longer exist.[29] In Solomon Islands, several local amendments were made to the High Court (Civil Procedure) Rules 1964 between 1967 and 1985.[30] In Kiribati and Tuvalu, they remain unamended. It is intended to replace the High Court (Civil Procedure) Rules 1964 in Tuvalu with a simpler and shorter set of Rules.

The Fiji Rules were replaced in 1988 and the new Rules, which came into force on 31 March 1988, incorporate some of the changes made to the RSC prior to that time.[31] Since then, further reforms have been implemented on a piecemeal basis. Some excellent changes were made in 1998 in an attempt to reduce delay by introducing costs penalties for unnecessary adjournments and expressly providing for costs orders to be made against lawyers personally.[32]

Tonga made new rules in 1991 that came into force on 1 January 1992. These rules are the briefest of the regional provisions and rely heavily on the Supreme Court Rules of England and Wales to fill any resulting gaps.

In 2000, the Vanuatu Rules Committee, chaired by the Chief Justice and consisting of two members of the judiciary, two private practitioners, a government lawyer and two academics, began an extensive review of the civil procedure rules.[33] The Committee's brief was to overhaul the existing rules with a view to simplification and expedition of the civil process. The Judicial Committee introduced limited amendments as an interim measure in 2000.[34] On 31 January 2003, new rules, drawn up on the basis of the Rules Committee's recommendations, replaced the High Court (Civil Procedure) Rules 1964. The archaic language present in the earlier Rules has largely been replaced by plain English and opportunities for settlement through conferences and mediation have been introduced.[35] The Rules also state their overriding objective, which is 'to enable the courts to deal with cases justly'.[36] Courts are to give effect to the overriding objective when interpreting the Rules or acting under them and parties are to help them to do this.[37]

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29 For example, Oil r7(1) CPR refers to service abroad by letter of request to the 'Chief Secretary or to the Resident Commissioner'.

30 High Court (Civil Procedure) (Amendment) Rules 1967, LN 104/1969; High Court (Civil Procedure) (Amendment) Rules 1967, LN 14/1971; High Court (Amendment) Rules LN 22/1975; High Court (Amendment) Rules LN 23/1975; High Court (Amendment) Rules LN 86/1975; High Court (Amendment) Rules LN 55/1980; Constitutional Provisions Rules of Court 1982, LN 9/1982; High Court (Amendment No 1) Rules LN 4/1985.

31 LN 37/1988. The new rules came into force on 31 March 1988.

32 High Court (Amendment) Rules 1998, LN 72/98. See further, Chapter 12.

33 The author was a member of the Committee from its inception in mid-2000 to her departure from Vanuatu in December 2002.

34 The amendments were made on 15 December 2000.

35 See the flow charts in Civil Procedure Rules 2002 (Van), Sched 4.

36 R1.2(1). Further details of the overriding objective are set out in Chapter 15.

37 Rr1.3 and 1.5.

3.4 Distinguishing the rules of court

The rules of court are not identical throughout the region. Notwithstanding that, the procedure prescribed by the various rules is broadly similar. This is because most rules are based on either the Supreme Court Rules of England and Wales (RSC) or the High Court Rules of New Zealand (NZR), which are themselves broadly similar. The differences of detail that do exist between the rules of the countries of the region depend on which of the two external models has been followed. Although this text does not cover the historical development of civil procedure or the rules, it is useful to know which model has been used as a basis for each of the regional countries' rules, as this identifies the general pattern of those rules. The other significance of the base model is that some rules allow recourse to that model if a situation arises that is not covered by the country's own rules. Table 1.1 shows the model on which each regional country has based its rules and the provision, if any, which allows recourse to the RSC or NZR.

TABLE 1.1—EXTERNAL MODELS USED FOR THE FORMULATION OF REGIONAL RULES

RULES OF THE SUPREME COURT OF ENGLAND AND WALES (RSC)	RULES OF THE HIGH COURT OF NEW ZEALAND (NZR)
Fiji Islands	Cook Islands
Kiribati, O71	Niue
Nauru	Samoa
Solomon Islands, O71	
Tonga, O2 r2(2)[38]	
Tuvalu, O71	

Vanuatu has not been included in the table as its new Rules[39] are not based on any one model. However, in general, the pattern of the Vanuatu Rules resembles that of the RSC, rather than the NZR.

The main difference between rules based on RSC and rules based on NZR is that the former provides greater opportunity for judgment to be entered before trial. Other differences will be discussed in the following chapters, particularly in the commentary on the Samoan rules.

The rules that apply in each country of the Region and the standard abbreviation used to refer to each set of rules throughout the text are set out below in Table 1.2. Order and Rule numbers appearing in brackets in the text or in footnotes are references to the CPR.

38 There was no such provision under the former rules, but in *Roberts v The Bank of British Columbia,* unreported, Court of Appeal, Tonga, Civ App 2/1982, it was held that the RSC applied in Tonga in addition to the local rules.

39 Civil Procedure Rules 2002.

TABLE 1.2—RULES OF COURT OF SUPERIOR COURTS OF THE REGION

COUNTRY	RULES	ABBREVIATION
COOK ISLANDS	Code of Civil Procedure of the High Court 1981	Cooks
FIJI ISLANDS	High Court Rules 1988	Fiji
KIRIBATI	High Court (Civil Procedure) Rules 1964	CPR
MARSHALL ISLANDS	Civil Procedure Act (Cap 1) 29 MIRC	Marshalls
NAURU	Civil Procedure Rules 1972	Nauru
NIUE	Rules of the High Court 1916 (NZ)	Niue
SAMOA	Supreme Court (Civil Procedure) Rules 1980	Samoa
SOLOMON ISLANDS	High Court (Civil Procedure) Rules 1964	CPR
TOKELAU	High Court Rules of New Zealand[40]	NZR
TONGA	Supreme Court Rules 1991	Tonga
TUVALU	High Court (Civil Procedure) Rules 1964	CPR
VANUATU	Civil Procedure Rules 2002	Van

If a second Order and Rule number appears after a semi-colon, within brackets, the second reference is to the Fiji Rules. The origin of other rules referred to in the text or in footnotes is indicated by use of the abbreviation set out in Table 1.2 above.

3.5 Procedure in cases outside the rules

As mentioned above, the origin of the regional rules often has additional significance. Some rules allow recourse to the source rules, that is, to the RSC or NZR, if a question of procedure is not expressly dealt with in the country's own rules.[41] An example of this process can be found in *Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering Ltd*,[42] where the Court of Appeal of Tonga had recourse to O35 RSC to supplement the

40 The High Court of New Zealand has jurisdiction in Tokelau and may, subject to any Tokelau rules, exercise it 'in the same manner in all respects as if Tokelau was for all purposes part of New Zealand', s 3(2) Tokelau Amendment Act 1986. No Tokelau rules have been made.

41 Similar provision is made in respect of the Magistrates Court of Samoa, r29, Magistrates Court Rules 1971 (Samoa).

42 Unreported, Court of Appeal, Tonga, Civ App 15/1999, 23 July 1999.

Tongan Rules, which made no provision for obtaining judgment on a counterclaim where the plaintiff does not appear at trial.[43]

The alternative method of providing for the situation where a question of procedure is not specifically dealt with by a country's own rules, is to confer on the court a discretion to deal with the matter as it sees fit. This is the approach adopted in Cook Islands,[44] Samoa and Vanuatu. Rule 206 of the Samoa Rules provides:

> If any case arises for which no form of procedure has been provided by the Judicature Ordinance 1961 or these rules, the Court shall dispose of the case in such manner as the Court deems best calculated to promote the ends of justice.

Similarly, r 1.7 of the Civil Procedure Rules 2002 (Van) provides:

> If these Rules do not deal with a proceeding or a step in a proceeding:
>
> (a) the old Rules do not apply; and
> (b) the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice.

3.6 Forms

Most rules prescribe forms for the most common procedural documents. These are contained in an appendix or schedule to the rules. Individual rules, governing a procedure for which a form has been provided, will identify the form and state that it must be used. Such rule may go on to say that the form may be used with 'such variations as the circumstances require' (for example, O2 r4), or the rule may contain a general rule or order to this effect (for example, r6(1) Cooks; r200 Samoa). Most forms are in English, but some, for example, the Samoan Forms, may be either in English or the local language (r201 Samoa).

The Vanuatu approach is to provide that 'Strict compliance with a form prescribed by these Rules is not required and substantial compliance is sufficient'.[45]

3.7 Failure to comply with the rules

It is important to note that, generally speaking, a party's failure to comply with the rules does not result in any penalty unless the other side takes the point and either, in the case of default, applies for a default judgment, or applies to the court to enforce the rules. The overriding objectives in the Civil Procedure Rules 2002 of Vanuatu suggest a different approach and state that the court must actively manage cases.[46] As the Rules have only just come into force, it is too early to say whether this mandate will be carried out to the extent that penalties will be imposed without the intervention of the other party to the case. However, it is worth noting that the onus is still on

43 But see *Bank of Tonga v Kolo* [1995] Tonga LR 168, where Hampton CJ refused to apply English procedure relating to writs of possession, on the grounds that there was not a lack of procedure in the area. This decision was disapproved in *Bank of Tonga v Malolo and Malolo,* unreported, Supreme Court, Tonga, Civ Cas 877/2000, 6 May 2002. These cases are discussed in Chapter 13.

44 Code of Civil Procedure of the High Court 1981 (Cooks), r4(2).

45 Civil Procedure Rules 2002 (Van), r18.9.

46 R1.4(1).

parties to apply to the court for a penalty to be imposed if the other party does not comply with an order.[47]

The rules of court contain various specific provisions for dealing with a party's failure to act and the most important of these will be discussed in subsequent chapters. However, the situation may arise where a party's failure to act in accordance with the rules is not specifically dealt with, or where a party does take action but does not do so in compliance with the rules. In countries other than Fiji Islands and Vanuatu, the consequence of such possibilities will depend on whether the breach is:

- a technical irregularity; or
- a fundamental irregularity.

The former will be the case where the breach is purely one of form, rather than of substance, as, for example, where non-essential wording is omitted from a document. Most rules contain a general provision that such irregularities shall not invalidate proceedings. For example, O69 r1 of the CPR provides:

> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.

Similar provisions can be found in O4 Tonga, r202 Samoa, O5 Cooks and O2 r1 Nauru.[48]

As stated in O69 r1, instead of rendering the proceedings void, a technical irregularity may result in the court setting aside all or part of the offending proceeding, or allowing it to be amended. Another possibility, encompassed by the court's power to deal with the matter 'otherwise', is for the action to be stayed until the irregularity is put right. The regional rules also usually contain a provision that any objection to a procedural irregularity must be taken within a reasonable time (for example, O69 r2; O2 i2(1)).

By contrast, fundamental irregularities may render the proceedings a nullity and consequently, the court will not have the discretion to allow rectification. Examples of defects which have rendered proceedings a nullity are:

- breach of statutory provisions in issuing the proceedings;
- failure to serve the proceedings;
- failure to comply with basic legal principles.

The distinction between technical and fundamental errors was discussed in *Samson Poloso v Honiara Consumers Co-operative Society Ltd*.[49] In that case, it was sought to set aside judgment in default on the basis of certain irregularities, being an inadequate statement of claim and failure to enter the plaintiff's address on the writ. It was held that these irregularities did not render the proceedings void and would affect the judgment entered only if the court so ordered.

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47 Civil Procedure Rules 2002, r18.11.
48 Similar provision can be found in magistrates' court rules, for example, r27 Magistrates Court (Civil Procedure) Rules 1969, as amended (SI).
49 [1988/89] SILR 16.

The Fiji Rules are based on the changes to the RSC which abolished the distinction between non-compliance with the Rules amounting to a nullity and non-compliance amounting to an irregularity.[50] Order 2 provides that failure to comply with the Rules, 'whether in respect of time, place, manner, form or content or in any other respect', shall be treated as an irregularity. Accordingly, no matter how fundamental a mistake is, provided it consists of a failure to comply with the Rules it will only amount to an irregularity and the court has the discretion to allow the defect to be remedied.[51] The Vanuatu Rules are more detailed and provide:[52]

> (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.
> (2) If there has been a failure to comply with these Rules, the court may:
>
> (a) set aside all or part of the proceeding; or
> (b) set aside a step taken in the proceeding; or
> (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.
>
> (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.

Under the Fiji and Vanuatu Rules, there may still be procedural errors that render proceedings a nullity if they consist of improprieties other than contravention of the Rules, such as failures to comply with statutory requirements or other defects that are so serious that they will render the proceedings a nullity.

In countries where conditional appearance may be entered, unconditional appearance arguably waives any irregularity.[53]

Applications to set aside for irregularity must be made within a reasonable time and before taking any other step in the proceedings.[54] Application is made by summons or notice of motion, or in Vanuatu by application, stating the objections relied on.[55]

Notwithstanding the fact that technical errors will not render the proceedings void, care should always be taken to try to avoid them. Not only may they result in unnecessary delay while things are put right and costs penalties for so doing, but also a procedural

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50 See RSC O2 r1(1) which was passed to replace O59 RSC 1875 and O70 r1 RSC 1883, as a result of the English Court of Appeal's decision in *Re Pritchard, Deceased* [1963] Ch 502.

51 Where the irregularity consists of failure to comply with a time limit for filing a document, a late filing fee may be payable: O3 r4(3), as amended by LN 67/93.

52 R18.10.

53 *Kumagai Gumi Limited v Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas 92/2002, 26 July 2002. See Chapter 7 for the meaning of appearance and the distinction between conditional and unconditional appearance.

54 O69 r2 CPR; O2 r2(1) Fiji.

55 O69 r3 CPR; O2 r2(2) Fiji; rr18 and 65 Samoa; O4 r3 Tonga; rr7.2 and 10.3 Van. See *Silvania Products (Australasia) Ltd v John William Storey,* High Court, Solomon Islands, Civ Cas 22/1990, 19 March 1990; *Kumagai Gumi Limited v Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas 92/2002, 26 July 2002.

mistake may deprive a party of substantive rights. For example, in *Joseph Kao v Public Service Commission*,[56] the appeal was dismissed because the notice of appeal did not state the grounds of appeal, as required by the court rules.

4 SPECIAL RULES

In some countries of the region, supplemental rules have been made to govern particular proceedings. In particular, there are sometimes rules governing constitutional applications. In Fiji Islands, the High Court (Constitutional Redress) Rules 1998 have been made.[57] In Solomon Islands, the Constitutional Provisions Rules of Court 1982 inserted O61A in the High Court (Civil Procedure) Rules 1964 applying in Solomon Islands. In Tuvalu, the Constitution (High Court[58] Constitutional Redress or Relief) Rules 1982 apply. In Vanuatu, special rules are laid down for constitutional applications by the Criminal Procedure Code. The notice and leave requirements contained in these rules are explained in Chapter 2.

56 (1989–94) 1VLR 398.
57 Made under the Constitution (Amendment) Act 1997 and the High Court Act 1997.
58 Cap 136, s 218.

SAMPLE DOCUMENT A—PROOF OF EVIDENCE

JOSEPH WALE of Lengakiki, Honiara, STATES:

I am 40 years old and my date of birth is 1 June 1963.1 am a prison officer with Solomon Islands prison service. I have been with the prison service for four years and before that I was a security guard for a private company. Shortly before the accident, my superior had told me that I was likely to be promoted to Senior Officer.

On Friday, 1 July 2002, I was running down the hill from Lengakiki, as part of my regular exercise regime. It was about 5pm. I was running on the verge at the side of the road, facing the oncoming traffic. Halfway down the hill, going towards Honiara, on the slight bend, I saw a car coming towards me and going very fast. I do not think the driver saw me to start with. He was partly on the verge. I tried to jump out of the way, but the car hit me with its near front side. The vehicle that knocked me down was a Toyota Corolla registration no 4785, driven by Simon Pita and owned by his employer, 'Solbread'.

I remember lying in the ditch groaning. I think someone stopped to help. Then I was hauled into the back of a truck and taken to Central Hospital. I was kept in hospital for five weeks. After the first week I was transferred to the private ward. My leg was broken and my shoulder was dislocated.

My leg is now out of plaster, but I still have a bit of a limp. I have also been getting headaches since the accident. I do not know if I will be allowed to continue in my job, but it seems unlikely. There may be an opening for me as a clerk at Prison Headquarters, but I am not keen on taking a desk job. I have always had an outdoor occupation. I like the variety and the fresh air.

The cost of the private ward at the hospital was $50 per night. I had to pay $100 for Dr Pitaka's examination last week and $50 for the X-ray he took during the examination.

My watch was broken in the accident and my shorts and T-shirt ruined. My watch was nearly new and cost me $125. My T-shirt and shorts were about six months old and would cost about $50 to replace.

The prison service paid my wages for the first four weeks that I was away from work. I returned to work, in the office at Headquarters, seven weeks after the accident and I am being paid the same wages as before the accident. Because of my limp, I shall not be able to return to my old job. I do not know if I can stick it out in the office, as the clerical job is so boring. My gross fortnightly pay is $1,000. After tax and provident fund contributions, I get $820 a fortnight.

I was in the prison service soccer team from the time I started the job. I used to train twice a week, by going for a run, as I was doing on the evening of the accident.

I am single and do not have any children. However, I send about $50 per month to my parents, who still live in the village in West Guadalcanal. I live with my brother and sister-in-law, at their house at Lengakiki.

Signed Joseph Wale

CHAPTER 2

PRE-ACTION CONSIDERATIONS

1 INTRODUCTION

The decision to take court proceedings should never be taken lightly. There are numerous factors which need to be considered before resorting to such action. Litigation can be expensive, time consuming, unpredictable and frustrating. Reasonable attempts must be made to elicit all relevant facts from the client, rather than just those that the client chooses to volunteer. All relevant documents must be identified and perused. Witnesses may need to be interviewed and expert opinion may need to be sought. On the basis of all available information, the client's legal position must be evaluated. Even then, the fact that a client's legal rights have been infringed does not mean that litigation should automatically ensue. The value of the claim must be carefully assessed and weighed against the financial and emotional cost of proceeding. Alternative methods of dispute resolution should always be considered.

This chapter discusses some of the considerations and steps that must be taken before initiating court action. Although these matters are not technically within the definition of 'civil procedure', in practice they are essential prerequisites to the commencement of civil proceedings.

2 THE INITIAL INTERVIEW

The underlying aim of the initial interview with the client is to ascertain what the client ultimately wants. It also provides a chance for the client and lawyer to meet each other and establish a basis for a professional yet friendly relationship. Sufficient information must be obtained to allow evaluation of the client's claim. Some practitioners use standard checklists for particular types of cases to ensure that pertinent information is not overlooked. However, a checklist is no substitute for skilled listening and questioning.

Interviewing is a core skill and requires a range of sub-skills.[1] In addition to listening and questioning, the information received from the client must be evaluated and legal and practical solutions generated. Ultimately, skilful interviewing will save time and money for the client. An interview may be regarded as successful if all pertinent facts are ascertained to enable the lawyer to offer the client the most appropriate options for resolving the client's problem. Litigation will only be one such option and, generally, it should be regarded as a last resort.

Where litigation is justified, the solicitor will have to prepare a full 'proof of evidence', that is, a statement of everything that the client knows which is relevant to the claim. In the case of a personal injury claim, this will include the client's personal circumstances; a description of the accident and the circumstances surrounding it; details of the injuries

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1 For details of the sub-skills of interviewing, see Chay, A and Smith, J, *Legal Interviewing in Practice,* 1996, North Ryde, NSW: LBC Information Services.

suffered and the treatment of those injuries; names of any witnesses; and details of any other available evidence. In the case of a debt collection claim, it will include the details of the debt and any interest; how the debt arose; the identity of the debtor; the attempts, if any, to recover the debt; and any response made. In both cases, information as to whether the proposed defendant is worth suing should be sought. Clients must be advised that even if a claim for recovery of a debt or damages is good in law, it will usually only be worth pursuing if there is sufficient income or assets to satisfy any judgment obtained.[2]

The client will obviously want advice as to whether the claim is likely to succeed. If the case is not straightforward, further documents or information may have to be requested before final advice can be given. In the meantime, the client should be encouraged to keep written records of everything that transpires. A client in a personal injury case, such as Joseph Wale, should be advised to keep receipts for medical expenses.

When the scope of the solicitor's authority is being discussed, it should be agreed whether the solicitor will correspond with the other side and in what circumstances proceedings may be instigated. For example, in both a personal injury case (such as Joseph Wale's) and a debt case (such as Outboards Plus Ltd's), the solicitor may be authorised to write a letter before action. The solicitor may also be authorised to issue proceedings without further discussion with the client if a denial of liability is received in response to that letter.

There are several established models of interviewing designed to suit countries outside the South Pacific region.[3] These may be useful as a starting point, but should not be followed blindly. Cultural considerations should be borne in mind. For example, in some cultures of the region, it may be viewed as discourteous to turn straight to business without spending some time establishing rapport and exchanging pleasantries. A good lawyer will take this into account and ensure that s/he does not alienate the client at the outset by trying to cut off seemingly unimportant and irrelevant discussion. A suggested model to use as a starting point is contained in Table 2.1.

It is good practice to follow up an interview with a letter, summarising instructions and any advice given.

On occasion, instructions may be given in writing, rather than at an interview. This is often the case with established clients and particularly in debt collection matters. Written instructions should be promptly acknowledged and any further information which is required should be requested.

2 The lack of means of the proposed defendant will not always be fatal. For example, an injunction may provide a remedy.

3 See, for example, Sherr, A, *Client Care for Lawyers,* 1999, 2nd edn, London: Sweet & Maxwell, p10.

TABLE 2.1—MODEL OF INITIAL INTERVIEW

Introductory/ courtesy stage	Introductions and exchange of appropriate courtesies. Invitation to client to tell story in own words.	
Listening stage	Listening to client's story in his/her own words.	
Questioning stage	Raising questions allowing client to complete and refine story. Repeating relevant facts and confirming understanding of events.	Start recording in writing here.
Planning/ advising stage	Advising where possible. Summarising action plan. Requesting further details/documents/action where necessary. Setting parameters of authority. Advising of costs implications. Arranging next contact.	Finish recording here.
Farewell/ courtesy stage	Farewell and exchange of appropriate courtesies.	

2.1 Costs

Costs should be discussed at the initial interview. The client should be advised of any available avenues for obtaining free or subsidised legal advice.[4]

In privately funded cases, the client should be advised of the basis on which costs will be charged. For example, the most common way of charging in the South Pacific is time costing, where costs are calculated on a set hourly rate. Some firms use a fixed fee for some types of work. From an ethical point of view, it is preferable to explain all the ways in which costs may be calculated, even though your firm may only use one method.[5] Where possible, an estimate of costs should be given, in general terms. If this is not a binding quotation, this should be made clear and the client should be warned that in litigious cases, the unexpected may happen to inflate the amount of work required. It is always prudent to record the agreement with the client on costs in writing. In other jurisdictions, this is now often mandatory.[6]

4 For example, through the Public Solicitor's Office in Solomon Islands.

5 In *Re An Application by Igaki Australia Pty Ltd* [1997] ANZ Conv R 527, Frybere J of the Queensland Supreme Court held that solicitors wishing to use the time costing method must explain to the client that this is likely to result in a higher bill.

6 See, for example, Queensland Law Society Act 1952, s 48, which compels the lawyer to enter into a client costs agreement and give the client a s 48 notice explaining the costs agreement and the matters which the costs agreement must include together with the client's rights and obligations in relation to costs.

Where court action is involved, the client should also be advised about the possibility of having to pay the other side's costs and any other costs orders that may be made by the court. As explained more fully in the Chapter 12, the general rule is that 'costs follow the event', that is, the successful party is entitled to have his or her costs paid by the losing party. However, those costs are usually only payable on a 'party and party'[7] basis and even successful clients will probably have to pay at least a quarter of their own bill. This should be carefully explained to the client.

2.2 Parties

Before commencing action, it is vital to identify the correct parties. There may be more than one possible defendant and the causes of action against each defendant must be outlined to the client. For example, if a person is injured when using a product, action may be taken against the supplier and/or the manufacturer of the product. There may also be more than one potential defendant due to vicarious liability, agency or other indirect involvement, for example, where a third party has induced a breach of contract. Some defendants may be more suitable than others from the point of view of:

- liability;
- means to satisfy the judgment; or
- service.

The correct legal entity must be identified. A company and/or a business names search should always be conducted when a business entity is involved.

The implications if the plaintiff is impecunious must also be considered. In certain circumstances, the plaintiff may be ordered to lodge security for costs and this is discussed further in Chapter 12.

3 LETTER BEFORE ACTION

Often, the first step to be taken after the initial interview is to write to the other side to indicate the client's interests and concerns and that s/he intends to take the matter further and to see what response that elicits. This may be all it takes to let the other side know that the matter is being taken seriously and to obtain a reasonable offer of settlement. In other cases, negotiations may continue by correspondence for some time. Alternatively, there may be no response or the reply may indicate that there is no possibility of a negotiated solution.

The most important pre-litigation letter is normally the 'letter before action'. In simple cases, this may be sent out without any preliminary correspondence. However, it is important to ensure that the position is clear before sending this letter, as any discrepancy between its contents and the case presented at trial may be exploited by the defendant. It differs from other pre-litigation correspondence in that it not only sets out the nature of the client's claim, but also specifies the remedies sought. It also contains a warning that unless an acceptable offer, or some other required step, is made or taken, legal proceedings

7 See Chapter 12 for an explanation of this term.

will be taken without further notice. The costs implications of proceedings should also be referred to. This may then be used as evidence that the matter was raised when the court is considering its award of costs at a later stage.

It is good policy never to write a 'letter before action' unless the threat of action will be carried out. This is particularly important in a small jurisdiction, where the size of the Bar results in lawyers becoming familiar with each other's style, and where a reputation for not pursuing threats of action might weaken the force of future letters before action. This is one reason why it is important to get the authority to carry out the threat of action at the initial interview, or at least before sending out a letter before action. If the solicitor does not have such instructions, it is better to send out a letter inviting the other side to make a settlement offer, without specifically threatening action. It should be noted that there is no common law duty to warn the other side that your client intends to commence action. As a matter of expedience, a letter before action is good practice. Apart from its relevance to costs, it may be all that is required to resolve the dispute.

An example of a preliminary letter to the other side, based on the facts of Joseph Wale's case, is given in Sample Document B. An example of a letter before action, based on the facts of Outboards Plus Ltd's case, is contained in Sample Document C.

SAMPLE DOCUMENT B—PRELIMINARY LETTER TO EMPLOYER OF DRIVER AND OWNER OF VEHICLE IN PERSONAL INJURY CASE

FIRM'S LETTERHEAD
(Giving name, address, contact numbers and other formal particulars of the firm required by legislation)

The General Manager
Solbread
PO Box 9948
Honiara

1 September 2002

Dear Sir

Re**: ACCIDENT AT LENGAKINI HILL ON 1 JULY 2002**

We act for Mr Joseph Wale in connection with an accident that occured on 1 July 2002. We are instructed that, whilst running on the verge, down Lengakiki Hill, our client was knocked down by a Toyota Corolla vehicle, registration no 4785, driven by your employee, Simon Pita.

Our client sustained injuries in this accident and is unlikely to be able to resume his former occupation as a prison officer.

It is clear from our instruction that our client was in no way to blame for the accident, which was caused entirely by your employee's negligent driving. In particular, he appears to have been travelling too fast and to have left the roadway and substantial damages from you and the driver, in respect of the injuries that he sustained in this accident.

No doubt you are insured against liability to the third parties. We would therefore suggest that you pass this letter to your insurers immediately. You may also wish to consult a solicitor to obtain some independent advice.

Yours faithfully

JUSTICE & ASSOCIATES

SAMPLE DOCUMENT C - LETTER BEFORE ACTION IN DEBT COLLECTION CASE

FIRM'S LETTERHEAD
(Giving name, address, contact numbers and other formal particulars of the firm required by legislation)

Mr A Toga
PO Box 2177
Suva

1 May 2003

Dear Sir

Re: **DEBT DUE TO OUTBOARDS PLUS LTD**

We act for Outboards Plus Ltd, which is in the business of selling outboard motors. We are instructed that you are indebted to our client in the sum of $32,000.00, being the balance of the purchase price of a Yamaha 40Hp outboard motor, which you obtained from our client on 1 December 2002. A copy of invoice no 1010, which was delivered to you at that time, is enclosed.

We are instructed that, in spite of numerous reminders, you have failed to pay. Unless payment of the full balance due is made via this office within 14 days from the date of this letter, court proceedings will be commenced against you for the outstanding sum together with interest and costs.

Yours faithfully

JUSTICE & ASSOCIATES

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4 QUANTIFICATION OF DAMAGES

One aspect of giving professional advice is to advise on the worth of clients' claims. If the claim is for repayment of a debt or some other liquidated amount, [8] this is usually a fairly straightforward matter of calculating known figures. However, in other cases, such as personal injury and fatal accident claims, it may be far more complex.

Advice as to the amount a judge is likely to award if the case goes to court is known as 'advice on quantum'. Assessment of quantum is required at an early stage, as it will be necessary in order to conduct effective negotiations. Accordingly, it is essential to be familiar with the principles on which damages are assessed. The law in this area is largely judge-made, but there are several relevant statutes. For example, the Law Reform (Miscellaneous Provisions) Act 1934 (UK)[9] and the Fatal Accidents Acts 1846 to 1959 (UK)[10] apply in some jurisdictions.

It will also be necessary to be familiar with local legislation governing accident compensation and insurance. In Solomon Islands, for example, the Workmen's Compensation Act[11] and the Motor Vehicle (Third Party) Insurance Act[12] apply.

The practitioners' 'bible' in this area is Kemp and Kemp, *The Quantum of Damages*,[13] a loose-leaf publication which lists the awards which courts in England have made for personal injuries and fatal accidents. However, although this may be of some use as a comparison, awards of overseas courts do not necessarily reflect the correct level of damages in countries of the Pacific.[14] There is no substitute for looking at the awards that the courts have made within the individual jurisdictions.[15]

The basic principle is that damages are to compensate the plaintiff and place him/her, as far as money can do, in the position s/he would have been in had the injury not occurred. There are two broad heads of damages: special and general.

4.1 Special damages

These represent the plaintiff's measurable loss, calculated between the date of injury and the date of trial. Every item of special damages must be pleaded and proved. Special damages are sometimes divided into:

- out-of-pocket expenses; and
- economic loss.[16]

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8 A liquidated amount is one that is ascertained or capable of being ascertained as a matter of mere arithmetic. See *Knight v Abbott* (1882–83) 10 QBD 11 and *Dempsey v Project Pacific* [1985] PNGLR 93.

9 This Act governs the award of damages to the estate of the deceased in fatal accident cases.

10 These Acts govern the award of damages to the dependants of the deceased in fatal accident cases.

11 Cap 77.

12 No 16 of 1972.

13 1975, London: Sweet & Maxwell.

14 See, for example, the views of Daly CJ in *Sukumia v Solomon Islands Plantations Ltd* [1982] SILR 142 at 145.

15 See Corrin Care, J, 'Rationality or Intuition?—the Assessment of the Quantum of Damages for Personal Injuries in Solomon Islands' (1997) 27 VUWLR 237.

16 See, for example, *Longa v Solomon Taiyo Ltd* [1980/81] SILR 239.

Examples of out-of-pocket expenses that will frequently form part of a claim within the region are as follows:

- Incidental damage to property, for example, ruined clothing, a broken wristwatch, damage to a motor vehicle.
- Medical expenses. All reasonable doctors' fees and prescription charges can be recovered.
- Purchase of items required to diminish the plaintiff's handicap, for example, crutches, wheelchair, artificial limbs.
- Cost of transport necessitated by the injuries. This might be to and from hospital, to and from doctors' appointments and to and from the pharmacy.
- Cost of paid help, such as nursing care.

Economic loss usually consists of loss of earnings from the date of injury to the trial. It may also include loss of fringe benefits, such as use of a vehicle provided by the employer.

4.2 General damages

These represent loss that cannot be quantified, that is, any non-pecuniary loss and future, unascertained, pecuniary loss. They do not have to be specifically pleaded, although the facts on which they are based do. Non-pecuniary loss is incapable of specific proof, but nonetheless, evidence is required and anything relevant to the assessment should be presented to the court.

General damages are usually calculated under the following headings:

- Pain and suffering. This refers to the physical pain and the emotional and mental suffering caused by the injury.
- Loss of amenity. This compensates the plaintiff for lost or reduced enjoyment of life. This loss may be general, for example, if the accident has affected the plaintiff's disposition; or specific, for example, if a plaintiff is no longer able to play sport.
- Future loss of earnings. This allows damages to be awarded where there is evidence that the plaintiff is prevented from continuing to earn his/her salary on an ongoing basis.
- Loss of earning capacity. This is sometimes referred to as damages for handicap on the labour market and applies where the plaintiff's salary is not affected, but his/her future employment prospects are not as good.
- Loss of pension rights. This compensates the plaintiff for the loss of the employer's contributions towards his/her pension fund.
- Future expenses. This covers the fact that out-of-pocket expenses are likely to be incurred in the future.

5 LIMITATION ACTS

5.1 Statutory bars

The right to sue for breach of a substantive right does not go on indefinitely. It is the policy of the law that there should be an end to litigation and that stale demands should be suppressed.

The period of time allowed for commencing a civil action is prescribed by legislation.[17] After that time has expired, the right of action is said to be 'statute-barred'. However, it is important to note that in most jurisdictions of the region, the statutory limitation period cannot be relied upon unless it has been pleaded, either expressly or by raising the necessary facts. This is due to the fact that rules of court require all grounds of defence or reply which show the opponent's case is not maintainable, or which might take the other party by surprise, to be pleaded. One such ground specified in O21 r16 CPR and O18 r7 Fiji is limitation.

The length of the period will depend on the type of action. The limitation period in contract and tort is usually six years.[18] In some countries of the region, the period in personal injuries actions is only three years.[19] For enforcement of judgments, it is usually 12 years.[20]

The relevant statutory provisions in the region prescribing the limits in actions based on contract or tort, are:

- Limitation Act 1950 (NZ) (Cooks), s 4(1);
- Limitation Act 1971 (Fiji), s 4;
- Civil Procedure Act (29 MIRC 1988), s 20;
- Limitation Act 1950 (NZ) (Niue), s 4(1);
- Limitation Act 1975 (Samoa), s 6;
- Limitation Act 1984 (Solomon Islands), s 5;
- Supreme Court Act (Cap 10) (Tonga), s 16(1);
- Limitation Act 1991 (Vanuatu), s 3.

Assuming that the Limitation Act 1939 (UK) is an Act of general application,[21] s 2(1)(a) would appear to apply a similar period of limitation in countries of the region that do not have their own Act.[22] There is no legislative provision for limitation of actions in Tokelau.

Time usually runs from the date on which the cause of action arose. This has been defined in most of the Acts as meaning the earliest date on which a person can sue. To put it another way, it runs from the date when facts exist which establish all the essential elements of the cause of action.[23] In relation to contracts, this is usually fairly easy to

17 Even within the statutory period the doctrine of laches may prevent an equitable remedy being awarded if there has been unreasonable delay in commencing proceedings.
18 The period is five years rather than six in Tonga, Supreme Court Act Cap 10, s 16(1).
19 For example, Limitation Act 1991 (Van), proviso to s 3(1).
20 For example, Limitation Act 1991 (Van), s 3(3); Limitation Act 1950 (Cooks), s 4(4).
21 For a discussion of the meaning of UK Acts of general application in the South Pacific, see Corrin Care, J, 'A Colonial Legacy' in (1997) 21 J Pac S 33.
22 For example, Kiribati and Tuvalu.

identify, as it is the date of the breach of contract. A regional example of the working of the limitation period, in an action for breach of a loan agreement, can be seen in *Development Bank of Western Samoa v Suhren*.[24] In that case, the defendants borrowed $3,000 from the plaintiff, pursuant to an agreement made on 18 November 1974. The final advance was made on 8 April 1975. The loan was repayable by instalments of $100 per month commencing in March 1975, or on demand. Those instalments were not paid. Demand for payment was not made until October 1980. Action was commenced on 27 October 1981. It was held that the cause of action arose when the first instalment should have been paid in March 1975. Accordingly, the plaintiff's claim was statute-barred.

In tort, the accrual of a cause of action may be more difficult to identify, for example, in personal injury cases, where illness or injury is not immediately apparent, or is not obviously linked to the tortious action. In the case of continuing wrongs, such as trespass to land, some limitation Acts provide that a fresh cause of action accrues on each day the wrong continues.[25] In the absence of such provision, time runs from the date of the commission of the tort in the case of torts that are actionable *per se*. If a tort is only actionable on proof of damage, time runs from the date of damage.

5.2 Extending the limitation period

In some circumstances, a party may be unaware, through no fault of his or her own, that a cause of action exists until after the limitation period elapses. Many of the regional statutes, as well as the UK Act, recognise that injustice might result in such cases and provide for an extension of the period. For example, Part III of the Fiji Act provides for four different situations: disability; acknowledgment; fraud; and certain personal injury actions. Each of these requires separate consideration.

5.2.1 Disability

If a person with a right of action was under a disability when the right to sue accrued, action may be taken at any time within six years from the date when the disability ceased or the disabled person died, whichever occurred first.

5.2.2 Acknowledgment

There will be a fresh accrual of action if an acknowledgment of the debt by the debtor or part payment of the debt occurs.[26] Acknowledgments must be written.[27]

23 *Read v Brown* (1888) 22 QBD 128.
24 [1980–93] 1 WSLR 83.
25 For example, Limitation Act 1984 (SI), proviso to s 17.
26 Limitation Act 1971 (Fiji), s 12.
27 Limitation Act 1971 (Fiji), s 13(1).

5.2.3 Fraud and mistake

Where the cause of action is based on fraud, or the right of action is concealed by fraud, or the action is for relief from the consequences of mistake, the cause of action will not start to run until the plaintiff could, with reasonable diligence, have discovered the mistake.[28]

5.2.4 Certain personal injury actions

The court has a discretionary power to extend the limitation period, on application, in claims for negligence, nuisance, or breach of duty causing personal injuries. This power may be exercised only where it is proved that:[29]

> …material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –
>
> (a) either was after the end of the three year period relating to that cause of action or was not earlier than twelve months before the end of that period; and
> (b) in either case, was a date not earlier than twelve months before the date on which the action was brought.

Application for leave is usually made *ex parte* to the court in which it is intended to bring the main cause of action.[30]

5.3 Pleading limitation of action

A litigant relying on a limitation period should state this in the pleadings.[31] The normal practice where a statute-barred claim is filed is to file a defence pleading the statute of limitations.[32] Failure to do so may result in loss of the defence.[33] If the application of the statute bar is subject to dispute, for example, where it is not clear when the cause of action arose, it may be pleaded in the alternative if there are other grounds of defence

5.4 Limitation under other statutes

It should be borne in mind that the Limitation Acts are not the only statutes which limit the time for commencing action. Other statutes impose limits in relation to particular claims. For example, the High Court (Constitutional Redress) Rules 1998 (Fiji)

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28 Limitation Act 1971 (Fiji), s 15. For a case on point in Solomon Islands, see *Tikana and Others v Motui and Attorney-General* unreported, High Court, Solomon Islands, Civ Cas 29/2001, 18 March 2002.
29 Limitation Act 1971 (Fiji), s 16.
30 Limitation Act 1971 (Fiji), ss 2(1) and 17.
31 See further Chapter 8, pp 139 and 151–52.
32 *Tofe v Fera,* unreported, High Court, Solomon Islands, Civ Cas 230/1999, 26 July 1999.
33 See, for example, *Pacific Commercial Bank Ltd v Nonumalo* [1980–93] WSLR 529; *Suva City Council v KW March Ltd,* unreported, High Court, Fiji, Civ Cas 957/1982,15 May 1997.

impose a limit of 30 days from the date on which the matter or issue arose in which to bring an application for redress under s 41(10) of the Constitution.[34]

6 NEGOTIATION AND MEDIATION

One alternative to be considered at the initial stages is whether there is room for negotiating a satisfactory settlement for the client without recourse to litigation. A negotiated settlement should also be kept in mind throughout the course of the action, as court proceedings may be discontinued by consent at any stage if an alternative solution can be found.[35] Negotiation can be summarised as the process of discussing resolution of the dispute with the other party or parties involved. Whether or not negotiation is appropriate will depend on the circumstances of each case and the client's instructions.

A practitioner who views negotiatingas a weakness and the resort of those afraid of a court 'battle' may fail to obtain the best solution for the client. Negotiation involves a joint decision by the parties, rather than a solution imposed by the court that may not suit either party perfectly and which is bound to involve costs for everyone.[36]

The Civil Procedure Rules 2002 of Vanuatu have introduced a system of referral for mediation by the court. Mediation is defined in the Rules as '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'.[37]

The court may refer a matter for mediation if:[38]

(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.

A substantial objection includes dissent on the grounds that:[39]

(a) the parties do not consent to mediation; or
(b) the dispute is of its nature unsuitable for mediation; or
(c) anything else that suggests that mediation will be futile, unfair or unjust to a party.

Although the court has the power of referral to mediation, participation is voluntary and a party may withdraw at any time.[40] If one party is unwilling to co-operate, this may make a referral a pointless exercise. In other jurisdictions, a more robust approach has been taken. For example, in Queensland, a party must attend at a court ordered

34 R3(2).
35 O28 r2; O21 r2(7).
36 Negotiation is an important skill, in-depth discussion of which is outside the scope of this work. See further Gifford, DG, *Legal Negotiation: Theory and Applications*, 1989, St Paul, Minn: West Pub Co.
37 R10.2Van.
38 R10.3(1)Van.
39 R10.3(2) Van.
40 R10.6Van.

mediation and must not impede the process.[41] Sanctions may be imposed against a defaulting party in the form of a stay of any claim the party has made or by an unfavourable costs order.[42]

The Vanuatu Rules do not prevent the parties arranging to have a dispute mediated without any intervention.[43] This applies in all countries of the region, where mediation may be arranged before resorting to court action or at any stage of proceedings. The difficulty in smaller South Pacific countries may be to find a qualified mediator who is also a neutral and independent person. The Vanuatu Rules provide that the Chief Justice may keep a list of people considered by the Chief Justice to be suitable mediators, but do not limit the court to using listed mediators when making a referral.[44]

7 NOTICE AND LEAVE

No warning of the intention to commence proceedings is required at common law. Neither is it generally necessary to obtain the leave of the court. The commencement of civil proceedings is an administrative act, as distinct from criminal proceedings, which involve a judicial act. However, there are some instances where notice or leave must be given before a civil case can be commenced. These two possible requirements will now be considered in turn by reference to some regional examples.

7. 1 Notice

7.1.1 Fiji Islands

The High Court (Constitutional Redress) Rules 1998[45] require three clear days' notice of intention to apply for relief under s 41(10) of the Constitution to be given to all parties affected.[46]

7.1.2 Samoa

Where there is an alleged breach of statutory or public duty, s 21 of the Limitation Act 1975 requires that notice must be given before commencing civil proceedings. This section is designed to protect a person or body acting in pursuance of a statutory or other public duty.

41 Supreme Court Act 1991 (Qld), s 103(1). See also UCPR 324–28.
42 Supreme Court Act 1991 (Qld), s 103(2).
43 R10.1(2) Van.
44 Rr10.3(4) and 10.4(1) Van.
45 Made under the Constitution (Amendment) Act 1997 and the High Court Act 1997. Application is by motion or writ of summons and may be made on shorter notice or *ex parte* with leave of the court: s 4(1) and (2).
46 R4(1). Notice may be dispensed with by leave of the court if the delay would cause 'irreparable or serious mischief: r4(2).

7.1.3 Solomon Islands

Section 106 of the Provincial Government Act 1981 contained provisions similar to those in Samoa. It required a month's notice before the commencement of proceedings against a provincial assembly or Honiara Town Council. The Provincial Government Act 1981 was repealed by the Provincial Government Act 1996, which does not contain any notice requirement.

The danger of not complying with such requirements is highlighted in *Solomon Islands National Union of Workers v Honiara Town Council*,[47] which refers to two abortive applications to the High Court by the plaintiff. The first of those applications failed because no notice was given under s 106.

7.1.4 Tuvalu

The Constitution (High Court Constitutional Redress or Relief) Rules 1982[48] require three clear days' notice of the intention to apply for relief under Arts 17(1) or 81 of the Constitution to be given to all parties affected.

7.2 Leave

As a general rule proceedings can be commenced without any permission from the court. The main exceptions to this can be classified under the following headings:

- applications claiming redress for infringement of fundamental rights enshrined in the Constitution;
- proceedings to be served outside the jurisdiction;
- judicial review;
- claims against the State.

Of these, judicial review is outside the scope of this work; service abroad is discussed in Chapter 6.

An example of the fundamental rights procedure can be found in the Constitutional Provisions Rules of Court 1982, which inserted O61A in the High Court (Civil Procedure) Rules 1964 applying in Solomon Islands. This provides that no application may be made seeking relief for breach of the human rights provisions under s 18(1) of the Constitution of Solomon Islands unless leave has been granted. An application for leave is made *ex parte,* on at least one day's notice. Notice of application must be accompanied by an affidavit verifying the facts relied on and by a statement setting out the name and description of the applicant, the redress sought and the grounds upon which it is sought, specifying the section or sections of the Constitution alleged to have been contravened.

An example of the requirement to obtain leave before proceeding against the State exists in Nauru. Leave of Cabinet is required to issue civil proceedings or counter-claim

47 [1988/89] SILR 43.

48 Constitution (High Court Constitutional Redress or Relief) Rules 1982, s 4(1). Application is by motion or writ of summons and may be made on shorter notice or *ex parte* with leave of the court: s 4(1) and (2).

against the Republic, any government department, instrumentality, the President, Cabinet, a Minister, or public officer acting in an official capacity.[49]

8 CONCURRENT CRIMINAL PROCEEDINGS

A situation often arises where the same set of facts gives rise to a criminal charge and a civil action against the same party. An obvious example is a motor vehicle accident, where a person is charged with careless driving and sued for damages for negligence. Another example is where an action for conversion is taken against a person charged with theft.

The question arises whether the civil proceedings should be pursued before, after or concurrently with the criminal proceedings. There is no specific statutory guidance or rule of procedure on this point. However, where concurrent proceedings are on foot, the court has inherent jurisdiction to stay proceedings in the interests of justice.[50]

In countries where a conviction is admissible evidence of the conduct constituting the offence, it may be tactically advantageous to delay civil proceedings until after the criminal proceedings have been concluded.[51] Any conviction in the criminal case may then be pleaded and, once proved, will operate as *prima facie* evidence in the civil case.[52] This reversal of the onus of proof may be of assistance, particularly if a plaintiff has evidential difficulties, for example, where injuries sustained during the events in question resulted in memory loss.

49 Republic Proceedings Act 1972, s 3.

50 See *Melcoffee Sawmill Ltd v Donovan & Sons*, unreported, Supreme Court, Vanuatu (Santo) Civ App 2/1999, 16 July 1999, approving *Jefferson Ltd v Betcha* [1979] 2 All ER 1108 and *Wonder Heat Pty Ltd v Bishop* [1950] VR 489.

51 See further Chapter 8, para 3.2, 'Pleading a criminal conviction'.

52 Unless proof of conviction is provided for by statute in a jurisdiction of the region, it is necessary to produce the actual record of the court and to call evidence identifying the relevant parties with the person mentioned in the record. The Civil Evidence Act 2000 (Fiji), s 17(5) provides for proof by means of a certified copy of the court document recording the conviction.

CHAPTER 3

COURTS

1 INTRODUCTION

For reasons that are explained in Chapter 2, litigation should always be the last resort. Assuming that court action is necessary, the next step is to choose the appropriate court. In all countries of the region there is more than one court with first instance jurisdiction.

This chapter describes the court hierarchy and constitution in the countries of the USP region. It also looks at the civil jurisdiction of those courts, which is vital to a decision as to where proceedings should be commenced. Nearly all the courts described have criminal jurisdiction as well as civil. The superior court in each country also has supervisory jurisdiction over inferior courts.[1] As neither of these aspects of jurisdiction is relevant to the procedure under discussion in this book they are not dealt with in this chapter.[2]

2 THE HIERARCHY OF THE COURTS

The hierarchy of the courts in countries of the USP region generally follows a standard model with three levels, consisting of inferior courts, a superior court and an appeal court. Due to lack of resources, the appeal court is not constituted in each country on a permanent basis, but sits between one and four times each year to deal with accumulated appeals.[3] Courts of Appeal deal with two sorts of appeals. They deal with 'first appeals' from decisions of the superior courts sitting in their original jurisdiction. They also deal with 'further appeals' from decisions made by the superior courts acting in their appellate jurisdiction. Cook Islands,[4] Niue, Kiribati and Tuvalu allow a further appeal to the Privy Council in England. Fiji Islands allow a further appeal to a second internal appeal court. In addition to the common law courts, many countries have established separate courts to deal with customary land and administer customary law. Appeal from these courts often leads back into the common law hierarchy.

Outside the formal hierarchy, customary tribunals often exist at a village level, for example, the village courts in Vanuatu. They do not necessarily have any legal recognition; rather they are based on respect for customary authority. Whilst these bodies may be

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1 See, for example, Constitution of Fiji Islands 1997, s 120(6); Constitution of Kiribati, s 89; Constitution of Solomon Islands, s 84.

2 For further information on the supervisory jurisdiction of superior courts see Corrin Care, J *et al, Introduction to South Pacific Law,* 1999, London: Cavendish Publishing, Chapter 5. For further information on the criminal jurisdiction of the courts see *ibid,* Chapter 11.

3 See Pulea, M, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) Pacific Perspective 1 for a discussion of the historical perspective and Mataitoga, I, 'South Pacific Court of Appeal' (1982) 11(1) Pacific Perspective 70 for a discussion of some of the problems which favour the present system in preference to a regional appeal court. See also Boyd, S, Australian Judges at Work Internationally' (2003) 77 ALJ 303.

4 For a survey of the relationship between the Privy Council and the Cook Islands, see Frame, A, 'The Cook Islands and the Privy Council' (1984) 14 VUWLR 311.

regarded as the most important tribunals from the point of view of those to whom they apply, they are not covered in this chapter, which looks only at the formal court structures to which procedural rules apply.

Table 3.1 shows the hierarchy of the courts recognised by legislation, etc, in each country of the region, grouping them together in accordance with the pattern of their court structure.

TABLE 3.1—HIERARCHY OF THE COURTS

Hierarchies with the standard three tier structure	
Nauru	High Court of Australia Supreme Court District Court
Tokelau	Court of Appeal of New Zealand High Court of New Zealand Village Council
Tonga	Court of Appeal Supreme Court Magistrates' Court
Hierarchies with the standard structure plus a customary court level	
Samoa	Court of Appeal Supreme Court Magistrates' Court Village Fono
Solomon Islands	Court of Appeal High Court Magistrates' Court Customary Land Appeal Court Local Court
Vanuatu	Court of Appeal Supreme Court Magistrates' Court Island Court and Customary Land Tribunal
Hierarchies with the standard structure plus appeal to the Privy Council or internal second appeal level	
Cook Islands	Privy Council Court of Appeal High Court (presided over by a judge) High Court (presided over by justices of the peace)
Fiji Islands	Supreme Court Court of Appeal High Court Magistrates' Court

TABLE 3.1—HIERARCHY OF THE COURTS–continued

Hierarchies with the standard structure plus appeal to the Privy Council or internal second appeal level – continued	
Kiribati	Privy Council Court of Appeal High Court Magistrates' Court
Hierarchies with the standard structure plus a customary court level and appeal to the Privy Council	
Tuvalu	Privy Council Court of Appeal High Court Magistrates' Court Island Courts
Hierarchies with a two tier structure	
Niue	Court of Appeal High Court

3 THE CONSTITUTION OF THE COURTS

3.1 Cook Islands

In Cook Islands, the High Court may be constituted as an inferior court or a superior court, depending on who presides. Appeal lies to the Court of Appeal. Cook Islands is one of the four regional countries which still allows a further appeal to the English Privy Council.

The Court of Appeal is established under Art 56 of the Constitution. It is constituted by three Judges of the Court of Appeal.[5] The Chief Justice and puisne judges of the High Court are Judges of the Court of Appeal.[6] Other judges are appointed by the Queen's Representative acting on the advice of the Executive Council.[7] Decisions of the Court of Appeal are final except where appeal to the Privy Council is allowed by statute.[8]

The High Court is established under Art 47 of the Constitution. It is divided into a civil division, a criminal division and a land division. It consists of the Chief Justice and

5 Constitution of Cook Islands 1964, Art 57.
6 Constitution of Cook Islands 1964, Art 56(2)(b).
7 Constitution of Cook Islands 1964, Art 56.
8 Constitution of Cook Islands 1964, Art 59. For problems surrounding the wording of this section, see Frame, A, 'The Cook Islands and the Privy Council' (1984) 14 VUWLR 311. The Privy Council (Judicial Committee) Act 1984 extends the Order in Council of 10 January 1910 (SR 1973/181 NZ) to Cook Islands.

any other judge appointed by the Queen's Representative acting on the advice of the Executive Council.[9]

Article 62 of the Constitution provides for the appointment of justices of the peace to be appointed by the Queen's Representative acting on the advice of the Executive Council. The Judicature Act 1980–81 provides for justices to sit in the High Court either alone[10] or as a bench of three.[11]

3.2 Fiji Islands

Fiji Islands is the only country of the region to have two levels of appellate court within the jurisdiction. Prior to the commencement of the 1997 Constitution, there was also provision for inferior courts to operate at a village level.[12] In fact, these courts had not operated since 1967.[13]

Section 117 of the Constitution of the Republic of Fiji 1997, vests the judicial power of the State in the High Court, the Court of Appeal, the Supreme Court and other courts created by law.[14] The Supreme Court consists of the Chief Justice, who is the President, judges appointed to the Supreme Court and the justices of appeal.[15] It must sit with at least three judges.[16] The Court of Appeal consists of the President of the Court of Appeal, justices of appeal and the puisne judges of the High Court.[17] The High Court consists of the Chief Justice and not less than 10 puisne judges.[18]

The Chief Justice is appointed by the President on the advice of the Prime Minister following consultation with the Leader of the Opposition.[19] Other judges and justices of appeal are appointed by the President on the recommendation of the Judicial Service Commission, following consultation with the Minister and the sector standing committee of the house of representatives responsible for the administration of justice.[20]

Magistrates' courts are established by the Magistrates' Courts Act.[21] Magistrates are divided into three classes: resident magistrate, second class magistrate and third class magistrate.[22] Magistrates are appointed by the Judicial Service Commission.[23]

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9 Constitution of Cook Islands 1964, Art 52.
10 Section 19.
11 Section 20.
12 Constitution of Fiji 1990, Art 122(1); Fijian Affairs Act 1945 and Fijian Affairs (Courts) Regulations 1948 (revoked 1967).
13 See Nadakuitavuki, V, Fijian Magistrates—An Historical Perspective', in Powles, G and Pulea, M (ed), *Pacific Courts and Legal Systems*, 1988, Suva: USP, pp 78–84.
14 The Judicature Decree 2000, passed by the interim civilian government purported to abolish the Supreme Court, but that Decree would appear to be invalid as it is contrary to s 117 of the Constitution of Fiji Islands 1997.
15 Section 128.
16 Supreme Court Decree 1991, s 5(1).
17 Constitution of Fiji Islands 1997, s 127.
18 Constitution of Fiji Islands 1997, s 126(1).
19 Constitution of Fiji Islands 1997, s 132(1).
20 Section 132(2).
21 Cap 14.
22 Magistrates' Courts Act Cap 14, s 3(2).
23 Section 133(a).

3.3 Kiribati

The Judicial Committee of the Privy Council, sitting in England, forms part of the judicial hierarchy in Kiribati as limited appeals from the High Court still exist. For the purpose of hearing such appeals, the Privy Council has all the jurisdiction and powers of the High Court of Kiribati.[24] Its decisions are enforceable as if they were decisions of the High Court.[25]

Section 90 of the Constitution establishes the Court of Appeal. It is constituted by the Chief Justice and other judges of the High Court and other persons appointed by the *Berentitenti*[26] acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission.[27] The President of the Court of Appeal is appointed by the *Berentitenti,* acting in accordance with the advice of the Cabinet given after consultation with the Public Service Commission.[28] It must sit with not less than three judges.[29]

Section 88 of the Constitution establishes the High Court. It is constituted by the Chief Justice and other judges.[30] Appointment of the Chief Justice is by the *Berentitenti* acting in accordance with the advice of Cabinet given after consultation with the Public Service Commission.[31] Appointment of other judges is by the *Berentitenti* in accordance with the advice of the Chief Justice and the Public Service Commission.[32]

Magistrates' courts are established by the Magistrates' Courts Act[33] on a district basis as ordered by the Chief Justice.[34] They are composed of three magistrates sitting together, one of whom is the presiding magistrate,[35] except in land cases where five magistrates must preside. A clerk of the court is attached to each magistrates' court.[36] Prior to 1977, there were also island courts, which dealt with minor local matters.[37] These were abolished by the Magistrates' Courts Act.[38] There was also a Native Lands Court and a Native Land Appeal Panel, but these have also been abolished.[39]

3.4 Nauru

There is no provision in the Constitution for an appeal court.[40] Article 57(2) states that Parliament may provide that an appeal lies from the Supreme Court to a court of another

24 Constitution of Kiribati s 123(3).
25 Constitution of Kiribati s 123(2).
26 The President, see s 30(1).
27 Constitution of Kiribati, s 91.
28 Section 91(3).
29 Court of Appeal Act Cap 16B, s 5(1).
30 Section 80(1).
31 Section 81(1).
32 Section 81(2).
33 Cap 52.
34 Magistrates' Courts Act Cap 52, s 3(2).
35 Magistrates' Courts Act Cap 52, s 7.
36 Magistrates' Courts Act Cap 52, s 12.
37 Island Courts Act No 10 of 1965.
38 Cap 52.
39 Native Lands Ordinance Cap 22, Part IV. See now Native Lands Ordinance Cap 61, as amended.
40 Article 57(1) provides that Parliament may provide for an appeal from a single judge of the Supreme Court to a court constituted by two or more judges.

country. In 1974, the Appeals Act 1972 was amended to introduce such an appeal.[41] The High Court of Australia must sit with a full court of at least two justices of the High Court to hear an appeal.[42]

Provision for the Supreme Court to be established as a court of record is made in Art 48 of the Constitution. It consists of the Chief Justice and other judges appointed by the President[43] from persons who have been qualified to practise as a barrister or solicitor in Nauru for at least five years.[44]

The Constitution also provides for the establishment of subordinate courts. Pursuant to this provision, the district court has been established by the Courts Act 1972. It consists of a resident magistrate and no fewer than three lay magistrates appointed by the President after consultation with the Chief Justice.[45] Candidates for appointment as resident magistrate must be qualified for appointment as a Supreme Court judge.[46] Lay magistrates are required to be qualified for appointment as a pleader.[47]

Nauru also has a Family Court which deals with family matters,[48] which is not discussed here.

3.5 Niue

The Court of Appeal was introduced in 1992, prior to which appeals were heard by the Court of Appeal of New Zealand.[49] It is established under Art 52 of the Constitution. It is constituted by three judges of the Court of Appeal.[50] The Chief Justice and puisne judges of the High Court are judges of the Court of Appeal.[51] Other judges are appointed by the Governor-General acting on the advice of Cabinet tendered by the Premier.[52] The Court of Appeal is constituted by three judges who may sit in Niue or overseas.[53] Decisions of the Court of Appeal are final, except where the Queen grants a petition to appeal to the Privy Council.[54]

The High Court in Niue is established as a court of record under Art 37 of the Constitution. It is divided into a civil division, a criminal division and a land division.[55] It may sit either as an inferior court or a superior court depending on its constitution. As a

41 Appeals (Amendment) Act 1974, s 10.
42 Appeals Act 1972, s 47.
43 Article 49(2).
44 Article 49(3).
45 In 1993 no lay magistrates had been appointed: Deklin, T, 'Nauru', in Ntumy, M (ed), *South Pacific Islands Legal Systems,* 1993, USA: University of Hawaii Press.
46 Courts Act 1972, s 10.
47 Courts Act 1972, s 10. See Aroi, K, 'The Role and Training of Pleaders in Nauru', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems,* 1988, Suva: USP, pp 153–56.
48 Family Court Act 1973.
49 The Constitution Amendment (No 1) Act 1992.
50 Constitution of Niue, Art 53.
51 Constitution of Niue, Art 52(2) (a).
52 Constitution of Niue, Art 52(2)(b).
53 Constitution of Niue, Art 53.
54 Constitution of Niue, Art 55(2).
55 Constitution of Niue, Art 37.

superior court, it must be constituted by one or more judges appointed by the Governor-General acting on the advice of Cabinet tendered by the Chief Justice, or in the case of appointment of the Chief Justice, tendered by the Chief Justice and the Minister of Justice.[56] Jurisdiction may be exercised by a single judge.[57] Commissioners of the High Court may be appointed by Cabinet to exercise such functions of a judge (other than any jurisdiction vested exclusively in the Chief Justice) as are conferred on him or her by statute.[58] It may also appoint justices of the peace and any two justices acting together may fulfil the role of a Commissioner of the High Court.

3.6 Samoa

Article 75 of the Constitution establishes a Court of Appeal, as a superior court of record.[59] The judges of the Court of Appeal are the Chief Justice, other judges of the Supreme Court and such other persons as are appointed by the Head of State acting on the advice of the Judicial Service Commission.[60]

Article 65 of the Constitution of Samoa 1962 provides for the establishment of a Supreme Court as a superior court of record. It consists of the Chief Justice and an unspecified number of puisne judges.[61] The Head of State appoints the Chief Justice on the advice of the Prime Minister.[62] Other judges are appointed by the Head of State acting on the advice of the Judicial Service Commission.[63] The powers of the court may be exercised by a single judge.[64]

District courts are established pursuant to Art 74 of the Constitution. They are governed by the District Courts Act 1969.[65] Appointment is by the Head of State acting on the advice of the Judicial Service Commission.[66] The district court may also be constituted by *afa'amasimo fesoasoani*[67] appointed by the Head of State acting on the advice of the Judicial Service Commission.[68]

The village *fono* or council, which operated prior to colonial times, was formally recognised by the Village Fono Act 1990. It consists of the assembly of the *alii ma faipule* or *matais* (chiefly heads of families or *'aiga'*) from the particular village.[69] It must exercise its power to deal with village affairs in accordance with custom and usage.[70]

56 Constitution of Niue, Art 42.
57 Constitution of Niue, Art 37(5).
58 Constitution of Niue, Arts 46 and 48.
59 Judicature Act 1961, s 41 contains a parallel provision.
60 Constitution of Samoa 1960, Art 75; Judicature Act 1961, s 41(2).
61 Judicature Act 1961, s 41(2).
62 Judicature Act 1961, s 22.
63 Judicature Act 1961, s 22.
64 Judicature Act 1961, s 32.
65 District courts were formerly known as magistrates' courts. They were renamed by the District Courts Amendment Act 1992/3, which came into force on 1 February 1999 (Commencement Order 1999/2).
66 District Courts Act 1969, s 5(2).
67 *Fa'amasino fesoasoani* means assistant magistrate.
68 District Courts Act 1969, s 6.
69 Village Fono Act 1990, s 2.
70 Village Fono Act 1990, s 3(2).

Appeals do not lead back into the standard structure, but to the Land and Titles Court, which is a separate court established to deal with customary land disputes and chiefly title.[71] The Land and Titles Court is not discussed here.

3.7 Solomon Islands

The Court of Appeal is established under s 85 of the Constitution. It is constituted from time to time, as the need arises, by a President and justices of appeal, together with the Chief Justice and the puisne judges of the High Court.[72] The President and justices of appeal are appointed by the Governor-General acting on the advice of the Judicial and Legal Service Commission.[73] Appointees must be qualified for appointment to the High Court.[74]

The High Court is established under s 77 of the Constitution. It consists of the Chief Justice and puisne judges.[75] They are appointed by the Governor-General acting on the advice of the Judicial and Legal Service Commission.[76] Commissioners of the court may be appointed to attend to urgent business.[77]

The magistrates' courts are established as courts of record by the Magistrates' Courts Act.[78] They are divided into principal magistrates' courts, magistrates' courts of the first class and magistrates' courts of the second class.[79] The courts sit in districts as directed by the Chief Justice.[80] Magistrates' courts are constituted by a principal magistrate or magistrate of the relevant class sitting alone. All magistrates are appointed by the Judicial and Legal Service Commission.[81] A clerk of the court is appointed to each magistrates' court by the Chief Justice or a judge.[82]

The local courts are established by Chief Justice's warrant under the Local Courts Act.[83] Each court is constituted in accordance with the law or custom of the area in which it has jurisdiction.[84] The court may sit to hear a case provided that at least three justices are present.[85] Each court must also have a clerk appointed to it by the Chief Justice.[86] Customary land appeal courts have been established to deal with customary land appeals. A further appeal is allowed from the customary land appeal court to the High Court on a point of law only

71 Constitution of Samoa, Art 103 and the Land and Titles Court Act 1981.
72 Constitution of Solomon Islands 1978, s 85(2).
73 Constitution of Solomon Islands 1978, s 86.
74 Constitution of Solomon Islands 1978, s 86(3).
75 Constitution of Solomon Islands 1978, s 77(2).
76 Constitution of Solomon Islands 1978, s 78.
77 Constitution of Solomon Islands 1978, s 79. Commissioners are usually chosen from the magistracy.
78 Cap 20.
79 Magistrates' Courts Act Cap 20, s 3(1).
80 Magistrates' Courts Act Cap 20, s 3(2) and s 50.
81 Constitution of Solomon Islands 1978, s 118.
82 Magistrates' Courts Act Cap 20, s 12.
83 Cap 19.
84 Local Courts Act Cap 19, s 3. The Chief Justice may prescribe the constitution of a local court, s 3, and has done so in each warrant establishing a local court.
85 See warrants establishing the local courts, for example, Warrant establishing the Honiara Local Court, LN 48/86 and LN 54/89.
86 Local Courts Act Cap 19, s 5.

3.8 Tokelau

Tokelau does not follow the standard model hierarchy. There is only one level of courts within the country. Whilst provision is made for major civil cases and appeals to be dealt with by New Zealand courts, no cases have yet been taken there. In fact most disputes are dealt with outside the formal court hierarchy in the *Taupulega* (Council of Elders).

The Court of Appeal of New Zealand has no separate status in Tokelau.[87] The Tokelau Amendment Act gives the High Court of New Zealand the status of a separate court of justice in and for Tokelau.[88]

Village councils are established on each of the three main islands, Atafu, Fakaofo and Nukunonu. They are presided over by a Commissioner, who is currently the *faipule* or 'chair' of the village council.

3.9 Tonga

The Privy Council of Tonga is a body appointed by the King to assist him, rather than a court.[89]

The Court of Appeal is established under cl 84 of the Constitution and governed by the Court of Appeal Act.[90] It consists of the Chief Justice and such other judges as are appointed by the King with the consent of the Privy Council.[91] The Chief Justice is the President of the Court of Appeal.[92] The court must sit with at least three members,[93] except on appeals from interlocutory orders which may be determined by two judges.[94] The Registrar of the Court of Appeal is the Registrar of the Supreme Court.[95]

The Supreme Court is established under cl 86 of the Constitution and governed by the Supreme Court Act.[96] The Supreme Court consists of a Chief Justice and judges appointed by the King with the consent of the Privy Council.[97] In civil cases, a single judge normally constitutes the court, but a party to a dispute has the right to claim the right of trial by jury wherever any issue of fact is raised.[98] In practice, the right to trial by jury is rarely exercised in civil cases.[99]

The magistrates' court is constituted under cl 84 of the Constitution and governed by the Magistrates' Courts Act.[100] It may be constituted by the chief police magistrate or

87 Tokelau Amendment Act 1986, s 4(1).
88 Tokelau Amendment Act 1986, s 3(1).
89 Constitution of Tonga Cap 2, cl 50(1).
90 Cap 9. Constitution of Tonga Cap 2, cl 85.
91 Constitution of Tonga Cap 2, cl 85.
92 Court of Appeal Act Cap 9, s 4.
93 Court of Appeal Act Cap 9, s 6.
94 Court of Appeal Act Cap 9, s 10(3).
95 Court of Appeal Act Cap 9, s 8.
96 Cap 10.
97 Constitution of Tonga Cap 2, cl 86.
98 Constitution of Tonga Cap 2, cl 99.
99 Information obtained from the Supreme Court Registry, Nuku'alofa, Tonga.
100 Cap 11.

a district magistrate, appointed by the Prime Minister with the consent of the Cabinet.[101] Magistrates' courts are authorised to operate in five districts under the Magistrates' Courts Act.[102]

In addition to the courts in the three tier structure there is a specialised land court which deals with land matters. The land court is established by s 144 of the Land Act,[103] pursuant to cl 84 of the Constitution. It is constituted by a judge and an assessor.[104] The assessor is chosen by the judge from a panel and both the judge and panel members are appointed by the King and the Privy Council.[105] Procedure in the land court is governed by the Land Court Rules.[106]

3.10 Tuvalu

By virtue of s 119 of the Constitution, the Privy Council is part of the judicial system in Tuvalu. Section 134 of the Constitution establishes the Court of Appeal. It is governed by the Superior Courts Ordinance.[107] It consists of the judges of the High Court and not fewer than three judges of appeal.[108] Judges of appeal are appointed by the Governor-General, acting in accordance with the advice of the Cabinet.[109]

Section 120 of the Constitution establishes the High Court as a superior court of record. It is constituted by the Chief Justice, who is appointed by the Head of State acting in accordance with the advice of the Cabinet.[110] Additional judges may be appointed by the Head of State acting in accordance with the advice of the Cabinet given after consultation with the Chief Justice, but no such appointment has yet been made.[111]

The Magistrates' Court Ordinance establishes the magistrates' court. This court is divided into two levels: the senior magistrate's court and the magistrate's court. The senior magistrate's court is not currently operating.

Island courts are established by the Island Courts Act[112] on each island that the Governor-General designates.[113] They are subordinate to magistrates' courts and are presided over by three island magistrates, being the President, the Vice-President and an ordinary member.[114] Appointments are by the Governor-General acting in accordance with the advice of the Public Service Commission and subject to the approval of the

101 Magistrates' Courts Act Cap 11, s 2(1).
102 Section 3(1).
103 Cap 132.
104 Land Act Cap 132, s 146(1). The role of the assessor is to assist the judge by explaining and advising on Tongan custom and usage: s 146(3).
105 Land Act Cap 132, s 147(1).
106 1927, made under the Land Court Act Cap 132, s 168.
107 Cap 1C.
108 Superior Courts Act Cap 1C, s 7(2).
109 Superior Courts Act Cap 1C, s 8(2).
110 Section 122.
111 Section 123.
112 Cap 3.
113 Section 3(1).
114 Island Courts Act Cap 3, s 9(1).

Chief Justice.[115] A clerk of the court is appointed to each island court by the senior magistrate.[116]

3.11 Vanuatu

The Court of Appeal is established under Art 50 of the Constitution. It is constituted from time to time as the need arises by two or more judges of the Supreme Court.[117]

The Supreme Court is established under Art 49 of the Constitution by s 28 of the Courts Act 1980. It consists of the Chief Justice and three puisne judges.[118] The Chief Justice is appointed by the President on the advice of the Prime Minister and the Leader of the Opposition.[119] Puisne judges are appointed by the President on the advice of the Judicial Services Commission.[120] The court is constituted by a judge sitting alone.[121]

The magistrates' courts are established under and governed by the Courts Act 1980. They are presided over by a lay magistrate or senior magistrate appointed by the Judicial Services Commission.[122] When hearing appeals from an island court they must sit with two or more assessors knowledgeable in custom.[123]

The island courts are established under the Island Courts Act 1983, pursuant to Art 50 of the Constitution, to administer customary law and to deal with customary land and minor local disputes.[124] Each island court is constituted by a minimum of three justices knowledgeable in customary law, at least one of whom must be a custom chief residing within the jurisdiction of the island court. Each island court must also have a supervising magistrate with powers and duties prescribed by the Chief Justice.[125] The island courts are not functioning regularly, due to lack of resources.

In 2001, jurisdiction over customary land matters was removed from the island courts and vested in customary land tribunals. Where a dispute involves land within a single village, the tribunal is referred to as a village land tribunal and is constituted by the principal chief as chairperson, two other chiefs or elders and a secretary appointed by the principal chief.[126] Where the dispute involves land of more than one village, the tribunal is referred to as a joint village land tribunal constituted by the principal chief of each village, two elders of each village and a secretary appointed by the principal chiefs acting

115 Island Courts Act Cap 3, s 9(2).
116 Island Courts Act Cap 3, s 12(1).
117 Constitution of Vanuatu, Art 48; Courts Act 1980, s 32.
118 Constitution of Vanuatu, Art 47(2).
119 Constitution of Vanuatu, Art 49(3).
120 Constitution of Vanuatu, Art 47(2).
121 Courts Regulation 1980, s 29(1), as amended by Courts Regulation (Amendment) Act 1989, s 1. The Courts Act Cap 122, s 14(1) provides that the Supreme Court is to be constituted by a judge sitting with two assessors. Arguably, this Act repealed the Courts Regulation 1980 or at least any incompatible sections. It would appear that the 1989 amendment overlooked this fact.
122 Courts Act Cap 122, s 20.
123 Island Courts Act Cap 167, s 22(2).
124 See further Russell, R, 'Preparing for Land Disputes in the Vanuatu Island Courts', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems,* 1988, Suva: USP, pp 278–82.
125 Island Courts Act Cap 167, s 2.
126 Customary Land Tribunal Act 2001, s 8.

together.[127] A chief must be included in the approved list, established by the Act, in order to qualify for appointment.[128] When hearing appeals, customary land tribunals are differently named and constituted depending on whether the land is situated in a custom sub-area or on an island with uniform or multiple customary systems. The different constitutions are summarised in Table 3.2.

TABLE 3.2—CONSTITUTION OF CUSTOMARY LAND TRIBUNALS HEARING APPEALS

TITLE OF COURT	CONSTITUTION OF COURT
Custom sub-area land tribunal	The chairperson of the council of chiefs of the custom sub-area;[129] two other chiefs or elders from the custom sub-area appointed by the council of chiefs of the custom sub-area; and a secretary appointed by the council of chiefs of the custom sub-area.[130]
Joint custom sub-area land tribunal	The chairperson of the council of chiefs of each sub-area or custom area;[131] two other chiefs or elders from each sub-area or custom area appointed by that sub-area or custom area council of chiefs; and a secretary appointed by the chairpersons of the sub-area and custom area councils of chiefs acting together.[132]
Custom area land tribunal	The chairperson of the custom area council of chiefs;[133] two other chiefs or elders from the custom area appointed by the custom area council of chiefs; and a secretary appointed by the custom area council of chiefs.[134]

127 Customary Land Tribunal Act 2001, s 9.
128 Customary Land Tribunal Act 2001, s 37.
129 If the chairperson is qualified under the Act to adjudicate the dispute and is willing to do so.
130 Customary Land Tribunal Act 2001, s 13(2).
131 Provided the chairperson is qualified under this Act to adjudicate the dispute and is willing to do so.
132 Customary Land Tribunal Act 2001, s 14(2).
133 Provided the chairperson is qualified under this Act to adjudicate the dispute and is willing to do so.
134 Customary Land Tribunal Act 2001, s 18(3).

TABLE 3.2—CONSTITUTION OF CUSTOMARY LAND TRIBUNALS HEARING APPEALS (continued)

Joint custom area land tribunal	The chairperson of the council of chiefs of each custom area;[135] two other chiefs or elders from each custom area appointed by the council of chiefs; and a secretary appointed by the chairpersons of the council of chiefs or each area acting together.[136]
Island land tribunal	The chairperson of the council of chiefs;[137] four other chiefs or elders from the custom area appointed by the island council of chiefs; and a secretary appointed by the island council of chiefs.[138]

4 JURISDICTION OF THE COURTS

Jurisdiction may be defined by the nature of the cause of action, or by financial limits, or by the location of the parties, or the subject matter of the dispute. The jurisdiction of the courts is generally governed by the specific legislation establishing them, rather than by the rules. For example, various Magistrates' Courts Acts within the region limit magistrates' civil jurisdiction to claims or subject matter up to a maximum amount, as illustrated in Table 3.3. The position is further complicated by the fact that different financial limits may be imposed for different types of claim. For example, as shown in Table 3.3, claims for possession of land between landlord and tenant are limited to $2,000 in the Fiji magistrates' court. As magistrates' courts are creatures of statute they have no powers, jurisdiction, or authority other than that authorised by the Act under which they are established.[139]

135 Provided the chairperson is qualified under the Act to adjudicate the dispute and is willing to do so.
136 Customary Land Tribunal Act 2001, s 19(2).
137 Provided the chief is qualified under the Act to adjudicate the dispute and is willing to do so.
138 Customary Land Tribunal Act 2001, s 23(3).
139 *Gaunder v Ravindra,* unreported, High Court, Fiji, Civ App 15/1997, 1 December 1998, 5.

TABLE 3.3—MONETARY JURISDICTION OF MAGISTRATES' COURTS OR EQUIVALENT TRIBUNAL

COUNTRY	MONETARY LIMIT	AUTHORITY
COOK ISLANDS	$3,000 (three justices); $1,000 (single justice).	Judicature Act 1980–81, s 19.
FIJI ISLANDS	$15,000 (personal suits re motor vehicle accidents and/or based in contract or tort); $2,000 (landlord and tenant); unlimited (trespass or recovery of land); $1,000 (second class magistrate); $200 (third class magistrate).	Magistrates' Court (Civil Jurisdiction) Decree 1988, s 2(1)(a); s 2(1)(b)(i); s 2(1)(b)(ii); s 2(2).
KIRIBATI	$3,000 (three magistrates).	Magistrates' Court Act Cap 52, s 23 and Sched 1.
MARSHALL ISLANDS	$5,000 (district court judge).	Judiciary Act 27 MIRC Cap 2.
NAURU	A$3,000 (causes based in contract or tort).	Courts Act 1972, s 21.
NIUE	NZ$500 (Commissioner or 2 JPs) (excluding land).	Rules of the High Court 1916, r 83.
SAMOA	T10,000 (magistrate) T1,000 (assistant magistrate) (causes based in contract or tort) (money recoverable by statute); unlimited jurisdiction in tax matters.	District Courts Act 1969, s 23 and s 33.[140]
SOLOMON ISLANDS	$6,000 (principal magistrate); $2,000 (first class magistrate).	Magistrates' Court Act Cap 20, s 22.
TOKELAU	NZ$1,000 (Commissioner) (recovery of debt or damages or recovery of chattels).	Tokelau Amendment Act 1986, s 7(1)(a) and (b).
TONGA	T$2,000 (chief police magistrate); T$1,000 (other magistrates) (excluding land).	Magistrates' Court Act Cap 11, s 55(1) and (2) (as amended by Act 29 of 1978).
TUVALU	$10,000(senior magistrate); $500 (magistrate) (excluding land).	Magistrates' Court Act Cap 2, s 22(3) read with LN 2/88 s 22(2).
VANUATU	Vt1,000,000; Vt2,000,000 (landlord and tenant); Vt1,200,000 (maintenance).	Magistrates' Court (Civil Jurisdiction) Act 1981, s 1, as amended by Magistrates' Court (CJ) (Amendment) Act 1994.

140 The Magistrates' Court Act 1969 was renamed the District Courts Act by the District Courts Amendment Act 1992/93, which came into force on 1 February 1999.

In Vanuatu, a Practice Direction has been issued stating that the Supreme Court will actively pursue its power to invest a magistrates' court constituted by a senior magistrate, with jurisdiction to try proceedings which would otherwise be beyond its jurisdiction, in suitable cases.[141] Examples of suitable cases are listed as:

- cases where the sum claimed does not greatly exceed the current magistrates' court limit;
- cases where the issues are clear and straightforward and do not involve important or complex points of law;
- matrimonial matters where no children are involved;
- any matter where the plaintiff requests a hearing in the magistrates' court at the time of filing and the Supreme Court thinks this is suitable.

Superior courts generally have unlimited jurisdiction, although there may be a minimum below which cases may not be instituted. For example, in Tonga, claims below T$50.00 may not be instituted in the Supreme Court. Superior courts also normally have exclusive jurisdiction to deal with certain cases, such as those involving interpretation of the Constitution.[142]

Jurisdiction may also be affected by the geographical location of the parties or other geographical factors and/or the subject matter of the dispute. This type of jurisdictional limitation will be discussed further in the chapter on service.

As a principle of practice, want of jurisdiction should be raised at the commencement of proceedings and whilst a total want of jurisdiction cannot be cured by consent of the parties,[143] a party who waives his or her rights by conduct cannot later rely on want of jurisdiction on appeal.[144]

4.1 Cook Islands

Appeals lie from the Court of Appeal to the Privy Council:

- where the case involves a substantive question of law as to the interpretation or effect of the Constitution of Cook Islands;
- where final judgment has been given, involving at least NZ$5,000; or
- where the appeal involves a question of great general or public importance or which otherwise ought to be submitted to the Privy Council.[145]

141 Practice Direction issued by Chief Justice Lunabek at Port Vila on 25 February 2002. The power to grant increased jurisdiction to magistrates' courts is conferred by the Courts Act Cap 122 (Vanuatu), s 4(3).

142 For example, Constitution of Fiji 1990, ss 19 and 113; Constitution of Samoa 1962, Art 73(1); Constitution of Tonga 1875, s 90.

143 *Jones v Owen* (1849) 18 LJQB 8.

144 *Surji v Native Land Trust Board*, unreported, High Court, Fiji, Civ App 12/1994, 19 June 1997. See also *Windsor v Dunford* (1848) 12 QBD 603; *Pringle v Hales* [1925] 1 KB 573.

145 Privy Council (Judicial Committee) Act 1984, s 3(2).

Appeals from decisions as to the right of a person to hold a chiefly office, or ownership of customary land, *Ariki* land,[146] or land owned in fee simple by a Cook Islander are not allowed.[147]

The Court of Appeal has jurisdiction to hear appeals from the High Court as of right:[148]

- where the High Court certifies that a substantive question of law is involved;
- where the dispute involves $400 or more; and
- where a question arises as to the interpretation of the Constitution.

Appeals also lie with the leave of the High Court[149] or special leave of the Court of Appeal[150] in certain cases.

The Court of Appeal may also determine a question of law by way of case stated, either on application by a party or the High Court's own motion.[151]

The High Court has unlimited original jurisdiction in civil matters.[152] This is normally exercised by a single judge. Appeal lies to the High Court from all decisions of justices of the peace, whether sitting alone or together.[153]

A single justice presiding in the High Court has jurisdiction to deal with actions for the recovery of any debt or damages or recovery of chattels, where not more than $1,500 is involved.[154] Three justices sitting together may deal with actions for the recovery of any debt or damages or recovery of chattels, involving between $1,500 and $3,000.[155] Both a single justice and a full bench may have additional jurisdiction conferred by statute.[156]

4.2 Fiji Islands

The Supreme Court is the final appellate court of the State.[157] It has exclusive jurisdiction to hear and determine appeals from all final judgments of the Court of Appeal with leave of the Court of Appeal or special leave of the Supreme Court.[158] Appeals lie as of right:

- from final decisions involving any constitutional question;
- from final decisions in proceedings involving F$20,000 or more.[159]

146 The terms 'customary land' and '*Ariki* land' bear the meaning given in the Cook Islands Act 1915. *Ariki* land means chiefly land.
147 Privy Council Judicial Committee) Act 1984, s 7.
148 Constitution of Cook Islands 1994, Art 60(2)(a)–(d).
149 Constitution of Cook Islands 1994, Art 60(2)(e).
150 Constitution of Cook Islands 1994, Art 60(3), as amended by Constitution Amendment (No 16) Act 1993–94.
151 Judicature Act 1980–81, s 52.
152 Constitution of Cook Islands, Art 47(2).
153 Judicature Act 1980–81, s 76.
154 Judicature Act 1980–81, s 19(b).
155 Judicature Act 1980–81, s 20(b).
156 Judicature Act 1980–81, ss 19(b)(iii) and 20(e).
157 Section 117(2).
158 Constitution of Fiji Islands 1997, s 122.
159 Supreme Court Decree 1991, s 8(1).

The President may, on the advice of Cabinet, refer questions as to the effect of the Constitution to the Supreme Court for an opinion.[160]

The Court of Appeal has jurisdiction to hear and determine appeals from judgments of the High Court.[161] Appeals lie as of right:[162]

- from decisions of the High Court sitting at first instance;[163]
- from any decision of the High Court under the Matrimonial Causes Act;
- on questions of law only, from decisions of the High Court sitting on appeal;[164]
- from final decisions in matters arising under the Constitution or involving its interpretation;
- from final decisions involving interpretation of the Judicature Act 1988;
- from interlocutory orders where:
  - (a) the liberty of the subject or the custody of minors is concerned;
  - (b) an injunction or the appointment of a receiver is granted or refused;
  - (c) a decision determines the claim of a creditor or the liability of any contributory or the liability of any director or officer under the Companies Act;
  - (d) a decree nisi has been made in a matrimonial cause or a judgment or order in an admiralty action determining liability.

The Court of Appeal may also hear appeals with leave from:[165]

- High Court Orders made by consent or as to costs;
- interlocutory orders or judgments of the High Court, except in certain cases specified above where appeal lies as of right.

The High Court has unlimited original jurisdiction to hear and determine civil proceedings.[166] It also has jurisdiction to determine appeals from all judgments of subordinate courts.[167] Appeals from all decisions (including interlocutory proceedings)

160 Section 123.
161 Constitution of Fiji Islands 1997, s 121.
162 Constitution of Fiji Islands 1997, s 121(2); Court of Appeal Act Cap 12, s 12(1).
163 The Court of Appeal (Amendment) Act 13 of 1998 replaced s 3(3) of the principal Act, which dealt with appeals from the defunct High Court of the Western Pacific, with a new subsection conferring jurisdiction on the Court of Appeal to hear appeals from final judgments of the High Court exercising original jurisdiction. In civil cases, this jurisdiction was already conferred by s 12(1)(a), which does not require the decision to be final, although s 12(2)(f) provides that leave is usually required to appeal from interlocutory orders or judgments.
164 The Court of Appeal (Amendment) Act 13 of 1998 inserted a new sub-section (4) in s 3 of the principal Act. The new s 3(4) confers jurisdiction on the Court of Appeal to hear appeals from final judgments of the High Court exercising appellate jurisdiction. In civil cases, this jurisdiction was already conferred by s 12(1)(c), which does not require the decision to be final, although s 12(2)(f) provides that leave is usually required to appeal from interlocutory orders or judgments.
165 Court of Appeal Act Cap 12, s 12(2)(e) and (f).
166 Constitution of Fiji Islands 1997, s 120(1). Proceedings must normally be commenced in the High Court registry in the Division in which the cause of action arose: O4 r1 (Fiji).
167 Constitution of Fiji Islands 1997, s 120(3).

of a resident magistrate may be taken to the High Court.[168] Magistrates may refer any question of law to the High Court.[169]

The territorial jurisdiction of magistrates' courts is limited to the division in which they are situated.[170] Magistrates have jurisdiction to hear:

- claims in contract or tort where the amount involved does not exceed F$15,000;
- proceedings between landlord and tenant where the annual rental does not exceed F$2,000;[171]
- in all suits involving trespass or recovery of land (other than landlord and tenant disputes);
- habeus corpus applications; and
- applications for appointment of guardians or custody.

The magistrates' court is specifically empowered to grant injunctions and similar relief in any action instituted.[172] Second and third class magistrates have jurisdiction to try civil proceedings arising out of motor accidents where the amount claimed does not exceed F$1,000 and F$200 respectively.[173] A resident magistrate has jurisdiction to hear appeals from decisions of second and third class magistrates.

4.3 Kiribati

The Privy Council has jurisdiction to hear appeals from any decision of the High Court involving the interpretation of the Constitution where application to the High Court was made on the basis of contravention of the rights of any Banaban[174] or of the Rabi Council[175] under Chapter III or IX of the Constitution.[176]

The Court of Appeal has jurisdiction to hear appeals as of right from any decision of the High Court exercising original jurisdiction[177] or on a question of law.[178] The Court of Appeal may also hear appeals from the High Court with leave:[179]

- where an order was made by consent or is as to costs only; and
- where the order or judgment is interlocutory, except in a case:
  - (a) where the liberty of the subject or custody of infants is concerned;
  - (b) where an injunction or appointment of a receiver is granted or refused; or
  - (c) where a decree nisi in a matrimonial cause or a judgment or order in an admiralty action is involved.

168 Magistrates' Courts Act Cap 14.
169 Magistrates' Courts Act Cap 14.
170 Magistrates' Courts Act Cap 14, s 4(1).
171 Magistrates' Courts Act Cap 14, s 16(1), as amended by Magistrates' Court (Civil Jurisdiction) Decree 1988, ss 2(1) and 3.
172 Magistrates' Courts (Civil Jurisdiction) Decree 1988, s 2(1)(f).
173 Magistrates' Courts (Civil Jurisdiction) Decree 1988, s 2(2).
174 A person from Banaban Island.
175 Council of Rabi Island in Fiji.
176 Section 123(1).
177 Court of Appeal Act Cap 16B, s 10(1)(a).
178 Court of Appeal Act Cap 16B, s 10(1)(b).
179 Court of Appeal Act Cap 16B, s 10(2).

No appeal lies from:

- a decision allowing an extension of time in which to appeal;
- an order giving unconditional leave to defend an action;
- a decision of the High Court which is provided by statute to be final; or
- from an order absolute for the dissolution or nullity of marriage, where the opportunity to appeal against the decree nisi has not been taken.[180]

The Court of Appeal has jurisdiction to hear appeals from the High Court exercising appellate jurisdiction in land matters.[181]

The High Court would appear to have unlimited original jurisdiction.[182] Appeals lie to the High Court as of right from decisions of the magistrates' court:

- in exercise of its jurisdiction in divorce;
- in any claim in which the amount involved exceeds $20;[183] and
- in land cases.[184]

The High Court is also empowered to determine disputes as to the validity of election of any member of the *Maneaba ni Maungatabu* and as to vacation of seats.[185]

The magistrates' court has jurisdiction within the limits of the district within which it is situated and over any territorial waters adjacent to the district in which it is situated, as well as over inland waters.[186] It may determine:

- petitions for divorce under the Native Divorce Ordinance;
- claims in contract and tort where the amount involved does not exceed $3,000; and
- applications for injunctions to preserve the status quo.

A magistrates' court constituted under s 7(4) has jurisdiction to deal with all land matters.[187] The Chief Justice may authorise an increase in jurisdiction in civil cases.[188]

4.4 Nauru

The High Court of Australia has jurisdiction to hear appeals from the Supreme Court against any final first instance judgment.[189] It may also hear appeals with leave of the trial judge or the High Court against an interlocutory order or judgment.[190] With

180 Court of Appeal Act Cap 16B, s 10(2).
181 Magistrates' Court (Amendment) Act 1990, ss 2 and 3.
182 This is not stated in the Constitution, nor is there a specific statute conferring such jurisdiction.
183 Magistrates' Courts Act Cap 52, s 66(1).
184 Magistrates' Courts Act Cap 52, s 75(1).
185 Constitution of Kiribati, s 60.
186 Magistrates' Courts Act Cap 52, s 4.
187 See para 3.3 above. This jurisdiction has been narrowly interpreted to exclude personal actions in contract or tort, even where land is involved: *SMEC v Temwakamwaka Landowners*, unreported, Court of Appeal, Kiribati, LN 8/97, 9 March 1998.
188 Magistrates' Courts Act Cap 52, s 28.
189 Appeals Act 1972, s 44(a).
190 Appeals Act 1972, s 44(b).

leave of the High Court it may hear an appeal from the Supreme Court exercising jurisdiction in appeals from the district court.[191] No appeal is permitted in the following cases:

- where the appeal involves the interpretation or effect of the Constitution;
- from a determination by the Supreme Court of a question concerning membership of Parliament;
- from a consent order;
- from a judgment given on appeal from the Nauru Lands Committee;
- from an order allowing an extension of time in which to appeal;
- from an order giving unconditional leave to defend;
- from a decision which is provided by statute to be final; or
- from an order absolute for the dissolution or nullity of marriage where an opportunity to appeal from the decree nisi was not taken.[192]

The Supreme Court has unlimited original jurisdiction.[193] It hears appeals from final decisions of the district court.[194]

The district court hears and determines all civil cases involving not more than A$3,000.[195]

4.5 Niue

The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court as of right:

- if the High Court certifies that a substantial question of law as to the interpretation or effect of the Constitution is involved;
- if the matter in dispute is not less than the minimum prescribed by statute; and
- in any case where an appeal is provided for by statute.[196]

The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court with leave of the High Court[197] or special leave of the Court of Appeal.[198]

The High Court has unlimited first instance jurisdiction in civil matters.[199] Since there are no subordinate courts set up in Niue, under Art 66 of the Constitution a Commissioner or two justices of the peace have jurisdiction to deal with actions for the recovery of debt or damages or recovery of chattels with a value not exceeding $1,500.[200] A judge of the

191 Appeals Act 1972, s 44(c).
192 Appeals Act 1972, s 45.
193 Courts Act 1972, s 17.
194 Appeals Act 1972, s 27.
195 Courts Act 1972, s 21.
196 Constitution of Niue, Art 55A(2).
197 Constitution of Niue, Art 55A(2).
198 Constitution of Niue, Art 55A(3).
199 Constitution of Niue, Art 37(2).

High Court has jurisdiction to hear appeals from decisions of the Commissioner or two justices sitting together.[201]

4.6 Samoa

The general jurisdiction of the Court of Appeal is to hear and determine appeals (including proceedings removed by order of the Supreme Court to the Court of Appeal) that are referred to it by statute.[202] Section 51 of the Judicature Act 1961 provides that appeals lie from the Supreme Court to the Court of Appeal:

- as of right from a decision involving $400 or more;[203] or
- with leave of the Court of Appeal or the Supreme Court, in matters of general or public importance, or where the magnitude of interests affected or other reason dictates that the decision ought to be submitted to the Court of Appeal for a decision.

There is also an appeal as of right from any decision of the Supreme Court in proceedings under Art 4 of the Constitution,[204] that is, regarding remedies for the enforcement of any fundamental right established by the Constitution. The Court of Appeal also has jurisdiction to hear appeals from decisions of the Supreme Court in cases involving a substantial question of law as to the interpretation or effect of the Constitution.[205]

The Supreme Court has unlimited original jurisdiction[206] throughout Samoa.[207] It also has specific jurisdiction conferred upon it by statute.[208] The Supreme Court has jurisdiction to hear appeals from a district court: [209]

- as of right from a decision involving $1,000 or more or where the title to land is in question; or
- with leave of the district court.

The district court has jurisdiction to hear and determine:[210]

- any action founded on tort or contract:
  (a) where the debt demand or damage, or the value of the chattels claimed is not more than $10,000; and
  (b) where the debt or demand claimed consists of a balance not exceeding $10,000 after a set-off of any amount claimed by the defendant from the plaintiff in the particulars of his claim or demand;

200 Rules of the High Court 1916, Amendment Regulations 1991, reg 3.
201 Rules of the High Court 1916, Amendment No 2 Regulations, reg 1.
202 Constitution of Samoa 1962, Art 79.
203 Although appeal is as of right, the leave of the Supreme Court is still required before the appeal can proceed: Judicature Act 1961 (Samoa), s 54(1). See further Chapter 15.
204 Constitution of Samoa 1962, Art 81; Judicature Act 1961, s 41.
205 Constitution of Samoa 1962, Art 80; Judicature Act 1961, s 41.
206 Judicature Act 1961, s 31.
207 Judicature Act 1961, s 32.
208 See, for example, Administration Act 1975, s 5 (probate jurisdiction); Citizenship Act 1972, s 18(2) (enquiry into deprivation of citizenship).
209 District Courts Act 1969, s 70.
210 District Courts Act 1969, s 23.

- claims for money recoverable by statute;
- actions for the recovery of any penalty, expenses, contribution, or other like demand which is recoverable by virtue of statute, if:
  (a) it is not expressly provided by legislation that recovery shall only be in some other court; and
  (b) the amount claimed in the action does not exceed the sum of $10,000;
- actions for the recovery of freehold land, where the value of the land or interest does not exceed $100,000 or the annual rental does not exceed $10,000;[211] and
- claims in equity where the sum involved does not exceed $10,000.[212]

The district court has ancillary power to make any necessary orders in proceedings properly before it.[213] Customary land is excluded from the district courts' jurisdiction.[214]

A court presided over by a *fa'amasino fesoasoani* has jurisdiction to hear and determine:[215]

- any action founded on contract or in tort where the amount involved does not exceed $1,000;[216] and
- any action for the recovery of any penalty (other than a criminal fine), expense, contribution or similar demand, which is recoverable under legislation if:
  (a) jurisdiction is expressly conferred by the legislation; and
  (b) the amount claimed in the action does not exceed $1,000.

The jurisdiction of *a fa'amasino fesoasoani* may be extended by the Chief Justice through the Supreme Court Registrar to allow him or her to deal with:

- disputes involving up to $2,000; and
- judgment summonses in cases where the original judgment was for up to $2,000.[217]

The jurisdiction of the village *fono* is limited to persons ordinarily resident in the village and does not extend to persons, other than *matai*, residing there on government, freehold, or leasehold land, who are not liable in custom to render *tautua* to a *matai* of that village.[218] The village *fono* has power to deal with the affairs of the village in accordance with custom and usage.

211 District Courts Act 1969, s 25.
212 District Courts Act 1969, s 28. The specific equitable jurisdiction is set out in the section.
213 District Courts Act 1969, s 21.
214 District Courts Act 1969, s 26.
215 District Courts Act 1969, s 33.
216 Amended by the District Courts Amendment Act 1992/93, s 7.
217 District Courts Act 1969, s 34.
218 Village Fono Act 1990, s 9.

4.7 Solomon Islands[219]

The Court of Appeal has jurisdiction to hear appeals as of right from:[220]

- any decision of the High Court sitting in the first instance, including decisions of judges sitting in chambers;
- any decision of the High Court under the provisions of the Islanders' Divorce Act;[221]
- on a question of law only, any decision of the High Court exercising appellate jurisdiction, provided that further appeal to the Court of Appeal is not prohibited by statute.

The Court of Appeal has jurisdiction to hear appeals from the High Court with leave:[222]

- where an order was made by consent or is as to costs only;
- where the order or judgment is interlocutory, except in a case:
  (a) where the liberty of the subject or custody of infants is concerned;
  (b) where an injunction or appointment of a receiver is granted or refused;
  (c) where the decision determines the claim of any creditor or liability of a contributor or other officer under the Companies Act; or
  (d) where a decree nisi in a matrimonial cause or a judgment or order in an admiralty action is involved.

No appeal lies from:

- a decision allowing an extension of time in which to appeal;
- an order giving unconditional leave to defend an action;
- a decision of the High Court which is provided by statute to be final, for example on appeal from the Customary Land Appeal Court;[223] or
- an order absolute for the dissolution or nullity of marriage, where the opportunity to appeal against the decree nisi has not been taken.

The High Court has unlimited original jurisdiction but this does not include the power to give advisory opinions.[224] Appeals lie to the High Court as of right from all judgments, orders and decisions of any magistrates' court except where it is made by consent, *ex parte* or relates to costs only.[225] In those cases special leave of the magistrates' court or of the High Court is required.[226] The High Court also hears appeals from the Customary Land Appeal Court on questions of law other than customary law, or where failure to

219 See Corrin Care, J, 'Courts in Solomon Islands' (1999) LAWASIA Journal 98.
220 Court of Appeal Act Cap 6, s 11.
221 Cap 170.
222 Court of Appeal Act Cap 6, s 11.
223 Land and Titles Act Cap 133, s 256(4).
224 *The Attorney-General and the Chairman of the Public Service Commission v Wheeler* [1990] SILR 137.
225 Magistrates' Courts Act Cap 19, s 41.
226 Magistrates' Courts Act Cap 19, s 41.

comply with a procedural requirement is alleged.[227] The decision of the High Court is final.

The Magistrates' Courts Act[228] confers jurisdiction on principal magistrates' courts throughout Solomon Islands. Other magistrates' courts are limited to the district in which they are established and to the territorial waters adjacent to that district.[229] Magistrates' courts have civil jurisdiction:

- in claims in contract or tort, where the amount involved does not exceed SBD2,000, or in the case of a principal magistrate, SBD6,000;
- in suits between landlord and tenant for possession of any land, where the annual value or rent does not exceed the sum of SBD500, or in the case of a principal magistrate, SBD2,000;
- to make guardianship and custody orders;
- to grant injunctions, orders for the detention or preservation of any property; orders to restrain torts or breaches of contracts; or similar relief;
- in claims for relief by way of interpleader in respect of land or other property attached in execution of a decree made by any magistrate provided the value of the land or other property concerned does not exceed SBD500, or SBD2,000 in the case of a principal magistrate;
- to enforce its orders by attachment and sale or delivery;
- to make a committal order of up to six weeks against a person with the means to pay, who fails to comply with a court order for payment of an order or judgment.

The jurisdiction of second class magistrates is limited to cases involving a maximum of SBD200[230]

The magistrates' court does not have jurisdiction to deal with:

- suits where the title to any right, duty or office is in question;
- suits where the validity of any will or testamentary writing or of any bequest or limitation under any will or settlement is in question;
- suits wherein the legitimacy of any person is in question;
- suits wherein the validity or dissolution of any marriage is in question;
- actions for malicious prosecution, defamation, seduction or breach of promise of marriage;[231]
- actions where the title to land or ownership of land is disputed, except where the parties consent.[232]

The Chief Justice may order an increase in the civil jurisdiction of named magistrates.[233]

227 Land and Titles Act Cap 133, s 256(3).
228 Cap 20.
229 Magistrates' Courts Act Cap 20, s 4.
230 Magistrates' Courts Act Cap 20, s 19(4).
231 Magistrates' Courts Act Cap 20, s 19(3).
232 Magistrates' Courts Act Cap 20, s 19(6).
233 Magistrates' Courts Act Cap 20, s 26. See, for example, LN 105/96 and LN 90/97 (SI).

The local court has jurisdiction conferred by the Local Courts Act,[234] to the extent set forth in its warrant, over causes and matters in which all parties are Islanders[235] resident or within the area of the jurisdiction of the court.[236] Civil jurisdiction extends to all civil suits and matters in which the defendant is ordinarily resident within the jurisdiction of the court or in which the cause of action arises. In cases involving immovable property, the property must be within the jurisdiction of the local court.[237] The court has jurisdiction to enforce its decisions by attachment and sale or delivery or committal for up to six weeks.[238]

The local court has exclusive jurisdiction to deal with all proceedings of a civil nature affecting or arising in connection with customary land other than:

- matters expressly excluded by the Land and Titles Act; and
- questions as to whether land is or not customary land.[239]

As a prerequisite to the exercise of jurisdiction, the local court must be satisfied that:

- the dispute has first been referred to the chiefs;
- all traditional means of resolving the dispute have been exhausted; and
- no decision wholly acceptable to both parties has been made by the chiefs.[240]

A local court also has jurisdiction to deal with any matter of a civil nature referred to it by the High Court or a customary land appeal court under the Land and Titles Act. Its decisions on such matters are subject to appeal to the customary land appeal court and from there to the High Court on a point of law only.[241]

4.8 Tokelau

The Court of Appeal of New Zealand has jurisdiction to hear appeals from the High Court of New Zealand exercising jurisdiction in relation to Tokelau.[242] The decision of the Court of Appeal is final.[243]

The High Court has original jurisdiction to deal with matters outside the j urisdiction of the Commissioner.[244] It also has jurisdiction to hear appeals from civil judgments of the Commissioners.[245] A Commissioner's territorial jurisdiction extends to:

- the island for which that Commissioner is appointed; and

234 Cap 19.
235 The term 'Islander' is not defined in the Act, but see the definition of 'Islander' in the Interpretation and General Provisions Act Cap 85, s 17(1).
236 Local Courts Act Cap 19, s 6.
237 Local Courts Act Cap 19, s 8(1).
238 Local Courts Act Cap 19, s 8(2).
239 Land and Titles Act Cap 133, s 254.
240 Local Courts Act Cap 19, s 12(1).
241 Land and Titles Act Cap 133, s 254(3) and s 256.
242 Tokelau Amendment Act 1986, s 4(1).
243 Tokelau Amendment Act 1986, s 4(2).
244 Tokelau Amendment Act 1986, s 3(1).
245 Tokelau Amendment Act 1986, s 10.

- the territorial sea of Tokelau that surrounds that island.[246]

Within those territorial boundaries, Commissioners have civil jurisdiction:

- in actions for the recovery of debt or damages not exceeding $1,000; and
- in actions for the recovery of chattels not exceeding $1,000 in value.[247]

Parties to a dispute may extend the jurisdiction of a Commissioner by memorandum of agreement.[248]

4.9 Tonga

The Privy Council has jurisdiction to hear appeals from all judgments and orders of the land court.[249] Its decision in such matters is final.[250]

The Court of Appeal has all the powers of the Supreme Court.[251] The Court of Appeal has exclusive jurisdiction to determine appeals from the Supreme Court.[252] Appeal lies as of right from all decisions except:

- where the amount involved does not exceed $1000;
- from an order made by consent;
- from an order as to costs;
- interlocutory decisions;

where leave of the Supreme Court judge or of the Court of Appeal is required.[253] The Court of Appeal also has jurisdiction to hear appeals from the land court except in matters relating to the determination of hereditary estates and titles, where appeals lie to the Privy Council.[254]

Both the Supreme Court and the land court may refer a point of law to the Court of Appeal by way of case stated.[255] Judges of the Court of Appeal are also empowered to give opinions on important or difficult matters when requested so to do by the King, the Cabinet or the Legislative Assembly.[256]

The Supreme Court has jurisdiction in:

- cases where the amount claimed exceeds $500;
- divorce, probate and admiralty matters; and
- any other matters not specifically allotted to any other tribunal.[257]

246 Tokelau Amendment Act 1986, s 7(3).
247 Tokelau Amendment Act 1986, s 7.
248 Tokelau Amendment Act 1986, s 8.
249 Constitution of Tonga Cap 2, cl 50(2); Land Act Cap 132, s 162.
250 Constitution of Tonga Cap 2, cl 50(2).
251 Court of Appeal Act Cap 9, s 11.
252 Constitution of Tonga Cap 2, cll 91 and 92.
253 Court of Appeal Act Cap 9, s 10(1).
254 Constitution of Tonga Cap 2, cl 90.
255 Court of Appeal Act Cap 9, s 3.
256 Constitution of Tonga Cap 2, cl 93.
257 Supreme Court Act Cap 10, s 4.

The Supreme Court hears appeals as of right from the civil judgment or order of a magistrate.[258]

A magistrates' court constituted by the chief police magistrate has jurisdiction throughout Tonga.[259] Other magistrates may exercise jurisdiction within the district to which they are assigned.[260] Every magistrate has the following general powers and jurisdiction in civil cases to:

- make orders for maintenance;
- issue subpoenas for witnesses;
- enforce payments;
- take affidavits and administer oaths;
- exercise powers set down by law; and
- make temporary orders where prompt action is needed.[261]

It also has specific jurisdiction in civil actions where the plaintiff or defendant resides in its district, provided the amount claimed does not exceed $1,000, or in the case of the chief police magistrate, $2,000.[262] The magistrates' court may also deal with claims for ownership or possession of goods up to the value of $1,000.[263]

The land court has jurisdiction to:

- define the area and boundaries of every parcel of land in Tonga;
- hear and determine all disputes involving title to land or any interest in land except disputes involving land resumed by the Crown; and
- appoint trustees for any Tongan entitled to land (other than a noble or *matapule*) who lacks legal capacity.[264]

4.10 Tuvalu[265]

The Privy Council has jurisdiction to hear appeals from the decisions of the Court of Appeal with leave of the Court of Appeal in the following matters:

- cases referred to in s 136(1) (a) of the Constitution, being:
  - (a) a final decision on a question as to interpretation or application of the Constitution;
  - (b) a final decision in proceedings for the enforcement of the fundamental rights provisions in Part II of the Constitution;

258 Magistrates' Courts Act Cap 11, s 69(1).
259 Magistrates' Courts Act Cap 11, s 2(3).
260 Magistrates' Courts Act Cap 11, s 3(2).
261 Magistrates' Courts Act Cap 11, s 8.
262 Magistrates' Courts Act Cap 11, s 59(1) and (2) as amended by the Magistrates' Courts Amendment Act 1990.
263 Magistrates' Courts Act Cap 11, s 60(1) as amended by the Magistrates' Courts Amendment Act 1992.
264 Land Act Cap 132, s 149(1).
265 See Lafaele Kaitu, 'Functions and Standards of Adjudicators in Tuvalu' and Atkinson, B, 'Regional Co-operation in the Courts: A Tuvalu View', in Powles, G and Pulea, M (eds), *Pacific Courts and Legal Systems*, 1988, Suva: USP, pp 53–56 and 241–14.

(c) a final or interlocutory decision in any case which the Court of Appeal considers to involve a question of great general or public importance or which ought to be submitted to the Privy Council.

- any civil case involving $2,000 or more; and
- proceedings for dissolution or nullity of marriage.[266]

The Court of Appeal has jurisdiction to hear appeals as of right from the High Court exercising any type of jurisdiction, except:

- where an order was made by consent or is as to costs only;
- where an order or judgment is interlocutory, except in a case prescribed by rules of court;

in which case, leave is required. No appeal is allowed from:

- a decision allowing an extension of time in which to appeal;
- an order giving unconditional leave to defend an action; or
- a decision of the High Court which is provided by statute to be final.[267]

The High Court has unlimited original jurisdiction in civil cases.[268] This includes matrimonial, admiralty, probate and maritime matters.[269] The High Court has jurisdiction to hear appeals as of right from all decisions of the senior magistrate's court[270] other than orders made *ex parte,* by consent, or as to costs only. In those instances special leave of the first instance or appellate court is required.[271] The High Court's jurisdiction to hear appeals from the senior magistrate's court exercising appellate jurisdiction includes decisions on appeal from the native land appeal panel.[272] The High Court may also decide a question of law referred to it by way of case stated from the senior magistrate's court.[273] The High Court also has a supervisory jurisdiction over inferior courts.[274]

A magistrates' court has original jurisdiction to hear civil cases involving up to $500. The senior magistrate's court has jurisdiction to hear civil cases involving up to $10,000.[275] The senior magistrate may also make adoption orders. The senior magistrate's court has jurisdiction to hear appeals from any other magistrates' court as of right in all matters[276] other than orders made *ex parte,* by consent, or as to costs only. In those instances special leave of the first instance or appellate court is required.[277] The senior magistrate's court also has jurisdiction to hear appeals for the native land appeal panel.[278] The senior

266 Superior Courts Act Cap 1C, s 13(1)(b).
267 Court of Appeal Act Cap 16B, s 10(2).
268 Superior Courts Act Cap 1C, s 3(2)(a).
269 Superior Courts Act Cap 1C, s 3(2)(b) and (c).
270 Magistrates' Court Act Cap 2, s 39.
271 Magistrates' Court Act Cap 2, s 39(2).
272 Native Lands Act Cap 22, s 26(2).
273 Magistrates' Court Act Cap 2, s 41.
274 Superior Courts Act Cap 1C, s 3(2)(d).
275 LN 2/88 made under Magistrates' Court Act Cap 2, s 22(3).
276 Magistrates' Court Act Cap 2, s 39.
277 Magistrates' Court Act Cap 2, s 39(2).
278 Native Lands Act Cap 22, s 26(1).

magistrate's court may decide a question of law referred to it by way of case stated by a magistrate.[279] The senior magistrate's court is not currently operating, so appeals are heard by the High Court instead. Magistrates' courts may hear appeals from island courts exercising divorce jurisdiction or jurisdiction in any civil matter where the amount involved exceeds $10.[280] The magistrates' court also has power to review any island court case, either on the petition of a party or of its own motion.[281]

Island courts have jurisdiction within the boundaries of the island on which they are established and over inland and adjacent waters.[282] Within that area they have summary jurisdiction to deal with the following civil matters:

- petitions for divorce or associated proceedings under the Native Divorce Act provided both parties are domiciled in Tuvalu;
- claims in contract and tort where the amount involved does not exceed $60;
- applications for maintenance under the Maintenance (Miscellaneous Provisions) Act; and
- applications under the Custody of Children Ordinance.[283]

4.11 Vanuatu[284]

The Court of Appeal has jurisdiction to hear appeals from the Supreme Court, exercising original jurisdiction in civil cases.[285] It has all the power, authority and jurisdiction of the Supreme Court and may substitute its own judgment or opinion, but may not interfere with the exercise of a discretion unless it was manifestly wrong.[286] A judgment of the Court of Appeal has full force and effect and may be executed as if it were an original judgment of the Supreme Court.[287]

The Supreme Court has jurisdiction throughout Vanuatu.[288] It has unlimited jurisdiction to hear and determine civil proceedings.[289] It also has jurisdiction to hear questions concerning elections and similar matters;[290] and any grievances by citizens about emergency regulations made by the Council of Ministers.[291]

279 Magistrates' Court Act Cap 2, s 41.
280 Island Courts Act Cap 3, s 28.
281 Island Courts Act Cap 3, s 37.
282 Island Courts Act Cap 3, s 4.
283 Island Courts Act Cap 3, Sched 1.
284 See further Corrin Care, J, 'Courts of Law in Vanuatu' [1987] Lawasia 119.
285 Constitution of Vanuatu, Art 50. The Courts Act Cap 122 does not specifically define the appellate jurisdiction. No appeal from the Supreme Court exercising appellate jurisdiction has been provided, although the Constitution states that such jurisdiction may be conferred: Art 50.
286 Courts Act Cap 122, s 26.
287 Courts Act Cap 122, s 26(4).
288 Courts Act Cap 122, s 15.
289 Constitution of Vanuatu, Art 47.
290 Constitution of Vanuatu, Art 54.
291 Constitution of Vanuatu, Art 72.

The Supreme Court has jurisdiction to hear appeals from a magistrates' court exercising civil jurisdiction. Its decisions in such cases are final.[292] It may also hear an appeal by way of case stated.[293] The Supreme Court has supervisory jurisdiction over customary land tribunals.[294]

Magistrates' courts have jurisdiction to hear cases where the amount claimed or the subject matter in dispute does not exceed vt1,000,000.[295] They also have jurisdiction to hear disputes between landlord and tenant where the amount claimed does not exceed vt2,000,000; claims for maintenance not exceeding vt1,200,000; and uncontested petitions for divorce or nullity of marriage. Magistrates' courts are specifically excluded from exercising jurisdiction in wardship, guardianship, interdiction, appointment of *conseil judicaire,* adoption, civil status, succession, wills, bankruptcy, insolvency or liquidation.[296] Magistrates' courts have jurisdiction to hear appeals from civil decisions of island courts, except decisions as to ownership of land, where appeal is to the Supreme Court.[297]

In addition to the jurisdiction outlined above, the magistrates' courts have limited territorial jurisdiction. This is outlined in s 2 of the Courts Act[298] and refers to the 'district' within which the court is located as the limit of the court's jurisdiction. The territorial jurisdiction extends to both inland waters and territorial waters adjacent to the district.[299] However, 'every magistrate may exercise jurisdiction throughout the Republic of Vanuatu' by virtue of s 6 of the Courts Act.[300]

The island courts are limited to dealing with matters in which the defendant is ordinarily resident within their territorial jurisdiction or in which the cause of action is within their boundaries.[301] Provided that territorial jurisdiction exists, island courts may determine all claims in contract or tort where the amount claimed or the subject does not exceed vt50,000; claims for compensation under provincial bylaws not exceeding vt50,000; and claims for maintenance not limited in amount.[302] Island courts are specifically empowered to administer the customary law prevailing within their territorial jurisdiction so far as it is not in conflict with any written law and is not contrary to justice, morality and good order.

292 *Frederick Brysten v Simon Dorsen,* Court of Appeal, Vanuatu, Civ App 5/1997, 8 October 1997; *John Atel v Dickson Massing and Paul Massing,* unreported, Court of Appeal, Vanuatu, Civ App 22/2001, 2 November 2001.
293 Courts Act Cap 122, s 26(1).
294 Customary Land Tribunal Act 2001, s 39.
295 Magistrates' Court (Civil Jurisdiction) Act Cap 130, s 1, as amended by Magistrates' Court (Civil Jurisdiction) (Amendment) Act 1994.
296 Magistrates' Court (Civil Jurisdiction) Act Cap 130, s 2.
297 Island Courts Act Cap 167, s 22(1).
298 Cap 122.
299 See s 2(2) of the Courts Act Cap 122.
300 Cap 122.
301 Island Courts Act Cap 167, s 8.
302 Island Courts Act Cap 167, s 8 and as conferred by warrant under s 1 (see, for example, The Warrant establishing the Efate Island Court, 30 April 1984).
303 Customary Land Tribunal Act 2001, s 7(1).

Customary land tribunals have jurisdiction to deal with disputes regarding the boundaries or ownership of customary land.[303] A single village land tribunal may only deal with land within the boundaries of that village. Joint tribunals may deal with land within the boundaries of all the villages represented in the joint village land tribunal.[304] Appeals lie to the following customary land tribunals:

- a custom sub-area land tribunal, where the land is situated in a custom sub-area;[305]
- a joint custom sub-area land tribunal; where the land is situated in more than one custom sub-area;[306]
- a custom area land tribunal, where the land is situated in one custom area;[307]
- a joint custom area land tribunal, where the land is situated in more than one custom area;[308]
- an island land tribunal, from village land tribunals, where there is only one custom area on the island and this is not divided into sub-areas.[309]

There is a further appeal from a custom sub-area land tribunal to a custom area tribunal if the land is situated on an island with more than one custom area.[310] There is a final appeal from a custom area land tribunal to an island land tribunal.[311]

304 Customary Land Tribunal Act 2001, s 7(2).
305 Customary Land Tribunal Act 2001, s 13.
306 Customary Land Tribunal Act 2001, s 14.
307 Customary Land Tribunal Act 2001, s 18.
308 Customary Land Tribunal Act 2001, s 19.
309 Customary Land Tribunal Act 2001, s 21(b).
310 Customary Land Tribunal Act 2001, s 21 (c).
311 Customary Land Tribunal Act 2001, s 21(a).

CHAPTER 4

PARTIES

1 INTRODUCTION

As mentioned in Chapter 2, it is vital to ensure that you have identified the correct and most suitable parties before commencing action. In fact, consideration of available defendants will be an integral part of considering whether to commence action at all. You must also ensure you have the correct legal entity. The names of the parties to the action must be set out at the head of every originating process.[1] These names form part of the title to the action. Judgments made in civil actions bind only the parties named in the action. Mistakes as to parties can usually be remedied by amendment, but this may waste time and result in costs penalties.[2]

The rules of procedure require that all persons who are necessary and proper parties to a dispute should be before the court before it can be resolved. Necessary parties are generally those with a legal right or legal liability relating to the dispute in question. This is mainly a matter of substantive law. However, it should be borne in mind that possession of a substantive right does not automatically give rise to a right to sue as, for example, a person may lack legal capacity. Special rules have been developed to deal with these situations and these are discussed below. In relation to defendants, a narrow view of 'necessary' is taken. Thus, in *Ratanji Motiram Narsey v Sydney George Gould*,[3] 'necessary' was distinguished from 'convenient' or 'desirable' and held to mean someone who is required to be bound by the judgment sought. The same would appear to be the case in relation to plaintiffs.[4]

In selecting parties to an action, two things may go wrong:

- the plaintiff may leave out parties who should have been joined. This is known as non-joinder; or
- the plaintiff may add parties who should not have been included. This is known as mis-joinder.[5]

An example of non-joinder is the case of *Kinhill Kramer (SI) Ltd v Totorea*,[6] where the plaintiff sued the defendant on the assumption that he was the principal in a contract signed by two others whom the plaintiff thought to be agents. The evidence disclosed that the defendant was neither principal nor agent and was not liable on the contract. Accordingly, the claim failed. Under the CPR it is specifically provided that a plaintiff

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1 See Chapter 5 for the different types of originating process.
2 But see, for example, *Amosa v The Board of Trustees of the Congregational Christian Church in Samoa (Inc) and Another,* unreported, Supreme Court, Samoa, Civ Cas (no number recorded), 3 February 1994, where the plaintiff's claim failed because he had sued the Board of Trustees rather than the Education Committee.
3 (1973) 19 FLR 91.
4 *Kasa and Kasa v Biku and Commissioner of Land,* unreported, High Court, Samoa, Civ Cas 126/1999, 30 August 2002.
5 This includes the case of misdescription.
6 Unreported, High Court, Solomon Islands, Civ Cas 362/1995, 6 October 1999.

who is in doubt as to whom to sue may sue all candidates, in order to have the question determined by the court (O17 r7 CPR). However, care should be exercised in using this rule as adverse costs consequences could arise from unnecessary use of it.

2 PARTICULAR TYPES OF LITIGANTS

There are certain parties to litigation to whom particular rules apply. The most common of these are as follows.

2.1 Persons under a disability

There are two categories of persons usually recognised by court rules as being under a disability: minors and persons of unsound mind.[7] At common law, minors are persons under 21. This is still the case in some countries of the region, such as Solomon Islands, Tokelau and Fiji. In others, such as Vanuatu and Tonga, the age has been reduced by statute to 18.[8] In Samoa, statute preserves the common law age of majority.[9] The word 'infant' rather than 'minor' is used in most court rules, but the modern term should be adopted in pleadings.[10] The Vanuatu Rules use the plain English term, 'child'[11] and define this in r 20.1 as meaning a person under 18. Persons under a disability may not conduct proceedings in person, but must participate through another person. Who that person is will depend on whether the person under the disability is a plaintiff or a defendant.

2.1.1 Plaintiffs under a disability

Minors and persons of unsound mind must sue 'by' their next friend.[12] In this context the word 'by' really means 'through'.[13] The Vanuatu Rules use the term 'litigation guardian' rather than next friend.[14] This term is defined as meaning 'a person appointed by the court to represent a person under a legal incapacity in a proceeding'.[15]

The role of the next friend or litigation guardian is to represent and speak on behalf of the plaintiff who is under a disability. In the case of a minor, the next friend or litigation guardian is usually the child's father or mother, but may be another relative or any person of full legal capacity. In the case of persons of unsound mind, the next friend or litigation guardian will usually be the person previously appointed by the court to represent them in all matters.

Although the Western Pacific and Fiji Rules are cast in permissive rather than mandatory terms, they must be read in context. This suggests that the word 'may' in fact

7 O17 rr14 and 15 CPR; O80 r1 Fiji; r3.8(1) Van.
8 Family Law Reform Act 1969 (UK).
9 Infants Act 1961, s 2.
10 The Family Law Reform Act 1969 (UK), s 1(1), specifically provides that the terms may be used interchangeably.
11 R3.8 Van.
12 O17 r14 CPR; O80 r2 Fiji.
13 The Civil Procedure Rules 2002 (Van) use the term 'through' rather than 'by': r3.8(3).
14 R3.8.
15 R20.

means 'shall'. This is the approach taken by the courts, which will stay an action commenced by a minor or person of unsound mind if they become aware of the plaintiff's incapacity.[16] The Vanuatu Rules make the position clear by the use of the following wording:[17]

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

Although the word 'may' is used it is combined with the word 'only' to emphasise that this process is mandatory.

If a minor or person under a disability sues personally, this will not make the proceedings void. It is an irregularity, which may be cured by adding a next friend or guardian.

2.1.2 Defendants under a disability

Minors may only defend through a guardian *ad litem.*[18] Persons of unsound mind may defend through their next friend or a guardian under the CPR[19] or through their guardian under the Fiji Rules.[20] In Vanuatu the representative is known as a litigation guardian in all cases.[21] A guardian must be appointed by the court in some jurisdictions, such as Solomon Islands[22] but not in others, such as Fiji.[23] The Solomon Islands Rules do not make it clear whether court appointment is necessary in other cases. In practice it would appear that appointment is not required. The Vanuatu Rules say that the court 'may' appoint a litigation guardian, but do not make it clear whether a person may act without such appointment.[24] It is too early to say whether appointment will be required in practice in Vanuatu.

Again, although the rules are expressed permissively, it is in practice mandatory to defend through a guardian. In the case of minors this is underlined in the CPR by the fact that only a guardian may enter an appearance.[25] In Vanuatu, the position is made clear by the use of the word 'only', as shown in r3.8(3) set out above.

Whether acting for a plaintiff or a defendant, the next friend or guardian should not have any personal interest in the proceedings.

16 *Seilinger v Gibbs* [1897] 1 Ch 479.
17 R3.8(3) and (4) Van.
18 O17 r14 CPR; O80 r2 Fiji.
19 O17 r15 CPR.
20 O80 r2(1) Fiji.
21 R3.8(2) Van.
22 O17 r15 CPR.
23 O80 r3(1) Fiji.
24 R3.8 (2) Van.
25 O17r17CPR.

2.1.3 Effect on proceedings

The fact that a minor is under a disability will be relevant to the following matters:

- *Service*
  This is dealt with more fully in Chapter 6.
- *Pleadings*
  The title of the action should refer to the disability. An example is given in Table 4.1.
- *Compromise*
  The court's approval must be obtained to any compromise.[26] This situation does not appear to have been addressed in the Vanuatu Rules.
- *Recovery of money*
  Directions from the court as to payment are required.[27] This situation does not appear to have been addressed in the Vanuatu Rules.

2.2 Bodies corporate

The rules of most of the countries of the region define 'person' as including a body corporate.[28] Where the rules are silent, the same effect is generally achieved by Interpretation Acts. For example, the Interpretation Act (Fiji) states that, "'person" and "party" include any company or association or body of persons, corporate or unincorporate'.[29] Accordingly a corporation may be sued in its own name. As special rules apply to companies, it is important to ascertain whether the party is a company or not and to get the name of the company right. It is therefore prudent to do a company search to ascertain all the registered details at the outset.

2.2.1 Representation

Normally, a corporation may take part in court proceedings only through a lawyer. This is a common law rule[30] that is echoed in some regional rules of court, for example O6 r2 (Fiji). Under the Vanuatu Rules and the CPR there is no specific requirement that proceedings on behalf of a company must be commenced through a lawyer. This fact was discussed in *Samson Poloso v Honiara Consumers Co-operative Society Limited*.[31] The defendant in that case sought to have the judgment set aside as having been irregularly entered on the basis, *inter alia,* that the plaintiff had been represented by an employee, rather than a qualified practitioner. It was held that the decision not to include a specific rule prohibiting such representation must have been made to take account of the circumstances of Solomon Islands, in the context of which it was appropriate for corporations to be represented by

26 O24 r9 CPR; O80 r8 Fiji.
27 O24 r9(2) to (7) CPR; O80 r10 Fiji.
28 O1 r1 CPR.
29 Cap 7, s 2. See also, for example, Acts Interpretation Act 1924 (NZ), s 4, applying in Niue.
30 See *Re London County Council and London Tramways Arbitration* (1897) 13 TLR 254; *Scriven v Jescott* (1908) 53 SJ 101.
31 [1988/89] SILR 16.

authorised employees. As the common law of England only applied where appropriate to local circumstances,[32] there was held to be no restriction on an authorised employee of a corporation, acting in the normal course of employment and for no additional remuneration, issuing proceedings.

2.2.2 Effect on proceedings

- *Service* The company search will reveal the registered office of the company, which is important for the purpose of service. The special rules as to service on corporations are dealt with in Chapter 6.
- *Pleadings* The title of the action should refer to the name of the company as set out in the companies registry. An example is given in Table 4.1.
- *Security for costs* The other significant factor about dealing with a company is that an application may be made for security for costs. This is dealt with more fully in Chapter 12.

2.3 Partnerships

2.3.1 Business names registries

In most jurisdictions of the region there is a business names registry. Any person or group of people carrying on a business, other than in their own names, will be required to register their business name, together with the name and address of all partners and the address of the business premises, at a central registry. In any case where a firm name is used, a search should be conducted at the business names registry, to get the correct name and the other details, at the outset. In spite of the fact that registration is compulsory and that failure to register carries a penalty, many businesses are not registered.

2.3.2 Using the business name in litigation

Persons carrying on a business as partners within the jurisdiction may sue and be sued in the firm's name.[33] This provision will apply not only to registered businesses,[34] but also to any business carried on in a name other than that of an individual.[35]

32 Sched 3 of the Constitution of Solomon Islands 1978.
33 O51 r1 CPR; O81 r1 Fiji; r3.11(1) and (2) Van.
34 In most jurisdictions of the region, persons operating a business other than in their own name are required to register their business name. See, for example, the Registration of Business Names Act 1971 (SI).
35 O51 r11 CPR; O81 r9 Fiji; r3.11(2) Van.

It is not compulsory to sue a partnership in the business name.[36] However, if partners are sued as individuals, the special rules as to disclosure and service on firms discussed below, cannot be used.

2.3.3 *Disclosure of details of partners*

Where the partners are the plaintiffs, the defendant may demand a list of the names and addresses of the individual partners.[37] If they fail to supply this, the defendant can apply for a stay of the action. A plaintiff suing a firm also has the option of applying for an order that a list of the names and addresses of all parties be given, in such manner as the court may direct.[38]

The Vanuatu Rules allow application by a party to a partnership proceeding[39] for the names, but not the addresses, of all parties to be made by written notice. The details must be supplied within the time stated in the notice, which must be not less than two days from service of that notice.[40]

2.3.4 *Effect on proceedings*

- *Service*

  Special provisions apply to service on a partnership. These rules are discussed in Chapter 6.

- *Pleadings*

  If the firm is sued, rather than the individual partners, the title of the action should include the words 'a firm' after the business name. An example is given in Table 4.1.

- *Appearance*

  The partners must appear in their own names not the firm's name.[41]

2.4 The Attorney-General

In England and Australia the Attorney-General is the only plaintiff recognised by law in an action to compel the performance of a public duty or to seek declarations regarding public rights or duties.[42] However, this may not be the case in the South Pacific region, where *locus standi* may depend on the courts' interpretation of relevant constitutional provisions. In *Bavadra v Attorney-General*,[43] it was argued on behalf of the defendant that the questions raised by the plaintiff were of a public nature and could only be raised by

36 Liability is joint and several. See, for example, the Partnership Act 1980 (UK), ss 9 and 12.
37 O51 r2 CPR; O81 r2(1) Fiji.
38 O51 r1CPR; O81 r2(3) Fiji.
39 The term 'partnership proceeding' is defined in r20 as 'a proceeding started by or against a partnership, including a proceeding against the partnership by one of the partners'.
40 R3.11(3)Van.
41 O12 r9 CPR; O81 r4(1) Fiji.
42 See, for example, *Gouriet v Union of Post Office Workers* [1978] AC 435.
43 [1987] SPLR 95 at 100.

the Attorney-General. The Supreme Court held that this depended on interpretation of the nature of the office of Attorney-General under the Constitution. As the events complained of arose from a military coup in which the plaintiff had been deposed from his position as Prime Minister, the court did not think it appropriate for this point to be pursued.

In some cases, including those discussed above, the status of a party may have to be specifically described in the title of the action. Some examples of the ways that parties should be named are contained in Table 4.1.

TABLE 4.1—EXAMPLES OF WAYS TO NAME PARTIES IN COURT DOCUMENTS

Minor plaintiff	MALCOLM LAKE (a minor) by BARNABAS LAKE his father and next friend
Minor defendant	FRANCIS WALE (a minor) by JOSEPH MAINA his guardian *ad litem*
Mental patient	ATECA BALE by MERE RAVONO her next friend
Limited company	SOLOMON SANITATION LTD
Partnership	FIJI FOODS (a firm)
Representative actions	MATTIAS SITA and JONA TASI on behalf of themselves and all other persons carrying on trade as fishermen at Fishing Village, Kukum, in Honiara Town
Trustees	SALA RAVUKA, GEETA DEO and SUNIL SINGH (Trustees)

3 REPRESENTATIVE ACTIONS

The general rule, developed in Western societies, is that all individuals interested in the proceedings must be parties to the action. Representative actions are an exception to this. They are a device used to cater for actions when interested parties are too numerous to be named individually in the proceedings. Representative actions are also useful in other situations. They have particular significance in the Pacific where it is more common for property to be communally owned. Particular difficulties may be encountered by businesses which sell goods on credit to individuals for the use of a community.[44] Provided that the action is properly constituted, judgment will be binding against all parties represented.[45] The parties should be described as representatives in the title of the action (see Table 4.1). The most common situations where they are used will now be considered.

44 See, for example, *Island Enterprises Ltd v Naitoro,* unreported, High Court, Solomon Islands, Civ Cas 24/1990, 12 October 1990.

45 *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 QB 1021.

3.1 Numerous parties

O17 r9 CPR states:

> Where there are numerous persons having the same interest in one cause or matter, one or more persons may sue or be sued, or may be authorised by the Court to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

From this wording it would appear that a plaintiff may sue as a representative without leave of the court. Similarly, a plaintiff may sue a representative of numerous potential defendants. However, he/she will be slow to take that step without an order, because if the action is not properly constituted, only the defendant on the record will be bound by the judgment. In the case of defendants who wish to appoint a representative, an application to the court is necessary.

O15 r14(1) of the Fiji Rules is similar. Leave of the court does not appear to be required either to sue or defend in a representative capacity. This view finds support in *Arjun Mudaliar v Lal Bahadur,*[46] a case concerning the more strictly worded Magistrates' Court Rules[47] where failure to obtain the court's authority to a representative action meant that only those named as parties were bound. Gould VP made it clear that this would not necessarily be the case under the Fiji Rules, which are more widely worded. In practice, as under the CPR, leave should be obtained in order to avoid a challenge to *locus standi* or difficulties at the enforcement stage.[48]

The Vanuatu Rules provide:[49]

> 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.

Although numerous parties are not a prerequisite to a representative action under this Rule, it would no doubt be the main reason for employing it. As under the Fiji Rules, leave of the court does not appear to be required either to sue or defend in a representative capacity. Again, it would prudent for a plaintiff to apply to the court for the appointment of the representative at the outset.

Rule 3.12(2) empowers the court to appoint a representative at any stage to represent persons having the same interest. If the representative appointed is not a party; the court must order the representative to become one.[50]

Under the Fiji and Vanuatu Rules, leave of the court is required to enforce judgment against a person represented but not a party to the proceedings.[51] This does not mean that the judgment is not binding on that person; a properly constituted representative action will automatically bind all those represented, who are taken to be present by representation.[52] The validity or binding character of the judgment cannot be challenged

46 22 FLR 36 at 43.
47 O8 r3.
48 See *Tuisawau and Others v Fiji Industries Ltd,* unreported, High Court, Fiji Islands, Civ Cas HBC 0164/1997, 9 July 1998 for an example of a challenge on the basis of lack of *locus standi*.
49 R3.12(1).
50 R3.12(3).
51 O15 r14(3) Fiji; r3.12(4) Van. Application for leave to enforce the order must be served on the person against whom enforcement is sought as if it were a claim: r3.12(5) Van.
52 *Commissioner of Sewers v Gellatly* (1876) 3 Ch D 610 at 615.

on such application;[53] a person can only escape liability 'by reason of facts and matters particular to his case'.[54] For example, a person may show that he or she is not a member of the class represented.[55]

Where it is important to bind the persons represented, for example, where the application is for an injunction or for the recovery of money where the representative is not a person of means, it may be prudent for a plaintiff to apply to the court for the appointment of the representative at the outset, rather than to proceed without a court order. In such circumstances, leave to enforce against a person who was given notice of a court order as to representation and expressly informed that he or she was present by representation would be unlikely to be refused.

The common law makes it clear that there are three conditions that must be fulfilled before a representative action can be taken or defended:

- there must be a common interest;
- there must be a common grievance; and
- the relief claimed must be beneficial to all parties (*per* Lord MacNaughten in *Bedford v Ellis*).[56]

In that case it was held that six fruitgrowers were entitled to represent all other fruitgrowers claiming rights over stands at the defendants' market. This case may be compared with *Markt & Co Ltd v Knight Steamship Co Ltd*,[57] where owners of cargo could not show a common interest in an action against a Russian warship that sank a ship carrying their cargo. They suffered a common wrong, but they were not shipping to a common destination. It was held that the claim of each shipper had to be considered on its individual merits. This case was approved in *Port Workers & Seafarers Union of Fiji v Ports Terminal Ltd*.[58] In that case, the defendant objected to the Union representing 34 members on the basis that the 34 were independent contractors and that there was no collective agreement in force. The court held that the Union had not shown that it had any cause of action. The interest of the Union was different from that of the 34 and therefore the Union could not represent them.

One situation where it has often been sought to use the representative action procedure is in respect of unincorporated associations. In the past, these attempts have often failed due to a failure to show a common interest. A more liberal approach was taken by the High Court of Australia in *Carnie v Asanda Ltd*[59] This approach has been followed in Vanuatu. In *Vohor and Song and Others v Adeng and Nako and Others*,[60] Lunabek J expressed the view that O17 r9 should be interpreted in the light of its purpose, which was to facilitate the administration of justice by enabling parties having the same interest to secure a determination in one action rather than in separate actions. Quoting the words of Megarry J in *John v Rees*,[61] his Lordship stated that O17 r9 should be used as 'a

53 *Ibid*.
54 O15 r14(5).
55 R3.12(5).
56 [1901] AC 1.
57 [1910] 2 QB 1021. See also *Smith v Cardiff Corporation* [1954] QB 210.
58 Unreported, High Court, Fiji Islands, Civ Cas HBC 0609/1998S, 26 November 1998.
59 (1995) 127 ALR 76.
60 Unreported, Supreme Court, Vanuatu, Civ Cas 75/1996, 27 August 1996.
61 [1970] Ch 345 at 370.

flexible tool of convenience in the administration of justice'. In that case he had no difficulty in allowing members of an unincorporated association to take a representative action based in contract. There has been some suggestion in cases involving unincorporated bodies sued in tort, that the representative action cannot be used for such claims.[62]

Where a declaration is sought, the courts appear to have a more relaxed attitude towards all owing representative actions. For example, in *Mataskelekele v Abil*,[63] a representative action was brought against the defendants, being respectively the Vice-President and Secretary-General of the Vanuaaki Pati. Although the point was not specifically in issue, the Court of Appeal expressed the view that this was a legitimate way of proceeding.[64]

3.2 Trustees, executors and administrators

Trustees, executors and administrators may sue and be sued on behalf of, or as representing, the property or estate which they represent.[65]

3.3 Head of group

The CPR give some recognition to community of ownership of property in O17 r8, which states:

> Any person entitled in accordance with custom, to represent any community, line or group of natives, may sue and be sued on behalf of or as representing such community, line or group.

For example, in *Nelson Kile (representing the Baehai Tribe) v Mega Corporation Ltd and Others*,[66] Nelson Kile was suing on behalf of his tribe, the Baehai Tribe, in respect of their alleged ownership of Sareai land.

There is no equivalent to this part of r 8 in the Fiji Rules. Arguably, O15 r14 could be used in these circumstances, but *Bavadra v Native Land Trust Board*[67] casts doubt on this. In that case, the plaintiff purported to represent a *mataqali* (customary landholding unit). Rooney J held that, even if he could show that he had the support of the majority of members, he did not necessarily have the right to represent the unit in civil proceedings:

> A *mataqali* cannot be equated with any institution known and recognised by common law or statute of general application. The composition, function and management of a *mataqali* and the regulation of the rights of members in relation to each other and to persons and things outside it are governed by customary law separate from and independent of the general law administered in this court.

62 *Mercantile Marine Service Association v Toms* [1916] 2 KB 243. But see *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229.
63 (1980–88) 2 VLR 517.
64 For an interesting article on point see Keeler, JF, 'Contractual Actions for Damages against Unincorporated Bodies' 34 MLR 615.
65 O17 r8 CPR; O15 r16 Fiji. See also O85 r3 Fiji.
66 Unreported, High Court, Solomon Islands, Civ Cas 229/96, 16 December 1996.
67 Unreported, Supreme Court, Fiji Islands Civ Cas 421/1986, 11 July 1986.

The court gave no indication as to how cases should be instituted on behalf of a *mataqali,* leaving a serious gap in the rules of procedure. An amendment to the Rules is required to remedy this problem.

4 JOINDER

4.1 Joinder of parties

Joinder is the word used to describe the process of grouping together plaintiffs or defendants in the same case at the outset of the proceedings. Accordingly, it can only be done at the instance of the plaintiff. It must be distinguished from adding parties after proceedings have been issued, which is dealt with below.

In the simplest of cases, where there are only two parties to the dispute, there is only one plaintiff and one defendant. However, the situation may be more complicated. Several people may be interested in claiming against one or more defendants. For example, in *Rosita Meredith, Michael Cheung Fuk and Patrick Cheung Fuk v Pualagi Pa'u,*[68] the three plaintiffs were joint owners of land seeking possession of part of that land from the defendant.

Joinder allows multiple parties to bring and/or defend a claim, provided that certain conditions are fulfilled, to avoid multiplicity of proceedings.

4.1.1 Joinder of plaintiffs

O17 r1 CPR states:

> All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court may order separate trials, or make such other order as may be expedient and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to costs occasioned by so joining any person who shall not be found entitled to relief unless the Court in disposing of the costs shall otherwise direct.

The equivalent Fiji Rule is O15 r4, the substance of which is very similar, except the defendant is not given any automatic right to the costs of unnecessary joinder. The Samoan equivalent, R31 does not give any automatic right to costs either, but is otherwise even closer to O17 r1 CPR.

68 Unreported, Supreme Court, Samoa, CP 78/94, 26 April 1995.

The essence of these rules is that persons who claim jointly, severally, or in the alternative,[69] may join together as plaintiffs, without leave, if:

- they are claiming in respect of the same transaction, or series of transactions; and
- where, if separate trials were held, a common question of law or fact would arise.

Transaction' is not restricted to the narrow sense, but should be construed liberally[70] However, its exact meaning is unclear. It is not restricted to the contractual sense, but extends to tortious actions by a defendant, affecting several people. Thus, in *Bendir v Anson*,[71] construction of a building which blocked the light to buildings on the opposite side of the street was a transaction.

The Vanuatu Rules do not deal with joinder of parties, except to say that, There can be more than one claimant and defendant in the one proceeding'.[72]

4.1.2 Joinder of defendants

The Fiji Rules and the Samoan Rules both apply similar conditions to the joinder of defendants as they do for plaintiffs. Thus, the claim against them must be in respect of the same transaction, or series of transactions; and a common question of law or fact must be involved.

The CPR, on the other hand, appear on their face much wider in the case of joinder of defendants. O17 r4 states:

> All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

However, in Queensland, an identically worded rule has been interpreted as being subject to the same restrictions as apply to plaintiffs, by implication, from the earlier rule. In *Black v Houghton*[73] Hart J gives a useful analysis of the Queensland rules in this area. Commonwealth rules in Australia have been interpreted in a similar fashion.[74]

Joinder of defendants is at the instance of the plaintiff, who will not usually be forced to join a person against whom no relief is claimed.[75] However, in Samoa, the Court of Appeal has interpreted the Rules as giving the court a wide discretion to join a defendant, not only where that defendant ought to have been joined by the plaintiff, but also where

69 'Joint' means a combined application, which will be made when the right of action vests in two or more persons. See, for example, *Nicholson v Revell* (1836) 4 A&E 638. A several claim is one where a plaintiff has a separate cause of action.
70 *Payne v British Time Recorder Co Ltd* [1921] 2 KB 1 at 16.
71 [1936] 3 All ER 326.
72 R3.1(2).
73 [1968] Qd R 179 at 182. See also *Queensland Estates Pty Ltd v Co-ownership Land Developments Pty Ltd* [1971] Qd R 164.
74 *Richardson v Trautwein* (1942) 65 CLR 585.
75 But see *Golden Springs Ltd and North New Georgia Timber Corporation v Paia,* unreported, Court of Appeal, Solomon Islands, Civ App 19/1998, 3 June 1999.

that party's presence may be necessary to enable the court to adjudicate effectively and settle all the questions involved in the action.[76]

4.2 Joinder of actions

Although joinder of actions is not to do with parties, it is convenient to deal with it here as there is considerable overlap between joinder of parties and joinder of actions. Just as there may be multiple parties, there may be multiple claims. More than one claim can be made in the same action.[77] Those claims may be between the same plaintiff and defendant; between one plaintiff and several defendants; between several plaintiffs and one defendant; or between several plaintiffs and several defendants. From this it should be obvious that the question of whether different causes of action may be joined is often combined with the question of whether different parties may be joined.

> O20 r1 provides that, subject to the rules which follow it:
> [T]he plaintiff may unite in the same action several causes of action; but if it appears to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may order separate trials…

Thus, the plaintiff is generally empowered to join any causes of action, even if they are radically different. O20 r3 limits this power to prevent joinder of causes by a private individual with causes of action in his/her capacity as a trustee in bankruptcy.

If it appears to the court that causes of action cannot conveniently be tried together, it can order separate trials.

Similar provision is made under O15 rr1 and 5 of the Fiji Rules, which also provide for joinder of causes of action by leave. Application for leave is to be made *ex parte* by affidavit, stating the grounds of the application. Given the width of the rule, it is rarely likely to be necessary to make such application.

The Vanuatu Rules contain no provision as to joinder of causes of action without leave. Rule 3.3, which is headed, 'Joining and Separating Claims' only deals with court-ordered joinder. Presumably this is an oversight and, in practice, the plaintiff will be free to join causes of action without leave of the court. This view is supported by the Rules' overriding objective, which includes the aim of saving expense.[78]

The Vanuatu Rules state that leave to join causes of action against the same person may be given if:[79]

(a) a common question of law or 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.

76 *Keil v Drake,* unreported, Civ App 2/95, 18 August 1995.
77 See further *Read v Brown* (1888) 22 QBD 128 at 131 which defines a cause of action as 'every fact which the plaintiff must prove to succeed'.
78 R1.2(2)(b) Van.
79 R3.3(1).

There is no provision in the Rules for the court to give leave to join several claims against several parties in the same proceeding. As in the case of joinder without leave, this would appear to be an oversight and, in practice, leave would no doubt be granted in such cases if the requirements of r3.3(1) were met.[80]

5 ADDITION OR DELETION OF PARTIES

As mentioned above, joinder is at the option of the plaintiff at the beginning of the action when he/she is instituting proceedings. What happens if it becomes apparent after issue that there has been a non-joinder or mis-joinder? Usually, this is not fatal.[81] The situation is dealt with in O17 r11 CPR, O15 r6 Fiji and r3.2 Van. In effect, the CPR and Fiji Rules provide:

- The court must deal with the parties actually before it, even if there has been a non-joinder or mis-joinder.
- The court may add or delete parties at any stage in the proceedings, either:
  (a) on application by an existing party, or
  (b) of its own motion.

The exception to this is that no one may be joined as a plaintiff unless they give consent in writing.[82]

The Vanuatu Rules do not impose a duty on the court to deal with the parties actually before it, even if there has been a non-joinder or mis-joinder. This appears to be an oversight and leaves it open to a party to apply to strike out the action for want of parties.[83]

The function of the addition and removal rules is to prevent an action failing simply because the wrong parties have been placed on the record.[84] In other words, errors which have been made as to joinder of parties can be remedied when they are discovered. It also provides machinery for the addition of parties whose interests are affected by the litigation, even if they are not major role players in the dispute. Even though defective joinder may be remedied by the court, this power should not be relied on as it will involve extra costs and delays.

The rules lay down the criterion for deciding whether a party should be added. The court will make such an order if the presence of the new party is necessary in order to adjudicate effectively on all the matters in dispute.[85]

80 Support for his view can be found in r1.2(2)(b) Van.
81 But see *Amosa v The Board of Trustees of the Congregational Christian Church in Samoa Inc and Another,* unreported, Supreme Court, Samoa, 29 June 1994, where the plaintiff sued the board of trustees or the church, rather than the education committee that had employed him. The claim was dismissed on the basis that the wrong defendant had been sued.
82 O17 r11 CPR; O15 r6(4) Fiji.
83 *Kendall v Hamilton* (1879) 4 App Cas 504.
84 *Van Gelder v Sowerby Bridge Society* (1890) 44 Ch D 374.
85 O17 r11 CPR; O15 r6(2)(b); r32 Samoa; r3.2(1) Van.

A wide view of a similar provision in the English rules was taken in *Amon v Raphael Tuck & Sons Ltd*.[86] The plaintiff sued for breach of a patent. The defendant company alleged that it was contractually bound to another person to manufacture the invention for him. It applied for this person to be added as a co-defendant, a step opposed by the plaintiff. Since that person's right to have the defendant manufacture the invention (which he claimed as his own) would be affected by the result of the case, the court ordered him to be added. Arguably, the manufacturing contract between the defendant and the new co-defendant was not strictly necessary to determine the breach of patent issue between the original parties, but the court appears to have taken the concept of 'necessary' in the widest sense to include cases where the result of an action would affect the new party's rights. This liberal approach has been followed in other jurisdictions, such as New Zealand.[87]

Addition of a party outside the limitation period is not usually allowed. In *Davies v Elsby Bros Ltd*[88] the plaintiff sued a partnership, but found that it had been converted into a company of the same name. Application to add the company as a defendant failed because it was out of time. In some Commonwealth jurisdictions there is a discretion to extend the period in special circumstances, even after the expiry of the limitation period. In the Queensland case of *Grotherr v Maritime Timbers Pty Ltd*,[89] for example, this discretion was confirmed, although it was held that special circumstances did not exist. This case is of interest as it contains a discussion of some of the problems surrounding the application of the rules in this area.[90]

The grounds for striking out a party are not spelt out in the CPR or Fiji Rules. The Vanuatu Rules do make provision in this regard:[91]

> 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.

The Vanuatu Rules make it clear that addition or removal of a party may take place on the court's own motion, on the application of a party, or, in the case of addition, on the application of a person affected who desires to be added. Application should be made in Form 10, supported by affidavit.[92]

The court's jurisdiction to strike out a party is used sparingly.[93] Similar principles apply to those which govern striking out pleadings on the grounds that there is no cause of action.[94] An example of a case where a plaintiff might be struck out is where co-plaintiffs

86 [1956] 1 QB 357.
87 For example, *Westfield Freezing Co Ltd v Sayer* [1972] NZLR 417.
88 [1961] 1 WLR 170. See also *Mabro v Eagle Star & British Dominions Insurance* Co [1932] 1 KB 488.
89 [1991] 2 Qd R 128.
90 *Ibid* at 148–50 *per* Lee J. See also *Liff v Peasley* [1980] 1 WLR 781.
91 R3.2(2) Van.
92 The Vanuatu Rules refer to an affidavit as a 'sworn statement'.
93 See, for example, *Keil v Drake,* unreported, Court of Appeal, Samoa, Civ App 2/1995, 18 August 1995, where such an application was refused. See also *The Supreme Court Practice,* (annual volumes), London: Sweet & Maxwell: para 15/6/6.
94 See further, Chapter 10 *et seq.*

disagree, in which case, one should be struck out and added as defendant.[95] Examples of cases where defendants should be struck out are where they are joined improperly[96] or merely for discovery.[97]

Parties may also be added by consent.[98]

6 THIRD PARTY PROCEDURE

It is the plaintiff who chooses the defendant or defendants. However, this does not mean that the defendant is confined to the parties chosen by the plaintiff. As the rules already discussed reveal, the defendant may apply to the court to delete parties chosen by the plaintiff.

The defendant may also want to add a co-defendant on the grounds that that person is either wholly or partially liable for the plaintiff's loss. For example, a defendant sued for causing a motor vehicle accident by negligent driving may blame the driver of another vehicle for the loss. If the plaintiff refuses to join or add that person, the defendant may apply to the court for the other person to be joined as a 'third party'.[99] The defendant's action against the third party is then a related but separate claim alongside the plaintiff's suit against the defendant. The third party becomes a party to the action, liable only to the defendant. There is no direct liability to the plaintiff. Unlike a co-defendant, who will be defending the plaintiff's claim and may share responsibility for the plaintiff's damages and costs, the third party only defends the claim of the defendant who has joined him/her.

6.1 Grounds for application

The grounds on which a person can be joined as a third party are:

(a) that the defendant is entitled to a contribution or indemnity;[100] or
(b) that the defendant is claiming relief or remedy connected with the original subject matter of the claim; or
(c) the determination of a question or issue connected with the original subject matter is required between the defendant and the third party, as well as the plaintiff and defendant.[101]

The Vanuatu Rules are substantially to the same effect.[102]

95 *Re Mathews* [1905] 2 Ch 460.
96 *Vacher & Sons v London Society of Compositors* [1913] AC 107.
97 *Wilson v Church* (1878) 9 Ch D 552.
98 *Betham Brothers Enterprises Ltd and New Zealand Container Lines Ltd v Big Save Timbers Ltd*, unreported, Supreme Court, Samoa, Civ Cas 22/1993, 16 May 1994.
99 O18 CPR; O16 Fiji; r3.7 Van.
100 This is to be decided according to the ordinary use of language: *Standard Securities v Hubbard* [1967] Ch 1056.
101 O18 r1(1) CPR; O16 r1(1) Fiji.
102 R 3.7(1) Van.

Where the existence of right to an indemnity is uncertain, the courts may still allow addition of the third party in order for the point to be argued.[103]

The Tongan Rules are similar, but drawn in wider terms. O10 r1 allows application for leave, not only where the defendant is claiming contribution or indemnity or where substantially the same relief is sought against the third party, but also where an issue that is being determined affects the third party.

The Samoan Rules contain an additional head to the CPR and Fiji Rules, allowing greater discretion. Rule 43(1)(c) (Samoa) allows an application for leave to issue a third party notice where any question or issue should properly be determined between the plaintiff, the defendant and the third party, whether or not it is connected with the original subject matter.

6.2 Procedure

Where one of the grounds in O16 r1(1) exists, the Fiji Rules allow a third party notice to be issued without leave in actions commenced by writ,[104] provided that this is done before service of the defence.[105] The position is the same in Vanuatu.[106] In the other countries of the region and in Fiji and Vanuatu, after the defence has been filed leave of the court is required to issue a third party notice. Under the CPR and Fiji Rules, application is usually made on an *ex parte* application supported by affidavit, although the court may direct a summons to be served on the plaintiff.[107] The Fiji Rules specify that the affidavit must include:

(a) the nature of the plaintiff's claim;
(b) the stage of proceedings reached;
(c) the nature of the applicant's claim or particulars of the question or issue requiring determination and the facts on which the third party notice is based;
(d) the name and address of the third party.

The Tongan rules require application by summons supported by affidavit.[108] The affidavit is required to identify the third party, state the grounds of the application and to exhibit[109] a copy of the third party notice.[110]

103 *Te'o v Kamu and Retlaff* [1980–93] WSLR 580. In that case, the defendant alleged that there was an implied term in a contract of service with the third party, obliging him to indemnify the defendant. There was no authority on this point, but the court allowed the application to add the third party in order for the point to be tested.
104 The circumstances in which commencement by writ will be appropriate are discussed in Chapter 5.
105 O16 r1(2) Fiji.
106 R3.7(3) Van. The grounds in r3.7(1) must be complied with.
107 O18 r1(2) CPR; O16 r2(1) Fiji.
108 O10 r2 Tonga.
109 'Exhibit' means refer to in and attach to the affidavit.
110 O10 r2(a) to (c) Tonga.

Application in Samoa is by notice of motion,[111] either *ex parte*[112] using Form 13, or on notice using Form 14[113] with a copy of the proposed third party notice attached.[114] An affidavit[115] in support must be lodged but the contents are not specified by the Rules.[116] The most significant difference between the other rules and the Samoan Rules is that in Samoa the application must be made and served on the plaintiff within 10 days after service of the summons.[117] In Samoa, it appears that the proposed third party may appear at the hearing and argue against the issue of a third party notice, although there is no provision for this in the Rules.[118]

The Vanuatu Rules do not specify the procedure and accordingly the general procedure for applications should be followed. It is not clear whether the application should be made *ex parte* or on notice. As no special provision is made it seems likely that application should be made in Form 10 supported by affidavit (referred to in the Vanuatu Rules as 'sworn statement') in Form 3.[119]

If leave is given, a third party notice must be served on the third party and all other parties. Under the CPR the notice is contained in Form 1 or 2 of Appendix B, depending on which ground is relied upon in the application. The Fiji form is contained in Form 2 of Appendix 1. In the Samoan and Vanuatu Rules it is in Form 4. No form is specified in the Tongan Rules.

The third party notice is treated like a writ, issued and served by the defendant against the third party,[120] who will have all the rights and obligations of a defendant.[121] The third party must appear or acknowledge service within the time limits laid down in the Rules unless an alternative time limit is imposed by the court.[122] Pleadings will be exchanged between the defendant and the third party in the usual way. After close of pleadings it is good practice for the defendant to supply a copy of the third party pleadings to the plaintiff.

111 A motion is an application to a court or a judge for an order directing something to be done in the applicant's favour. See further Chapter 5.
112 In its primary sense *ex parte* means on behalf of, meaning that an application is made by a person who is not a party. Here, it is used in its more usual sense, meaning that application is made by a party in the absence of the other.
113 R43(2) and r65(1)(b) and (c) Samoa.
114 R43(1) Samoa.
115 A voluntary written statement in the name of the person signing and sworn to or affirmed.
116 R43(2) and r65(1)(e) Samoa.
117 R43(2) Samoa. The summons is a document issued from the office of the court calling upon the person to whom it is addressed to attend at a hearing.
118 *Te'o v Kamu and Retlaff* [1980–93] WSLR 580.
119 See r2.6(4).
120 O18 r3 CPR; O16 r3(3) Fiji.
121 R3.7(4) Van.
122 O18 r4 CPR; O16 r3 Fiji.

CHAPTER 5

INITIATING PROCEEDINGS

1 INTRODUCTION

Procedure in the common law world has progressed from its origins, where the forms of action required litigants to use a different form of initiating process for each different cause of action.[1] In England, the forms of action were abolished by the Common Law Proceedings Act 1852, which provided for all actions in the superior court of first instance to commence by writ of summons. Unfortunately, the pleading precedents for each action were retained, thus perpetuating their distinctive features. The Judicature Acts 1873–75 finally 'buried' the forms of action by introducing a new code of civil procedure. However, different initiating processes were retained for cases other than 'actions' and for different levels of court.[2] Many Commonwealth countries inherited this procedure. Consequently, civil proceedings in the superior courts of many jurisdictions were begun by writ of summons, originating summons, originating motion or petition, depending on the requirements of any applicable Act or civil procedure rule or on a difficult distinction between 'actions' and 'matters'.[3] Different initiating processes, such as a plaint or summons, were prescribed for inferior courts.[4]

In many common law countries, sweeping reforms have taken place in recent years leaving only two forms of initiating documents and these may be adapted to fit the circumstances, whichever court has jurisdiction and whatever the subject matter of the case.[5] The remaining distinction is mainly between cases involving disputes of fact and those involving questions of law and is justified by the fact that one requires pleadings to isolate the facts in dispute, whereas the other does not.

Proceedings in the superior courts of the region that follow the English model[6] are generally divided into the following two categories:

- Causes, which are disputes between opposing parties, that is, plaintiffs and defendants.[7] The parties might be private individuals or private bodies, statutory bodies, government agencies, public representatives or other public bodies.[8]

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1 Maitland, *The Forms of Action at Common Law,* 1968, Cambridge: CUP, p 61.
2 In the English county court, proceedings were commenced by Plaint or Originating Application: County Court Rules 1936, O6 rr1 and 4 (later superseded by Request for summons and Particulars of Claim: see, for example, County Court Rules 1981, O6).
3 See, for example, Rules of the Supreme Court (UK) O5 (originally O1); Rules of the Supreme Court (Qld) O2 r1.
4 In Queensland, for example, proceedings were commenced by a Plaint in the district court: District Court Rules 1968, Pt 5; and Plaints and Summons in the magistrates' court: Magistrates' Court Rules 1960, Pt 2.
5 See, for example, Uniform Civil Procedure Rules 1999 (Qld), r8, which provides that commencement is either by Claim or Application.
6 Such as Fiji and Solomon Islands.
7 See para 3.1 below for an explanation of the correct way to describe the parties.
8 O1 r1 CPR; O2 r1 Fiji.

- Matters, which are proceedings which do not involve opposing plaintiffs and defendants.[9] They are usually statutory applications to obtain the court's leave as required by the Act in question. Examples are an application by a company for a winding up order, an application by a married person for a declaration of death of their spouse, or an application to be admitted as a legal practitioner.

The distinction is the most important factor in determining the originating process to be used. Subsequent procedure will differ, according to the originating process chosen. The most common method of commencement is by writ and subsequent chapters concentrate on the procedure in actions started by writ. The different methods of commencing proceedings are discussed below.

2 CHOICE OF PROCESS

In Fiji, Kiribati, Tuvalu and Solomon Islands, there are four possible ways of commencing proceedings:

- by writ of summons;
- by originating summons;
- by petition; or
- by notice of motion.

The rules governing the use of these are ambiguous. However, the general position is explained below.

2.1 Writ of summons

Under the CPR all causes which qualify as actions must be commenced by writ.[10] In a strikingly bad and circular piece of drafting, the Rules go on to say that those causes which are commenced by writ are known as actions,[11] but do not explain which causes amount to actions and which do not. It would appear that causes that involve plaintiffs and defendants to a dispute governed by statute, for example, under the Solomon Islands' Companies Act,[12] or causes where the facts are not substantially in dispute are not actions. In practice, nearly all common law causes are commenced by writ.

In Fiji, strictly speaking, unless a statute or the High Court Rules provide for a particular method of commencement, the plaintiff has a choice whether to use a writ or an originating summons.[13] However, r2 of the same Order provides that the following claims must be begun by writ:

- claims in tort other than for trespass;
- claims based on allegations of fraud;

9 O1 r1 CPR; O2 r1 Fiji. See also the definition in *Johnson v Refuge Association Co Ltd* [1913] 1 KB 259.
10 O1 r1, read with O2 r1.
11 O2 r1 CPR.
12 Cap 66.
13 O5 r4(1) Fiji.

- claims for damages in respect of personal injuries or death or damage to property arising from breach of contractual or statutory or any other duty; and
- claims in respect of infringement of patents.

2.1.1 Form of writ

Appendix A of the CPR sets out the two forms of writ. The first is the general form of writ. The second is the specially indorsed writ. An example of a generally indorsed writ, based on the facts of Joseph Wale's case, is set out in Sample Document D.

The Fiji Rules also contain the form of writ, in Appendix 1. This was amended in 1993 to a simpler form.[14] An example of this, based on the facts of Outboards Plus Ltd's claim, is set out in Sample Document E.

14 High Court (Amendment) Rules 1993, r10.

SAMPLE DOCUMENT D—GENERALLY INDORSED WRIT (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Jurisdiction no 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

ELIZABETH II, by grace of God, of the United Kingdom of Great Britain and Northern Ireland and of her other Realms and Territories Queen, Head of Commonwealth, Defender of the Faith

To SIMON PITA of Honiara and SOLBREAD (a Firm) of Ranadi, Honiara

We command you, that within 14 days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of JOSEPH WALE and take notice that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS, Reginald Strar, Registrar of the High Court,
the 20th day of January in the year of Our Lord two thousand and three.

NB This writ is to be served within 12 calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by his advocate by leaving the appropriate forms, or forwarding the same and an addressed envelope foolscap size to, the Registrar.

GENERAL INDORSEMENT

The Plaintiff's claim is for damages for injury to the Plaintiff by the negligent driving of the First Defendant in the course of his employment by the Second Defendant.

.....

(JENNIFER JUSTICE)

This writ was issued by Jennifer Justice of Honiara whose address for service is 2nd Floor, Anthony Saru Building, Honiara, advocate for the Plaintiff, who resides at Lengakiki, Honiara.

This writ was served by me at on the First Defendant, Simon Pita, on the day of 2003

Indorsed the day of 2003

This writ was served by me at on the Second Defendant, Solbread, on the day of 2003

Indorsed the day of 2003

SAMPLE DOCUMENT E—SPECIALLY INDORSED WRIT (FIJI)

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION

CIVIL ACTION NO 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

To ASERI TOGA of 99 Seni Buadromo Road, Suva Point, Suva

THIS WRIT OF SUMMONS has been issued against you by the above named Plaintiff in respect of the claim set out overleaf.

Within 14 days after the service of this Writ on you, counting the day of service, you must either satisfy the claim or return to the registry mentioned below the accompanying ACKNOWLEDGMENT OF SERVICE stating therein whether you intend to contest the proceedings.

If you fail to satisfy the claim or return the ACKNOWLEDGMENT within 14 days or if you return the ACKNOWLEDGMENT without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued from the High Court registry at Suva this 1st day of March 2003

.....

Jennifer Justice, of Victoria Chambers, Suva Building, Suva, Solicitor for the Plaintiff which has its registered office at Suite One, River Building, Suva.

NOTE: This Writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ACKNOWLEDGING SERVICE

The Defendant must acknowledge service in person or by solicitor by handing in the accompanying form, duly completed, at the High Court registry at Suva.

NOTE: Where the writ is indorsed with or served with a statement of claim, if the Defendant acknowledges service, then unless a summons for judgment is served on him in the meantime, he must also serve a defence on the solicitor for the Plaintiff within 14 days after the last day of the time limited for acknowledging service otherwise judgment may be entered against him without notice.

STATEMENT OF CLAIM

The Plaintiff's claim is for $32,000.00 for the price of goods sold and delivered.

Particulars:

Purchase of one Yamaha, long shaft, 40 hp outboard motor on 1 December 2002	$35,000.00
Less deposit	$3,000.00
Balance due	$32,000.00

AND the Plaintiff claims $32,000 plus statutory interest.

.....

(SIGNED)

And, where the claim is for a debt or liquidated demand the sum of $40.00 (or such sum as may be allowed on taxation) for costs and also, if the Plaintiff obtains an order for substituted service, the further sum of $15.00 (or such sum as may be allowed on taxation). If the amount claimed and costs be paid to the Plaintiff, (he being resident within the jurisdiction), or his solicitor or agent within 8 days after service hereof (inclusive of the day of service), further proceedings will be stayed.

2.2 Originating summons

Under the CPR, causes other than actions may be commenced by originating summons.[15] O58 provides that applications for the determination of any question of construction arising under deed, will or other written instrument, such as a simple contract, may apply for a declaration as to the rights of the interested parties by originating summons. Claims depending on the construction of any written law may also be commenced by application for interpretation of the law and a declaration as to the right claimed under it. Whilst O58 is phrased permissively, some regional courts have interpreted it as mandatory. For example, in *Samsen v Ierget*,[16] the Supreme Court of Vanuatu held that application for declarations as to the validity and effect of a will should have been made by originating summons.

Matters must be commenced by originating summons where a statute specifies that the initial application is to be made to a judge in chambers.[17] Other matters may be commenced by originating summons, unless the Rules or a statute provide otherwise.[18]

In Fiji, any statutory proceedings must be commenced by originating summons unless a statute or the Rules provide otherwise.[19] Such proceedings would include various claims under the Companies Act.[20] The Fiji Rules also specify a number of proceedings that are 'appropriate' to begin by originating summons. These are:

- proceedings in which the principal question is one of construction of an Act, deed, will, contract or other document;
- proceedings in which the principal question is some other question of law;
- proceedings which are unlikely to raise any substantial question of fact;[21]
- applications for judicial review.[22]

In other cases, the plaintiff has a choice whether to use a writ or originating summons.

Put briefly, the practice under the CPR and the Fiji Rules is that an originating summons is always used to commence statutory applications, where the statute in question specifies this course. Further, it will normally be used when the principal

15 O2 r1 CPR.
16 Unreported, Supreme Court, Vanuatu, Civ Cas 21/2000, 3 August 2000.
17 O57 r1 CPR. Matters that must be disposed of by a judge in chambers are listed in O57 r14 and include, for example, matters relating to adoption.
18 But see *Teibi v Permanent Secretary, Department of Finance,* unreported, High Court, Solomon Islands, Civ Cas 62/1992, 20 April 2000, where it was held that only applications coming within O58 r1 could be commenced by originating summons.
19 O5 r3 Fiji.
20 Cap 216.
21 O5 r4(2) Fiji.
22 O53 r5 Fiji. Whilst this text does not cover judicial review, this use of the originating summons is included for the sake of completeness. The High Court of Fiji Islands has refused to follow the English line of cases nolding that applications raising questions of public law should be struck out if commenced other than by way of originating summons: *Fiji Teachers Union v The Permanent Secretary for Education and The Secretary for Public Service Commission:* High Court, Fiji Islands, Civ Cas 0021/1997, 21 July 1998. Applications for judicial review may also be commenced by motion (O53 r5(1)). Whilst O53 r5(1) refers to 'originating' motions and summonses, the action would not be an originating process as the originating application is for leave, under O53 r3.

issue is one of law or the construction of a written document and where there is no substantial issue on the facts.[23]

2.2.1 Form of originating summons

The form of originating summons depends on whether it is *inter paries*24 or not. The CPR set out the required forms in Appendix H.[25] The Fiji High Court Rules set out three forms in Appendix 1.

2.3 Motion

The meaning and purpose of a 'motion' is not defined in the CPR. However, it is made clear in O55 r1 that motions are to be used where application is to a judge in court, as opposed to a judge in chambers.[26] Accordingly, proceeding must be by way of motion where a statute requires application to be made in open court. Motions may also be used in statutory proceedings where the applicant has a choice of proceeding in open court or chambers.[27] Applications for prerogative writs may be made by notice of motion as an alternative to summons.[28]

O5 r5 Fiji makes it clear that a motion may only be used where authorised by statute or rules of court. As under the CPR, a motion may be used in applications for prerogative writs as an alternative to summons.[29]

2.3.1 Form of motion

A motion not required to be made on notice may be made orally to the court without any initiating documentation. This will be allowed only in cases of extreme urgency, or where there is no opposing party.[30] Normally a notice of motion must be filed. No form of notice is given in the CPR.

The Fiji Rules set out the requisite form in Appendix 1, Form 6.

2.4 Petition

The CPR do not define the meaning or purpose of a 'petition'. In fact, it is only mentioned in the rules in the definition of 'pleading' (O1 r1) and briefly in O55 rr13–15, none of

23 For an example of an appropriate use of the originating summons procedure, see *John Noel v Obed Toto,* unreported, Supreme Court, Vanuatu, Civ Cas 18/94, 19 April 1995.
24 Between parties, as opposed to *ex parte,* where proceedings are taken without notice to the other side.
25 Forms 1 and 2.
26 *In Re B (an Alleged Lunatic)* [1892] Ch 459.
27 The term 'chambers' is not defined in the rules, but refers to proceedings in private, usually in the judge's chambers, rather than in open court.
28 O61 r4(1). Whilst this text does not cover judicial review, this use of the motion is included for the sake of completeness.
29 O53 r5(1).
30 O55r3CPR.

which gives any guidance as to when it is to be used.[31] It would appear that it may be used only where authorised by statute or rules of court.[32]

2.4.1 Form of petition

No form of petition is specified in the CPR or the High Court Rules.

2.5 Choice of process in other jurisdictions of the region

2.5.1 Tonga

The position in Tonga is superficially more straightforward. O6 r1 provides that all proceedings, except habeas corpus, are commenced by writ. However, as in other jurisdictions, although not stated, this must be read as subject to specific provisions in other rules or Acts, which require proceedings to be commenced in some other manner. An example is provided by the case of divorce proceedings, where r4 of the Divorce Rules 1991 provides that proceedings for divorce must be commenced by petition.

The form of writ is set out in Form 1. It is similar to that used under the CPR. The statement of claim can either be attached or set out on the reverse side of the writ. A sample writ is set out in Sample Document F.

2.5.2 Samoa

In Samoa, unless otherwise provided by Act or Rules, proceedings are divided into:

- actions;
- proceedings commenced by motion.[33]

Actions are:

- proceedings to recover a debt or damages;
- proceedings for recovery of land or chattels; or
- proceedings for specific performance.

Except where a statute, rule, or order provides otherwise, all other proceedings are by motion.[34] Proceedings by motion are governed by Part XVIII of the Rules and relevant forms are contained in Forms 53 to 55.

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31 Rr13–15.

32 This is certainly the case in Fiji, where O5 r5 makes it clear that a petition may only be used where authorised by statute or rules of court. Typical examples of proceedings commenced by petition are divorce, judicial separation, bankruptcy and winding up of companies. Another common petition within the region is the election petition, issued to challenge an election result.

33 R11 Samoa.

34 R12 Samoa. An example of a statute providing; otherwise is the Electoral Act 1963 which provides for commencement of proceedings to challenge an election to be by way of petition; see, for example, *Aloaina v Ah Sam, The Chief Electoral Officer & The Registrar of Voters,* unreported, Supreme Court, Samoa, 6 April 2001.

Actions are commenced by statement of claim. The court then issues a summons to which the statement of claim is annexed. The summons is set out in Form 1 and an example of this is set out in Sample Document G. The form of statement of claim to be used in the case of goods sold and delivered is set out in Form 2. An example of the statement of claim which would be annexed to the summons in Outboards Plus Ltd's case is set out in Sample Document H. In other cases, the form should be adapted to meet the circumstances of the case.[35]

2.5.3 Vanuatu

Vanuatu has replaced the complex system which existed under the High Court (Civil Procedure) Rules 1964 with a much simpler procedure. The Civil Procedure Rules 2002 provide only one method of starting proceedings and that is by claim.[36] There are still some proceedings, such as constitutional petitions[37] and electoral petitions,[38] which are required by statute to be commenced by petition. The claim must be in Form 5 with the heading in Form 1.[39] A sample claim is set out in Sample Document I.

35 R200 Samoa.
36 R2.2 Van.
37 See Criminal Procedure Code Cap 136 Van, ss 218–20 and the Rules made under s 220.
38 Representation of the People Act Cap 146 Van, ss 54–65 and the Rules made under s 59.
39 R4.3(1)(c) and r2.6(1) Van.

SAMPLE DOCUMENT F—WRIT OF SUMMONS (TONGA)

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
Nuku'alofa Registry

No C1112 /2003

BETWEEN

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

To the First Defendant SIMON PITA of Nuku'alofa and to the Second Defendant SOLBREAD c/o PO Box 33333, Nuku'alofa.

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff whose claim is fully set out in the statement of claim attached.

TAKE NOTICE THAT

If you wish to defend the claim you must, within 28 days of service of this writ on you, send to the Court a written defence, stating concisely the grounds upon which you intend to rely and whether you require the case to be tried by a jury. A sealed copy must be served on each Plaintiff.

If you fail to satisfy the claim or to file a defence within the time stated, the Plaintiff may obtain judgment against you without further notice.

If the claim is defended the Plaintiff *requires/does not require the case to be tried by a jury.

*(delete as appropriate)

Issued this day of 2003

[SEAL]

Note: This writ may not be served later than 12 months from its date of issue unless renewed by order of the Court.

STATEMENT OF CLAIM

The Plaintiff's statement of claim is attached.

This writ was issued by Jennifer Justice who will accept service of all documents at Justice Chambers, Main Road, Nuku'alofa.

SAMPLE DOCUMENT G—SUMMONS (SAMOA)

IN THE SUPREME COURT OF SAMOA
HELD AT APIA

Civil Jurisdiction no 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

YOU ARE HEREBY summoned to attend at the Supreme Court to be held at Apia on the day of 2003 at the hour of 9.30 in the forenoon, to answer the Plaintiff/s claim, the particulars of which are set out in the statement of claim annexed hereto.

DATED at Apia this day of 2003

.....

DEPUTY REGISTRAR

TO THE DEFENDANT

	Claim	T32,000
NOTICES TO THE DEFENDANT (These notices should be read carefully)	Cost of summons Solicitor's fee for Preparing statement of claim	T T_____
If you admit the whole claim, you may, within 10 days of service of this summons on you, inclusive of the day of service, either –		**T.....**

(a) File in the office of the Court a confession for the amount and the costs noted on this summons; or

(b) Pay into Court the full amount of the claim and the costs noted on this summons; or

(c) Deliver possession of the land or chattels to the Plaintiff and pay into Court the amount of his money claimed (if any) and the costs noted on this summons –

and no further costs will be incurred. Note particularly that the Court cannot accept cheques.

If you dispute the whole of the claim, you should, within 10 days of service of this summons on you, inclusive of the day of service, file in the office of the Court a statement of defence.

If you dispute part of the claim, you may, within 10 days of service of this summons on you, inclusive of the day of service, either –

(a) File in the office of the Court a confession for the part you admit; or

(b) Pay the part you admit into Court.

You should also, within the same period, file in the office of the Court a statement of defence in respect of the part of the claim you dispute.

If you have a counterclaim, you should, within 10 days of service of this summons on you, inclusive of the day of service, file in the office of the Court a statement of that counterclaim.

If you do not file a statement of defence or counterclaim, judgment may be given against you, for the amount of the Plaintiff's claim and his costs.

Forms of confession may be obtained at any office of the Court. No fee is payable on the filing of these documents.

The filing of a statement of defence or a counterclaim does not relieve you from attendance at the Court on the day named in the summons.

If you do nothing, the Plaintiff may have judgment entered against you and may proceed to enforce that judgment.

Failure to observe the time limits mentioned in these notices may add to the costs.

This summons was sued out by Jennifer Justice of Main Street, Apia, solicitor for the Plaintiff.

If you are in doubt, consult a solicitor or the Registrar immediately.

The office of the Court is open to the public from 8.30am to 12.00pm and 1.00pm to 3.00pm, Monday to Friday inclusive.

SAMPLE DOCUMENT H—STATEMENT OF CLAIM (SAMOA)

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

Civil Jurisdiction no 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

STATEMENT OF CLAIM

The Plaintiff claims the balance of $32,000 for goods being one Yamaha, long shaft, 40 hp outboard motor sold and delivered by the Plaintiff to the Defendant on 1 December 2002, the particulars of which have been delivered.

Particulars of calculation of balance:

Purchase price	$35,000.00
Less deposit paid on 1 December 2002	$ 3,000.00
Balance due	$32,000.00

AND the Plaintiff claims $32,000 plus statutory interest.

.....

(SIGNED)

This statement of claim is filed by Jennifer Justice, advocate for the Plaintiff which has its registered office at Suite One, River Building, Apia, whose address for service is Justice Chambers, Main Street, Apia.

SAMPLE DOCUMENT I—STATEMENT OF CLAIM (VANUATU)

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (CIVIL JURISDICTION)

CIVIL CASE NO 1112 OF 2003

BETWEEN

JOSEPH WALE

Claimant

Represented by JENNIFER JUSTICE

Claimant's lawyer

AND

SIMON PITA

First Defendant

AND

SOLBREAD (a Firm)

Second Defendant

Represented by ANN ADVOCATE

Defendants' lawyer

SUPREME COURT CLAIM

Date of filing: 1 May 2003
Filed by: Jennifer Justice
Address for Service: Waterview Chambers, Kumul Highway, Port Vila, Vanuatu

Set out details of claim in numbered paragraphs

1. [an example of the details which would be included in these paragraphs is contained in the sample statement of claim in Chapter 8]

2.

Signed by Jennifer Justice, lawyer for the Claimant)
at Port Vila) .....
on 1 May 2003)

IMPORTANT: To **SIMON PITA** and **SOLBREAD (A FIRM)**
YOU MUST READ THIS CLAIM AND THE ATTACHED NOTES. YOU MAY WISH TO CONSULT A LAWYER. YOU MUST RETURN THE RESPONSE FORM TO THE COURT. YOU MUST TAKE ACTION QUICKLY.

COURT CLAIM

NOTES FOR DEFENDANTS

You have been served with a claim in legal proceedings. You are the Defendant. This claim is made against you personally or as the representative of the Defendant.

YOU MUST TAKE ACTION QUICKLY

1. Complete the attached RESPONSE form.

   Take or send one copy to the Court.
   Take or send one copy to the Claimant.

These copies must be actually with the Court and Claimant in 14 days from when you received the Claim.

2. If you have ticked box 2 or 3 on the Response form, you must file a DEFENCE form.
   Set out in the Defence why you dispute part or all of the claim.

   Take or send one copy to the Court.
   Take or send one copy to the Claimant.

These copies must be actually with the Court and Claimant in 28 days from when you received the claim.

3. If you have ticked box 4 on the Response form, you must file a Defence (see paragraph 2) and a COUNTERCLAIM.
   Set out in the Counterclaim what you are claiming against the claimant.

   Take or send one copy to the Court.
   Take or send one copy to the Claimant.

These copies must be actually with the Court and Claimant in 28 days from when you received the claim.

WARNING: If you do not take action as required, then the Claimant can sign judgment against you. This means the Claimant will win the case. You can then only reopen the case on the Order of a judge or magistrate if you have good reason.

2.6 The consequences of using the wrong originating process

As discussed in Chapter 1, technical errors will not render the proceedings void and this usually applies where proceedings are commenced in the wrong form. Although such error will not normally render the proceedings a nullity, it may result in unnecessary costs and delays while a party applies to have the matter set right. There may also be cases where commencement in the wrong form will result in the case being struck out.[40] For example, the cases of *O'Reilly v Mackman*[41] and *Cocks v Thanet District Council*[42] have been relied on in the Fiji Islands as the basis for saying that an action commenced by writ which should have been commenced by application for judicial review, will be struck out summarily as an abuse of process of the court. This is because judicial review provides a procedure whereby every type of remedy for the infringement of the rights of an individual entitled to protection in public law could be obtained. The procedures have built-in protections to guard against groundless, unmeritorious or tardy harassment of public bodies. These protections are necessary to satisfy the pubic policy requirement of speed and certainty in the resolution of disputes in the interests of both good administration and the protection of third party rights.[43]

In *Fiji Teachers Union v The Permanent Secretary for Public Service Commission*,[44] the plaintiff commenced action against the defendants by issuing a writ of summons with statement of claim annexed, requesting a declaration that the defendants' failure to make a contribution towards the salaries of a certain category of teacher created two classes of teachers doing the same work and was therefore discriminatory and unlawful. The plaintiff also sought an order that the contributions be made. In response, the defendants issued a summons to strike out the writ on the grounds that it had been commenced by the wrong procedure and that the plaintiff should have proceeded by way of judicial review. The defendants sought to rely on the two House of Lords cases referred to above. On the facts of the case here, Byrne J was of the view that here was a genuine private law claim and that therefore the action had legitimately been commenced by writ. However, he also took the opportunity to point out that, whilst lawyers had relied on the cases mentioned for some time, they had been the subject of criticism and should not be used indiscriminately. In particular, Byrne J referred to the words of Saville LJ in *British Steel plc v Customs and Excise Commissioners*:[45]

> The old forms of action have doubtless long been laid to rest, but others have sprung up in their place, giving rise once again to litigation which is devoted to the question whether the right form of action has been used, rather than addressing and resolving the real dispute between the parties.

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40 For example, in *Joseph Kao v Public Service Commission* (1989–94) 1 VLR 398 (Van), the appeal was dismissed because the notice of appeal did not state the grounds of appeal, as required by the court rules.

41 [1983] 2 AC 237.

42 [1983] 2 AC 286.

43 *Fiji Teachers Union v The Permanent Secretary for Public Service Commission,* unreported, High Court, Fiji Islands, Civ Cas 0021/1997, 21 July 1998.

44 *Ibid.*

45 [1997] 2 All ER 366 at 379, cited by Byrne J in *Fiji Teachers Union v The Permanent Secretary for Public Service Commission,* unreported, High Court Fiji Islands, Civ Cas 0021/1997, 21 July 1998, at p 9.

The cases where proceedings will be struck out for reasons based on form are few. In *Home Finance Corporation of Solomon Islands v Makana*,[46] Palmer J held not only that failure to commence the proceedings by writ, rather than originating summons, was not a ground for striking out, but also that the parties should bear their own costs of the application to strike out. The plaintiff was given 14 days to file an amended claim in the form of a writ of summons with statement of claim endorsed.

3 THE REQUIREMENTS OF A VALID WRIT

The writ must be in the form specified in the Rules,[47] with such variations as circumstances may require.[48] It must be prepared by the plaintiff or his/her solicitor. Additionally, under the CPR, an illiterate plaintiff may request the registrar to prepare the writ at his/her dictation.[49]

Other particular requirements of a valid writ are specified in the Rules. The main elements of the writ are described below.

3.1 The title of the action

This should be set out at the top of the writ. It includes the name of the court, the civil case or proceeding number and the names, with any appropriate qualification,[50] and descriptions of the parties.

At first instance the parties are described as plaintiff and defendant. It should be noted that those descriptions are not appropriate for motions, where the proper description is applicant and respondent. Nor are they appropriate for petitions where the proper description is petitioner and respondent. In *Mathias Pepena v The Speaker Makira/Ulawa Province and Attorney-General*,[51] it was stated to be important that titles of parties should be correctly stated in court papers. In that case the parties had been wrongly described in an originating summons as plaintiff and respondents.

3.2 Teste

This is the part of the writ that witnesses the date and place of issue in the name of the Chief Justice.[52]

46 Unreported, High Court, Solomon Islands, Civ Cas 97/2000, 14 June 2000.
47 See pp 83–87.
48 O2 r2 CPR; O6 r1 Fiji.
49 O5 r2 CPR.
50 Seep 69.
51 Unreported, High Court, Solomon Islands, Civ Cas 110/96, 22 August 1996.
52 O2r5CPR.

3.3 Address for service

Where the plaintiff sues in person he/she must put his/her residential address and occupation on the writ. If the address is outside the jurisdiction, an address for service must also be included.[53]

If the plaintiff sues through a lawyer, the lawyer's name and address for service must be included as well as the plaintiff's address.[54]

3.4 Indorsement of claim

Indorsement merely means something that is written on the back of a document. The plaintiff's claim must be indorsed on the writ before it is issued.[55]

Under the CPR and the Fiji Rules there are two different ways of indorsing a writ:

- General indorsement.
- Special indorsement.

These require separate consideration.

3.4.1 General indorsement

This is a short indication of the nature of the plaintiff's claim. Its purpose is to set out the parameters of the claim, so that the defendant has notice of the general nature of the claim. Full details are then given in a separate document, called the statement of claim.

Any claim may be generally indorsed.

3.4.2 Special indorsement

A special indorsement gives full details of the claim. Thus all details are contained in the writ itself and no subsequent document is required[56] or, under the CPR, allowed.[57]

Special indorsement is allowed in most cases, excluding matrimonial causes, probate, admiralty actions, defamation actions, malicious prosecution, false imprisonment and actions where fraud is alleged. It is specifically allowed in the following cases:

- certain claims for a debt or liquidated demand;
- claims for possession of land from a tenant;
- claims for possession of goods;
- claims for possession of property securing money.

53 O4 r2 CPR; O6 r4(1)(b) Fiji.
54 O4 r1 CPR; O6 r4(1)(a) Fiji.
55 O3 r1 CPR; O6 r2(1) Fiji.
56 O18 r10 Fiji.
57 O22 r1(a) CPR.

Special indorsements of claims for a debt or liquidated amount may be made in an abbreviated form, such as the example given in Sample Document E.[58]

This distinction does not exist in Samoa, Tonga or Vanuatu. Arguably it is an unnecessary complication in the other countries of the region, where it could usefully be abolished.

3.4.3 Form of indorsements

There are two requirements in the rules which give guidance:

- The indorsement must contain a statement of the nature of the claim made, or of the relief or remedy required in the action.[59] Similarly worded orders have caused problems in other jurisdictions. The word 'or' has often been interpreted by the courts as 'and' and indorsements have consequently failed.[60] In fact, failure to give sufficient details will not usually be fatal in the case of a general indorsement, as further information can be given in the statement of claim. However, care should still be taken in drafting the general indorsement, as the statement of claim must not introduce a totally new claim which is not mentioned in the indorsement. This matter was considered in *Graff v Rimrose*.[61] In that case the plaintiff was suing because the defendants had constructed a sewerage system below the plaintiff's premises, causing it to subside. The indorsement claimed 'damages for wrongfully taking away the support of plaintiff's land and houses'. In the statement of claim the plaintiff pleaded the fact that the defendants had excavated and caused loss of support and then pleaded, in the alternative, negligence for not taking sufficient precautions to prevent loss of support. The defendants said this was introducing a new cause of action. The Court of Appeal held that the indorsement was adequate, as the statement of claim was only further developing the claim within the framework of its general nature as set out in the indorsement.
  If a plaintiff wishes to bring in a new claim outside the indorsement, application may be made to amend the indorsement, but this will not normally be allowed if the new claim is statute barred.[62]
- The Forms in the CPR, Appendix A, Parts II and VI must be used for general indorsement, if applicable. The Forms in Appendix A, Part IV must be used for special indorsements. If there is no applicable form, a similar form must be devised.[63] There are no such forms in Fiji or in the Samoan Rules.

In *Samson Poloso v Honiara Consumers Co-operative Society Ltd*,[64] the defendant sought to have judgment in default set aside on the ground that it had been irregularly entered.

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58 This abbreviated form is specified in the CPR (Appendix A, Part IV) and in the Supreme Court (Civil Procedure) Rules 1980 (Samoa), Form 2.
59 O2 r1 CPR; O6 r2(1)(a) Fiji.
60 For example, *Sterman v Moore* [1970] 1 QB 596; *Belmont Finance v Williams* [1979] Ch 250; *Elsum v Jameson* [1974] VR 529.
61 [1953] 2 QB 318.
62 *Weldon v Neal* (1887) 19 QBD 394.
63 O3 rr3 and 5 CPR.
64 [1988/89] SILR 16.

One of the defects relied on was that the statement of claim indorsed on the writ was inadequate. The indorsement read:

> The plaintiff's claim is for the sum of $9,044.98 being value of goods supplied on credit to HM Salo Store during the year of 1982. The summons is addressed to Mr Samson Poloso, he being the Managing Director.

At first instance the registrar held that this was clear and precise. On appeal the Chief Justice agreed with counsel for the defendant that the indorsement was inadequate. The form in the Appendix should have been followed and particulars supplied. However, he refused to set the judgment aside on the basis that the judgment itself was regular, notwithstanding the fact that the proceedings which went before it were not.

Whilst the distinction between general and special indorsements does not exist in Samoa, the court may order a plaintiff to file a further and more explicit statement of claim under r16.

There is no distinction between general and special indorsements under the Tonga or Vanuatu Rules. In Tonga, the statement of claim can either be attached or set out on the reverse side of the writ.[65] In Vanuatu, the statement of the case is set out in the claim in every case.[66]

3.5 Currency

Under the CPR and Fiji Rules, a writ has a life of 12 months. If not served or renewed within that time it expires. An extension of up to 12 months may be granted by the court under the Fiji Rules (O6 r7(2) Fiji). A renewal of six months may be granted if applied for before the writ expires and if the court is satisfied that reasonable efforts have been made to serve the defendant, or that there is other good reason for renewal.[67] Further renewals may be applied for during the currency of a renewed writ.[68] If a writ does expire there is nothing to prevent a plaintiff issuing another one, provided that the limitation period for the action in question has not expired.

Under the Vanuatu Rules a claim has a life of three months, renewable for three months on application to the court.[69]

4 ISSUE OF PROCESS

A writ of summons must be issued out of the court registry. 'Issue' refers to the process of sealing of the writ with the seal of the court.[70] Under the Fiji Rules, proceedings must normally be issued in the High Court registry located in the division in which the cause of action arose.[71]

65 O6 r5 Tonga.
66 R4.1 Van.
67 O8 r1.
68 *Ibid.*
69 Rr4.14 and 5.3 Van.
70 O5 r3 CPR; O6 r6(2) Fiji.
71 O4 r1(1) (Fiji).

The Rules appear to require only two copies of the writ to be presented to the court, but in practice four copies are lodged, plus one for each additional party if there are more than two. Lodgment must be accompanied by the requisite fee.[72]

Under the Vanuatu Rules, the claim may be filed in any Supreme Court office.[73] The claimant is required to serve sealed copies on all parties, so sufficient copies must be filed to allow for this.[74]

72 Currently $100 in Solomon Islands for claims over $7,500.
73 R2.3 Van.
74 R5.15Van.

CHAPTER 6

SERVICE

1 INTRODUCTION

Service is the word used to describe the process of bringing the writ or other document related to the proceedings to the attention of the other party. Service of court documents within the South Pacific region is usually required to be personal, which means that documents must be physically handed to the other party.[1] In many other countries of the Commonwealth, service by post is now allowed. This is not generally allowed within small South Pacific States because of the lack of a comprehensive system of street addresses and house numbering. Post is usually directed to a post office box. Not everyone has a post office box and an address may be an employer's or relative's post office box. Accordingly, the post cannot be relied on to bring a document to a person's attention.

Personal service may be carried out at any place and on any day other than Sunday, Good Friday, Christmas Eve, Christmas Day, or Boxing Day (O9 r15 CPR). Service on a weekday must be before 4pm and on Saturday before 11am.[2] Service after those times is deemed to take place on the following day permitted for service.[3] In Samoa, service on Christmas Eve and Boxing Day is not prohibited, but service on Anzac Day is (r26 Samoa). Only service on Sundays is prohibited under O65 r10 of the Fiji Rules. There are no prohibited days for service under the Rules in Tonga or Vanuatu. In Tonga, s 6 of the Constitution may operate to prevent service on a Sunday. This states that, 'The Sabbath Day shall be kept holy' and 'no person shall practise his trade or profession or conduct any commercial undertaking on the Sabbath Day except according to law'.

A party to an action is entitled to participate at each stage of the action (other than in exceptional circumstances where *ex parte* proceedings are allowed by the rules). Service is therefore a vital requirement to ensure that both sides get the opportunity to present their side of the story.

If service is not effected, or is irregular, the other party may object. This objection may be taken immediately, or at a later stage, when the serving party wishes to proceed with the action, or for example, after judgment in default has been obtained. Irregular service will automatically entitle the innocent party to have any judgment set aside. Thus, it is important to be able to show that service has been properly effected.

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1 R5.8 Van defines personal service.
2 O64 r7 CPR.
3 O64 r7 CPR.

2 MODE OF SERVICE

2.1 Writ and other originating process

The general rule is that the writ of summons or other originating process must be served personally (O9 r2; O10 r1(1); r19 Samoa; Oil r2(5) Tonga; r5.2 Van). What this means is that a duplicate or attested copy of the document must be handed to the other party to the action.[4] The Vanuatu Rules specify that the copy served must be a sealed copy[5] If the other party refuses to accept the document, the common law provides that service will still be effective if the document is left as close as possible to the person to be served. The process server should tell the person served what the document is. In *Graczyk v Graczyk*,[6] for example, the respondent to a divorce suit was in a room with the co-respondent. The co-respondent opened the door, but prevented the process server from entering. The process server saw the respondent in the room and pushed the writ under the door. This was held to be sufficient personal service.[7] This common law rule is incorporated into the Rules of Tonga[8] and Vanuatu.[9]

On request, the contents of the writ or other document served should be explained to the recipient.[10] The original writ must be shown if the defendant requires to see it.

Under the Fiji Rules, although the normal rule is personal service,[11] the Rules go on to allow service of the writ by:

- sending it by ordinary post to the defendant's usual or last known address; or
- inserting the writ in the letterbox at that address.[12]

In an action to recover land, where the land is unoccupied and service cannot otherwise be effected, the CPR allow service by posting a copy of the writ on the door of the dwelling house or other conspicuous part of the property.[13]

2.2 Service of other documents

Under the CPR and Tongan Rules, service of all other documents is also personal.[14] In practice, however, once an address for service has been given, as both parties are obliged to do, documents may be left at that address. Under the Fiji and Vanuatu Rules, service of documents other than the originating process is dealt with separately. The Vanuatu Rules expressly allow service of a document other than the claim by leaving it at the address given for service or by sending it to that address by prepaid post or by fax.[15] The Rules

4 R5.8(1)(a) Van.
5 R5.15 Van.
6 [1955] ALR (CN) 107.
7 See also *Thomson v Pheney* (1832) 1 DPC 441. But compare with *Heath v White* (1844) 2 D&L 40.
8 Oil r2(4) Tonga.
9 O65 r2 Fiji; R5.8(1)(b) Van.
10 O9 r13(2) CPR.
11 O10 r1(1) Fiji.
12 O10 r1(2) Fiji.
13 O9 r10 CPR.
14 O9 r14 CPR; Oil r1 Tonga.

also provide that every document filed must be sealed and must state an address for service for the party filing the document.[16] Under the Fiji Rules, documents which are not required to be served personally may be served by registered post or by leaving them at the 'proper address' of the person to be served.[17] The 'proper address' is defined as the address given by that party for service.[18]

The Samoan Rules do not deal with service of documents other than the summons, but presumably service may be effected personally or by delivering documents to the address specified in the statement of claim or the statement of defence or confession, as the case may be.

2.3 Service on advocate or agent

Under the CPR, personal service of a writ is not required where a party's advocate gives a written undertaking to accept service and enters an appearance.[19] Documents other than the writ may always be served on a party's legal representative.[20] O9 r14(2) also permits service on any other recognised agent. However, in the case of an agent other than a legal representative, this must be read with O9 r9. Rule 9 requires leave of the court to be obtained to serve an agent validly, in the case of a contract entered into within the jurisdiction through that agent acting on behalf of an overseas principal. Notice of the order giving leave and the writ must then be sent by prepaid registered post to the principal at the overseas address.

Under the Fiji Rules a writ may be served on the defendant's solicitor, provided that he endorses a statement that he accepts service on the back of the writ.[21]

The Tongan Rules compel service on a party's lawyer where notice of acting has been given to the court.[22] Similarly, the Vanuatu Rules provide that where a party is represented by a lawyer, the party's address for service must be the address of the lawyer's office.[23] As service of a document other than a claim may be served by leaving it at, or sending it to, the address for service,[24] it follows that service may be on a party's solicitor.

The Samoan Rules do not mention service on a party's lawyer, except if the defendant is outside the jurisdiction. In that case, r22 provides that leave of the court must be sought to serve the attorney or authorised agent. Prior to the making of the Supreme Court (Civil Procedure) Rules 1980, it was held that service of originating process on a solicitor, who accepted the document on behalf of a party, was good

15 R5.5(b) and (c) Van.
16 Rr 5.4(2) and 5.15 Van. R5.4(4) Van provides that a party must file a notice of change if his or her address for service changes. The notice must be served on every other party: R5.4(5) Van.
17 O 65 r5 Fiji.
18 O65 r5(2) Fiji.
19 O9 r1 CPR.
20 O9 r14(2) CPR.
21 O10 r4 Fiji.
22 Oil r2(4) Tonga.
23 R5.4(3)(b) Van.
24 R5.5(b) and (c) Van.

service in Samoa.[25] However, since the making of r22, this no longer appears to be the case.

2.4 Where service is not required

Under O10 r1(5) of the Fiji Rules, a defendant who enters an acknowledgment of service before service, is deemed to have been served on the date of the acknowledgment of service. This is known as appearance 'gratis'.[26] Although no specific rule to this effect is included in the CPR, Samoan, Tongan or Vanuatu Rules, the common law practice allowing appearance gratis would appear to apply.[27]

The Fiji Rules also provide that if a party has not filed an acknowledgment of service (in the case of the defendant) or provided an address for service (in the case of either party), a document other than a writ need not be served unless the Rules direct otherwise or the court directs service.[28]

Where more than one defendant is sued, but they are not all served, there is nothing to prevent the plaintiff proceeding against the party or parties who have been served.[29] However, care should be taken in this respect, as the first judgment may act as an election in the case of defendants liable in the alternative[30] and will exhaust the plaintiff's rights in the case of defendants liable jointly.[31]

2.5 Time for serving documents

The writ must be served within 12 months from the date of issue.[32] If service has not been effected within that time, application may be made to renew the writ for 12 months (or six months under the CPR).[33] Under the CPR, the court will only grant a renewal if it is satisfied that reasonable efforts have been made to serve the defendant.[34] Further renewals may also be applied for during the life of the renewed writ.[35]

The time for serving other documents is not stated in the CPR. The Rules provide time limits for filing and require the filing party to serve the other party, but do not specify when this must be done. Usually, a party will be eager to serve the document filed on the other party, so that time limits for their response are triggered. But this may not be the case if an unscrupulous party or lawyer is playing for time, as may be the case in an action to recover a debt, or if a party delays service of an affidavit or submissions to the

25 *International Finance and Services Ltd v South Pacific Island Airways Incorporated and Wray and Steffany* [1970–79] WSLR 267.
26 See *The Gniezno* [1967] 3 WLR 705.
27 *Oulton v Radcliffe* (1874) LRCP 189; *Boyle v Sacker* (1888) 39 Ch D 249; *Pike v Nairn & Co Ltd* [1960] Ch 553.
28 O65 r9 Fiji.
29 *Khan v Waoanivere,* unreported, High Court, Fiji, Civ Cas HBM 0007/1997L, 18 July 1997.
30 This will be the case where proceedings are in respect of an undivided debt. See *French v Howie* [1905] 2 KB 580, adopted on appeal [1906] 2 KB 674.
31 *Kendall v Hamilton* (1879) 4 App Cas 504.
32 O8 r1 CPR; O6 r7(1) Fiji; O6 r6(1) Tonga.
33 O8 r1 CPR; O6 r7(2) Fiji; O6 r6(2) Tonga.
34 O8 r1 CPR.
35 O8 r1 CPR; O6 r7(2) Fiji; O6 r6(2) Tonga.

last minute to restrict the other party's time for responding. The Vanuatu Rules prevent this problem by providing that documents other than a claim must be filed *and* served within the time limits specified in r4.13.[36]

The Samoan Rules state that the summons must be served within 12 months unless the court gives leave to serve outside that period.[37] The summons may be renewed for a further 12 months on *ex parte* application to the registrar.[38] Further renewals are permitted but may not exceed a total of five years.[39] It is also provided that service must be effected at least 10 days before the date of the hearing of the summons except in cases under the Government Proceedings Act, when 28 days' notice is required.[40]

The Tongan Rules provide that after a document is filed in *inter partes* proceedings, no further step may be taken until it is served.[41]

3 SERVICE ON PARTICULAR DEFENDANTS

The CPR contain special provisions for serving certain types of party. The other rules in the region are not so detailed. Unless specifically mentioned below there is no relevant provision in the Fiji, Samoan, Tongan or Vanuatu Rules and the general rules as to service discussed above apply.

3.1 Husband and wife

Where they are both defendants, they must both be served (O9 r3(1)).[42]

3.2 Member of the armed forces

Defendants in the armed forces may be served through their commanding officer (O9 r3(2)).

3.3 Minors

Under the CPR and Fiji Rules, minors may be served by serving their father or guardian, or if they do not have one, the person with whom they live or who cares for them.[43] These

36 R5.6 Van.
37 R24(1) Samoa.
38 R25(1) Samoa.
39 R25(2) Samoa.
40 1974 Samoa, s 11; r24(2) Samoa.
41 Oil r1(2) Tonga. The court may order otherwise.
42 Cf *O'Sonis v Truk* [1988] SPLR 106, where it was held that the Micronesian tradition dictating that the husband is responsible for taking care of the family's legal matters justified a husband in commencing legal action in his own name on behalf or his wife. This custom overrides Truk State Court Rule of Civil Procedure 17, which provides that suits must be brought in the name of the real party.

outdated provisions have been replaced in Vanuatu to allow service on a parent or guardian or a person acting in that capacity.[44]

Under the Tongan Rules, a party may serve a minor, but before taking any further step must apply by summons to a judge for directions as to whether a guardian *ad litem* should be appointed.[45]

3.4 Persons of unsound mind

Persons of unsound mind may be served by serving the person with whom they live or who cares for them.[46] Under the Vanuatu Rules the litigation guardian must be served if the person of unsound mind (referred to in these Rules as 'impaired capacity') is a party to proceedings and a guardian has been appointed.[47] If no guardian has yet been appointed for a person of impaired capacity who is a party to proceedings, application must be made to the court for such appointment to be made.[48] If the person to be served is not a party to proceedings, his or her guardian or the person appearing to be acting in that position must be served.[49]

Under the Tongan Rules a party may serve a mental patient, but before taking any further step must apply by summons to a judge for directions as to whether a guardian *ad litem* should be appointed.[50]

3.5 Partners

Where partners are sued in the firm's name, any one or more of them may be served.[51] Alternatively, the person in control or management of the business may be served at the principal place of business (O9 r6; O81 r3(1)(a)). Under the Fiji Rules, process may also be sent by ordinary first class post to the principal place of business (O81 r3(1)(c)). Notice of the capacity in which the person is served must be given in writing at the time of service.[52]

The Samoan Rules allow service by delivery to any partner or by leaving the summons at the firm's place of business.[53] Similarly, the Vanuatu Rules provide that a claim against a partnership must be served on a partner or at the principal place of business.[54] The Rules of Samoa and Vanuatu do not require partners to be sued in the partnership name to take advantage of this mode of service.

43 O9 r4 CPR; O80 r13 Fiji. These Rules may be unconstitutional in some countries, as they contravene anti-discrimination provisions. See, for example, s 15(1), Constitution of Solomon Islands 1978.
44 R5.10(1)Van.
45 O9 r7(3) Tonga.
46 O9 r4 CPR; O80 r13 Fiji.
47 R5.10(3)(a) Van.
48 R5.10(3)(b) Van.
49 R5.10(4)Van.
50 O9 r7(3) CPR.
51 O9 r6 CPR; O81 r3(1)(a) Fiji.
52 O9 r7 CPR; O81 r3(4) Fiji.
53 R21 Samoa.
54 R5.

3.6 Corporations

The CPR provide for the manner of service on corporations 'in the absence of any statutory provision regulating service'.[55] As statutory provision is made by the Companies Act Cap 66 (SI), that provision applies in Solomon Islands and is specifically stated to amount to good service.[56] Section 370 of the Companies Act states that, 'A document may be served on a company by leaving it at or sending it by post to the registered office of the company'. In Kiribati, the Companies Act provides that a document may be served on a company by leaving it at, or sending it by post to, the company's registered office or the post office box number notified to the registrar.[57] If a company has no registered office, a director may be served or, if no director can be traced in Kiribati, any member of the company may be served.[58]

The importance of abiding by the Companies Act provisions is illustrated by the case of *Davinia Boso v Blue Shield (Solomons) Insurance Limited*,[59] where service of a writ and all subsequent proceedings were set aside, with costs to be paid by the plaintiff, on the grounds that the writ had been served at the defendant's principal place of business, rather than at the registered office.

Under the Fiji Rules, service of the originating process is by posting or leaving the writ at the registered or principal office of the body corporate.[60] If personal service is required, the document may be served on the chairman or president of the body, or mayor or the town clerk in the case of a municipal corporation, or secretary or treasurer or other similar officer.[61]

The Samoan Rules do not allow service on a corporation by post. The summons may be left at the corporation's place of business with any person in apparent authority.[62]

The Tongan Rules make no provision for service on a company, but the Companies Act 1995 provides for service by leaving or sending the document to the registered office.[63]

The Vanuatu Rules take a different drafting approach in their treatment of service on corporations. Rather than relying on cross-reference to the companies legislation or setting out a special mode of service that applies separately from the normal service rules, r5.8(2) is, in effect, a deeming provision. It states that:

A document is served personally on a corporation:

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

55 O9 r8(1) and (2) CPR.
56 O9 r8(1) CPR.
57 Cap 10A, s 142(1).
58 Section 142(3).
59 Unreported, High Court, Solomon Islands, cc181/96, 22 August 1996.
60 O65 r3(2) Fiji.
61 O65 r3 Fiji.
62 R20 Samoa.
63 See also, the Offshore Banking Act Cap 110 (Tonga), s 13; Incorporated Societies Act Cap 28 (Tonga), s 16.

(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.

Presumably, a document other than a claim may also be served on a corporation by leaving the document at, or sending it to, the address specified for service. What is not clear is whether 'A document may be served on a company by…sending it by post to the registered office of the company', as provided by the Companies Act Cap 191 (Van). If the registered office is the address given for service, such service will be effective both under the Rules and the Act.[65] If it is not, service by post to the registered office would still appear to be effective, as the Rules are delegated legislation and cannot repeal the provisions of a statute.[66]

3.7 Unincorporated associations

The CPR make provision for the manner of service on unincorporated societies and fellowships 'in the absence of any statutory provision regulating service'.[67] 'Society' and 'fellowship' are expressly stated to include registered trade unions and co-operative societies,[68] but the terms appear to be wide enough to include any unincorporated association. In Solomon Islands, statutory provision is made in the case of trade unions under the Trade Union Act,[69] and in the case of co-operative societies under the Co-operative Societies Act.[70] In the case of other societies, where there is no specific statutory provision, service may be effected either:

- by sending the document by prepaid registered post to the secretary or other corresponding officer at the registered or head office of the society; or
- by serving it personally on that person at such office.[71]

3.8 Government departments

Under the CPR, a government department may be served either:

- by sending the document by prepaid registered post to the head of the department at the head office of the department; or
- personally on that person at such office.[72]

Under the Fiji Rules, service must be on the Attorney-General[73] either by leaving the document with a responsible member of the staff at the Suva chambers or by posting it by registered mail to those chambers.[74]

64 Section 397.
65 R5.5(c) Van.
66 Only Parliament can repeal its own enactments. See also *Re Grosvenor Hotel* [1965] Ch 1210.
67 O9 r8(2) CPR.
68 O9 r8(2) CPR.
69 Cap 76 (SI).
70 Cap 73 (SI).
71 O9 r8(2) CPR.
72 O9 r8(3) CPR.
73 O65 r6 Fiji.
74 O77 r3 Fiji. See also regional legislation governing proceedings against the Crown, for example, Crown Proceedings Act Cap7 (SI).

The Vanuatu Rules provide for service on the State or government by deeming a copy left at the State Law Office during business hours to be personally served.[75]

3.9 Service of persons on board ship

A person living or serving on a ship may be served by delivering the writ or document to the person in charge of the ship.

3.10 Service relating to a deceased estate

The CPR do not deal with service in proceedings in which the estate of a deceased person is a party. The Vanuatu Rules, however, specifically prove that, in such case, all documents must be served on one of the legal representatives of the estate.[76] The purpose and effect of this rule is not entirely clear. If a grant of probate or administration has been made, proceedings should be against the personal representative to whom the grant has been made, not the estate. Presumably then, this rule is directed to cases where there is no grant and proceedings are taken against the estate itself. However, the Rules cannot introduce substantive changes in the law[77] and statutory authority is required to allow proceedings against an estate. The Proceedings Against Estates Act 1970 (UK) may apply in Vanuatu to allow such actions.[78] If it does not, this rule would appear to be ineffective.

4 SUBSTITUTED SERVICE

4.1 Grounds for application

If a party is unable to serve a document personally, for example, because the other party is avoiding service or cannot be found, application may be made to the court for an order allowing the document to be served in some other way. This is known as 'substituted service'. The modes of service which may be applied for under the CPR are:[79]

(a) delivery to an adult at the party's last known residence or business place; or
(b) delivery to a party's agent or some other person who is likely to bring the document to the party's knowledge; or
(c) advertisement at the Public Office of the High Commissioner or Resident Commissioner;[80] and as directed by the court; or

75 R5.8(3) Van.
76 R5.11 Van. See also r3.9 which deals with the death of a party and in particular r3.9(2) which requires a personal representative to be named in proceedings.
77 See *Re Grosvenor Hotel, London (No 2)* [1965] Ch 1210.
78 See further Corrin Care, J *et al, Introduction to South Pacific Law,* 1999, London: Cavendish Publishing, p 55. Proceeding against an estate is not provided for in the Wills Act Cap 55 (Van).
79 O10 r1 CPR.
80 Reference to High Commissioner and Resident Commissioner is obviously no longer appropriate and should be read as the modern equivalent, being the Governor-General or Prime Minister (cf The Constitution (Adaptation and Modification of Existing Laws) Order 1978 (SI)).

(d) by notice put up at one of the following:
- the Court House; or
- the office of the District Commissioner or District Agent[81] or a public place within the district where proceedings were issued; or
- the party's usual or last known residence or place of business; or

(e) by prepaid registered letter addressed to the party at an address indicated in the affidavit, where it is likely to come to his/her notice; or
(f) [in Solomon Islands only] by service message through the Solomon Islands Broadcasting Corporation.[82]

Method (b) should be contrasted with O9 r14(2), where service on a 'recognised' agent is deemed to be effective without any court order. As the only difference appears to be the qualifying word 'recognised' in the latter, it would appear that, if the other party has agreed in writing or by unequivocal conduct that a person is his/her agent, no application for substituted service is necessary. Where there is any doubt that a person is a recognised agent, application should be made.

The modes of substituted service specified in the Vanuatu Rules are similar but are more suitable to the circumstances of the country. Under r5.9(2), a document may be served:

(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.

If substituted service by notice in the paper or by radio announcement is ordered, the message:[83]

(a) must be addressed to the person; and
(b) must give the person's name and last known address and the claimant's name and address for service; and
(c) must say where a copy of the document can be picked up by the person; and
(d) if the document requires the person to go to a court, must say the time, date and place of the court where the person is to go.

The modes of substituted service are not specified under the Fiji and Tongan Rules, but otherwise the substance of the Rules is similar to the CPR.[84]

81 The offices of District Commissioner and District Agent no longer exist. These references should be ignored and the alternative method of putting notice up in a public place requested.
82 This alternative was added by LN 4/85.
83 R5.9(3) Van.
84 O65 r4 Fiji; O1 r4(1) Tonga.

The Samoan Rules do not specify modes of service either and are even more general than the Fiji Rules. Rule 23 provides that the court may dispense with personal service on the grounds that reasonable efforts have been made to effect service; and either:

- the summons has come to the defendant's knowledge; or
- prompt personal service cannot be effected.

The court may grant this dispensation on such terms as it thinks fit. Normally it will impose terms that include a method of substituted service.

4.2 Procedure

Application for substituted service is made by *ex parte* summons, supported by affidavit, setting out the grounds on which application is made.[85] The affidavit should also include:

(a) facts showing that service cannot conveniently be effected;
(b) evidence of any attempts that have been made at service (although attempted service is not a prerequisite if the facts show that this would have been futile);
(c) where it is sought to serve on an agent or other person, under the CPR, facts which go to show that there is a reasonable probability that the document will come to the party's notice through that person;[86] and
(d) where it is sought to send the document by post, the address in question and facts that show that it is likely to come to the party's notice if sent to that address.

In Samoa, application is by *ex parte* motion, supported by affidavit or other evidence, showing where the defendant is likely to be and the grounds of the application.[87]

In Vanuatu, no particular form of application is specified and therefore it should be in the general application form, which is Form 10. The Form must be accompanied by a sworn statement (affidavit) setting out the 'reasons why the order should be made'.[88] In practice, the sworn statement should contain the same information as an affidavit under the CPR. Prior to the introduction of the Civil Procedure Rules 2002, the CPR had been amended in Vanuatu to allow for application for substituted service to be made orally without an affidavit.[89] This is not allowed under the new Rules. Although oral application during a conference is permitted,[90] this is unlikely to assist a party seeking substituted service which is required at the outset of proceedings.

85 O10 r3 CPR; O65 r4(2) Fiji; Oil r4(3) Tonga.
86 O10 r1(b) CPR.
87 R29(2) Samoa.
88 R7.2(4)(b).
89 O10 r3, as amended on 15 December 2000.
90 R7.2(2) Van.

5 SERVICE OUTSIDE THE JURISDICTION

5.1 Service outside the jurisdiction without leave

Under the CPR, service of a writ outside the jurisdiction in an action in contract is allowed without leave where the parties have agreed to this as a term of that contract.[91] In that case, service may be by the method and at the place agreed on. This is not the position in Fiji or Vanuatu, where the fact that the parties have submitted to the jurisdiction by contract is a ground for application for leave of the court, rather than an automatic entitlement.[92] Leave is also required in Tonga.[93] The matter is not addressed in the Samoan Rules. The common law allowing a foreigner to submit to the jurisdiction by contract would appear to apply,[94] but leave of the court to effect service on that basis will still be required.

The Fiji Rules also allow service outside the jurisdiction without leave where the claim is under a statute which specifically gives the court jurisdiction over the defendant.[95]

5.2 Service outside the jurisdiction with leave

5.2.1 Grounds for application

A party may apply to the court for an order that civil proceedings may be served outside the jurisdiction. Under the CPR, application may be made on any of the following grounds:[96]

(a) the whole action relates to land situated within the jurisdiction, or the presentation of testimony relating to land within the jurisdiction; or
(b) the action involves construction, rectification, setting aside, or enforcement of any act, deed, will, contract, obligation or liability affecting land within the jurisdiction; or
(c) relief is sought against any person domiciled[97] or ordinarily resident within the jurisdiction; or
(d) the action is for the administration of the estate of a person who dies domiciled within the jurisdiction or to execute the trusts of a written instrument relating to property within the jurisdiction, of which the person to be served is trustee and which ought to be executed according to the law of the country; or

91 Oil r2 CPR.
92 Oil r1(1)(d)(iv) Fiji; r5.14(2)(f) Van.
93 O12 r1(iv)(d) Tonga.
94 *International Finance and Services Ltd v South Pacific Island Airways Incorporated and Wray and Steffany* [1970–79] WSLR 267; *Vogel v R&A Kohnstamm Ltd* [1973] QB 133.
95 Oil r1(2) Fiji.
96 Oil r1 CPR.
97 A person is domiciled in the country in which they intend to make their home indefinitely.

(e) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief in respect of the breach of contract which:
- was made within the jurisdiction; or
- was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or
- is by its terms, or by implication, governed by the law of the country;
- or is a claim brought in respect of a breach committed within the jurisdiction of a contract wherever made, even if the breach was preceded or accompanied by a breach out of the jurisdiction that made it impossible to perform that part of the contract which ought to have been performed within the jurisdiction; or

(f) the action is founded on a tort committed[98] within the jurisdiction; or

(g) an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed; or

(h) any person outside the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; or

(i) the action relates to a mortgage of personal property situated within the jurisdiction and seeks relief such as sale, foreclosure, delivery of possession, redemption etc; but does not include a claim for any personal judgment or order for payment of monies due under the mortgage, except so far as permitted under paragraph (e).

The grounds under the Fiji Rules and Tongan Rules are similar, but not identical.[99]

The Vanuatu Rules are very similar to the CPR but extend the situations where application may be made in tort to those where damage is suffered in Vanuatu, whether or not the tort causing it happened in the country.[100] The Rules also allow the court to make an order permitting service outside Vanuatu if 'for any other reason the court is satisfied that it is necessary for the claim to be served on a person outside Vanuatu'.[101]

The Samoan rules are phrased more generally. Rule 28(1) provides:

> A summons may be served out of Western Samoa, by leave of the Court,
> (a) Where the cause of action or some material part thereof has arisen in Western Samoa;
> (b) Where the subject matter of the action is property situated in Western Samoa.

98 See *Distillers Co (Biochemicals) Ltd v Thompson* [1871] AC 458 for an explanation of when a tort will be committed within the jurisdiction.
99 Oil r1(1)(a) to (m) Fiji; O12 r1 Tonga.
100 R5.14(2)(i) Van.
101 R5.14(2)(m) Van.

5.2.2 *Procedure*

Application is by *ex parte* summons, supported by affidavit stating the following:

(a) that the deponent[102] believes the plaintiff to have a good cause of action;
(b) the place or country in which the defendant is or is probably[103] to be found;
(c) whether the defendant is a British subject[104] or not (only required under CPR);[105] and
(d) the grounds on which the application is made.[106]

Under the Fiji Rules, the content of the affidavit is slightly different. Whilst (a), (b) and (d) are common, (c) is not relevant. Where the application is made on the basis that any person outside the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, the affidavit must also give the grounds for the belief that there is a real issue to try between the plaintiff and the person whom it is sought to serve.[107]

In Samoa, the application is by *ex parte* motion, supported by affidavit, showing (b) and (d).[108]

In Vanuatu, the procedure is not specified and therefore Form 10, the general application form, should be used. The Form must be accompanied by a sworn statement (affidavit), setting out the 'reasons why the order should be made'.[109] In practice, the sworn statement should contain the same information as an affidavit under the Fiji Rules.

Where the defendant is not a British subject living within the Commonwealth, the CPR provide that notice of writ, rather than the writ itself must be served.[110]

In all jurisdictions of the region, the affidavit or sworn statement of facts should have a heading along the following lines:

> In the Matter of the High Court (Civil Procedure) Rules, 1964
> And in the matter of an intended action
> Between AB…Plaintiff and CD…Defendant.

Theoretically, any person with knowledge of the facts can make the affidavit, but it is usually made by the plaintiff's solicitor who states facts within his or her knowledge,

102 The person making the affidavit.
103 The word used in the text is 'properly', but this would appear to be a misprint for the word 'probably'. The RSC support this view, as the word 'probably' is used in Oil r4(1)(c), which is otherwise identical.
104 The term British subject and Commonwealth citizen have the same meaning: British Nationality Acts 1948–58.
105 During colonial times this was presumably regarded as a relevant factor to be taken into consideration in weighing the balance of convenience. It is now obsolete.
106 Oil r3 CPR; O12 r2 Tonga.
107 Oil r2(1)(d) Fiji.
108 O28r2 Samoa.
109 R7.2(4)(b).
110 Oil r5 CPR. Oil r3 RSC was revoked by RSC (Amendment No 4) 1980, SI 1980/2000 (UK) with effect from 2 June 1981. The writ itself is now served in all cases in the UK.

information and belief. As a general rule, the affidavit should not be made by a clerk but by a lawyer who is bound by the rules of professional conduct.

6 AFFIDAVIT OF SERVICE

Where service of any document must be proved, an affidavit of service should be filed after service. The exception to this is where service has been effected by a bailiff,[111] in which case signature of a certificate of service is *prima facie* evidence of service (O9 r18 CPR).

No form is specified in the CPR or Tongan Rules. Form 1 in Appendix 1 of the Fiji Rules includes an affidavit of service, as does Form 3 of the Samoan Rules.[112] An affidavit of service, based on the facts of Outboards Plus Ltd's case is contained in Sample Document J.

The Vanuatu Rules provide that no evidence of service is required if the defendant files a response or defence to a claim.[113] Similarly, no evidence is required if a party served with any other document files a subsequent document.[114] If the party served does not respond by filing a document, service must be proved prior to taking the next step in that action. Proof must be by filing a sworn statement setting out details of the time and manner of service.[115] An affidavit of service, based on the facts of Joseph Wale's case is contained in Sample Document K. Particular provision is made regarding the content of the sworn statement if substituted service was effected, but this sub-rule does not appear to add anything to the requirement that details of the time and manner of service are required.[116]

111 In Solomon Islands, a police or any court officer may serve: O9 r18 CPR, as amended by LN 4/85 (SI).

112 In Samoa, the affidavit must also comply with the requirements of the Oaths, Affirmations and Declarations Act 1963, Pt III.

113 R5.13(1) Van.

114 R5.13(2) Van.

115 R5.13(2) Van. See also r20.1, in which 'proof of service' is defined.

116 R5.13(3) Van provides: '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 of the announcement; and (c) for service in any other way, give details of how the document was served.'

SAMPLE DOCUMENT J—AFFIDAVIT OF SERVICE OF WRIT (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Jurisdiction no 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

AFFIDAVIT OF SERVICE

I, ALAN MEKE of Tandai Highway, Honiara, solicitor's clerk MAKE OATH and say as follows:

(1) On the 1st day of February 2003 I served the defendant, Aseri Toga, with a true copy of the writ of summons in this action by handing it to him at the Central Market, Honiara.

(2) On the 1st day of February 2003 I endorsed on the writ a memorandum of the day and date on which I served the defendant.

SWORN at Honiara
this 3rd day of February
2003

BEFORE ME

COMMISSIONER FOR OATHS/SOLICITOR

SAMPLE DOCUMENT K—SWORN STATEMENT OF SERVICE OF CLAIM (VANUATU)

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

CIVIL CASE NO 1112 OF 2003

BETWEEN

JOSEPH WALE

Claimant

Represented by JENNIFER JUSTICE

Claimant's lawyer

AND

SIMON PITA

First Defendant

AND

SOLBREAD (a Firm)

Second Defendant

Represented by ANN ADVOCATE

Defendants' lawyer

SWORN STATEMENT

I, Abraham Ngwele, law clerk, of Nambatu, Port Vila, Vanuatu, swear the following is true:

1. On the 1st day of May 2003 at about 4pm I served the first defendant, Simon Pita, with a true copy of the claim in this action by handing him a sealed copy of the claim at Red Light Nakamal, Second Lagoon, Port Vila.

2. I recognised the first defendant as being Simon Pita as he is well known to me.

SWORN by)
Abraham Ngwele)
on 2nd day of May)……
2003) Signature of person making statement

BEFORE ME

……..
Signature of witness
Commissioner for Oaths OR Notary Public

CHAPTER 7

APPEARANCE, ACKNOWLEDGMENT OF SERVICE AND RESPONSE

1 INTRODUCTION

If the defendant wishes to defend the proceedings or to temporise and prevent judgment in default being entered he/she must 'appear' by filing a document entitled a 'memorandum of appearance' (CPR), an 'acknowledgment of service' (Fiji), or a 'response' (Van). This is a formal step, referred to as an 'entry of appearance' taken by a defendant who has been served with a writ. It is dealt with in O12 of the CPR. The equivalent under the Fiji Rules is entry of acknowledgment of service, which is also dealt with in O12. In Vanuatu it is referred to as a response.[1] A response is not required if a defence is filed and served within the requisite time.[2]

Since the making of the Supreme Court (Civil Procedure Rules) 1980, appearance is no longer required in Samoa. The defendant proceeds directly to the filing of a defence and/or counterclaim.[3] Alternatively the defendant may file a confession if the claim is admitted.[4] Appearance is not required in Tonga where a defendant who wishes to contest the proceedings merely files a defence.[5]

2 TIME LIMIT FOR ENTRY

No time limit for entry of appearance is set out in the substantive Orders in the CPR. Rather, it is indicated that appearance may be entered at any time before judgment.[6] However, the writ Form in Appendix A indicates that there is a time limit of 14 days. It states, 'We command you, that within fourteen days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you'.

Under O12 r4(a) Fiji, the acknowledgment must be filed within 14 days after service of the writ. The time limit for filing and serving the response in Vanuatu is also 14 days.[7]

Where the writ is to be served outside the jurisdiction, the order giving leave must state the time limit for appearing (Oil r4; O12 r4(b)).

In all cases, provided that judgment has not been entered, appearance, acknowledgment of service or response may be entered out of time.[8] However, the

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1 R4.4(1) Van.
2 R4.4(3) Van.
3 Supreme Court (Civil Procedure Rules) 1980 (Samoa), r96.
4 *Ibid.*
5 Supreme Court Rules 1991 (Tonga), O8 r2(1).
6 O12 r11 CPR.
7 R4.13(1)(a) Van.
8 R4.14(1) Van; *Harrison's Timber v Haster* (1969) 22 Federal Law Reports 258.

Vanuatu Rules go on to say that, 'The court may decide whether or not the document is effective for the proceeding'.[9] It is not clear when this decision will be made by the court or whether application by the other party is required. The Rules go on to list the factors to be taken into account by the court in deciding whether a late filed document is effective:

(a) the reasons why the document was filed late; and
(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.[10]

If the court decides the filing is not effective it 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 filing.[11]

3 PROCEDURE

Appearance is entered by delivery of the memorandum of appearance or acknowledgment of service to the registrar of the court, together with a duplicate. In practice three copies are usually filed: one for the court, one for the defendant to keep and one for service. The registrar will seal and date the documents and enter the appearance or acknowledgment in the cause book (O12 r8; O12 r3(b)).

The Vanuatu Rules merely provide that the response must be filed and served.[12] The word 'filed' is not defined.

3.1 Forms

Under the CPR, Fiji and Vanuatu Rules, the form of response is prescribed. In the CPR it is in Appendix A, Pt V, Form 10; in Fiji it is in Form 2; in Vanuatu it is in Form 7. In the Fiji Rules, the title of the action is filled in on the acknowledgment form by the plaintiff and sent with the writ to the defendant to be completed (O6 r6(4) Fiji). Under the Vanuatu Rules, the claimant must send the response form to the defendant with the claim.[13] The Rules do not make it clear who is required to complete the title of that action, but in practice it would be prudent for the claimant to do this. Under the CPR, the defendant must draw up and complete the document.

3.2 Other formalities

(a) The memorandum of appearance, acknowledgment of service or response must be signed by the defendant or the defendant's solicitor.[14]

9 R4.14(2) Van.
10 R4.14(3)Van.
11 R4.14(4) Van.
12 R4.4(1)Van.
13 R4.3(1)(e) Van.
14 O12 r2 Fiji; r4.4(2)(c) Van. The CPR do not specify signature, but this is implicit in O12 r2(1), which requires the memorandum to be 'fully filled up'.

(b) If the defendant acts in person, the document must specify the defendant's residential address and if this is not within the jurisdiction, an address for service outside the jurisdiction.[15] Although the wording of the Fiji Rules does not appear to require it, the form envisages that the defendant's residential address will be given, even if the defendant is represented. In the case of a body corporate the address must be the registered or principal office of the body.[16] The address given becomes the address for service. The Vanuatu Rules are much more straightforward and simply require the response to set out the defendant's address for service.[17]

(c) If the defendant is represented, the memorandum of appearance or acknowledgment of service must specify the solicitor's business address.[18] If the solicitor is an agent, the principal's name and address must also be given.[19]

If the address is not given, or if it is possible to prove that the address given is not genuine, the plaintiff may apply to the court to have the appearance set aside.[20] For example, in *A v* B,[21] a defendant's memorandum of appearance gave an address for service where he had ceased to live and where there was no one to receive and forward documents. The appearance was set aside.

If Joseph Wale's case was proceeding in Solomon Islands, both defendants would have to file a memorandum of appearance if they wanted to defend the claim. Simon Pita's memorandum is contained in Sample Document L. An example of the response which would have to be filed by Solbread if the case was proceeding in Vanuatu is contained in Sample Document M. An example of an acknowledgment of service, which would have to be filed by the defendant if Outboards Plus Ltd's case was proceeding in Fiji Islands is contained in Sample Document N.

15 O12 r5 CPR; O12 r2(2) Fiji.
16 O12 r2(2) Fiji.
17 R4.4(2)(a) Van.
18 O12 r4 CPR; O12 r2(2)(b) Fiji.
19 O12 r2(3) Fiji.
20 O12 r6 CPR; O12 r2(4) Fiji.
21 [1883] WN 174.

SAMPLE DOCUMENT L—UNCONDITIONAL APPEARANCE (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Jurisdiction no 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

MEMORANDUM OF APPEARANCE

Enter an appearance for Simon Pita, the First Defendant, in this action.

Dated the 13th day of May 2003

.....

Ann Advocate

Advocate for the Defendant, whose address for service is 2nd Floor, Anthony Saru Building, Honiara.

SAMPLE DOCUMENT M—RESPONSE (VANUATU)

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (CIVIL JURISDICTION)

CIVIL CASE NO 1112 OF 2003

BETWEEN

JOSEPH WALE

Claimant

Represented by JENNIFER JUSTICE

Claimant's lawyer

AND

SIMON PITA

First Defendant

AND

SOLBREAD (a Firm)

Second Defendant

Represented by ANN ADVOCATE

Defendants' lawyer

RESPONSE

The second defendant's address for service of documents is:

Seaview Chambers, Kumul Highway, Port Vila, Vanuatu.

Second defendant's address for service.
You must tell the court and the other parties immediately if you change this address.

I have received a copy of the claim in this case.

Please tick appropriate box or boxes

☐ 1. I agree the claim is correct.

☐ 2. I dispute part of the claim.

☐ 3. I dispute all of the claim.

☐ 4. I want to make a counterclaim.

YOU MUST return this form to court and serve a copy on the claimant, within 14 days from when you received the claim. If you have ticked box 2 or 3 you must file a defence and serve a copy on the claimant, in 28 days from when you received the claim. If you have ticked box 4 you must file a defence and counterclaim and serve them on the claimant, in 28 days from when you received the claim.

.....

Ann Advocate

Signature of defendant's lawyer, or defendant if defendant does not have a lawyer

Date of filing: 13 May 2003
Filed by:

Ann Advocate
Lawyer for the second defendant
Seaview Chambers, Kumul Highway, Port Vila, Vanuatu.

SAMPLE DOCUMENT N—ACKNOWLEDGMENT OF SERVICE (FIJI)

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
CIVIL ACTION NO 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

Service of the Writ is hereby acknowledged by Aseri Toga of 99 Seni Buadromo Road, Suva Point, Suva.[1]

The Defendant does* intend to contest the proceedings.

does not*

The Defendant does* intend to apply for a stay of execution

does not*

against any judgment entered by the Plaintiff.[2]

The Defendant does* intend to apply for the transfer of the action to

does not*

the High Court at (*here insert where transfer is to be applied for if applicable*).

Dated the 30th day of January 2003

.....

Ann Advocate, solicitor for the Defendant, whose address for service is Unit 2, Palm Close, Victoria Parade, Suva.

*Delete whichever is inapplicable.

1. If this acknowledgment is given by a barrister and solicitor, his or her full name and address for service should be stated as well.
2. This is appropriate if–
   (a) the claim on the writ is for a debt or liquidated demand; and
   (b) the Defendant does not intend to contest the claim.

The court will do its best to give effect to the memorandum of appearance, acknowledgment of service or response, even if it is irregular.[22]

3.3 Service

Service under the CPR depends on whether the defendant is appearing in person or not. A defendant who enters an appearance in person may do so through the post, in which case the defendant should include a notice of appearance[23] for the plaintiff and one copy of the notice for the court file together with a sufficiently stamped envelope. The registrar will then arrange for service of the notice of appearance on the plaintiff (O12 r2). In practice, it is rare for the registrar to be requested to serve a notice of appearance. Where the registrar is not so requested, the CPR provide that notice in writing, together with a sealed duplicate of the memorandum, must be served at the address for service, or sent by post to that address on the same day as entry of appearance (O12 r3(1)).

In Fiji, under O12 r3(c), the acknowledgment is served by post by the registrar on the plaintiff or his/her solicitor.

4 CONDITIONAL APPEARANCE

Under the CPR, if the defendant wishes to challenge the jurisdiction of the court or the regularity of the writ or service, he/she must enter a conditional appearance. Entry of a normal, or 'unconditional appearance', as it is known, is usually taken to be a submission to the jurisdiction and a waiver of any antecedent irregularities.[24]

In *Kumagai Gumi Limited v Attorney-General*,[25] the defendant applied to strike out the statement of claim on the ground that it contained evidentiary material. The plaintiff responded, *inter alia*, that by filing an unconditional appearance, the defendant had effectively waived any irregularities. Palmer ACJ, finding for the plaintiff, held that:

> There is clear authority in this jurisdiction which provides that where such action, that is an unconditional appearance is entered, that it virtually puts an end to the right to object to the jurisdiction of the court and amounts to an effective waiver of any irregularities raised in this application (see *Silvania Products (Australia) Ltd v John William Storey* [1990] SILR 41, 43–44, *per* Ward CJ; *Tiffany Glass Ltd v F Plan Ltd* [1979] 31 WIR 470, 472, 478, 494). The common approach usually taken in such circumstances is to file conditional appearance and then proceed to apply to have the Writ and Statement of Claim struck out for non-compliance with the rules.[26]

Similarly, in Samoa, prior to the making of the Supreme Court (Civil Procedure Rules) 1980, when appearance was still required, it was held that defendants who enter an

22 See *Tsai v Woodworth* (1983) 127 SJ 858; *Bundy v Lloyds Bank plc* (1991) 135 SJ 412.
23 There is no prescribed form for the notice. Normally it will consist of a letter to the plaintiff stating that appearance has been entered.
24 It does not confer jurisdiction on the court that it would otherwise not have. See *Wilkinson v Barking Corp* [1948] 1 KB 721.
25 Unreported, High Court, Solomon Islands, Civ Cas 92/2002, 26 July 2002.
26 *Ibid, at 2.*

unconditional appearance are deemed to have submitted to the jurisdiction.[27] A conditional appearance, on the other hand, usually preserves the defendant's right to object to the jurisdiction or irregularities in procedure and also prevents the entry of a judgment in default. A defendant must draft the conditional appearance carefully, because if it goes further than challenging the jurisdiction or irregularity, the defendant may be taken to have accepted jurisdiction. However, where the defendant makes it clear that there is no waiver of the irregularity and no argument is addressed to the substance of the case, pressing an objection will not be deemed to be submission to the jurisdiction.[28]

The proper form of wording is:

> Enter conditional appearance for Simon Pita, without prejudice to an application to set aside the writ.

Application to have the writ or service set aside should be made promptly after the conditional appearance has been entered. If the defendant does not make such application within a reasonable time, the appearance will become unconditional.[29] In *Slater and Gordon and Others v Ross Mining (Solomon Islands) Ltd and Others*,[30] the Court of Appeal of Solomon Islands held that the application to set aside must be made before the expiry of the time for entry of appearance. In the absence of such application within that time, the appearance becomes unconditional. It therefore constitutes an acknowledgment of jurisdiction and overcomes any deficiency in the making of the order for service of the writ out of the jurisdiction.

No leave to enter conditional appearance is required.[31]

Conditional acknowledgment is not necessary under the Fiji Rules, as acknowledgment stating an intention to defend does not waive an irregularity in purported service, nor does it amount to a submission to the jurisdiction of the court (O12 rr6 and 7(5) Fiji). However, the notice of intention to defend must be followed by an application to the court by notice of motion or summons disputing the point in question.[32] This application must be made within the time for service of defence.[33] Provided this time limit is complied with, considerable latitude may be allowed in dealing with objections. In *Caribbean Gold Ltd v Alga Shipping Co Ltd*,[34] service was acknowledged under the similar English rule and the defendant took almost five months to object to defective service. Nevertheless, this was held not to amount to a waiver of irregularity.

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27 *International Finance and Services Ltd v South Pacific Island Airways Incorporated and Wray and Steffany* [1970–79] WSLR 267. In that case, the defendants had also entered a defence.
28 *Williams and Glyns Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438. See also *Laurie v Carroll* (1958) 98 CLR 310.
29 *Murfin v Ashbridge and Martin* [1941] 1 All ER 231.
30 Unreported, Court of Appeal, Solomon Islands, Civ App 7/1999, 23 November 1999.
31 But see *Slater and Gordon and Others v Ross Mining (Solomon Islands) Ltd and Others*, unreported, Court of Appeal, Solomon Islands, Civ App 7/1999, 23 November 1999, where it was suggested that conditional appearance entered without leave was irregular, although it was allowed to stand as an unconditional appearance. Leave was required under the equivalent rule, which formerly applied in England (O12 r7 RSC) and it is still required in certain Australian states, such as Victoria.
32 O12 r7(2) Fiji.
33 O12 r7(1) Fiji.
34 [1993] 1 WLR 1100.

CHAPTER 8

PLEADINGS

1 DEFINITION, HISTORY AND PURPOSE OF PLEADINGS

1.1 Definition

Pleadings are formal written statements of the parties' allegations. A pleading is more specifically defined in O1 r1 of the CPR to include:

> …any petition or summons and also includes the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any counterclaim of a defendant…

O1 r2(1) Fiji contains a similar definition:

> [A] 'pleading' includes any petition or summons and also includes the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any counterclaim of a defendant; but does not include a petition, summons or preliminary act.

This rule is contradictory in that it defines pleading to both include and exclude a petition or summons.

The Vanuatu Rules replace the term 'pleadings' with the term 'statements of the case'.[1] Statements of the case are set out in the claim, defence or reply.[2] The term is not specifically defined but their purpose is stated in r4.1(2) which is set out below.

1.2 History

Pleadings are almost as old as the system of common law itself. And just as the common law has evolved, so have the rules relating to pleadings and their importance.

Pleadings originated over 500 years ago in England. At that time, judges were sent by the monarch to the various centres in the country to hold court. Before a case began, it was necessary for the judge to know what it was about and for the parties to know what the allegations of the other side were. The usual practice was for the parties to state their case before the judge. Each party would make allegations against the other and reply to the allegations against them. This process became known as 'pleading' the case. Individuals who were experienced in the practice of pleading sometimes spoke for the parties. They became known as 'pleaders'.

After the parties or their pleaders had stated their case, they had to agree upon the issue to be decided by the judge. The issue was written down on a piece of parchment. In this way, the court and the parties could identify the question to be decided before

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1 R4.1(1) Van.
2 R4.1(1) Van.

the commencement of the case. The trial could then begin and the judge and jury could resolve the question that had been written down.

The practice of pleading the case evolved further. It became common for the parties to borrow the parchment from the court and take it in turn to write on it their allegations and their response to the other party's allegations. As the process continued to evolve, the parties began using separate paper for their pleadings. This eventually developed into the modern practice of exchanging written pleadings prior to the trial.

The system of pleading which developed and which was used until the middle of the 19th century was very rigid. Different substantive rights required different methods of procedure. Actions had to be commenced by the appropriate document known as a form of action and each form of action had rules of pleading of its own.[3] These rules often stipulated a very technical and complex form of pleading. Claims based on pleadings that did not conform to the specific requirements would be defeated. This development continued to such an extent that sometimes the merits of a litigant's claim would have little or nothing to do with the success of that claim.

The law of civil procedure no longer places such emphasis on the technical adherence to precedents of pleading. Parties have greater latitude in drafting pleadings and pleadings may reflect the issues in plain language. The rules also allow pleadings to be amended in many circumstances, to enable courts to determine cases on their merits. However, pleadings bind the parties as to the relevant issues and thus remain important components of civil litigation.[4]

1.3 The purpose of pleadings

In *Philipp (Chris) v LT Endemann & Company Ltd*,[5] the Court of Appeal of Samoa said that:

> The purpose of pleadings is to show exactly and unambiguously what allegations are made by one party and what the other party admits and denies in order to define the issues and thereby to inform the parties in advance of the case they have to meet. *Farrell v The Secretary of State for Defence* [1980] 1 All ER 166 at 173. In Sim's and Cain's *Practice and Procedure* it is put, on the authority of Master Williams in the unreported case of *National Bank of New Zealand v National Westminster Finance* that the underlying premise in litigation is that litigation is designed to enable the parties to deal with the real matters in controversy between them and to enable the court to adjudicate on those matters.

Pleadings may also provide a useful record of the issues for the judge. So, the two main purposes of pleadings are:

- To inform the other side of the case that they have to meet and thus to ensure that they are not taken by surprise at trial.

3 See further Maitland, *The Forms of Action at Common Law,* 1968, Cambridge: CUP.

4 See for example, *Carpenters Fiji Ltd v Virendra Karan,* unreported, High Court, Fiji Islands, Civ App 247/1995, 10 December 1997. In that case, the defendant was not allowed to submit that the fire which damaged the plaintiff's vehicle whilst in the defendant's garage started elsewhere and spread to the defendant's garage, as this had not been pleaded.

5 [1980–93] WSLR 539.

- To provide a summary of the contentions that will be put forward by the parties so that the trial judge can see what is at issue between the parties.

More particularly:

- Pleadings define the scope of the litigation.
  The pleadings, taken together, define the issues. Theoretically, the parties cannot adduce evidence or argue outside the scope of those issues.[6]
- Pleadings confirm the jurisdiction of the court.
  Because the pleadings define the issues to be decided and the amount and type of claim being made, they also indicate whether the court has jurisdiction. This may be important even where a case is brought in a superior court. For example, in most countries of the region, a customary land dispute cannot be brought in the first instance in a court of general jurisdiction.
- Pleadings provide parties with particulars of claims or defences.
  This is in contrast with the originating process, which by itself provides a party with limited information about particulars.
- Pleadings permit each side to conduct discovery effectively and prepare for trial.
  They also limit the range of discovery. This is because the issues that are identified in pleadings delineate what is relevant.
- Pleadings show on their face whether a reasonable cause of action or defence is disclosed.
- Pleadings permit the parties to make a choice of the appropriate mode of resolution of the dispute.
  If the pleadings show that the resolution of a point of law will dispose of the case, then it may be more appropriate to raise a preliminary point of law than to go to a full trial. Similarly, pleadings may indicate that an application for summary judgment may be appropriate.
- Pleadings serve as a record of what the litigation was about.
  This might be useful if *res judicata* is subsequently raised.
- Pleadings allow a judge to identify the issues in advance of the trial and prepare accordingly.
  Pleadings may be the only 'window' that a judge has through which to view the case before the trial begins. This is especially true if the judge presiding at trial has not presided over any interlocutory proceedings.

In Vanuatu, the purpose of statements of the case is set out in the Rules to be to:[7]

(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

6 See *Carpenters Fiji Limited v Virendra Karan*, unreported, High Court, Fiji, Civ App 247/95, 10 December 1997, where Pathik J said 'the Court is bound by pleadings and it cannot go outside [them] in considering the issues before it'.

7 R4.1(2) Van.

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

2 GENERAL PRINCIPLES

There are three types of procedural rules that govern pleadings:

- General rules that apply to all pleading documents and all types of plea.[8]
- Special rules that apply to all pleading documents, but only to certain types of plea. For example, rules that apply only when a criminal conviction is being pleaded.
- Rules that apply only to particular pleading documents. For example, rules that apply only to the statement of claim.

This section deals with general rules of court that govern all pleadings. Some of these rules are fundamental, others are of a technical nature. It should be noted that failure to comply with technical requirements will not be fatal. For example, O21 r28 CPR provides that 'no technical objection shall be raised to any pleading on the ground of any alleged want of form'.

2.1 Forms

The CPR require pleadings to be in the Forms specified in Appendices C, D and E, where they are applicable. In other cases the Forms should be adapted.[9] In Vanuatu, Forms 5 and 8 are to be used for claims and defences respectively.[10] There are no Forms for pleadings in the Fiji Rules. The Samoan Forms contain a statement of claim for use in a claim for goods rendered or goods sold and delivered[11] but no other pleading precedents. The Tongan Rules do not contain any pleading Forms.

2.2 Material facts not evidence or law must be pleaded

The CPR Rules contain the following general rule of pleading:

> Every pleading shall contain and contain only a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved…[12]

The effect of this rule was summarised by Palmer J in *Kumagai Gumi Limited v Attorney-General*,[13] where he said that pleadings, 'must set out the facts and not law, the material facts and not evidence and must do so in summary form'.

The equivalent of O21 r4 in the Fiji High Court Rules is O18 r6(1):

8 The Samoan and Tongan Rules do not contain any general principles of pleading.
9 O21 r5 CPR.
10 Rr4.3(1)(c) and 4.5(7) Van.
11 Form 2 Samoa. See Sample Document G in Chapter 5.
12 O21 r4 CPR.
13 Unreported, High Court, Solomon Islands, Civ Cas 92/2002, 26 July 2002.

> [E]very pleading must contain and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved and the statement must be as brief as the nature of the case admits.

In Vanuatu, r4.2(1) states:

> Each statement of the case must:
>
> (a) be as brief as the nature of the case permits; and
> (b) set out all the relevant facts on which the party relies, but not the evidence to prove them; and
> (c) identify any statute or principle of law on which the party relies, but not contain the legal arguments about it; and
> (d) if the party is relying on custom law, state the custom law.

Rule 4.2(1)(d), requiring custom to be pleaded, is discussed under special rules in paragraph 3.4 below.

Whilst they are differently worded, the CPR, Fiji and Vanuatu Rules, set out above, all give rise to three requirements as to the contents of pleadings:

(a) the material facts of the claim must be briefly stated;
(b) evidence must not be pleaded;
(c) (by implication) law must not be pleaded.

These requirements merit individual consideration.

2.2.1 The material facts of the claim must be briefly stated

'Material' means directly connected with the cause of action. To put it another way, material facts are essential to the case to be argued and proved at trial. The first step in drafting pleadings is, therefore, to isolate the elements of the cause of action. For example, in a claim based on negligence, the cause of action consists of:

- a duty of care;
- breach of duty;
- damage.

Every fact which is material to proving any of these elements must be put into the document.

In an action for breach of contract the facts pleaded will have to show:

- agreement;
- inclusion of the terms material to the dispute in that agreement;
- breach of those terms.

If a material fact is left out, resulting in a failure in the alleged facts to show a cause of action, then the pleading is defective and the court has a discretion to strike it out.[14]

14 *Bruce v Oldhams Press Ltd* [1936] 1 KB 697.

The pleadings must also be in summary form. Drafting concise pleadings is a task that takes practice to perfect. However, apart from being a requirement of the rules, pleadings that are concise are less likely to contain inconsistencies that the other side can rely on to its advantage.

2.2.2 *Evidence must not be pleaded*

The facts that constitute the cause of action must be pleaded, that is, the primary or ultimate facts. What must not be pleaded is the evidence by which those facts will be proved, that is, secondary facts. This rule has been endorsed in Fiji, in the case of *Sama Rajin v Bhajin*.[15]

The difficulty with this rule is that it is often difficult to draw the line between facts and proof of those facts. There is no clear dividing line between the two. Sometimes facts may be both facts and evidence. For example, if you are alleging breach of contract and relying on a particular term of the contract, the inclusion of that term may be a fact; it may also be evidence of what was agreed. It may be useful to think of the facts as being the story of what happened and evidence as being how it may be shown that the story is true. Sometimes facts may constitute evidence as well. An example of a straightforward case can be given from a personal injury claim arising from a 'running down' case. As shown in the sample statement of claim, the plea might be:

> On or about the 1st day of July 1997, the Plaintiff was lawfully using the verge at the side of road known as Lengakiki Hill, facing oncoming traffic and heading in the direction of Honiara town centre, when a motor vehicle, registration no 4785, the property of the Second Defendant and driven by the First Defendant as the servant or agent of the Second Defendant, mounted the verge and there collided with and knocked down the Plaintiff.

It would be inappropriate to add 'and Wilson Koro was a witness to the same'.

2.2.3 *Law must not be pleaded*

Generally, law should not be pleaded as the court is presumed to know the law. The legal basis of the case is a matter for argument and not for pleadings which are where the facts are summarised. It is for the court to decide what cause of action is disclosed by those facts. For example, where a plaintiff is claiming damages for assault, it would not be appropriate to plead that 'the defendant committed an assault on the plaintiff. Rather the facts that constitute the assault should be pleaded, for example, 'the defendant struck the plaintiff in the face with his fist'.

Just as is the case with the line between primary facts and evidence, the line between fact and law is not clear cut. For example, in *Phillips v Phillips,*[16] the pleading stated that the effect of certain documents was that the plaintiff was entitled to certain land. He argued that this was proper pleading, as the effect of a document was a fact. The court held that the effect was the meaning given to it by the court, which is law. The plaintiff

15 (1976) 22 FLR 160.
16 (1878) 4 QBD 127.

should have set forth the purport of the document and left the court to draw the conclusion of law.

In accordance with this principle it is best to avoid words like 'wrongfully' and 'entitled', which are legal conclusions or consequences rather than facts.

One advantage of this rule is that the plaintiff is not precluded from obtaining a remedy justified by the facts alleged, even though it has not been specifically raised and may not have been what the plaintiff was actually claiming. This situation arose in *Drane v Evangelou*.[17] The plaintiff was lessee of a flat and was protected from eviction by the Rent Acts (UK). While he was out, the landlord broke in, put the plaintiff's belongings into the back yard and bolted himself and his relations into the flat. In his particulars of claim, the plaintiff alleged that the landlord had interfered with his right to quiet enjoyment of the premises by unlawful eviction and gave material facts alleged to support this. It was held that the facts particularised amounted to a trespass and the trial judge was right to make an award of exemplary damages, even though neither trespass nor exemplary damages had been claimed in the pleadings.

However, there are exceptions to this rule. Probably the most important one is negligence, which should be mentioned specifically in the pleading. Another important example is statutory limitation. If a defendant wishes to rely upon the provisions of a Limitation Act as a defence to the plaintiff's claim, it should be pleaded. In *Suva City Council v KW March Ltd*,[18] Byrne J refused to take into account the defendant's submission on limitation as this had not been raised in the pleadings.[19] Fraud and lack of capacity are other exceptions to this rule.

There are two situations mentioned in the CPR and Fiji Rules in which law must be pleaded:

- Where a party wishes to raise a point of law on the pleadings.
- Where a party is pleading a ground of defence or reply which might take the other party by surprise.[20]

Pleading a ground of defence or reply which might take the other party by surprise is discussed at paragraph 4.2 below.

Raising a point of law on the pleadings is a convenient course, which allows a party to take a preliminary point on the facts as pleaded.[21] O27 r2 goes on to say that the point may be set down for hearing as a preliminary issue by consent or by order of the court on application by either party. The same procedure is available by court order under O33 r3 Fiji. Advantage should be taken of this procedure wherever costs can be saved by a point of law that requires serious argument and consideration being disposed of before the trial.[22] Application to set down a preliminary point should be made by summons or on the summons for directions. In *Tahani v Attorney-General and Commissioner of Lands*,[23] Kabui

17 [1978] 1WLR 455.
18 Unreported, High Court, Fiji, Civ App 957/82, 15 May 1997.
19 See also *Pacific Commercial Bank Ltd v Nonumalo* [1980–93] WSLR 529 (Samoa); *Tofe v Fera*, unreported, High Court, Solomon Islands, Civ Cas 230/1999, 26 July 1999.
20 O21 r6 CPR; O18 r7 Fiji.
21 O27 r2 CPR; O18 r10 Fiji. See section 3 below.
22 *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 1 Ch 93.

LJ of the High Court of Solomon Islands, refused to deal with a preliminary point which had been set down by notice of motion, on the basis that there was no court order by consent or otherwise that the point be dealt with as a preliminary matter. Nor was there any other evidence of consent. Rather than considering whether it was an appropriate case for the court to order the preliminary point to be heard, His Lordship refused to hear the matter at all.

The Samoan Rules do not specifically require a party to plead points of law, but the general provision that the statement of claim must specify sufficient particulars to ensure that the other party is 'fully and fairly informed of the cause of action' would require this.[24] Further, the Rules permit a point of law to be raised as a special case prior to trial and a party intending to take this course should raise the issue in the pleadings, although this is not required by the Rules.[25]

The Vanuatu Rules take a more straightforward approach and provide that a party must 'identify any statute or principle of law on which the party relies, but not contain the legal arguments about it'.[26] They also provide that a defence or reply must specifically mention a matter that 'makes another party's claim or defence not maintainable'[27] or 'may take another party by surprise if it is not mentioned'.[28] This is discussed at paragraph 4.2 below.

Matters of law falling within either of these categories would obviously have to be pleaded.

2.3 Paragraphs and numbering

O21 r4 of the CPR states that pleadings:

> [S]hall, when necessary, be divided into paragraphs, numbered consecutively.

The equivalent in the Fiji Rules is O18 r5(2):

> Every pleading must, if necessary, be divided into paragraphs numbered consecutively, each allegation being so far as convenient contained in a separate paragraph.

The Vanuatu Rule 2.6(3)(d) provides that all pleadings shall:

> [B]e divided into consecutively numbered paragraphs, with each paragraph dealing with a separate matter.

2.4 Dates, sums and numbers

O21 r4 of the CPR states that in pleadings:

> Dates, sums and numbers shall be expressed in figures and not in words.

23 Unreported, High Court, Solomon Islands, Civ Cas 245/2001, 18 April 2002.
24 R15(1) Samoa.
25 R123 Samoa.
26 R4.2(1)(c) Van.
27 R4.7(a)Van.
28 R4.7(c)Van.

O18 r5(3) of the Fiji Rules is almost identical:

> Dates, sums and other numbers must be expressed in a pleading in figures and not in words.

2.5 Signature

O21 r4 of the CPR states:

> Where pleadings have been settled by an advocate they shall be signed by him; and if not so settled they shall be signed by the party if he sues or defends in person.

The Fiji equivalent is O18 r5(5):

> Every pleading must be signed by the party's solicitor or by the party, if he sues or defends in person.

2.6 Endorsement and marking

O21 r13 of the CPR states:

> Every pleading…shall be marked with the date of the day on which it is delivered, the reference of the letter and number of the action, the title of the action and the description of the pleading and shall be endorsed with the name and place of business of the advocate and agent, if any, delivering the same, or the name and address of the party delivering the same if he does not act by an advocate.

The Fiji Rules contain equivalent provisions in O18 r5(1) and O18 r5(4). Similar provision is also made in the Vanuatu Rules.[29]

2.7 Typed or handwritten

Pleadings may be typed, handwritten or partly typed and partly handwritten.[30] The Vanuatu Rules provide that pleadings must be typewritten or in neat legible handwriting.[31]

3 SPECIAL RULES

This section describes the special rules that apply to all pleading documents, but only to certain types of plea.

3.1 Matters which must be particularised

In certain cases, the plaintiff must give not only material facts, but also 'particulars'. Particulars are more specific details of the material facts alleged. When a party finds it necessary to request further details of the facts alleged in a pleading, particulars are usually referred to as 'further and better particulars'. The object of particulars is to enable the

29 R2.6(1) and (3)(e) Van.
30 O21 r11 CPR.
31 R2.6(3)(a) Van.

other party to know the case he/she has to answer at trial and to avoid a party being taken by surprise and thereby to save unnecessary expense.[32]

If the other party's immediate response on receiving the pleading is likely to be, 'how?' 'why?' or 'how much?', it is an indication that particulars are required. This will often be the case with damages. It is also the case with negligence. Particulars may be included in the paragraph of material facts, but it is more common to put them in a separate paragraph, sub-headed 'particulars' or more specifically, for example, 'particulars of negligence'.

O21 r6 CPR and Oil r4 Fiji state that particulars are always required where a party relies on:

- misrepresentation;
- fraud;
- breach of trust;
- wilful default;
- undue influence; or
- innuendo, in a defamation action.

The extent to which a claim of fraud must be particularised was discussed in *Hickes v Faddy*, a case decided in Fiji on O19 r7 RSC, which is similar to Oil r4, currently applying in Fiji.[33] In that case, it was held that the acts alleged to be fraudulent must be stated. It is then sufficient to allege fraudulent intention as a fact without setting out the circumstances from which that intention is to be inferred.

The Fiji Rules also require particulars of any condition of mind relied on, other than knowledge, to be particularised.[34] This includes:

- mental disorder or disability;
- malice; and
- fraudulent intention.

O21 r23 CPR specifically states that particulars are not necessary in such cases, except where malice is relied on in an action for libel or slander.

The CPR also state that if particulars of debt, expenses or damages exceed three 'folios',[35] that must be stated and a reference made to where the full details can be found, either in particulars already delivered, for example, with a letter before action, or in a document to be delivered with the pleading.[36]

3.2 Pleading a criminal conviction

Particulars are specifically required by the Fiji Rules where a party wishes to rely on a criminal conviction. O1 r10 provides that a party intending to rely on a conviction as

32 *Hickes v Faddy* (1925) II Supreme Court Cases (Fiji) 132, citing *Spedding v Fitzpatrick* (1888) 38 Ch D 410.
33 (1925) II Supreme Court Cases (Fiji) 132 at 133.
34 Oil r4 Fiji provides that the court may order a party to serve particulars of knowledge or notice.
35 'Folio' is not defined in the regional rules, but is defined by O1 r4 RSC as meaning 72 words.
36 O21 r6(1) CPR.

evidence in civil proceedings must include in their pleadings a statement of intention to do so and particulars of:

(a) the conviction and the date thereof;
(b) the court which made the conviction; and
(c) the issue in the proceedings to which the conviction is relevant.

This Rule should be read with s 17 of the Civil Evidence Act 2000 (Fiji), which allows a criminal conviction to be admitted in evidence in civil proceedings. The Rule constitutes a departure from the principle that evidence should not be pleaded. To the contrary, evidence of the conviction must be pleaded in order to be proved.

There is no such rule in the CPR. This results from the fact that, at the time those rules were drafted, evidence of criminal convictions was inadmissible in the countries where the rules applied. This is still the case, but in practice, criminal convictions are pleaded in Solomon Islands. An example of the manner of such pleading is contained in the Sample Document N.

In Vanuatu, s 11 of the Civil Evidence Act 1968 (UK), which abolished the English common law rule in *Hollington v F Hewthorn & Co Ltd*,[37] applies to allow convictions to be admitted as evidence in a civil case. Unfortunately, the Civil Procedure Rules 2002 do not make any provision regarding the procedure to be followed by a party who wishes to rely on a criminal conviction. They do make provision for a party who takes advantage of s 213 of the Criminal Procedure Code[38] to raise a civil claim in criminal proceedings, stating that the Civil Procedure Rules 2002 will apply to the progress and hearing of the civil claim in the criminal proceedings.[39]

The Evidence Act 1961 of Samoa does not appear to permit a conviction to be relied upon in civil proceedings and this is no doubt why the Rules are silent on the point.[40]

Section 96 of the Evidence Act Cap 15 (Tonga)[41] provides for a conviction to be admitted in evidence, but no provision is made in the Tongan Rules for pleading a conviction. The Civil Evidence Act 1972 (Nauru) also provides for a conviction to be admissible as evidence in civil proceedings.[42]

Even where a criminal conviction is admissible, it is not proof of the facts on which the conviction is based. The effect of pleading such a conviction is to reverse the burden of proof. The convicted party may bring evidence that the conviction was erroneous. In *Tebara Transport Ltd v Attorney-General*,[43] the Supreme Court of Fiji upheld the magistrate's finding that, in spite of the criminal conviction for driving without

37 [1943] KB 587.
38 Cap 136 Van.
39 R16.21.
40 In practice it would appear that criminal convictions are pleaded in civil cases. This practice is open to challenge on the basis of English common law which applies so far as it is not excluded by any other law in force in Samoa: s 111(1) of the Constitution.
41 As amended.
42 Section 12.
43 Unreported, Supreme Court, Fiji, Civ App 2/80.

due care and attention, the evidence before the court showed that the defendant was not negligent.[44]

3.3 Pleading the effect of a document

Where the effect of any document is material, the effect should be briefly stated.[45] Extracts from the document should be set out only if they are material.[46]

The Fiji Rules add to this by saying that the purport of any conversation must also be stated briefly [47]

3.4 Pleading indigenous custom or law

O21 r30 CPR provides that a party who is relying on native law or custom must state that law in the pleading with sufficient particularity to show the nature and effect of the native law or custom and the geographical area and the line or group of persons to which it relates. R4.2(1)(d) Van puts this more simply, stating that a 'party relying on custom law' must 'state the custom law'. These Rules reflect the fact that, unlike other law in force in the countries governed by the CPR and the Vanuatu Rules, customary law is not written down. It is also indicative of the fact that, at least in Solomon Islands and Vanuatu, customary law is not one homogenous body of law, but differs from island to island and sometimes from village to village. The courts have struggled with the question of how to accommodate customary law within the formal system. The technical rules of procedure are alien to the way in which disputes were resolved in customary forums.

Customary land disputes are usually determined in customary forums or in special courts established with a view to having such matters decided in a less formal atmosphere by an arbiter who is knowledgeable in customary law.[48] Whilst procedure in these courts is certainly less formal than within the introduced hierarchy, there has been a tendency for procedure to become more technical than was probably envisaged when they were set up.[49]

There is no equivalent to O21 r30 CPR and r4.2(1)(d) Van in the other regional Rules.

4 PARTICULAR PLEADINGS

The general nature of pleadings and the rules that relate to all pleadings have been examined in the preceding sections. This section looks at each pleading and the particular rules which apply to it.

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44 See *J v Oyston* [1999] 1 WLR 694, where Smedley J refused to strike out pleadings that challenged a pleaded conviction.
45 O21 r22 CPR; O18 r6(2) Fiji.
46 O21 r22 CPR; O18 r6(2) Fiji.
47 O18 r6(2) Fiji.
48 See further the discussion of customary land tribunals in Chapter 3.
49 See, for example, the Island Courts (Civil Procedure) Rules 1984 (Van). Customary land is now dealt with in customary land tribunals: Customary Land Tribunals Act 2002 (Van).

4.1 Statement of claim

Under the Rules based on the RSC, this is the first pleading in a civil action commenced by writ. Special and general indorsements were discussed in Chapter 5. If the writ is specially indorsed, the indorsement will stand as the statement of claim and no further statement can be delivered.[50]

If the writ is generally indorsed, the writ must be accompanied, or followed by a statement of claim.[51] The time limit for serving the statement of claim is 14 days from the appearance or notice of intention to defend.

The Rules require the statement of claim to fulfil two functions:

- It must allege facts which give the plaintiff a cause of action.
- It must specify the relief claimed.[52]

More particularly, it must show the connection between the defendant, the alleged facts and the relief claimed; the general rules of pleading must be complied with and a cause of action recognised by law must be disclosed.

Under the CPR, forms of statement of claim are specified in Appendix C. These must be used or adapted to the facts of the case in hand. Within the framework of these forms, the case may be presented as the plaintiff sees fit. Precedent books contain general forms of pleading, which, although they have no force of law, have the force of custom and usage. See, for example, the *Encyclopaedia of Forms and Precedents*[53] and *Atkins Court* Forms.[54]

The statement of claim commonly consists of:

- Introductory allegations, or matters of inducement These are formal particulars, which are often not absolutely essential, but which serve to clarify the circumstances of the parties.[55] For example, they may identify the parties and say how they are related to the dispute, if this would otherwise be confusing. A common example is where the plaintiff is a company. This fact will be stated in the first paragraph.

50 O22 r1(a) CPR; O18 r1 Fiji. This does not prohibit service of a subsequent statement of claim, but that is unlikely to be allowed.
51 O22 r1(b) CPR; O18 r1 Fiji.
52 O22 r3 CPR; O18 r14 Fiji.
53 *Encyclopaedia of Forms and Precedents,* 1997, London: Butterworths.
54 *Atkin's Encyclopaedia of Court Forms in Civil Proceedings,* 1994, London: Butterworths.
55 These are not usually included in a special indorsement of a claim for a debt or liquidated amount.

SAMPLE DOCUMENT P—STATEMENT OF CLAIM (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Jurisdiction no 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

STATEMENT OF CLAIM

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1. On or about the 1st day of July 2002, the Plaintiff was lawfully using the verge at the side of road known as Lengakiki Hill, facing oncoming traffic and heading in the direction of Honiara town centre, when a motor vehicle, registration no 4785, the property of the Second Defendant and driven by the First Defendant as the servant or agent of the Second Defendant, mounted the verge and there collided with and knocked down the Plaintiff ('the accident').
2. The accident was caused by the negligence of the First Defendant while acting in the course of his employment as a servant or agent of the Second Defendant.

Particulars of Negligence

(a) Driving at a speed that was excessive in the circumstances.

(b) Failing to keep any or any proper look out.

(c) Mounting the said verge and colliding with the Plaintiff.

(d) Failing to exercise or maintain any or any proper or effective control over the said vehicle.

(e) Failing to stop, to slow down, to swerve, or in any other way so to manage or control the said vehicle as to avoid mounting the verge or colliding with the Plaintiff.

(f) So far as may be necessary the Plaintiff will rely upon the doctrine of *res ipsa loquitur*.

3. By reason of the matters set out above the First Defendant was convicted on 15th July 2002 by the Central Magistrates' Court of the offence of driving without due care and attention contrary to section 39 of the Traffic Act (Cap 19). The said conviction is relevant to the issue of negligence and the Plaintiff intends to rely on it as evidence in this action.
4. By reason of the said collision the Plaintiff sustained severe injuries and has suffered loss and damage.

Particulars of Injuries

Comminuted fracture of the left tibia and fibula with deformity. The Plaintiff was admitted to hospital as an in-patient for approximately five weeks and thereafter has attended regularly as an out-patient. The fracture of the fibula has resulted in permanent disability and the Plaintiff will be unable to resume his occupation as a prison officer and has lost his prospects of promotion. The Plaintiff was born on 1 June 1963.

Particulars of Special Damages

Loss of Earnings from 30 July 1997 to 19 August 1997 at the net rate of $820 per fortnight	$1,230
Plus loss of contributions to Solomon Islands National Provident Fund	$ 153.75
Value of clothing etc damaged beyond repair	$ 175
Cost of hospital bed for 28 nights @ $50 per night	$1,400
Cost of medical expenses and X-ray	$ 150
Cost of travelling expenses to and from hospital @ $10 per appointment	$ 100
	$3,208.75

And the Plaintiff claims:

(1) Damages

(2) Interest on damages at such rate and for such period as the Court thinks just

(3) Costs

.....

Jennifer Justice

Advocate for the Plaintiff

Delivered the 10th day of February 2003.

- Substantive allegations

  These are the allegations of the plaintiff's cause of action. They form the body of the statement of claim. In them it is necessary to consider the substantive law and decide which elements make up the civil wrong in question. All facts that go to show these elements have to be presented in a summary, yet comprehensive, form.

- The relief sought

  The plaintiff must specify the relief sought, for example, recovery of a debt or liquidated sum, damages, an injunction, or specific performance. However, the court will not be limited to this relief. It may also award general relief required to make the main remedy required by the plaintiff effective. For example, where a plaintiff has claimed damages for nuisance, the court could couple this with an injunction, provided that this is consistent with the case shown by the pleadings.

The statement of claim alleges the facts as they exist at the date of the writ. It should not anticipate the defence. If the plaintiff wished to raise affirmative matters in response to the defence, then he/she should do so in the reply. Thus, for example, a plea of estoppel should not be raised, as this is not relevant unless and until a denial is made in the defence.[56] The exception is that facts that take a claim outside the limitation period should be pleaded.[57]

Under the Samoan Rules, the statement of claim is both the originating process and the first pleading. The Rules provide that the statement of claim must specify particulars of the claim, including:

- time;
- place;
- names of persons;
- dates of instruments; and
- other circumstances;

sufficient to ensure that the opposite party is fully and fairly informed.[58] The particulars of claim will commonly be set out in the same way as a statement of claim drafted under the CPR, Fiji or Tongan Rules.

Under the Vanuatu Rules, the originating process and first pleading is also combined in one document, which is known as a claim. The claim must contain a statement of the case complying with r4.2(1), which is set out above. The statement of the case will commonly be set out in the claim in the same way as a statement of claim drafted under the CPR, Fiji or Tongan Rules. It is also provided that, if damages are claimed, the claim or counterclaim must state the nature and amount of the damages claimed, including special and exemplary damages. If general damages are claimed, the following particulars must be included:[59]

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

56 *Spicers and Detmold Ltd v Australian Automatic Cigarette Paper* [1942] VLR 97.
57 *Busch v Stevens* [1963] 1 QB 1 at 7.
58 R15.
59 R4.10(2) Van.

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

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.[60]

4.2 Defence and counterclaim

If the defendant wishes to defend the action, the plaintiff's claims must be answered by filing a defence. All defences arising may be pleaded in the same document. They need not necessarily be consistent. For example, a defendant might deny the existence of a contract, but then proceed to allege that the plaintiff is in breach of the contract. The process of pleading allegations followed by answering those allegations continues in subsequent pleadings. The reply answers the allegations made in the defence. Accordingly, many of the rules that apply to the defence also apply to the reply. Though a plaintiff cannot in the statement of claim refer to matters that have occurred since the issue of the writ, a defendant may in the reply refer to such matters.[61]

Under the CPR and Fiji Rules, the defence must be filed within 14 days of the time limited for appearance or acknowledgment of service or the delivery of the statement of claim, whichever is later.[62] The Tongan Rules allow 28 days from the service of the writ for a reply to be filed.[63] Under the Samoan Rules, the defendant has 10 days from service of the summons to file a statement of confession, a statement of defence or a statement of counterclaim.[64] In Vanuatu, the defence must be filed and served within 28 days after the date of service of the claim, except if no response has been filed, in which case the defence must be filed within 14 days of service of the claim.[65]

There are three main ways in which to answer an opponent's pleading:

- traversing;
- confession and avoidance;
- objection in point of law.

These will each now be examined in turn.

4.2.1 Traversing

Traversing is the process of denying allegations made by the other party. Like the plaintiff, the defendant must include every material fact which he or she wishes to rely on at trial. Further, the most important rule relating to a defence is that every allegation of fact that the defendant wishes to deny must be individually 'traversed'. If an allegation is not traversed, either specifically or by necessary implication, it will be taken to be admitted.[66] The exception is damages, which are deemed to be in issue.[67] Notwithstanding, there are

60 R4.10(2) Van.
61 O18 r8 Fiji.
62 O23 r6 CPR; O18 r2 Fiji.
63 O8 r2(1) Tonga.
64 R96 Samoa.
65 R4.13(1)(b) and (2) Van.
66 O21 r14 CPR; O18 r12(1) Fiji. But note that an implied admission can be recalled in proper circumstances: *Hollis v Burton* [1892] 3 Ch 266.
67 O23 r4 CPR; O18 r12(4) Fiji.

some cases where damages should be dealt with, for example, where damage is part of the cause of action and is being denied, or where remoteness or failure to mitigate is being alleged.

Theoretically, general denials are not allowed by the Rules.[68] Rather, a specific traverse of each allegation of fact denied must be given. However, it is a common form of pleading. For example, a defendant may say, The defendant denies the allegation made in paragraph 3 of the statement of claim'. Further, after dealing with each allegation made by the plaintiff, it is common to insert a general or blanket traverse to cover minor details in respect of which the defendant puts the plaintiff to proof. For example, the concluding paragraph of the defence may say, 'Unless specifically admitted in this defence, the defendant denies all allegations in the statement of claim'.

The undesirability of allowing general denials, which can be used as a tactic to delay the plaintiff obtaining judgment even though there is no real defence, has been recognised in other jurisdictions. The new Vanuatu Rules deal with this by providing that, 'If the defendant does not deny a particular fact, the defendant is taken to agree with it'.[69] Further, the Vanuatu Rules have made an important change to defence. It is no longer good enough to deny an allegation. The denial must now be accompanied by a statement of what the defendant alleges happened.[70] In other words, the reason for the denial must be made clear. A similar approach has been taken in recent reforms outside the region. For example, in Queensland, the Uniform Civil Procedure Rules 1999 now provide that a denial or non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted.[71] If it is not, the party is taken to have admitted the allegation.[72]

In any event, general denials should not be used to deny any allegation that is seriously in dispute.[73] Further, there are some circumstances where a general denial will not be sufficient under the regional rules:

- where it amounts to evasion;
- where the plaintiff might be taken by surprise;
- in actions for debt or a liquidated demand;[74]
- in actions based on a contract or bills of exchange.[75]

The first two circumstances require further explanation.

- Evasive denials

  Although a general denial may be permitted, an evasive one will not.[76] An evasive denial is one that leaves doubt as to what is admitted and what is denied.

68 O21 r18 CPR; O18 r12(3) Fiji; r4.5(3) Van.
69 R4.5(5) Van.
70 R4.5(4) Van.
71 UCPR, r166(5).
72 UCPR, r166(6).
73 See, for example, *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd* [1946] 2 All ER 685.
74 O23 r1 CPR.
75 O23 rr2 and 3 CPR.
76 O21 r20 CPR; O18 r12(3) Fiji.

The CPR give the specific example of an allegation of money had and received. In that case it is not sufficient to deny that the particular amount was received. Either the defence must deny that any money was received, or it must say how much was received and deal with any other allegation made separately.

The reason for disallowing evasive denials is that it would defeat the purpose of pleadings, which is to define the issues in dispute. If an evasive answer is allowed, the other party will not know whether the whole or part of the allegation is denied. There may often be a fine line between evasive and general denials.[77] An example of a general denial is where a single allegation is met with the response that 'the defendant denies the allegation made in paragraph 3 of the statement of claim'. This is not evasive as it is clear that the allegation is totally denied. An example of an evasive denial is, The defendant puts the plaintiff to proof of the several allegations made in the statement of claim'.[78] This is not sufficient as it does not make it clear whether the defendant is denying the allegations or not.

- Where the plaintiff might be taken by surprise

  Under O21 r16 of the CPR and O18 r7 of the Fiji Rules, a party must plead all grounds of defence or reply that show the opponent's case is not maintainable, or which might take the other party by surprise. Examples of such matters given in the Rules are:

  - performance;
  - release;
  - limitation;
  - fraud;
  - illegality;
  - Statute of Frauds (CPR only).

  This rule was discussed in the case of *Shankar Ltd v Fiji Foods Ltd*.[79] In that case the Court of Appeal considered an appeal from a decision of Kearsley J who had dismissed the appellant's claim for breach of a contract of cartage when, in the second month of a two year term, the respondent refused to continue with the agreement. The trial judge's decision was based on an exemption in the contract, applying to 'customer cartage'. This exemption had not been pleaded and had only been raised as a ground of defence at trial. Roper JA stated that:

  > This rule enforces one of the cardinal principles of pleading, namely, that every defence or reply must plead specifically any matter which makes the claim in the preceding pleading not maintainable, or which might take the opposite party by surprise, or raise issues of fact not arising out of the preceding pleading. The effect of the rule said Buckley LJ in *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch 717 at 728 'is for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove'.

  Accordingly, the appeal was allowed with costs.

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77 Compare *Thorpe v Holdsworth* (1876) 3 Ch D 637 with *John Lancaster Radiators Ltd v General Motor Radiator Co Ltd* [1946] 2 All ER 685.

78 *Harris v Gamble* (1878) 7 Ch D 877.

79 Unreported, Court of Appeal, Fiji, Civ App 113/85, 14 November 1986.

Similarly, in *Solomon Islands Electricity Authority v Solomon Islands Ports Authority*,[80] the plaintiff sued the defendant for the value of a box of electrical equipment that it alleged it had delivered to the defendant. At trial the defendant sought to rely on the statutory limitation contained in s 80 of the Ports Act Cap 99, which limited the defendant's liability as a lighterman, wharfinger or warehouseman. The plaintiff pointed out that the section had not been pleaded, either expressly, or by raising the necessary facts. Daly CJ refused to allow the defendant to rely on the limitation.

An example concerning the Limitation Act is *Pacific Commercial Bank Ltd v Nonumalo*,[81] where the defendant's failure to plead or argue the Limitation Act 1975 (Samoa) resulted in the plaintiff succeeding in its claim. Similarly, in *Suva City Council v KW March Limited*,[82] Byrne J held that if the defendant wished to rely on the Limitation Act, the proper time for doing so was in the defence or, in this case, the amended defence, or at the start of the trial. A defendant who raised a limitation defence as an afterthought would not be allowed to rely on it.

The CPR make specific provision to prevent a defendant taking a plaintiff by surprise in defamation actions. A defendant pleading truth or fair comment must give particulars.[83]

The Fiji Rules make specific provision for defending actions for recovery of land. Every ground of defence must be pleaded and a general defence based on possession is insufficient.[84]

The Vanuatu Rules provide that a defence or reply must specifically mention a matter that 'makes another party's claim or defence not maintainable'[85] or 'may take another party by surprise if it is not mentioned'.[86] Matters of law falling within either of these categories would obviously have to be pleaded.

4.2.2 Confession and avoidance

This is the name given to the process of admitting some or all of the allegations in an opponent's pleadings and raising other facts that justify or explain away the allegation.

4.2.3 Objection in point of law

The rules permit a point of law to be taken in the pleadings.[87] An objection in point of law is an assertion that even if the facts are true they do not give the plaintiff the right to a legal remedy. It is an objection to the legal basis of the pleading.

80 [1983] SILR 160.
81 [1980–93] WSLR 529.
82 Unreported, Civ Cas 957/1982, High Court, Fiji Islands, 15 May 1997.
83 O21 r24 CPR.
84 O18 r7(2) Fiji.
85 R4.7(a) Van.
86 R4.7(c) Van.
87 This procedure replaces the common law demurrer. This was a pleading by which one party alleged that the preceding pleading showed no good cause of action or defence.

SAMPLE DOCUMENT Q—DEFENCE (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

CIVIL CASE No 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

SI REMOULDS LTD

Third Party

DEFENCE OF THE FIRST DEFENDANT

The First Defendant says that:

1. He admits that the Plaintiff was on the stated date lawfully using the verge at the side of the said road as a pedestrian and that while the Plaintiff was so doing the Second Defendant's motor vehicle driven by the First Defendant as the servant or agent of the Second Defendant, mounted the verge and there collided with and knocked down the Plaintiff. The First Defendant denies that he was negligent as alleged or at all.
2. Further, the accident was caused wholly by the negligence of the Third Party, its servants or agents.

Particulars of Negligence of the Third Party

3. The Third Party, its servants or agents on or about the 30th day of June 1997 caused to be fitted to the First Defendant's motor vehicle a remould tyre which, as they well knew or ought to have known, was in a defective condition by reason of concealed damage to the wall thereof and consequently would or might endanger the safety of any vehicle to which it was fitted.

4. The First Defendant admits that he was convicted as set out in paragraph 5 of the Statement of Claim, but says that the said conviction was erroneous in that the matters complained of by the Plaintiff were caused as alleged in paragraph 2 and not as adjudged by the said court.
5. The First Defendant does not admit the alleged or any injuries, loss or damage.
6. Except as admitted above, the Defendant denies all allegations in the Statement of Claim.

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Ann Advocate

Advocate for the First Defendant

Delivered this 5th day of June 2003 by Ann Advocate, 5 Solomon Place, Honiara, advocate for the First Defendant.

4.2.4 Counterclaim and set-off

In addition to direct answers, the defendant may wish to raise a cross-claim against the other party by counterclaim or set-off. A set-off is a defence that precludes the plaintiff from enforcing the claim in whole or part. It is not a direct answer to the claim, as it is not a denial. Rather it is a tacit admission coupled with reasons why the plaintiff should not succeed. As it is a defence, it is included in the same document as the rest of the defence.[88] The term equitable set-off is normally used to distinguish common law set-offs, which are only allowed in the case of mutual debts.[89] Equity on the other hand allows an unliquidated demand to be set off against a liquidated demand; in fact a set-off may be claimed in any case where the defendant has a claim in debt or damages which is so closely related to the plaintiff's claim as to make it inequitable for the plaintiff to succeed.[90] A counterclaim on the other hand is not a defence, but an independent cause of action.[91] For the sake of convenience it is included in the same document as the defence, but it must be clearly separated from the rest of the pleading.

In *Dhiraj Lal v Ramanlal Brothers Ltd*,[92] Speight VP pointed out that although the distinction was usually of no importance it could have a practical effect:

> A set-off is a monetary cross-claim which is also a defence to the claim in the action.
>
> It is only available in respect of debts or liquidated demands due between the same parties in the same right—*Supreme Court Practice*, 18/17/2, 1967. If successful it extinguished the claim in whole or in part—*Hanak v Green* [1958] 2 QB 9 at 29.

88 O18 r16 Fiji; r108 Samoa.
89 *Stunmore v Campbell & Co* [1892] 1 QB 314. See further, Van Der Watt, PM, 'The Clarification of Equitable Set-Off (1998) 72(7) ALJ 516.
90 *Rawson v Samuel* (1841) 41 ER 451.
91 O23 r9 CPR; O18 r17 Fiji.
92 Unreported, Court of Appeal, Fiji, Civ App 4/97, 13 March 1987 at 3.

> A counterclaim is any claim for relief or remedy against a plaintiff in respect of any matter (whenever or however arising) and is pleaded as if it were a separate cause of action. Rules of Supreme Court O15 r2 (1967). If successful it may balance or exceed a judgment given in a claim tried at the same proceedings or may succeed on…its own.
>
> Of course a set-off can be also pleaded as a counterclaim in the same matter to allow an established surplus to lead to a judgment for defendant. In such cases the practice is to describe the pleading as 'set-off and counterclaim'.

His Lordship explained that the distinction might become important in summary judgment cases. If the defendant's reply to the claim is a set-off and this is successful, the plaintiff would not be entitled to judgment as there is no debt owing. If the defendant has a counterclaim but does not deny the claim, the plaintiff is entitled to judgment but may be restrained in a summary judgment from execution, pending the resolution of the counterclaim.[93]

Similarly, in *Ansett Transport Industries (Operations) Proprietary Limited v Polynesian Airlines (Holdings) Limited*,[94] it was pointed out that if a defendant succeeds in claiming a set-off which exceeds a plaintiff's claim, the balance between the plainitff's extinguished claim and the set-off is left 'hanging in the air'. In order for the matter to be dealt with effectively, a counterclaim should be filed so that judgment can be given for this balance in favour of the defendant.

The counterclaim should be clearly separated from the rest of the defence.[95] Generally, the rules that apply to the statement of claim apply to pleading a counterclaim.[96]

4.3 Reply (and answer to counterclaim)

Under the Fiji Rules, it is not always necessary to file a reply to the defence. Denials of the allegations in the defence do not need to be answered, as it will be implied that the plaintiff does not agree.[97] This is known as joinder of issue. Under the CPR, joinder of issue is not automatic. The desire to 'join issue' must be specifically raised in the reply.[98] Thus, a plaintiff who wishes to pursue allegations after they have been denied in a defence must always file a reply.

Under the Fiji Rules and the CPR, it is necessary to file a reply if fresh issues have been raised in the defence, for example, if the defendant has raised a plea in confession and avoidance, or if the plaintiff alleges that the defence is bad in law. If the plaintiff admits anything in the defence this should also be put in the reply. The time limit for filing a reply under the CPR and the Fiji Rules is 14 days from service of the defence.[99]

If the plaintiff wishes to respond to a counterclaim, an answer (or defence) to counterclaim must be filed. This is contained in the same document as the reply, but should be clearly headed to distinguish it from the rest of the document. The time

93 *Ibid at 4.*
94 Unreported, Supreme Court, Samoa, Civ Cas 314/93, 22 July 1994.
95 O23 rr9 and 10 CPR; r4.8(3)(a) Van.
96 R4.8(3)(b) Van.
97 O18 r13 Fiji.
98 O21 r19 CPR.
99 O25 r1 CPR; O18 r3(4) Fiji.

limit for filing an answer to counterclaim under the CPR and the Fiji Rules is 14 days from service of the counterclaim.[100]

The Tongan Rules make passing references to a reply, but do not mention joinder of issue. Accordingly, the English Supreme Court Rules will apply pursuant to O2 r2(2) Tonga. The English position is the same as under the Fiji Rules.

The Samoan Rules make no provision for a reply

Like the Fiji Rules, the Vanuatu Rules provide for joinder of issue. If a claimant does not file and serve a reply, he or she is taken to deny all the facts alleged in the defence.[101] However, if a claimant wishes to allege further relevant facts after receiving the defence, he or she must file and serve a reply in Form 9.[102] The claimant's reply must contain a statement of the case and state what the claimant alleges happened.[103] If the claimant's reply does not deal with a particular fact, he or she is taken to deny it.[104] The Vanuatu Rules allow 14 days from service of the defence to file a reply[105] The time limit for filing the defence to the counterclaim is not entirely clear, but would appear to be 14 days.[106]

5 FURTHER AND BETTER PARTICULARS

5.1 Introduction

As discussed above, in some cases a party must give 'particulars', that is, more specific details of the material facts alleged. Where the facts of a case do not bring it within the rules requiring particulars to be given automatically, a party may nevertheless apply for these. A further and better statement of the matters raised in a pleading may be ordered in any case.[107] The grounds for making such an application are that the pleading is not specific enough to allow the responding party to reply or that they are necessary to enable the other party to know the case he/she has to answer at trial.[108] When a party finds it necessary to request further details of the facts alleged in a pleading, particulars are usually referred to as 'further and better particulars'.

An order will not be made before service of the defence unless particulars are necessary to enable the defendant to plead or there is some other special reason.[109] This rule is designed to prevent a request for particulars being used to gain time to file a defence. Examples of cases where particulars may be ordered before defence, are where a defendant

100 O25 r2 CPR; O18 r3(4) Fiji.
101 R4.6(1) Van.
102 R4.6(2) and (5) Van.
103 R4.6(3) Van.
104 R4.6(4) Van.
105 R4.13(1)(c) Van.
106 This is not specifically stated in r4.13, but 14 days is the time allowed for filing the reply, which would normally contain the defence to counterclaim. However, the Rules allow 28 days for a defence to a counterclaim against a third party to be filed: r4.13(1)(d) Van.
107 O21 r7 CPR; O18 r11(3) Fiji; O8 r4(1) Tonga.
108 *Hickes v Faddy* (1925) II Supreme Court Cases (Fiji) 132, citing *Spedding v Fitzpatrick* (1888) 38 Ch D 413.
109 O21 r9 CPR; O18 r11(5) Fiji; O8 r5 Tonga.

requires particulars of special damages in order to consider making a payment into court[110] and where particulars are necessary to allow a defendant to know the relationship under which an alleged duty arises.[111]

The Samoan Rules specifically provide for particulars of the statement of claim to be ordered against a plaintiff.[112] Where particulars of any other pleading are required, application may be made under r67(2) which empowers a judge to direct any party to file or deliver particulars which the judge considers necessary to define the issue. Such order may be made on application by a party or on the judge's own motion.

Grounds for objecting to supplying further and better particulars include:

- the responding party cannot give the requested particulars;[113]
- it would be harsh and oppressive to order those particulars;[114]
- the particulars are seeking details of evidence.

The Vanuatu Rules do not make specific provision regarding particulars. However, this is clearly something which could be raised at a conference and the Rules do say that the judge may order further statements of the case to be filed at conference.[115]

5.2 Procedure

Before applying to the court for an order for further and better particulars, application should be made to the other side by letter.[116] If no request is made by letter, this may be relevant to costs. The Fiji Rules provide that failure to apply by letter may result in refusal of an order.[117] The letter should be accompanied by a request set out in a formal document, with the title of the action at the top and headed 'Request for Further and Better Particulars of the Statement of Claim' (or whatever pleading it is sought to have particularised). This is done because the request and the answer become part of the pleading at the trial. The body of the request should identify by paragraph number the paragraph of the pleading being attacked. This is usually underlined as a heading, below which is specified precisely what further particulars are required. For example:

> Under Paragraph 5
>
> Of 'agreed to sell', state whether the alleged agreement was oral or in writing; if oral, state the date, time and place of the conversation, between whom it took place and the words alleged to constitute the agreement; if in writing, identify the document, its date and the parties to it.

110 White Book, para 18/12/36.
111 *Selangor etc Ltd v Cradock* [1965] Ch 896.
112 R16 Samoa.
113 O21 r6 CPR; O18 r11(6) Fiji; O8 r4(1) Tonga. See *Kera v Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas 15/1998, 8 May 2002.
114 *Ibid.*
115 R6.4(2) Van.
116 O21 r6 CPR; O18 r11(6) Fiji; O8 r4(1) Tonga. See *Kera v Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas 15/1998, 8 May 2002.
117 O18 r11(6) Fiji.

If the letter does not produce the necessary response, application should be made by summons accompanied by a draft of the request for further and better particulars.

The answer to the request should repeat the request and underneath set out the further and better particulars supplied in response.

In proceedings commenced in Vanuatu, it would appear prudent to apply for particulars by letter in the first instance even though this is not required by the rules. Failure to comply with such a request could then be raised as a ground of application for costs by the party requesting particulars.[118]

6 CLOSE OF PLEADINGS

Pleadings close 14 days after service of the reply, if there is one. If no reply is served, pleadings close 14 days after service of defence to counterclaim. If there is no defence to counterclaim, pleadings close 14 days after service of the defence.[119] The Samoan Rules do not provide for close of proceedings. This will effectively take place when the court or registrar adjourns the proceedings *sine die* under r100. The Vanuatu Rules do not mention close of pleadings either. There is room for confusion here, as the Rules allow a party to file a document outside the times fixed by the Rules and the court may decide whether or not such filing is effective.[120] It is not clear when and in what circumstances such determination will be made by the court.

7 AMENDMENT

7.1 Introduction

In *Reddy Construction Co Ltd v Pacific Gas Co Ltd*,[121] Speight JA of the Fiji Court of Appeal said:

> The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate the matter. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties even if it takes some time and some amendment for the crux of the matter to be distilled.

In that case, the Court of Appeal allowed an appeal against refusal to give leave to amend the statement of claim, to allege fraud to counter a specific defence.

A similar approach prevails in Australia. In *Queensland v JL Holdings Pty Ltd*,[122] the High Court of Australia confirmed that the fundamental principle on which applications for amendments would be considered was the attainment of justice. It held, on appeal by

118 R6.4(2)(vi) Van.
119 O29 r10 CPR; O18 r19 Fiji; O8 r7 Tonga.
120 R4.14 Van.
121 (1980) 26 FLR 121.
122 (1997) 71 ALJR 294.

special leave from the Full Court of the Federal Court, that, except perhaps in extreme circumstances, considerations of case management should not be used as a basis to refuse an application to amend pleadings in order to litigate a fairly arguable issue. The ultimate aim of the court was attainment of justice.

7.2 Amendment without leave

Amendment without leave is allowed under the CPR and Fiji Rules, but the time limit for making such amendment is different in each.

7.2.1 Writ and statement of claim

Under O30 r2 of the CPR, the plaintiff may amend the statement of claim, whether or not it is indorsed on the writ, without leave, within the following times:

- once before the time limit for replying has expired and before replying; or
- where no defence is delivered, up to 28 days after appearance.[123]

There is no provision allowing amendment of other parts of the writ of summons without leave.

Under O20 r1 of the Fiji Rules, the plaintiff may amend the writ before it has been served. It may also be amended once before the close of pleadings, provided that the amendment does not involve:

(a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued; or
(b) the addition or substitution of a new cause of action; or
(c) (without prejudice to r3(1)), an amendment of the statement of claim (if any) indorsed on the writ.

Accordingly, a statement of claim indorsed on the writ may only be amended without leave before service of the writ. A statement of claim contained in a separate document may be amended under O20 r3, which is described below.

Under the Vanuatu Rules, the same provision applies to amendment of all pleadings and this is discussed under the next heading.

7.2.2 Other pleadings

Under O30 r3 CPR, the defence itself may not be amended. However, a set-off or counterclaim may be, in the following circumstances:

- any time before expiration of time for replying to the answer to counterclaim and before replying; or
- if there is no answer to the counterclaim, within 28 days from the defence.

There is no provision under the CPR to amend other pleadings. The Fiji Rules, on the other hand, allow the amendment of any pleading once before the close of pleadings.[124]

123 O30 r2 CPR.
124 O20 r3 CPR.

Under the Samoan and Tongan Rules there is no provision for amendment without leave.

The Vanuatu Rules provide that a party may amend any pleading to:[125]

(a) better identify the issues between the parties; or
(b) correct a mistake or defect; or
(c) provide better facts about each issue.

Amendment requires the leave of the court, which may be given at any stage of the proceeding.[126] 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 awarding costs or granting an extension of time or an adjournment.[127]

7.2.3 Setting aside an amendment without leave

In those jurisdictions where amendment is allowed without leave, a party who considers that such an amendment is unjust may apply to the court for its disallowance within 14 days of the delivery of the amended pleading.[128]

7.3 Amendment with leave

The court may grant an application to amend at any stage of the proceedings (O30 r1 CPR; O20 r5(1) Fiji). In *Fiji Electricity Authority v Balram*,[129] the plaintiff was allowed to amend the statement of claim to rectify a technical error after the close of its case. In *Chow v Attorney-General*,[130] the plaintiff failed to include a claim for special damages in the statement of claim in an action for negligence. Judgment was entered for the plaintiff with damages to be assessed. At the damages hearing, the plaintiff adduced affidavit evidence as to special damages and the defendant failed to object to its admission. However, in argument, the defendant submitted that the special damages should not be allowed, as they had not been pleaded. Kabui J indicated that amendment would be allowed 'to achieve justice in favour of the plaintiff and adjourned the damages hearing to a date to be fixed for the plaintiff to seek leave to amend the statement of claim. The cases cited by his Lordship in support of a flexible approach to amendment of pleadings all concerned amendment at a late stage, but prior to judgment on liability.[131] Amendment at or after a subsequent hearing on damages may deprive the other party of an opportunity to alter its tactics or otherwise take steps to deal with the amended case. Accordingly, it is suggested that it should only be allowed in exceptional circumstances.

125 R4.11(1) Van.
126 R4.11(2) Van.
127 R4.11(3) Van.
128 O30 r4 CPR; O20 r4(1) Fiji.
129 (1972) 18 FLR 20.
130 Unreported, High Court, Solomon Islands, Civ Cas 127/2000, 6 September 2002.
131 In *Re Robinson's Settlement* [1912] 1 Ch 717; *Pirie v Richardson* [1927] 1 KB 448; *Gould Birbeck and Bacon v Mount Oxide Mines Ltd* (1916) 22 CLR 490; *Banque Commercial SA v Akhil Holdings Ltd* (1989–1990) 169 CLR 279; *Nguyen v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1966) 66 FLR 239.

Difficulty arises where applications to amend are made after the expiration of the relevant limitation period. The English case of *Weldon v Neal*[132] laid down the principle that amendment would not be allowed if this had the effect of introducing a statute barred claim. This approach was also taken in Fiji. For example, in *District Administrator, Suva v Mohammed Sadiq*,[133] the District Administrator commenced an action under the Compensation to Relatives Ordinance[134] as administrator of the estate of the deceased whose death was alleged to have arisen from the defendant's negligence. At the time proceedings were issued, the District Administrator had not been officially appointed to deal with the estate in accordance with the relevant legislation. It was held that no amendment by substitution could be made in respect of the claim under the Ordinance because the time limited for action had expired.

O20 Fiji has since been amended to deal with applications for amendment that might not be allowed at common law due to infringement of the Limitation Act 1971. Amendment will be allowed, provided it is just:

- to correct the name of a party, even if this has the effect of substitution of a new party provided that this is to correct a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or be sued;
- to alter the capacity in which a party sues, if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired;
- to add or substitute a new cause of action provided that it arises out of the same facts as an existing cause of action.

Under the Tongan Rules, O8 r5 provides for an application to be made for leave to amend. The Samoan Rules refer specifically only to application for leave to amend a statement of claim.[135] However, it would appear that the general power contained in r206 would allow application to be made for leave to amend other pleadings.

7.3.1 Procedure

The procedure for applications for leave to amend is not specified in the CPR. It would appear that there are three possible ways of making such an application:

- On the hearing of the summons for directions

  Whilst amendment is not one of the matters mentioned in O32 r2(a), which specifies some of the matters on which the court may make orders at the directions hearing, it is within the general power of the court to give 'any such directions as to the proceedings to be taken in the action and as to the costs thereof as the Court thinks proper'.[136] If it is apparent that amendment is required at the directions stage, it is a convenient time for this to be dealt with without incurring the cost of an extra hearing. Failure to raise the matter at that stage

132 (1887) 19 QBD 394.
133 (1954) 8 FLR 217.
134 Cap 20.
135 R17 Samoa.
136 O32 r2(1).

would be a ground for an application for costs in any event, if a separate hearing is required.

- Application by summons If amendment requiring leave needs to be sought before or after the directions hearing but before trial, application should be by summons on notice to the other side.[137]
- At trial Application for leave to amend may be granted at trial on such terms as to costs as may be just.[138] If the amendment results in delay, the amending party is liable to be ordered to pay the costs thrown away.

Amendment must be made and served within the time specified in the order giving leave or within 14 days, if no time is specified.[139] Failure to amend within the relevant time limit renders the order to amend void unless extended by the court.[140]

The CPR provide for amendments of less than 144 words to be written into the existing document.[141] The Fiji Rules make similar provision in respect of amendments that are short enough to be conveniently included.[142] However, the practice in all cases is to produce a new version of the document with the amendments typed[143] in and any deleted words struck through in red. The document should be marked with the words:[144]

Amended the day of pursuant to order of dated the of

If the amendment is made without leave, the following wording should be used:

Amended the day of pursuant to Order 30 r2.[145]

There is no specific procedure laid down for applications to amend in Samoa. Accordingly, application should be made on notice in Form 14, supported by affidavit if evidence in support is required.[146]

Under the Tongan Rules, application is made on summons with a copy of the proposed amendment.[147] A copy of the amended pleading must be filed and served on all parties to the action.[148]

Under the Vanuatu Rules, application should be made at a conference.[149]

137 O57 r1.
138 O30 r6.
139 O30 rr7 and 10.
140 O30 r7; O20 r8.
141 O30 r8.
142 O20 r9(1) Fiji.
143 The word 'typed' is used loosely to include documents produced by word processor, which is almost invariably the case.
144 O30 r9; O20 r9(2).
145 Or whatever rule the amendment is made under.
146 R65.
147 O8 r5(2).
148 O8 r5(4).
149 Pt 6 Van.

CHAPTER 9

INTERLOCUTORY PROCEEDINGS

1 INTRODUCTION

An application to the court made during the course of proceedings, prior to trial, for an order that will not finally determine the parties' rights is known as an interlocutory application. Such applications may be made at any time, even before the issue of the writ or other originating process.[1] The appropriate time for bringing such an application will depend on what is sought. If a problem arises during the exchange of pleadings, relief can be sought then. However, most interlocutory applications are made between close of pleadings and the trial. Interlocutory application may be made either *ex parte*[2] or *inter partes.* An order made on an interlocutory application is referred to as an interlocutory order.[3]

1.1 *Ex parte* applications

An *ex parte* application may be made in the following circumstances:

- where it is not possible to give notice, for example, because the other party is not yet on the record, as where the application is for substituted service;
- where no other party is affected, for example, on application to correct an accidental slip in a registrar's order;
- where there is real urgency, for example, in an application for an injunction;[4]
- where secrecy is essential to the efficacy of the order sought, for example, an application for a Mareva injunction or Anton Piller order.[5]

Ex parte applications may be made with a hearing or 'on the papers'.[6] The applicant is under a duty to give full and frank disclosure and failure to do so gives the other party a right to have the order set aside.[7] In *Deamer v UNELCO Management*,[8] Chief Justice d'Imecourt made it clear that *ex parte* orders would not be made lightly and only where there was a good reason for such an order. In the case of *ex parte* applications

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1 Rr7.1(2) and 7.7 Van.
2 Meaning in the absence of the other side.
3 R7.1(1) Van defines an interlocutory order as 'an order that does not finally determine the rights, duties and obligations of the parties to a proceeding'.
4 A case of sufficient cogency must be made. See, for example, *Rolland Masa and Others v Koloeana Development Co and Others,* unreported, High Court, Solomon Islands, Civ Cas 361/95, 29 March 1996.
5 A Mareva injunction is an interlocutory order freezing the defendant's assets. An Anton Piller order is an interlocutory order allowing the plaintiff to enter the defendant's premises and seize documents relating to the case. The Civil Procedure Rules 2002 (Van) have renamed these as an 'order to protect property' and an 'order to seize documents or objects': rr7.8 and 7.9 Van.
6 In some circumstances an interlocutory order may be granted without a hearing on the basis of the court's consideration of the documents filed. This is known as a determination 'on the papers'.
7 *R v Kensington Income Tax Commissioners ex p Polilgnac* [1917] 1 KB 486.
8 (1989–94) 2 VLR 554.

for an injunction, the judge also made it clear that an affidavit would always be required.

Generally, *ex parte* orders are provisional until the time fixed for an *inter partes* hearing,[9] or at least until such time as the other party applies to set the order aside or until the date of the next hearing in the action.

1.2 Varying interlocutory orders

Once a court order has been regularly made it cannot be altered except by means of an appeal or in cases where the rules expressly provide for this.[10] This applies to interlocutory orders as well as final ones, unless the order is made with 'liberty to apply' or the rule under which the order was made specifically provides for revocation.[11] Liberty to apply will be implied in cases where the order directs further steps to be taken in the case.[12] Express provision for revocation or variation is made in relation to the following orders:

- an order for discovery or inspection, on sufficient cause being shown;[13]
- orders as to how evidence is to be presented at trial;[14]
- orders as to interrogatories;[15]
- orders setting down for trial.[16]

Although an order cannot be varied, a supplemental order may be made on proof of new facts.[17] It is therefore essential to frame an application to deal with problems in an existing order as an application to vary, rather than to 'substitute' or 'vacate' an existing order. In *McQuade v Bycroft*,[18] the High Court of Solomon Islands refused an application to substitute directions by consent for an order of the court. This application was refused on the grounds that the court had no jurisdiction to vacate or discharge an order. The court made it plain that it would have been prepared to 'adjust' the existing order by making a supplemental order, but considered that there was insufficient evidence before the court to justify this. There is English authority to suggest that the method of giving effect to an order may be changed, even though the substance cannot be.[19]

9 See, for example, *Rolland Masa and Others v Koloeana Development Co and Others*, unreported, High Court, Solomon Islands, Civ Cas 361/95, 29 March 1996, at p 21.
10 *McQuade v By croft*, unreported, High Court, Solomon Islands, Civ Cas 041/1999, 21 June 2002; *Kelsey v Doune* [1912] 1 KB 482.
11 For discussion of variation of judgments, see Chapter 11.
12 *Penrice v Williams* (1883) 23 Ch D 353.
13 O33 r28 CPR; O24 r17 Fiji.
14 O38 r6 Fiji, allowing revocation or variation of orders made under O38 rr1–5 Fiji.
15 O26 r6 Fiji.
16 O34 r3(4) and (5) Fiji.
17 *Ford-Hunt v Singh* [1973] 1 WLR 738.
18 Unreported, High Court, Solomon Islands, Civ Cas 041/1999, 21 June 2002.
19 *Lewis v Daily Telegraph Ltd* (No 2) [1964] 2 QB 601; *Prestney v Colchester Corp* (1883) 24 Ch D 384.

1.3 Self-executing orders

As discussed in Chapter 1, a party's failure to comply with the rules does not usually result in any penalty unless the other side takes steps to enforce them. An exception to this is where a self-executing order has been made. Such an order directs a party to take the steps required by a particular rule within a specified time limit and states that, in default, the party's claim or defence, as the case may be, will automatically be struck out. It was at one time held that the court had no power to extend the period of time for compliance after it had expired.[20] However, in England[21] and Australia[22] it has since been held that the court's general power to extend time is sufficient to allow it to extend the time to comply with a self-executing order, even after it has expired. However, in *Bonagi v Solgreen Enterprises Ltd*,[23] Kabui J, in the High Court of Solomon Islands, seemed to be of the view that an extension of time could not be given. However, the remarks were *obiter* and his Lordship's attention does not appear to have been drawn to the more recent cases on point. In *Wong v Dennis*[24] Kabui J made it plain that this prohibition did not prevent an appeal against the self-executing order. Further, his Lordship held that an extension of time in which to appeal against that order might be given after the expiry of the time for appealing. Whilst there is still no reference to recent English authority, the judgment cites authority distinguishing *Whistler v Hancock*[25] and *King v Davenport*[26] on which the earlier decision was founded. On the basis of these distinguishing authorities, Kabui J held that there was no hard and fast rule prohibiting the extension of time. Quite remarkably, his Lordship gave an extension of time in which to apply to set aside the registrar's 'unless order', which had expired on 12 October 2000, to 11 September 2002, 23 months later. Even more remarkably, from the facts given in the judgment it appears that the self-executing order had not come into effect anyway. The order made on 6 October gave seven days in which to pay the appeal fee of $1,780. This sum was paid on 13 October. Although Kabui J stated that the time limit expired on 12 October and this seems to have been assumed by the parties, by virtue of O64 r8 CPR, a number of days is to be calculated exclusively of the first day and inclusively of the last day. Unless the seven day period was specified to be 'clear' days and there is no indication of this, the period began on 7 October and ended on 13 October, making the appellant's payment within time.

2 CHAMBERS APPLICATIONS

Under the CPR and Fiji Rules, applications are usually by summons. This requirement is dispensed with in some *ex parte* cases.[27] The CPR specify the form of summons, which is

20 *Whistler v Hancock* (1877–78) 3 QBD 83.
21 *Samuels v Linzi Dresses Ltd* [1981] QB 115.
22 *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268.
23 Unreported, High Court, Solomon Islands, Civ Cas 33/2002, 4 July 2002.
24 Unreported, High Court, Solomon Islands, Civ Cas 1/2000, 12 September 2002.
25 (1977–78) 3 QBD 83.
26 (1978–79) 4 QBD 402.
27 O57 rr1 and 2 CPR; O32 r1 Fiji. A fee is payable and where the hearing is adjourned due to the default of a party or a legal representative a wasted hearing fee may be ordered to be paid: O32 r18.

contained in Form 1 of Appendix H.[28] Where evidence is required, it is almost invariably given by affidavit. Many rules specifically require an affidavit and, even where the rules are silent, an affidavit is required in practice if facts are in dispute, as this will be the only means of establishing that the claim has merit. There are some cases where no affidavit is required. These can be divided into two main categories:

- Cases where the merits of the application are apparent from the documents already filed, for example, on an application for security for costs on the grounds that the address for service is outside the jurisdiction.
- Cases where there is nothing controversial about the application, which is for a routine order such as the normal directions. An example is O33 r10 CPR, which specifies that no affidavit is required on application for discovery of documents.

In *inter partes* applications, the summons must be served on the other party not less than two clear days prior to the hearing.[29] Under the Fiji Rules, the affidavit must also be served two clear days prior to the hearing.[30] Although this is not a requirement under the CPR, a party intending to use an affidavit in support of a chambers application must give notice of this intention to the other side[31] and, as a matter of courtesy, the affidavit is served with the summons if circumstances permit.

The hearing is in chambers, either before a judge or registrar. In Solomon Islands, for example, the registrar is expressly empowered to deal with most chamber matters.[32] The Fiji Rules also empower the registrar to deal with chambers applications, but jurisdiction is restricted to a specified list of cases.[33] These include all normal directions, amendments, extensions of time, renewal of the writ, substituted service and summary judgment. In many jurisdictions of the region, a chambers application day is allocated.[34]

Under the Samoan Rules, the general procedure for making interlocutory applications is contained in r65. This specifies that application may be *inter partes* or *ex parte.* In the former case, Form 14 is to be used;[35] in the latter, Form 13.[36] An affidavit in support must also be filed.[37] The summons must be served on the other side at least 24 hours before the return date.[38] The hearing must be before the registrar, if he has power to deal with the application. Otherwise it is before a judge.[39]

28 O57 r13 CPR.
29 O57 r7 CPR; O32 rr3 and 14 Fiji. Except in the case of time summonses, which may be served on the day before the return date.
30 O32 r14 Fiji.
31 O40 r21 CPR.
32 O57 r1A(1) CPR, inserted by LN 55/80 (SI).
33 O32 r9 Fiji.
34 Currently Thursdays in Solomon Islands.
35 R65(1)(c) Samoa.
36 R65(1)(b) Samoa.
37 R65(1)(d) Samoa.
38 R65(1)(c) Samoa.
39 R65(1)(f) Samoa.

The Tongan Rules do not deal specifically with interlocutory applications, other than interlocutory applications for an injunction.[40] Such applications are stated to be by summons supported by affidavit[41] and it is reasonable to assume that other interlocutory applications should be made in the same way Service, in the case of application for an injunction, must be effected not less than five days before the return date, except in the case of urgency when application may be made *ex parte*.[42] It is not clear whether this time limit applies to other interlocutory applications.

Under the Vanuatu Rules, the procedure is slightly different. The norm is not a written application. Instead, once proceedings have started, the parties must make interlocutory applications orally during a conference, if this is practicable.[43] Applications made at any other time must be made in Form 10,[44] unless the application is urgent. A written application in Form 10 must:

(a) state what the applicant applies for; and
(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.

A 'sworn statement' is the name given by the Vanuatu rules to an affidavit.

Urgent oral application may be made if:[45]

(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.

If a sworn statement is filed in support of the application, it must be served on the other party at least three days before the hearing.[46]

3 ADJOURNMENTS

During the progress of a civil case, parties often find that they are not ready to deal with an interlocutory hearing, either because evidence is not to hand, preparation is incomplete or they have been taken by surprise by the other side, for example by the

40 O22 Tonga. For an example of such an application see, for example, *Tong v Takabwebwe* [1988]SPLR 185.
41 O22 r1(2) Tonga.
42 O22 r(3) and (4) Tonga.
43 R7.2(2) Van.
44 R7.1(3) Van.
45 R7.6 Van.
46 R11.6(c) Van.

delivery of a pertinent affidavit at the last moment. There may also be a tactical reason for applying for an adjournment, for example, where a party wishes to delay the proceedings. A practitioner who makes an application for tactical reasons alone is arguably in breach of his/her duty to the court. A party who is not ready to proceed must apply for an adjournment of the proceedings to allow them extra time. Parties should attempt to agree an adjournment with the other side wherever possible and the court should be notified of any such agreement at the earliest possible stage. In Samoa, this process is officially provided for in r68(2), which states that an application for adjournment shall be sufficiently made if a request in writing, recording the other party's consent, is sent to the registrar.

Written advice of the agreed adjournment is given as a matter of courtesy to avoid the waste of court time, but does not excuse the parties from attending at the hearing unless there is a rule to this effect, as there is in Samoa,[47] or the court specifically agrees to this by practice direction or letter. Where an adjournment has not been agreed to between the parties, application should be made at the beginning of the hearing. Again, as a matter of courtesy, counsel should notify the court and the other side of their intention to apply for an adjournment at the earliest possible opportunity. The grant of an adjournment is at the court's discretion, exercised in accordance with the interests of justice. The party requesting the adjournment will normally be ordered to pay the costs resulting from the delay. However, this will not be the case if the other side's actions have resulted in the applicant being taken by surprise.[48]

The Samoan Rules deal with adjournments in r68, which specifically provides for the judge or a registrar to adjourn at any time, either on application by a party or his/ her own motion, on such conditions as he/she thinks fit.

An adjournment may be granted to a fixed date, a date to be fixed by the registrar or listing officer or *sine die*. In the case of adjournment *sine die,* application is required to re-list the matter. The practice in most jurisdictions of the region is to accept informal application to re-list by letter and this is specifically provided for under r68(3) Samoa. The registrar then allocates a new hearing date and notifies all other parties of this.

There is no specific provision relating to adjournment of interlocutory proceedings in the other Rules. However, superior courts have inherent jurisdiction to order an adjournment.[49] Jurisdiction to grant an adjournment is discretionary.

4 DIRECTIONS

4.1 Summons for directions

When it becomes obvious that a case is likely to go to trial, arrangements need to be made to ensure that the case is properly prepared by the time of the hearing. These details are arranged at an interlocutory hearing, known as the directions hearing. A timetable is established for going through the steps that need to be accommodated

47 R68(2).
48 See further Chapter 12 for the orders that might be made in this event.
49 *Hinckley and South Leicestershire Permanent Benefit Building Society v freeman* [1941] Ch 31.

between close of pleadings and trial. These directions are sought on a special summons called a summons for directions, which is taken out shortly after the close of pleadings.

O25 r1(1) of the Fiji Rules sums up the purpose of directions and sets out the time limits for application:

> With a view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that-
>
> (a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with and
>
> (b) such directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,
>
> the plaintiff must, within one month after the pleadings in the action are deemed to be closed,[50] take out a summons for directions returnable in not less than 14 days.

The CPR are not so expansive as to the role of directions, but do provide a time limit. A summons for directions must be taken out within 14 days after the close of pleadings.[51] It must be returnable in not less than 21 days. O32(2) empowers the court to make such orders as it thinks fit, but specifically directs that the court may make orders as to the following:

- discovery and in particular:
  - (i) discovery and inspection of documents;
  - (ii) interrogatories;
  - (iii) inspection of real and personal property;
  - (iv) admissions of fact or of documents;
- evidence by affidavit or by examination before a magistrate;
- evidence by statement, oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise;
- limitation of expert witnesses;
- recording of consent to limit or exclude rights of appeal;
- pleadings and particulars;
- that tortfeasors' offers of contribution, made *inter se,* be treated as payment into court;
- for the action to be tried with assessors.

In Solomon Islands, a Registrar's Circular was issued in 2000, attaching a draft of the usual directions that would be made by the court.[52] One of these directions purports to make a radical change to civil proceedings in Solomon Islands by providing that all witness statements be exchanged simultaneously, within 28 days of the filing of answers to interrogatories or, if there are no interrogatories, within 28 days of inspection.[53] Witnesses

50 Pleadings close 14 days after the service of the reply, or if there is no reply after service of the defence to counterclaim and if there is no counterclaim, 14 days after service of the defence: O18 r19 Fiji.

51 O32 r1(a) CPR.

52 Circular 3/2000.

may be called to give evidence only if their statement has been exchanged or if leave of the court has been given. Leave is only available on terms as to payment of the costs incurred as a result of any delay occasioned by the default. An exception is made in the case of a witness giving evidence that does not go outside a previously filed affidavit. This direction goes far beyond the reforms of disclosure rules in other countries, where parties are precluded from adducing evidence of experts only where the expert's report has not been disclosed (a matter which is also provided for in the Circular).[54] In some jurisdictions, the obligation to disclose experts' reports is confined to personal injury cases.[55] In others it is a general obligation.[56] Whilst both proposed directions could be said to promote a more open system of pre-trial procedure, their validity is doubtful. They do not abrogate the rule of substantive law that witness statements and experts' reports prepared for the dominant purpose of contemplated or actual litigation are privileged, as there is still no right to compel disclosure. However, they do purport to limit the right to adduce relevant evidence, a right that cannot be restricted without specific legislative enactment. The parties may agree different directions, but only if they have 'substantially the same effect'. The Circular suggests that, if alternative directions are proposed by one party, but not agreed to by the other, these directions would not be made. However, the Circular cannot override the court's discretion in O32 r3, which, like all discretions, must be exercised properly.[57] The Circular appears to acknowledge that it has no binding force, as the final paragraph states that the directions have been introduced in this way to retain a degree of flexibility, but it also states that if the directions 'are being flouted or ignored' the registrar will propose their implementation by way of practice direction. It is suggested that legislation would also be required to introduce a change of this magnitude.

A typical order made on the summons for directions in Solomon Islands (omitting the problematic direction regarding witness statements) is contained in Sample Document R.

53 Registrar's Circular 3/2000, Draft Direction, no 5.
54 *Ibid*, no 4.
55 See, for example, O25 r8 Fiji.
56 See, for example, Uniform Civil Procedure Rules (Qld), r212.
57 See *Russo v Russo* [1953] VLR 57 at 62–63 for a summary of the nature of judicial discretion.

SAMPLE DOCUMENT R—ORDER MADE ON SUMMONS FOR DIRECTIONS (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

CIVIL CASE No 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

and

SI REMOULDS LTD

Third Party

ORDER ON SUMMONS FOR DIRECTIONS

On hearing counsel for the parties and pursuant to O32 r2 IT IS ORDERED THAT:

1. Lists of Documents be filed and served by all parties within 14 days hereof;
2. Inspection take place within seven days thereafter;
3. Interrogatories be filed and served within 14 days thereafter;
4. Answers to interrogatories be filed and served within 14 days thereafter;
5. Expert evidence be limited to two witnesses per party and the substance of such experts' evidence and or reports be disclosed at least 28 days prior to the trial of the action and in default of such disclosure a party shall be barred from calling the expert whose evidence was not disclosed without the leave of the court which shall only be given on terms as to payment of the costs incurred as a result of any delay occasioned by such default.

6. The action be set down for trial before a Judge sitting alone in Honiara upon the filing of a Certificate of Readiness together with:

   (a) The appropriate fee;

   (b) Court Bundles as provided by O38 r3;

   (c) A Trial Bundle (which may be amalgamated with the Court Bundle) containing copies of experts' reports, witnesses' statements, summary of the issues by all parties, authorities to be used by all parties, agreed documents.

7. The Certificate of Readiness be served on all parties to the action within two days of filing the same in court.

8. Costs be in the cause.

Dated the day of 2003

.....

Application is by summons. No affidavit may be filed in support without the leave of the court.[58]

The Fiji Rules also require the court to consider making orders as to interrogatories, inspection of property, admissions and other evidentiary matters. The court is also required to consider whether amendment of the writ or any pleadings is required[59] and whether any agreements may be made,[60] including agreement as to exclusion or limitation of rights of appeal.[61]

If the plaintiff fails to take out the summons for directions within the time limit specified, the defendant may apply to have the action dismissed. At the hearing of that application, the court may either dismiss the action or treat the hearing as a summons for directions.[62]

Under the Tongan Rules, the onus is on the registrar to summon all parties to attend before the judge in chambers for the directions hearing.[63]

58 O32 r3; O25 r6 CPR. Unless the Rules require an affidavit in respect of a particular order sought: O25 r6(2).
59 O25 r3(b) Fiji.
60 O25 r4 Fiji.
61 O25 r5 Fiji. The Fiji Rules specifically state that the court is not required to attempt to secure agreement to the exclusion or limitation of appeal rights.
62 O33 r8 CPR; O25 r1(4) and (5) Fiji.
63 O19r1 Tonga.

The Samoan Rules are more general. They provide that the judge may at any time, on the application on notice of any party, or of his or her own motion, give such directions as he/she thinks proper.[64]

The Vanuatu Rules have replaced the directions hearing with a conference, called 'conference 1'.[65] The conference is arranged by a judge after a defence has been filed on a date after the time for the last pleading to be filed.[66] The purpose of conference 1 is to enable the court to manage the proceeding actively. In particular, the judge may:[67]

(a) deal with any interlocutory applications (see Pt 7), or fix a date for hearing them; and
(b) make orders:
    (i) adding or removing parties (see Pt 3); and
    (ii) about whether it is necessary to employ experts (see Pt 11 dealing with evidence); and
    (iii) for the medical examination of a party; and
    (iv) about disclosure of information and documents (see Pt 8); and
    (v) that a party give security for costs (see Pt 15); and
    (vi) that statements of the case be amended or that further statements of the case be filed; and
    (vii) about any other matter necessary for the proper management of the case.

4.2 Automatic directions

Under the Fiji Rules, there is no need to apply for directions in a personal injury action, other than a claim for medical negligence. In such cases, the following directions will take effect automatically:

- discovery of documents within 14 days, inspection 14 days thereafter;
- disclosure of experts' reports within 10 weeks;
- in the absence of agreement otherwise, limitation of experts to two medical and one other, whose evidence has been disclosed under the preceding direction;
- photographs, a sketch plan and the contents of any police accident report book to be admissible in evidence at trial and to be agreed if possible.

Notwithstanding this provision for automatic discovery, a party may choose to take out a summons for directions, to obtain further or different directions, if the circumstances of the case so demand.[68]

64 R67 Samoa.
65 R6.4(2) Van.
66 R6.3(1) and (2) Van.
67 R6.4(2) Van.
68 O25 r8 (3) Fiji.

5 DISCOVERY AND INSPECTION OF DOCUMENTS

5.1 Introduction

Discovery is a procedure whereby one party to a dispute can obtain details about an opponent's case. After the close of pleadings the issues should be fairly well defined. However, parties want to know how the facts in dispute will be proved and whether they are all going to be pursued. The purpose of discovery is to define the issues further and to ensure that neither party is taken by surprise at trial.

There are two related procedures, which are known together as 'discovery'. Under the Vanuatu Rules they are known as 'disclosure'. The two procedures are as follows:

- Discovery and inspection of documents

  This is a method by which one party is forced to disclose to the other all documents relevant to a fact in issue in the proceedings. A broad approach has been taken by the courts to what is relevant and relevance of an indirect kind may suffice.[69] In the Vanuatu Rules this is referred to as 'disclosure of documents'.[70]

- Interrogatories

  This is a method of obtaining further information about the facts in dispute and the opponent's case generally. In the Vanuatu Rules this is referred to as 'disclosure of information'.[71]

5.2 Discovery and inspection

5.2.1 Definition of document

The first question that arises is what is meant by a document for the purposes of discovery. Obviously, it includes a printed or written document, but does it extend to information that cannot be read by the naked eye? In the age of information technology this question is obviously of vital importance.

Only the Vanuatu Rules include a definition of document, which is stated to include 'anything in or on which information is recorded by any means'.[72] In some countries of the region there is a statutory definition in the Evidence Act. For example, the Evidence Act of Marshall Islands defines documents as meaning 'any matter expressed or described upon any substance by means of letters, figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter'.[73] The Evidence Act of Tonga defines document as meaning 'any matter expressed or inscribed for the purpose of recording such matter upon any substance by means of letters, figures or designs'.[74] Whilst those definitions do not strictly apply outside the

69 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.
70 Pt 8, division 1 Van.
71 Pt 8, division 2 Van.
72 R20.1 Van.
73 Evidence Act 1986, s4(b).
74 Cap 15, s 2.

confines of the Act in question, they would be highly persuasive in relation to interpretation of the term 'document' in the context of discovery. There is also statutory guidance in some regional interpretation Acts. For example, the Interpretation and General Provisions Act of Solomon Islands defines document as including 'any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter'.[75] The courts outside the region have now made it clear that tape recordings,[76] video tapes[77] and microfiches[78] are included in the term.[79] The English courts have taken the view that such orders will be made as are necessary as part of the discovery process.[80] This approach is likely to be followed within the region. To hold otherwise would be to defeat the purpose of discovery.

5.2.2 Procedure

Under the Fiji Rules, discovery is automatic in cases other than motor vehicle accidents and actions to recover a statutory penalty.[81] The Tongan Rules also provide for automatic discovery in all actions.[82] In both cases the list of documents must be served within 14 days after close of pleadings. The practical consequence of this is that discovery generally takes place before the summons for directions and any orders required in consequence may be applied for at that time. Under the CPR, there is no provision for automatic discovery, but the court may order discovery of documents (O33 r10), either in the form of a list (O33 r13) or in the form of an affidavit (O33 r12). This order is usually made on the summons for directions. The Fiji Rules provide that the court may order the list to be verified by affidavit (O24 r3). The Tongan Rules provide that a party may give notice that the list is required to be verified by affidavit, any time before the summons for directions (O18 r3). The form of list or affidavit is specified in the Rules. Under the Fiji Rules, it is Form 13 of Appendix 1. Under the CPR, it is Form 13 in Appendix B. In both cases, the list or affidavit falls into three parts:

- Schedule 1, Part 1

  This includes all relevant documents that a party has in his/her possession, custody or power and is prepared to show his/her opponent. Common

75 Cap 85, s 16(1).
76 *Grant v Southwestern & County Properties Ltd* [1974] 3 WLR 221. In this case the court held that it had general and inherent powers to make any order necessary for meaningful inspection.
77 *Radio Ten Pty Ltd v Brisbane TV Ltd* [1984] Qd R 113 at 123.
78 *State Bank of South Australia v Heinrich* (1989) 52 SASR 596.
79 In some countries, procedural rules define the term 'document', see, for example, O35 r1(1) Supreme Court Rules of Queensland, which applies the meaning in the Evidence Act 1977 (Qld), which includes any disk, tape, soundtrack or other device in which sounds or data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; any film negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.
80 *Dunn and Bradstreet Ltd v Typesetting Facilities Ltd* [1992] FSR 20.
81 O24 r2 Fiji. In *Shiu Palbidesi v Millers Ltd* (1976) 22 FLR 139, it was held that mutual discovery was mandatory unless the parties agreed otherwise. Once a court order for discovery was made it had to be obeyed and it was improper for the parties to waive this requirement.
82 O18r1 Tonga.

examples are: all correspondence between the parties, invoices and receipts (in a debt collection action), copy of police accident report (in a personal injury action).

- Schedule 1, Part 2

  This should contain all relevant documents, which the party has in his/her possession, but refuses to show, for instance, because they are privileged. Common examples are counsel's opinions and letters between client and solicitor.

- Schedule 2

  This should contain all relevant documents which the party once had, but no longer has in his/her possession, custody, or power. Details given must include what has happened to those documents, for example, that they have been thrown away. The most common entry under this heading is original letters which have been sent to the addressees.

Sample Document S is an example of the list of documents that might be filed in Joseph Wale's case.

The Tongan Rules contain a list of documents in Form 4, which is almost identical to the lists described above. The difference is that Schedule 2 is divided into two parts. The list of documents, which the party objects to producing, must be placed in Part 1 and the circumstances surrounding the loss of possession in Part 2. The affidavit verifying the list is in Form 5.

The Samoan position is rather different. Any party may issue an order in Form 17 for discovery of documents on oath without application to the court.[83] The party served must file and serve the affidavit of documents within ten days of service of the order.[84]

Under the Vanuatu Rules, the time for disclosure will be determined at conference. Disclosure is by making a sworn statement in Form 11 that:[85]

(i) lists the documents; and
(ii) states that the party understands the obligation to disclose documents; and
(iii) states that, to the best of the party's knowledge, he or she has disclosed all documents that he or she must disclose; and
(iv) for documents claimed as privileged, states that the documents are privileged, giving the reasons for claiming privilege; and

the list must be filed and served on the other party.[86]

The statement must be in Form 11 and must:

(a) identify the documents; and
(b) list them in a convenient order and as concisely as possible; and
(c) include documents that have already been disclosed; and

83 R86(1) and (2) Samoa.
84 R86(3) Samoa.
85 R8.5(1)(a) Van.
86 R8.5(1)(b) Van.

(d) list separately all documents claimed as privileged; and
(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.

Where a list of documents is filed by a firm or company, the sworn statement must be made by a responsible officer or employee and give the name and position of the person who selected the individuals who provided the information and the name and position of each of those.[87]

87 R8.5(1) Van.

SAMPLE DOCUMENT S—LIST OF DOCUMENTS (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

CIVIL CASE No 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

and

SI REMOULDS LTD

Third Party

LIST OF DOCUMENTS OF THE PLAINTIFF

The following is a list of documents relating to the matters in question in this action which are or have been in the possession, custody or power of the above-named Plaintiff and which is served in compliance with the order herein dated 1 May 2003.

1. The Plaintiff has in his possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the first schedule.

2. The Plaintiff objects to producing the said documents set forth in the second part of the said first schedule hereto on the grounds that the said documents are by their very nature privileged from production.

3. The Plaintiff has had, but has not now, in his possession or power the documents relating to the matters in question in this action set forth in the second schedule hereto.

4. The last-mentioned documents were last in his possession or power on their respective dates when they were posted to the addressees.

5. The Plaintiff has not now and never had in his possession, custody, or power, or in the possession, custody or power of his advocates or agents, or in the possession, custody or power of any persons or person on his behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing or any copy of or extract from any such document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto.

SCHEDULE 1 – Part 1	
Description of Document	Date
1 Police Accident Report Book	2 July 1997
2 Copy letters from the Plaintiff's solicitors to the other parties' solicitors and the insurer of the Second Defendant	Various
3 Original letters from the Second Defendant's insurer and solicitors for the other parties	Various

SCHEDULE 1 – Part 2	
Description of Document	Date
Correspondence and communications between the Plaintiff's solicitors and the Plaintiff; Instructions to Counsel; Opinions of Counsel; statements and proofs of witnesses and other correspondence and documents prepared and obtained solely for the purpose of this action. Drafts and copies of privileged documents.	Various

SCHEDULE 2	
The originals of the copy documents referred to in item 2 of Schedule 1, Part 1	Various

Dated the 13th day of May 2003

.....

Ann Advocate

Solicitor for the Plaintiff

5.2.3 *Challenging the list of documents*

Normally the list of documents is conclusive. It cannot be challenged by filing an affidavit questioning the accuracy of the list. In *Lyle v Kennedy (No 3)*,[88] it was held that mere suspicion, even if it is a reasonable suspicion, is not enough to get the court to look into a claim that a refusal to allow inspection on the grounds of legal professional privilege is unjustified. This is one of the reasons why solicitors are under an ethical obligation to impress upon their clients the seriousness of disclosing all relevant documents.

However, this does not mean that a list of documents may never be challenged. There are two available methods of challenge:

- A general challenge

  If a party fails to serve a list of documents, application can be made to compel this.[89] A defaulting plaintiff runs the risk of having the action struck out for want of prosecution.[90] A defaulting defendant runs the risk of having the defence struck out.[91] If a party does not serve an adequate list of documents, application can be made for an affidavit of documents to be filed.[92] Under the Tongan Rules, a party may serve a notice requiring verification of a list of documents by affidavit at any time prior to the summons for directions.[93] The party served with such a notice must file and serve the affidavit within 14 days of receipt.[94]

  If an affidavit has already been filed, the position is more complicated, as this is normally conclusive. However, it is possible to convince the court that a further and better affidavit should be filed. The grounds on which this discretion will be exercised were considered in *British Association of Glass Bottle Manufacturers Ltd v Nettlefold*.[95] The Court of Appeal held that if the affidavit of documents or any other document in the proceedings gives reasonable grounds to believe that there were documents in existence which should have been included, this would justify a challenge. The discretion might also be exercised if such documents gave reasonable grounds for believing that the other party had misconceived the principles on which the affidavit should be made.

- A specific challenge

  If a party believes that a specific document has not been disclosed, application may be made to compel its discovery.[96] In *Beecham Group Ltd v Bristol-Myers Co*,[97] it was said that an order should be made under the equivalent English rule, where the court had reasonable grounds for being fairly certain that the specified documents were, or had been, in the possession of the other party.

88 (1884) 27ChD1.
89 O33 r21 CPR; r8.15 Van.
90 O33 r21 CPR; O24 r3(2) Fiji; r93 Samoa; O18 r6 Tonga; r8.15(2)(b) Van.
91 O33 r21 CPR; O24 r3(2) Fiji; O18 r6 Tonga; r8.15(2)(b) Van.
92 O33 r13 CPR.
93 O18 r3(1) Tonga.
94 O18 r3(2) Tonga.
95 [1912] AC 709.
96 O33 r19(3) CPR; O24 r7 Fiji; r91(1) Samoa; r8.9(1) Van.
97 [1979] VR 273.

In both cases, the application should be supported by an affidavit.[98]

5.2.4 Inspection

Once lists have been exchanged, those documents that are discoverable must be made available for inspection.[99] A notice to inspect is usually indorsed at the end of the list of documents. The CPR do not provide an automatic right to give notice for inspection, but in practice inspection is always allowed by consent and a notice to inspect is often put at the end of the list of documents. If inspection is not allowed, application may be made to the court for an order to inspect under O33 r15 CPR.

A party is restricted to using information obtained on inspection for the purposes of the action.[101] Any collateral use may be restrained. For example, in *Distillers Co (BioChemicals) Ltd v Times Newspapers Ltd*,[102] documents made available on discovery were given to a newspaper for publication. The court granted an injunction to restrain the use of the documents in that case, as it was an abuse of process. Another example is *Home Office v Harman*,[103] where a solicitor was found guilty of contempt when she made documents given to her in the course of discovery available to a journalist.

Inspection may be refused on the following grounds:

- Lack of relevance

  Only documents that are relevant to the proceedings are required to be discovered. The meaning of relevance was discussed in *The Samoan Outrigger Hotel Ltd v Samoa Realty and Investments* Ltd.[104] Sapolu CJ held that:

  > The test whether a document is relevant in a discovery sense is whether it may advance the case for the party seeking discovery or damage the case for his adversary or may fairly lead to a train of inquiry to either of these two consequences…[105]

  The Vanuatu Rules put it in the following way. A party need only disclose a document if 'the document to a material extent adversely affects that party's case or supports another party's case'.[106]

- Legal professional privilege

  This ground may be divided into two categories:

  Legal advice—confidential communications between client and lawyer; confidential communications between two or more lawyers acting for the client;

98 R91(2) Samoa.
99 O24 r9 Fiji; r87 Samoa; O18 r5 Tonga; r8.7(1) Van.
100 Form 13, Appendix 1 Fiji; Form 4 Tonga.
101 R8.16 Van. Cf *Mahan v Rahn* [1997] 3 WLR 1230, documents disclosed in criminal proceedings are not subject to any implied undertaking not to use them for other purposes.
102 [1974] 3 WLR 728.
103 [1981] 2 WLR 310.
104 Unreported, Supreme Court, Samoa, 15 November 2001, p 1.
105 Citing *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55; *Thorpe v Chief Constable* [1989] 2 All ER 827, 829, 833; *Comalco NZ v Broadcasting Standards Authority* [1995] 3 NZLR 468, 470, 471.
106 R8.2(1)(b) Van.

and contents of confidential documents prepared by the client or lawyer for the dominant purpose of providing legal advice to the client.

Litigation—confidential communications between the client or lawyer and a third party and confidential documents prepared for the dominant purpose of actual, anticipated or pending proceedings.

- Tendency to incriminate

  A person may not be compelled to produce documents where to do so would expose the person to a criminal conviction or civil penalty.[107]

- Public policy

  Even where no personal privilege applies, evidence may be excluded under the broad heading of public policy.

- Objection may be based on the class of document or the contents of the document in question.
- In *Lopez v Attorney-General (No 1)*,[108] the High Court of Solomon Islands held that a claim for public interest privilege required the court to hold the balance between the public interest (in that case, as expressed by a Minister) in withholding certain documents and the public interest in disclosing them to ensure the proper administration of justice.[109]
- The Vanuatu Rules specifically deal with the public policy considerations. Rule 8.11 provides that a party may apply for an order dispensing with the disclosure of a document on the ground that disclosure would damage the public interest. The application must identify the document (unless disclosure of its existence would itself be against the public interest) and set out the reasons why disclosure would be against the public interest.[110] The court may raise public interest of its own motion if it considers that disclosure of a document could be damaging.[111]
- Agreement between the parties

  Parties may agree to conduct negotiations with a view to reaching a compromise or settlement. Generally, communications between parties to civil proceedings are not privileged, nor would they be 'protected' by legal professional privilege if the lawyers acted as intermediaries. However, it is obviously desirable that litigation should be avoided where possible by way of a negotiated compromise or settlement. In order to facilitate this, documents forming part of this process are generally protected from disclosure as being 'without prejudice'. It is usual to mark the words 'without prejudice' on the correspondence, but the fact that the words do not appear will not affect the position. The important point is whether the parties' conduct and circumstances clearly show 'off the record' negotiations are proposed, particularly if legal representatives were present.[112]

107 *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1.
108 [1983] SILR 232.
109 See s 20, Government Proceedings Act 1974 (Samoa). In *New Samoa Industries Ltd v Attorney-General* [1970–79] WSLR 8, it was held that discovery will only be ordered against the State if it indicated that it did not wish to exercise the privilege conferred by s 20 on the grounds that disclosure would be 'injurious to the public interest'.
110 R8.11(2) Van.
111 R8.11(3) Van.

The protection may be waived, but only if both parties to the correspondence agree.

- Documents not under a party's control

  The rules only require a party to make discovery of documents that are or have been under his or her control. The test expressed in the CPR and Samoan Rules is whether the document has been within the party's 'possession or power'.[113] Under the Fijian and Tongan Rules it is whether it has been in a party's 'possession, custody or power'.[114] The distinction between 'possession' and 'custody' is that, whilst both involve physical possession, the former normally refers to possession pursuant to a right of possession, whereas 'custody' refers to the situation where a party has physical possession, unaccompanied by any right. An example is where an employee holds a document on behalf of his or her employer. In practice, in those jurisdictions where custody is not specifically mentioned in the rules, 'possession' is likely to be interpreted widely to include mere physical possession. 'Power' means an enforceable right to obtain possession or control of the document.[115]

  The Vanuatu Rules make the position clearer by referring only to 'control' and providing that:[116]

  > A document is or has been in a party's control if:
  >
  > (a) the document is or was in the party's physical possession; or
  > (b) the party has or has had the right to possess it.

- Oppression

  The court maintains discretion to relieve a party from the duty to produce documents for inspection if this would be oppressive, for example, because of the number of documents sought to be discovered, or the excessive cost associated with production when compared with the evidential value.[117]

A court order for inspection is subject to the disclosing party's right to claim privilege and there is no need for this to be spelt out in the order. In *Carbon Industries (Fiji) Ltd and Campbell v Australia and New Zealand Banking Group Ltd and Murphy,*[118] the plaintiff asserted that following a directions order, including a direction for allowing inspection, the court was *functus officio,* the defendant not having allowed inspection as ordered. Pathik J made his disapproval of this argument very clear and pointed out that an order for inspection did not prevent a party asserting privilege.

112 See *Rodgers v Rodgers* (1964) 114 CLR 608 at 614; *Gregory v Phillip Morris Ltd* (1988) 80 ALR 455 at 475.
113 O33 r10; r86 Samoa.
114 O24 r1(1) Fiji; O18 r1 Tonga.
115 *Lonrho Ltd v Shell Petroleum Ltd* [1980] 1 WLR 627.
116 R8.3(2) Van.
117 *Attorney-General v North Metropolitan Tramways Co* [1892] 3 Ch 70.
118 Unreported, High Court, Fiji, Civ Cas 451/1993, 3 December 1998.

5.3 Interrogatories

Interrogatories are written questions served by one party on the other and usually required to be answered on oath. Questions are aimed at getting admissions from the other side about the facts that will help the interrogating party at trial (either because they assist his/her case or because they damage the opponent's case). It can be compared to a 'paper version' of examining the other side on oath in the witness box. It may therefore be used as a practice run for some questions that will be asked at trial. Questions are restricted to requests for admissions relevant to the issues raised by the pleadings.[119]

In some other Commonwealth jurisdictions, interrogatories have fallen out of favour. In Queensland, for example, the Uniform Civil Procedure Rules 1999 provide that interrogatories may only be delivered with leave and, even then, are limited to 30 questions.[120] Leave will only be given if the court is satisfied that there is no reasonable simple and inexpensive alternative method of proof.[121] In *Ranger v Suncorp General Insurance Ltd*,[122] the Court of Appeal of Queensland indicated that leave would only be granted in exceptional cases. However, this case has since been distinguished in Cross *v Queensland Rugby Football Union and Another*[123] and the test of 'quite special circumstances' questioned, albeit at Supreme Court level.

Interrogatories usually fall into one of four types:

- a demand for further and better particulars of material facts;
- a demand for admissions of fact which support the case of the interrogating party;
- a demand for admissions of fact which harm the case of the interrogated party;
- a request directed to obtaining a copy or extract of accounts from a fiduciary agent.

These categories are not as wide as they appear. They are restricted by the controlling principle, mentioned above, that the interrogatories must be relevant to a question of fact in dispute. Whilst relevance has been interpreted widely, generally questions must 'go to maintain the interrogator's case or to destroy the case of his adversary'.[124] Accordingly, questions should not be directed to:

- the credibility of an opponent's witness;
- possible claims or defences outside the scope of the issues arising on the pleadings (often referred to as a 'fishing expedition');
- matters which a party would not have to respond to whilst testifying;
- matters which require an excessive amount of work to answer, or involving questions that are otherwise oppressive.[125]

119 *Sunny Wunsan Tong v Kayuken Pacific Ltd and Kong Ming Khoo* [1990] SILR 4.
120 R229 UCPR.
121 R230 (1)(b) UCPR.
122 [1999] 2 Qd R 433.
123 [2001] QSC 173.
124 *Sunny Wunsan Tong v Kayuken Pacific Ltd and Kong Ming Khoo* [1990] SILR 4, at 5.
125 Even if relevant, a question will be disallowed if its value is outweighed by the inconvenience involved in answering it: *White v Credit Reform Association* [1905] 1 KB 653.

5.3.1 *Procedure*

Leave is always required to deliver interrogatories.[126] This is usually obtained on the summons for directions.[127] The Fiji and Tongan Rules require a draft of the proposed interrogatories to be filed with the summons (O26 r1(2) Fiji; O20 r1(2) Tonga). This is also a requirement under O33 r2 of the CPR, which states that the draft should be delivered at least five days before the hearing. In practice this requirement is not usually insisted upon. The Samoan Rules require an affidavit in support of the application to be filed and it is good practice to annex a draft of the proposed interrogatories to this affidavit (r79). Under the CPR, interrogatories are in Form 11 of Appendix B. Under the Samoan Rules, they must be in Form 15.

The Vanuatu Rules provide that oral application for leave to ask interrogatories, which are renamed 'written questions', should be made at a conference.[128] If this is not practicable, an oral application may be made.[129]

5.3.2 *Answering interrogatories*

Under the CPR, answers to interrogatories should be by affidavit in Form 12 of Appendix B and filed within 14 days, or such other time as the court allows (O33 r7). Under the Samoan Rules, answers to interrogatories should be by affidavit in Form 16 and filed within 10 days, or such other time as the court allows (r81). The Tongan Rules require answers to be by affidavit, but no form is specified (O20 r1(1)(ii) and (3)). Although the Fiji Rules do not expressly require the answer to be in the form of an affidavit, this is implicit in O26 r4.

The Vanuatu Rules provide that written questions must be answered within 14 days of the questions being served on the party or within the period fixed by the court.[130] The questions must be answered in writing, setting out each question followed by the answer, and be verified by a sworn statement. The Rules also state that the substance of each question must be answered without evasion or resorting to technicalities.[131]

A party may object to answering interrogatories on the grounds that they are:[132]

- irrelevant;[133]
- scandalous;[134]
- not *bona fide*;[135]

126 O33 r1 CPR; O26 r1 Fiji; r77 Samoa; O20 r1 Tonga; r8.19 Van.
127 Interrogatories will rarely be ordered prior to the summons for directions. See *Hall v Selvaco Ltd* [1996] PIQR 344, where it was held to be premature to serve interrogatories without order before the exchange of witness statements under the RSC.
128 R8.20(1) Van.
129 R8.20(2) Van.
130 R8.22(2) Van.
131 R8.23(3)(a) Van.
132 For a summary and explanation of the grounds for objection, see Cairns, B, *Australian Civil Procedure*, 5th edn, 2002, Sydney: Law Book Co, pp 319–20.
133 O33 r6; *Sunny Wunsan Tong v Kayuken Pacific Ltd and Kong Ming Khoo* [1990] SILR 4.
134 *Ibid*.
135 O33 r6.

- not material at that stage of proceedings;[136]
- other.

Commonly, claims under the last head are oppressiveness, incrimination and privilege.

The Vanuatu Rules have consolidated the common law grounds (r8.24(2) Van) of objections and provide that objection to answering a written question may be made 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
(b) the question is not reasonably necessary to enable the court to decide the matters at issue between the parties; or
(c) there is likely to be a simpler and cheaper way available at the trial to prove the matters asked about; or
(d) the question is vexatious or oppressive; or
(e) privilege.

The objection is to be dealt with at a conference (r8.24(3) Van).

If any person omits to answer or answers insufficiently, the interrogating party may apply for an order compelling an answer or further answer, as the case may be.[137]

There are other procedural devices relating to discovery, including inspection, detention, or preservation of property and discovery before suit, but these are not dealt with in this text.

6 TIME

6.1 Calculating time

The rules of court operating in the region specify time limits within which certain procedural steps must be taken. The rules also provide mechanisms for calculating periods of time under the rules or specified in any order.

The following rules apply under the CPR and Fiji Rules:

- 'Month' means a calendar month unless the context suggests otherwise.[138]
- Where an act has to be done within or not less than a specified period, the period ends immediately before that date.[139]

The following rules apply under the CPR, Fiji and Samoan Rules:

- Where an act has to be done within a specified period after or from a specified date, the period begins immediately after that date.[140]

136 *Ibid*.
137 O33 r9 CPR; O26 rr5 and 6 Fiji; r83 Samoa; O20 rr4 and 5 Tonga; r8.25 Van.
138 O64 r1 CPR; O3 r1 Fiji.
139 O64 r8 CPR; O3 r2(3) Fiji.
140 O64 r8 CPR; O3 r2(2) Fiji; r208(1) Samoa.

- Where a period of:
  (i) less than six days (CPR);
  (ii) less than five days (Fiji);
  (iii) less than 48 hours (Samoa);
  is specified, this does not include:
  (i) Sunday, Christmas Day or Good Friday (CPR);[141]
  (ii) Saturday, Sunday or Public Holiday (Fiji);[142]
  (iii) Saturday, Sunday or day on which the court office is closed (Samoa).[143]

The following rule applies under the Fiji Rules:

> Where the act has to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and the specified date.[144]

The CPR contain a special rule, which applies where there has been an order for security for costs to be given. In that case, the period commencing on the day of the order up to and including the day when security is given is excluded from the computation of time allowed to take any step in proceedings.[145]

The Vanuatu Rules do not contain a provision regulating the calculation of time.[146] They take a different approach by providing that a party may file a document after the time limit fixed. It is then for the court to 'decide whether or not the document is effective for the proceeding'.[147] Unfortunately, the Rules do not say when the court will make this decision or whether application by the other side in the proceedings is required before such a decision is made. This has a profound implication for default proceedings. The Rules proceed on the basis that a party may file for default judgment in the absence of a response or in the absence of a defence. Presumably, once such an application is filed, late filing is not acceptable. This rule requires clarification by the court or, preferably, by an amendment to the Rules.

6.2 Extensions of time

The CPR, Fiji Rules, Samoan, Tongan and Vanuatu Rules bestow a specific discretion on the court to extend or abridge time.[148] This discretion exists even if the time limit in question has already expired.[149] The CPR and Vanuatu Rules provide that the cost of obtaining such an order shall be paid by the applicant unless the court orders otherwise.[150] An

141 O64 r2 CPR.
142 O3 r5 Fiji.
143 R208(2) Samoa.
144 O3 r2(4) Fiji.
145 O64 r4. This rule is taken from the former O64 r6 RSC, which does not appear in the current RSC.
146 The times for filing documents are specified in r4.13 Van.
147 R4.14 Van.
148 O65 r5 CPR; O3 r4 Fiji; r69 Samoa; O5 r1 Tonga; r18.1 Van.
149 O64 r5 CPR; O3 r4(2) Fiji; r69(2) Samoa; r18.1(2) Van.

adverse order for costs would normally be made in the other jurisdictions, but must be specifically ordered. Some of these Rules also provide that time limits may be extended by consent of the parties in writing.[151]

A party applying to the court for an extension must file an affidavit containing evidence in support.[152]

Under the CPR, Fiji Rules, Samoan Rules and Tongan Rules, there is an automatic extension if a time limit expires on a day when the court office is closed. In that case, the act shall be deemed to be done on time if it is done on the next day that the court is open.[153]

Under the Fiji Rules, if the time for filing a pleading or other document is extended, whether by the court or by consent, a late filing fee will be payable, unless the court orders this to be waived.[154]

6.3 Notice required after delay

The CPR and Fiji Rules provide that if no step in the proceedings has been taken for a year, a notice must be served giving one month's notice of the serving party's intention to proceed.[155] A summons on which no order has been made does not constitute a step in proceedings.[156] Nor, generally, does a party's solicitor writing a letter to the other side.[157]

Notice to proceed is not required under the Vanuatu Rules. However, these Rules have taken a serious approach to delay in civil proceedings and provide that, if no steps have been taken in a proceeding for three months, the claimant may be given notice to appear and show cause why the claim should not be struck out.[158] Further, the court may strike out a claim without notice if no step has been taken for six months.[159]

7 FAILURE TO COMPLY WITH THE RULES

7.1 Applications where a breach has occurred

Failure to comply with the rules of court is a common occurrence. In some cases, this is because the time limits imposed by the rules are unrealistic, particularly in the South Pacific region where the profession is fused and lawyers often have court work to attend

150 O64 r5 CPR; r15.13 Van.
151 O64 r6 CPR; O3 r4(3) Fiji; O5 r2 Tonga.
152 *Kera v Mbaeroko Timber Co Ltd, Golden Fountain (SI) Co, Huti and Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas 15/1998, 28 March 2002.
153 O64 r3 CPR; O3 r3 Fiji; r208(3) Samoa; O5 r3 Tonga.
154 O3 r4(3), as amended by LN 67/93.
155 O64 r9 CPR; O3 r5 Fiji.
156 *Ibid.*
157 *Brighton Marine Palace & Pier Ltd v Woodhouse* [1893] 2 Ch 486 at 488.
158 R9.10(3) Van.
159 R9.10(2) Van.

to as well as office work. The consequences of failure to comply with the Rules were mentioned in Chapter 1. Such failure usually has no effect unless a party obtains an order from the court imposing a penalty for the breach. An application based on the other party's failure to comply with the Rules should be taken at the first possible opportunity. If a party knowing of a breach of the Rules by the other side, takes the next step in the proceedings without objecting to the breach, the right to object is waived.[160] A party who has breached or cannot comply with a rule or order should attempt to remedy the position by consent or by obtaining the appropriate court order at the earliest possible opportunity.

Under the Vanuatu Rules, the court may deal with a failure to comply with the Rules of its own motion or on application.[161]

7.2 Self-executing orders

A court may make an order that specifies certain consequences. For example, striking out of an action or defence may automatically follow from failure to comply with its terms, without the need for any application by the innocent party. Such orders are known as 'self-executing' or 'unless' orders. A Practice Direction issued in the UK sets out approved wording for such an order. The following example has been adapted from the least ambiguous of the three forms of approved wording as a suggested model to be used when drafting an order in the South Pacific:

> Unless by pm on the day of 2003 the plaintiff [or defendant, as the case may be] serves further and better particulars of the Statement of Claim pursuant to the requested date…[or such other action as is required by the order], the action shall be struck out and judgment entered for the defendant [or plaintiff] with costs [or such other penalty as the court considers appropriate].

8 INTERLOCUTORY INJUNCTIONS

8.1 Introduction

Injunctions were described by Vaudin d'Imecourt CJ in *Deamer v UNELCO Management:*[162]

> An injunction is an order or decree by which a party to an action is required to do, or refrain from doing, a particular thing. Injunctions are either restrictive (preventive) or mandatory (compulsive). As regards time, injunctions are either interlocutory (or interim) or perpetual. A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant; an interlocutory injunction may be granted at any time after the issue of the writ to maintain things in status quo. O53 r6 empowers the court to grant an injunction by interlocutory order in all cases

160 *Rein v Stein* (1892) 66 LT 469; *Sage v Double A Hydraulics Ltd* (1992) *The Times, 2* April.
161 R18.10 Van.
162 (1989–94) 2 VLR 554 at 555.
163 An interim injunction is a form of interlocutory injunction, usually granted *ex parte*, which continues until a named date.

in which it appears to be just or convenient to do so. The order can be made unconditionally or subject to terms and conditions.

8.2 Principles

The principles on which an interlocutory injunction will be granted are well settled in Solomon Islands. The principles in *American Cyanamid Co v Ethicon Ltd*[164] have been applied in a number of cases.[165] In *Allardyce Lumber Co v Nelson Anjo*,[166] the Court of Appeal confirmed that they were part of the common law and equity to be applied in Solomon Islands pursuant to para 2 of Sched 3 of the Constitution. The relevant questions were summarised as follows:

> The first question is: Is the action by the respondent frivolous or vexatious? Is there a serious question to be tried? Is there a real prospect that the respondent will succeed in his claim for permanent injunction at the trial? In essence all these questions are part and parcel of the same test….
>
> The next question the Court must consider is whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction. There are two sides to this question. If the respondent succeeds in his action, would he be adequately compensated for damages for loss sustained between the application and the trial? If the answer to this inquiry is positive, no interlocutory injunction should normally be granted.
>
> If on the other hand damages would not provide adequate [compensation] the Court should then consider whether if the respondent fails, the appellants would be adequately compensated under the respondent's undertaking in damages. If the answer to this inquiry is positive, there would be no reasons on this ground to refuse an interlocutory injunction.
>
> In this matter, the respondent gave no undertaking for damages. We were advised by counsel that in the Solomon Islands it is not normal to request such undertaking from customary landowners. Counsel for the appellants has submitted that this is a consideration in favour of not granting the interlocutory injunction.
>
> As a part of considering the balance of convenience, other things being even, an important factor that should be considered is preserving the status quo until the trial is held.
>
> It may also be proper in appropriate circumstances to take into account in tipping the balance the relative strength of each party's case on the evidence before the trial judge.

A similar approach is taken in the other jurisdictions of the region, apart from the customary landowners' exemption from the requirement to give an undertaking in damages, which is unique to Solomon Islands.[167] Since the decision in *Allardyce Lumber*

164 [1975] 1 All ER 504.

165 *Tung Shing Development Ltd v Yim Kwok and Others,* unreported, High Court, Civ Cas 66/95, 7 April 1995; *North New Georgia Timber Corporation and Another v Sake Hivu and Others,* unreported, High Court, Civ Cas 387/93, 10 February 1995; *John Wesley Talasasa v Attorney-General and Others,* unreported, High Court, Solomon Islands, Civ Cas 43/95,15 May 1995.

166 Unreported, Court of Appeal, Solomon Islands, Civ App 8/1996,15 April 1996.

167 Logging companies in dispute with customary landowners will be required to give an undertaking as to damages: *Eastern Development Enterprises Ltd v Stanley Zae and Others,* unreported, Civ Cas 350/1999,4 February 2000.

Co v Nelson Anjo, the exemption has been extended to other cases. In *Rolland Masa and Others v Koloeana Development Co and Others,*[168] Muria CJ said that an undertaking would only be dispensed with in exceptional cases and that this would include the case where an applicant was represented by the Public Solicitor's Office or had limited means.[169] In other countries all applicants are usually required to give undertakings as to damages before being granted an injunction.

The balance of convenience was considered in Tonga in *Veronesi v Oasis Co Ltd*.[170] In that case, the plaintiff had been running a restaurant under an agreement with the defendant. Following a dispute, the defendant denied the plaintiff access to the restaurant and removed some of the furniture. The plaintiff obtained an interim injunction restoring the furniture and possession and the restaurant reopened. The parties agreed that there was a serious issue to be tried. In considering whether damages would be an adequate remedy, the court did not consider the fact that damages were the only likely remedy at trial to be fatal to an application for an injunction. Ward CJ considered that assessment of damages would be very complex if the injunction were discharged. The plaintiff could open another restaurant but this would take some time to establish and its success would depend on the reputation established in the present restaurant. That harm might not be capable of being adequately compensated for in damages. On the other hand, the defendant had employed a new chef and would have to terminate that contract. On the balance of convenience, the court found in favour of the plaintiff.

In *Tong v Takabwebwe,*[171] the High Court of Kiribati held that it was doubtful whether the court had power to grant an injunction against a Minister of the Crown so as to interfere with the parliamentary process. In any event, the court held that it was not satisfied that an interlocutory injunction should be issued. Referring to the case of *American Cyanamid Co Ltd v Ethicon Ltd,*[172] Topping J held that the plaintiff had failed to show that irreparable harm would be caused, or that the balance of convenience favoured an injunction, and that the plaintiff was guilty of an unexplained delay in bringing the proceeding.

In Solomon Islands, it has been made clear that where environmental damage such as logging may occur, in the absence of an injunction, damages will not be an adequate remedy.[173]

8.3 Procedure

The application may be made *ex parte* or on notice.[174] Application should only be brought *ex parte* where the case is urgent.[175] The CPR expressly provide that an *ex parte* application should only be allowed if the court is 'satisfied that the delay caused by proceeding in the

168 Unreported, High Court, Solomon Islands, Civ Cas 361/95, 29 March 1996 at 23.
169 See also *Hitukera v Hyundai Timber Co Ltd and Maepeza,* unreported, High Court, Solomon Islands, Civ Cas 132/92, 23 July 1992.
170 Unreported, Supreme Court, Tonga, Civ Cas 1188/1999, 19 November 1999.
171 [1988] SPLR 185.
172 [1975] AC 396.
173 See, for example, *Taluomea and Others v Lolo/Ngalulu Development Corporation Ltd and Others,* unreported, High Court, Solomon Islands, Civ Cas 2/2002, 8 August 2002.
174 O53 r7 CPR; O29 r1(2) Fiji; r65(1)(a) and r71(a) Samoa; rr7.3(1) and 7.6 Van.
175 O55 r3 CPR; O29 r1(2) Fiji; rr7.3(1) and 7.6 Van.

ordinary way would or might entail irreparable or serious mischief…'.[176] This point was clearly made by Kabui J in *Western Solomon Islands Mission of Seventh Day Adventist Church v Nale and Nale.*[177] Similarly, in *Deamer v UNELCO Management,* Vaudin d'Imecourt CJ said:[178]

> I take this opportunity to give certain guidance to the Bar of Vanuatu. They would all do well to remember that *ex parte* applications for injunctions should only be made when there is a real need for it.[179]

His Lordship also gave the following guidance:

> There should always be affidavits and writs or originating summons in support. The Court will only grant them if satisfied that an emergency does exist. There will be a short return date, when the whole of the evidence will be gone into and all parties will be heard. Undertakings as to costs and damages will always be asked for and in some instances even security for the same will be ordered to be paid into Court.[180]

Application may be by either party. *Ex parte* applications are normally commenced by *ex parte* originating summons unless proceedings have already commenced, when an interlocutory *ex parte* summons should be taken out. In Samoa, they are by motion in Form 13. In cases of extreme emergency, application on affidavit may be permitted. In these cases, the injunction may be granted on condition that the writ or summons is issued forthwith.[181] The Vanuatu Rules provide that an oral application may be allowed on condition that a written application is made within the time directed by the court.[182]

An interlocutory injunction made *ex parte* may be discharged on application by the other side.[183]

Application on notice may be made by a plaintiff at any time after issue of the writ and by a defendant at any time after appearance.[184] This will usually be by notice of motion. In Samoa, the form of notice is specified as Form 14.[185] In Tonga, application is by summons.[186] Two clear days notice is required under the CPR, unless the court gives special leave to the contrary.[187] Twenty-four days notice is required under the Samoan rules, unless leave is given to abridge or dispense with the notice period.[188]

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176 O55 r3 CPR.
177 Unreported, High Court, Solomon Islands, Civ Cas 015/2000, 24 January 2000. See also *Kofela v Sanga and Beka,* unreported, High Court, Solomon Islands, Civ Cas 206/1999.
178 (1989–94) 2 VLR 554 at 557.
179 See also *Rolland Masa and Others v Koloeana Development Co and Others,* unreported, High Court, Solomon Islands, Civ Cas 361/95, 29 March 1996 at 21–22.
180 With regard to undertakings as to damages, see *Allardyce Lumber Co v Nelson Anjo,* unreported, Court of Appeal, Solomon Islands, Civ App 8/1996, 15 April 1996 and *Rolland Masa and Others v Koloeana Development Co and Others,* unreported, High Court, Solomon Islands, Civ Cas 361/95, 29 March 1996.
181 O29 r1(3) Fiji; O22 r1(5)(ii) Tonga.
182 R7.6 Van.
183 *Meredith and Fuk v Pa'u,* unreported, Supreme Court, Samoa, CP78/1994, 5 May 1994.
184 O53 r7 CPR; O29 r1(3) Fiji; O22 r1(5)(i) Tonga.
185 R65(1)(c) Samoa.
186 O22 r1(2) Tonga.
187 O55 r5 CPR.
188 R65(1)(c) Samoa.

The Tongan Rules require five days notice, except in cases of urgency.[189] Under the Vanuatu Rules, application is made in Form 10.[190] Three days notice is required unless the court orders otherwise.[191]

In all cases an affidavit in support is required. This should contain a clear and concise statement of the facts giving rise to the cause of action, the facts giving rise to the application for an injunction and the precise relief sought. If the application is made *ex parte,* it should also contain the facts relied on as justifying *ex parte* relief, any assertions likely to be made by the defendant in answer to the main action or the application for interlocutory relief possible, and any known facts that might justify refusal of the order.

The Vanuatu Rules make special provision for application for a Mareva injunction or Anton Piller order.[192] The Rules rename these as a 'freezing order' (Mareva injunction) and 'order to seize documents or property' (Anton Piller order).[193] As discussed in paragraph 1.1 above, a Mareva injunction is designed to prevent a party removing assets from the jurisdiction or otherwise dealing with them in such a way as to frustrate any judgment which might be made in the proceedings. An Anton Piller order is an order authorising the applicant to seize documents and objects in the other party's possession which are required to be preserved as evidence in the proceedings. Application is made orally or in Form 10, supported by sworn statement.[194]

The CPR and Fiji Rules contain less ambitious provisions, which allow the court to make an order for the preservation or interim custody of property which is the subject matter of the dispute or to provide for the interim attachment of property.[195] Application is by summons or, in Fiji, by notice (if the application is to be made on the summons for directions)[196] accompanied by affidavit.

189 O22 r1(3) Tonga.
190 R7.1(3) Van.
191 R7.3(2) Van.
192 Rr7.8 and 7.9 Van.
193 Rr7.8 and 7.9 Van.
194 R7.8(5) Van.
195 O53 CPR; O29 r2 Fiji.
196 See O25 r7 Fiji.
197 O29 r2 Fiji.

CHAPTER 10

DETERMINATION WITHOUT TRIAL

1 DEFAULT JUDGMENT

1.1 Introduction

In most jurisdictions, there are two types of default judgment:

- judgment in default of appearance, notice of intention to defend, or response;[1]
- judgment in default of pleading.

Neither of these is a judgment on the merits. It is an administrative procedure, allowing judgment to be entered by virtue of the fact that the other side has not indicated a desire to defend the case.

1.2 Judgment in default of appearance or notice of intention to defend

The time limit for entry of appearance, acknowledgment of service (which is the document containing the notice of intention to defend) or response is 14 days.[2] In Vanuatu, the Rules state that there is no need to file a response if the defence is filed within 14 days.[3] In that case, the defence takes the place of the response. Whilst the CPR and Fiji Rules do not contain an express rule to this effect, in practice the registry will refuse to accept an application for judgment in default after a defence has been filed, as it serves as a clear indication that the other party intends to defend. Even if the registry were prepared to accept the application, a party would be unwise to file for default judgment as it would be likely to result in an unfavourable costs order if an application were made to set judgment aside.

An extension of time for filing an appearance or other response may be obtained, either by agreement with the other side, or by application to the court. If there is no extension of time and the defendant has not filed a defence, the plaintiff is entitled to assume that the defendant does not want to take part in the proceedings and to enter a judgment in default.

1.2.1 Procedure for obtaining judgment in default of appearance and notice of intention to defend

Procedure is governed by O13 CPR; O13 Fiji; and rr9.1–9.14 Van. The following must be lodged at the court registry:

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1 This is not available in Samoa, Tonga or Niue. The equivalent is available in the magistrates' court, Samoa (MCR rr7, 15 and 17).
2 See further, Chapter 7.
3 R4.4(3) Van.

(a) An affidavit of service or sworn statement.[4]

Under the Fiji Rules, this will not be necessary if the defendant has filed an acknowledgment of service or the solicitor has endorsed acceptance of service on the writ.

(b) Under the Fiji Rules, a *praecipe* for a search to see if a notice of intention to defend has been filed.

An example is set out in Sample Document T.

(c) Under the Fiji Rules, a fee of $10.00.
(d) Under the CPR and Fiji Rules, a judgment for sealing by the court.
(e) Under the Vanuatu Rules, a request for judgment in Form 12 or 13.

4 O13 r2 CPR; O13 r8 Fiji; rr9.1, 9.2(2) and 9.3(2) Van.
5 There is no logical reason for requiring an affidavit of service in cases of this sort under the CPR and an amendment to this effect would be useful.

SAMPLE DOCUMENT T—*PRAECIPE* FOR SEARCH (FIJI)

IN THE HIGH COURT OF FIJI ISLANDS
CIVIL JURISDICTION
CIVIL ACTION NO 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

PRAECIPE

Search for:

Notice of Intention to Defend

.....

Solicitor for the Plaintiff

Dated the 17th day of March 2003

The type of judgment (in Vanuatu, request for judgment) to be filed will depend on the relief applied for in the writ or claim. The possibilities are as follows:

- Recovery of a liquidated amount

  In cases where a liquidated amount is applied for, the plaintiff may apply for final judgment by lodging an appropriately worded judgment or request for judgment.[6] Under the CPR, Form 1 in Appendix F must be completed. An example is given in Sample Document U. Under the Vanuatu Rules, Form 12 must be used. The Fiji Rules do not specify a form.[7]

  In *Subodh Mishra v Car Rentals Ltd*,[8] the Court of Appeal of Fiji stated that a liquidated amount meant a sum ascertained or capable of being ascertained as a mere matter of arithmetic. It was held that special damages in a tort action were not a liquidated amount. The meaning of liquidated was also considered in *Jai Prakash Narayan v Sanita Chandra*,[9] where the Court of Appeal held that contractual interest on a debt could be a liquidated sum and consequently included in a default judgment.

  Under the Vanuatu Rules, the term 'fixed amount' is used, rather than 'liquidated amount'. 'Fixed amount' is not defined in the Rules and it is unclear whether it will be interpreted in the same way as 'liquidated amount' or whether it will be taken more literally to mean a sum which is stated in the claim. The Rules specifically allow a claim for interest to be included in an application for default judgment for a fixed amount.[10] This would appear to extend to statutory interest rather than being restricted to contractual interest.

- Unliquidated claims

  Where the claim is unliquidated, that is, not capable of calculation without the intervention of the court, the plaintiff may apply for interlocutory judgment for damages to be assessed by lodging an appropriately worded judgment or request for judgment.[11] Form 2 or 3 in Appendix F must be used under the CPR and Form 13 under the Vanuatu Rules. No form is specified under the Fiji Rules.

  Assessment of damages will be at a hearing, which under the CPR and Fiji Rules may take place in chambers, where evidence will normally be presented by affidavit. This is not the case under the Vanuatu Rules, where the determination 'must be conducted as nearly as possible in the same way as a trial'.[12] 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.

6 O13 r3 CPR; O13 r1 Fiji; r9.2(2) Van.
7 The forms in Vol 2, *The Supreme Court Practice* (annual volumes), London: Sweet & Maxwell, are commonly used.
8 Unreported, Fiji, Court of Appeal, Civ App 85/438.
9 Unreported, Fiji, Court of Appeal, Civ App 85/156, 8 November 1985.
10 R9.2(2)Van.
11 O13 r5 CPR; O13 r2 Fiji; r9.3(2) Van.
12 R9.4(2) Van.

A claimant seeking default judgment for damages in Vanuatu may therefore be at a disadvantage compared with plaintiffs under the CPR or Fiji Rules, as it will be necessary to go to the expense of adducing oral evidence to prove the amount of damages.

- Partly liquidated and partly unliquidated claims

  Where the claim is partly liquidated and partly unliquidated, the plaintiff may apply for final judgment under the CPR, by lodging an appropriately worded judgment in Form 4, Appendix F.[13]
  The closest equivalent under the Fiji High Court Rules is O13 r5, which is headed 'Mixed Claims' and states:

  > Where a writ issued against any defendant is indorsed with two or more of the claims mentioned in the foregoing rules and no other claim, then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter against that defendant such judgment in respect of any such claim as he would be entitled to enter under those rules if that were the only claim indorsed on the writ and proceed with the action against the other defendants, if any.

  The first part of the Rule is clearly dealing with the situation where a writ is indorsed with two or more claims, as mentioned in the earlier parts of O13. O13 provides for a liquidated claim, an unliquidated claim, a claim for detention of goods or a claim for possession of land. It is clear from O13 r5 that, when two or more of these types of claims are mixed together in the indorsement on the writ or statement of claim, the plaintiff may enter judgment on any claim as if it were the only claim indorsed. The reference to claims against other defendants would appear to be referring to the situation where there is more than one type of claim and each one is against a different defendant. In this case, default judgment may be entered against one defendant but proceed towards trial with the claim against any other defendant(s). It appears that O13 r5 may have been wrongly transcribed from the original draft of the Rule and that it contains part of two rules, the first dealing with mixed claims and the second with several defendants. An amendment is needed to rectify the position.

  The Vanuatu Rules divide applications for default judgment into those where the claim is for a fixed amount and those where the claim is for damages. No provision is made for claims which are partly for a fixed amount and partly for damages. Nor is any provision made for claims for any other relief. Until the court has made a pronouncement on the procedure to be followed, the position is unclear. The best course in claims which do not fall neatly into one of these two categories would probably be to file a default application for damages under r9.3, altering Form 13 to suit the circumstances of the case. The overriding objectives of 'saving expense' and 'ensuring that the case is dealt with speedily' are available to be cited in support of this approach.[14] The alternatives are to continue towards trial or apply for judgment under r18.10, on the basis of failure to comply with the Rules.

13 O13 r7 CPR.
14 R1.2(2)(b) and (d) Van.

- Claim for the detention of goods

  The CPR and Fiji Rules make special provision for the entry of judgment where the claim is for detention of goods. The Fiji Rules provide that interlocutory judgment may be entered:

  (a) giving the defendant the option to deliver the goods or their value, to be assessed; or
  (b) ordering the defendant to pay for the value of the goods, to be assessed.

  If the plaintiff wishes to apply for delivery of the goods without giving the defendant the option to pay the value of the goods, the plaintiff must apply by summons for judgment for delivery.[15] The wording of the CPR, O13 r5, is more obscure, but would appear to be of like effect.

  The Vanuatu Rules do not provide for the situation where recovery of goods is sought. Until the court has made a pronouncement on the procedure to be followed, the position is unclear. The best course would probably be to file a default application for damages under r9.3, as discussed under the previous heading. The alternatives are to continue towards trial or apply for judgment under r18.10, on the basis of failure to comply with the Rules.

- Equitable relief or recovery of land

  The CPR do not permit an application for judgment in default where the claim is for equitable relief or recovery of land. In such cases, the action must proceed as if appearance had been entered.[16] In effect, this means that the plaintiff is required to file an affidavit of service and a statement of claim and then wait to see whether a defence is filed. If it is not, application may be made by motion for judgment, which will be heard as if it were defended. The position is the same in claims for equitable relief under the Fiji Rules.[17] However, differentiation is made between actions for possession of land and other claims for equitable relief. In actions for possession of land, final judgment may be obtained on production of a solicitor's certificate that it is not a mortgage action. If the plaintiff sues in person, an affidavit containing evidence that it is not a mortgage action must be filed.[18]

  The position is not covered by the Vanuatu Rules. The claimant would appear to have the option of continuing towards trial or applying for judgment under r18.10 on the basis of failure to comply with the Rules.

- Action on a mortgage

  Judgment in default may not be entered in actions on a mortgage without leave of the court.[19] The court may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons. The court may also require notice of the evidence to be given to the defendant and to any other person the court thinks desirable.[20] Thus, for example,

15 O13 r3 Fiji.
16 O13 r9 CPR.
17 O13 r6 Fiji.
18 O13 r4 Fiji.
19 O13 r11 CPR; O88 r4 Fiji.
20 O13r11CPR.

if there is a second mortgage, the court may require notice to be given to that mortgagee. Also, if the property is tenanted, the tenant may be served with notice.

There is no equivalent procedure under the Vanuatu Rules. The claimant would appear to have the option of continuing towards trial or applying for judgment under r18.10 on the basis of failure to comply with the Rules.

SAMPLE DOCUMENT U—FINAL JUDGMENT IN DEFAULT OF APPEARANCE (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

CIVIL CASE NO 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

JUDGMENT IN DEFAULT OF NOTICE OF INTENTION TO DEFEND

Entered this 18th day of March 2003

No notice of intention to defend having been given by the Defendant herein, it is this day adjudged that the Defendant do pay the Plaintiff $32,000.00 and $30.00 costs.

.....

Registrar of the High Court

SAMPLE DOCUMENT V—REQUEST FOR DEFAULT JUDGMENT (VANUATU)

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

CIVIL CASE NO 1111 OF 2003

BETWEEN

OUTBOARDS PLUS LTD

Claimant

Represented by JENNIFER JUSTICE

Claimant's lawyer

AND

ASERI TOGA

Defendant

Represented by ANN ADVOCATE

Defendant's Lawyer

REQUEST FOR DEFAULT JUDGMENT (FIXED AMOUNT)

Outboards Plus Ltd of Suite One, River Building, Port Vila.

Requests the court to give default judgment against the Defendant on the ground that the Defendant has not filed a response within 14 days after being served with the claim in this proceeding.

The Claimant Claims:	3,200,000 vatu
Interest:	Nil
Filing and Service Fees:	20,000 vatu
Costs:	Nil
Total Claimed:	3,220,000 vatu

Jennifer Justice, lawyer for the Claimant

Date of filing: 18th March 2003
Filed by: Jennifer Justice of Waterview Chambers, Kumul Highway, Port Vila, Vanuatu.

1.3 Judgment in default of defence

Even if the defendant enters an appearance, notice of intention to defend or response, the plaintiff may still get a chance to obtain a default judgment. This right arises if the defendant does not deliver a defence within the requisite time. Under the CPR and Fiji Rules, the defendant has 14 days from the time limited for appearance or from the delivery of the statement of claim, whichever is later, to file a defence.[21] Under the Vanuatu Rules, the defendant has 28 days from the service of the claim to file and serve the defence.[22] A defence may be filed outside the time limits specified, provided that application for judgment has not been entered in the interim.[22a]

1.3.1 Procedure for obtaining judgment in default of defence

The procedure is parallel to that for entry of judgment in default of appearance. Under the CPR and Fiji Rules a distinction is made between:

(a) liquidated demands and debts;
(b) claims for detention of goods;
(c) unliquidated claims;
(d) mixed claims;
(e) equitable claims; and
(f) claims for possession of land.

In the case of claims in category (a), the defendant may enter a final judgment under the CPR, simply by completing Forms 1 or 4 of Appendix A and taking it to the registry, where the registrar will sign it and enter judgment.[23] O19 r2 Fiji also provides for a final judgment to be entered. No form is specified.[24] A claim for damages is not a liquidated sum and for this reason a final judgment in default was set aside by the High Court of Fiji in *Dragon Seafood Company (Fiji) Ltd v Seamech Ltd*.[25]

Claims falling into categories (b) and (f) proceed as in the case of judgment in default of appearance or notice of intention to defend.

In the case of (c), an assessment of damages by the court is required. Therefore, the plaintiff may only get interlocutory judgment for damages to be assessed and costs.[26] In this case, the CPR require Form 2 of Appendix A to be used.

In the case of (d), final judgment may be entered for the liquidated amount and interlocutory judgment for the unliquidated amount.[27] O19 r6 of the Fiji Rules is ambiguous, rolling together the situation where there are mixed claims and the situation

21 O23 r6 CPR; O18 r2 Fiji.
22 R9.1(b)Van.
22a See, for example, *Kelly (Representing the Vatuvulo Sub-Tribe) v Attorney-General*, unreported, High Court, Solomon Islands, Civ Cas 11/2000, 18 April 2002. In that case, the defence was filed over 10 months late.
23 O29 r2 CPR.
24 The forms in the *Supreme Court Practice* (annual volumes), London: Sweet & Maxwell, are commonly used.
25 Unreported, High Court, Fiji, Civ Cas HBC0246/95, 12 June 1996.
26 O29 r4 CPR; O19 r3 Fiji.
27 O29r6CPR.

where there are several defendants with different claims against each. However, it appears clear that the intention is to allow entry of different judgments in respect of different types of claim made.

With regard to (e), as the plaintiff's claim is for equitable relief, judgment may only be obtained by application to the court on a motion for judgment. The court then examines the plaintiff's statement of claim and if it thinks the plaintiff is entitled to the equitable remedy, it will order accordingly.[28]

As discussed above, the Vanuatu Rules divide applications for default judgment into those where the claim is for a fixed amount and those where the claim is for damages. This applies equally to applications for judgment based on default in filing a defence. No provision is made for claims outside those categories. Until the court has made a pronouncement on the procedure to be followed, the position in such cases is unclear. The best course in claims which do not clearly fall into one of these two categories would be to file a default application for damages under r9.3, altering Form 13 to suit the circumstances of the case. The overriding objectives of 'saving expense' and 'ensuring that the case is dealt with speedily' are available to be cited in support of this approach.[29] The alternatives are to continue towards trial or apply for judgment under r18.10, on the basis of failure to comply with the Rules.

In Tonga, the plaintiff may apply in writing for judgment in default to be entered if no defence is filed.[30] Practice Direction No 5/94 also requires an affidavit to be filed before judgment in default of defence may be entered. This must depose to service, lack of defence within 28 days and, if any sums have been paid, the balance due. In the case of a liquidated demand, this will be a final judgment.[31] In the case of an action for unliquidated damages, it will be an interlocutory judgment.[32] In the case of a claim for wrongful detention of goods, judgment may be entered for delivery of the goods or their value and costs.[33] There is no provision for the entry of a default judgment in the case of an equitable claim.

In Samoa, r97 allows judgment to be entered in the case of default in filing a counterclaim, defence, payment into court, or a confession for the total claim and costs.[34] However, this is not a purely administrative judgment, as application must be made to the court, although there is no hearing on the merits. Where a year has elapsed since service, an *ex parte* application for leave to enter judgment must be made.[35] The Samoan Rules also provide for judgment to be entered where a defendant files a confession to the whole claim. Application to a judge is still required.[36]

28 O29 r8 CPR; O19 r7 Fiji.
29 R1.2(2)(b) and (d) Van.
30 O13 r1 Tonga.
31 O13 r2(1) Tonga.
32 O13 r2(2) Tonga.
33 O13 r2(3) Tonga.
34 The defendant has 10 days in which to take action.
35 R97(2) Samoa.
36 R98 Samoa.

1.4 Judgment in default of other pleadings

The plaintiff may also be in default of pleading. If the plaintiff fails to deliver a statement of claim, the CPR and Fiji Rules permit the defendant to apply for the action to be dismissed.[37] There is no equivalent procedure in the Vanuatu Rules or the Rules of Tonga or Samoa.

The Fiji Rules provide for judgment in default of defence to counterclaim.[38] The Samoan Rules do not expressly provide for this, but the setting aside provision in r140 is predicated on the basis that such a judgment may be obtained. In the other jurisdictions of the region, an application to the court must be made in order to obtain judgment on the counterclaim.

1.5 Judgment in default where there are several defendants

Where one or more of several defendants is in default, the rules allow for judgment in default of appearance or notice of intention to defend[39] or of defence[40] to be entered without prejudice to the right to proceed against the others.

1.6 Courtesy

There is no requirement to give the other side notice of intention to apply for judgment in default,[41] but it is courteous to do this. The practice of giving notice of intention has been endorsed by the courts in Fiji Islands. In *Dragon Seafood Company (Fiji) Ltd v Seamech* Ltd,[42] Byrne J adopted the comments of Tuivaga J in *Bula Ltd v Geelong Holdings* Ltd[43] and of Scott J in *Fiji Forests Industries Ltd v Timber Holdings Ltd and Others*,[44] to the effect that this was a sensible and proper practice. A similar practice is followed in a number of overseas jurisdictions. For example, in the Queensland case of *Ezi-Frame Pty Ltd v Al-Cote (Australia) Pty* Ltd,[45] it was commented that, 'There is in the profession a matter of courtesy, to put it at its lowest, by which a solicitor, when he knows there is a solicitor representing the defendant, does not enter judgment in default without acquainting that solicitor of his intention'. However, that professional courtesy does not impose any obligation on a party and its non-observance by an opponent does no more than offer an explanation why a pleading was not delivered.

Giving notice of intention to enter judgment in default is particularly important in small jurisdictions where lawyers frequently have to deal with the same colleagues on a

37 O29 r1 CPR; O19 r1 Fiji.
38 O19 r8 Fiji.
39 O13 rr4 and 6 CPR; O13 r5 Fiji.
40 O29 rr3, 5 and 9 CPR; O19 r6 Fiji.
41 *Australia & New Zealand Banking Group Ltd v Hubner,* unreported, Supreme Court, Queensland, Civ Cas 331/97, 28 May 1998; *Marsh v Marsh* [1945] AC 271; *Australian Musical Distributors Pty Ltd v Whebell* (1969) QWN 40.
42 Unreported, High Court, Fiji, Civ Cas HBC0246/95, 12 June 1996.
43 Unreported, High Court, Fiji, Civ Cas 173/77.
44 Unreported, High Court, Fiji, Civ Cas 117/94. See also *Dragon Seafood Company (Fiji) Ltd v Seamech Ltd,* unreported, High Court, Fiji, Civ Cas HBC0246/95, 12 June 1996.
45 [1982] Qd R 602 at p 611.

regular basis and a spirit of co-operation is likely to assist in the long-term aim of conflict blocking. In any event, if the other party applies for the judgment to be set aside, the exercise will be a waste of time and money, even though the costs of having a regularly entered judgment set aside will normally have to be paid by the applicant. The exception to the practice occurs when the client instructs the entry of judgment in default without notice to the other side.

1.7 Inclusion of interest in final default judgments

Interest may be awarded either:

- pursuant to contract; or
- by virtue of statute.

1.7.1 Pursuant to contract

There is no problem in entering judgment in default including interest pursuant to contract, because this is a liquidated amount. However, the claim for interest must be included in the statement of claim or special indorsement. The rate of interest will be the contractual rate.[46] If the contractual rate is not specified, the CPR and Fiji Rules allow interest to be awarded at the rate of 5%.[47]

1.7.2 By virtue of statute

Claiming interest pursuant to statute in default proceedings is more problematic.[48] Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (UK), which applies in Solomon Islands,[49] Vanuatu, Kiribati, Tonga[50] and Tuvalu, allows the court to award interest in any proceedings for the recovery of money, at such rate as it thinks fit. The equivalent enactment in Fiji is the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.[51] Where interlocutory judgment is entered for damages to be assessed, interest may be claimed and the amount determined by the court at the damages hearing. Final judgment in default, on the other hand, cannot include interest under these statutes as its award is discretionary.[52] A plaintiff who wishes to claim statutory interest must, therefore, enter

46 The Vanuatu Rules state that interest will be 'at a rate fixed by the court'. No rate has yet been fixed, but presumably the court will specify that the contractual rate will apply, where specified in the claim.
47 O13 r3 CPR; O13 r1(2) Fiji.
48 For a history of the controversy surrounding the obtaining of interest on default judgments in Queensland, see *Richard Crookes Constructions v Wendell* [*1990*] 1 Qd R 392 at 398–99. The problem has been solved by UCPR 1999 (Qld), Chapter 9, Pt 1, Division 2.
49 Applied (in a different context) in *Cheung v Tanda* [1934] SILR 108.
50 *Teta Ltd v Ullrich Exports Ltd* [1981–88] Tonga LR 127.
51 Cap 27 Fiji, s 3.
52 This should be distinguished from the position where a statute gives a right to interest, such as the Bills of Exchange Act 1882 (UK), s 57.

interlocutory judgment for the interest to be assessed by the court.[53] If the amount of interest is not substantial, the plaintiff has the alternative course of abandoning it and finally entering judgment for the liquidated amount only.[54]

The Vanuatu Rules provide that interest may be claimed in an application for final default judgment at a rate to be fixed by the court.[55] It is not clear how or when this rate will be fixed. However, it appears from part of the same rule,[56] that costs must be awarded by the court in the exercise of its discretion under r15.1(1). This suggests that the court must make a judicial determination on interest and costs, even in cases involving application in default for a fixed amount.

1.8 Costs on default judgments

In liquidated claims in excess of $1,000 and claims for possession of land (other than tenancy disputes involving an annual rent of less than $1,000), the CPR, as amended in Solomon Islands, allow fixed costs to be included in the judgment and recovered from the defendant. Fixed costs are currently $30 plus $3 for each extra defendant plus additional allowances where an application relating to service has been necessary and where separate judgments are entered (Appendix J, Pt II).

Under the Fiji Rules, fixed costs may be included in the judgment in claims in excess of $600 and claims for possession of land (other than tenancy disputes involving an annual rent of less than $800). These are currently $35[57] plus $10 for each extra defendant plus additional allowances where an application relating to service has been necessary and where separate judgments are entered.[58]

The Vanuatu Rules state that default judgment may be given for costs in accordance with r15. However, r15 makes no mention of costs to be allowed on default judgments. In fact, it does not provide for fixed costs in any situation. Presumably, costs must be awarded by the court in the exercise of its discretion under r15.1(1). The effect of this is that the court must make a judicial determination even in cases involving application in default for a fixed amount. This view is supported by r9.2(4)(b) which states that interest will be at a rate fixed by the court.

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53 *Rodway v Lucas* (1855) 10 Exch 667. But see *Jai Nayaran v Savita Chandra*, unreported, Court of Appeal, Fiji, Civ App 37/85, 8 November 1985, where the court extended me principle that interest under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 may be awarded on summary judgment to judgments under O19 r2. With respect, this appears to ignore the significant difference between an administrative and judicial judgment and to be contrary to the requirement of the Act that discretion be exercised (see the words 'if it thinks fit' in s 3).

54 At one time, there was Australian authority suggesting that a litigant could not abandon interest and proceed to obtain final judgment for the capital sum, for example, *Ezi-Frame v Al-Cote* [1982] Qd R 602. This has since been overruled. Abandonment has always been allowed under the English rules, see Atkin, *The Encyclopaedia of Forms and Precedents in Civil Proceedings*, 1940, London: Butterworths, p 387.

55 R9.2(4)(b) Van.

56 R9.2(4)(c) Van.

57 This appears to be an error in the High Court (Amendment) Rules 1993, as the sum was previously $40 and the Rules allow $40 costs to be claimed in the writ for payment if the defendant pays within eight days of service of the writ. Accordingly, the costs recoverable on entry of judgment in default are less than those recoverable where the defendant pays voluntarily, without the need for judgment to be entered.

58 Fiji Rules, Appendix 4, as amended by LN 67/93.

1.9 Setting aside default judgment

The system of default judgment may appear oppressive. It allows a party to obtain judgment, irrespective of the merits, on the basis of inaction by the other party. However, the position of a *bona fide* defendant is safeguarded by the Rules for setting judgment in default aside.[59] These provide a special procedure for application to be made to set the administrative judgment aside, either because it is irregular, or because it is just to do so. This is not an appeal, but a distinct step provided by the Rules to allow for the fact that there is no judicial intervention at the judgment stage and therefore no decision from which to appeal.[60] This was made clear in *Samuel Billeam v Vassal Gadeoengin*,[61] where judgment in default had been entered in the district court of Samoa under the Rules in force at that time. The defendant appealed to the Supreme Court. Thompson CJ dismissed the appeal as 'premature and misconceived'. Appeal would only have been appropriate after application to set aside had been made to the district court under Oil r9 of the District Court Rules. The setting aside procedure does not apply in the Supreme Court of Samoa except where judgment is entered in default of appearance at a hearing.[62]

1.9.1 Setting aside judgment irregularly entered

The strength of the defendant's position will depend on whether judgment was regularly entered or irregularly entered. In the case of a judgment irregularly entered, that is, not entered strictly in accordance with the Rules, the defendant has a right to have the judgment set aside, subject to the court's power to cure the irregularity. This power is only rarely exercised.[63] It appears that the right to have a judgment set aside for irregularity may be lost if a party delays in making application. This was the case in *Samson Poloso v Honiara Consumers Co-operative Society Ltd*.[64]

The main categories of irregularity are:

- judgments entered too early;[65]
- judgments entered for too much;
- improper service of the originating process;[66]
- entry of final judgments where the claim is not a debt or a liquidated amount.

A judgment entered irregularly due to improper service was set aside in *Transport Publicity Fiji Ltd v Vishnu Deo Sharan*.[67] The writ had not been served at the registered office of the

59 O13 r8 and O29 r12 CPR; O19 r9 Fiji; r140 Samoa; O13 r3 Tonga.
60 It would appear that judicial intervention is necessary to decide on the amount of costs and interest under the Vanuatu Rules. See r9.2(4)(b) and (c)
61 [1978] WSLR 134.
62 R140 Samoa. As there is a judicial decision when judgment in default of defence is entered, the remedy is appeal.
63 For example, *City Mutual v Gianarelli* [1977] VR 463.
64 [1988/9] SILR 16.
65 For example, *Manasseh Kagabule v Allardyce Lumber Company Ltd*, unreported, High Court, Solomon Islands, Civ Cas 308/96, 6 March 1997.
66 See, for example, *Asset Management Unit v Viralala*, unreported, Supreme Court, Vanuatu, Civ Cas 77/1999, where the court set aside judgment obtained after improper service.
67 Unreported, Court of Appeal, Fiji, Civ App 17/84, 21 November 1984.

defendant. At first instance, the judgment was set aside on condition that the defendant pay $6,000 by way of security for costs. The Court of Appeal allowed the appeal against the imposition of this condition, confirming that a defendant is entitled to have an irregular judgment set aside as of right. The costs of setting aside an irregular judgment will normally be ordered to be paid by the plaintiff.

1.9.2 Setting aside judgment regularly entered

Judgment will be regularly entered where the plaintiff has complied with all requirements of the Rules. In this case, the court still has discretion to set aside.[68] The Vanuatu Rules provide that the court may set aside judgment if satisfied that the defendant:[69]

(a) has shown reasonable cause for not defending the claim; and
(b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.

The grounds on which the discretion to set aside should be exercised are not specified in the other Rules of the region. In *Fiji National Provident Fund v Shri Datt*,[70] Fatiaki J made it clear that the Rules provide an unfettered discretion to set aside judgment and that the court should consider all the circumstances of each individual case. His Lordship's summary of the position is worth setting out in full:

> The discretion is prescribed in wide terms limited only by the justice of the case and, although various 'rules' or 'tests' have been formulated as prudent considerations in the determination of the justice of a case, none have been or can be elevated to the status of a rule of law or condition precedent to the exercise of the Court's unfettered discretion.
>
> These judicially recognised 'tests' may be conveniently listed as follows:
>
> 1. Whether the defendant has a substantial ground of defence to the action.
> 2. Whether the defendant has a satisfactory explanation for his failure to enter an appearance to the writ; and
> 3. Whether the plaintiff will suffer irreparable harm if the judgment is set aside.
>
> In the latter regard in my view it is proper for the Court to consider any delay on the defendant's part in seeking to set aside the default judgment and how far the plaintiff has gone in the execution of its summary judgment and whether or not the same has been stayed.

A judgment will not be set aside if no good purpose would be served. The defendant must therefore show that he/she has a *prima facie* defence.[71] If the defendant cannot do so, he/she will normally fall at the first hurdle and the application to set aside will not succeed. In *Westpac Banking Corporation v Manohan Aluminium Glass (Fiji) Ltd*,[72]

68 O13 r8 and O29 r12 CPR; O13 r10 and O19 r9 Fiji; O13 r3 Tonga; r9.5 Van.
69 R9.5(3) Van.
70 [1988] SPLR 138. See also *Evans v Bartlam* [1937] AC 473. Cited with approval in *Petisons Enterprises v Hansji,* unreported, High Court, Fiji, Civ Cas HBC0366/1996, 24 October 1997.
71 *Barlow and Another v Than* (1987) 1 VLR 315.
72 Unreported, High Court, Suva, Civ Cas 67/1998, 29 June 1998.

the writ had been served at the defendant's registered office. The defendant had in fact ceased to use that office some years previously but had not filed a change of address. The defendant only became aware of the proceedings when served with a copy of the judgment in default at its current business address. Pathik J cited, with approval, the remarks of Denning LJ in *Burns v Kondel*,[73] where he said that in the ordinary course of events, a judgment in default would not be set aside unless the defendant adduced evidence of a defence disclosing an arguable or triable issue. It is clear that the defendant need not actually establish a defence, but only that there is a triable issue.[74] However, it is open to the plaintiff to discredit the defendant's assertion that there is a triable issue either by legal argument or the presentation of relevant affidavit evidence.[75]

As made clear in *Fiji National Provident Fund v Shri Datt*,[76] even if there is an arguable defence, the court must still be persuaded that it is a proper case to exercise its discretion. The same factors will be relevant under the CPR. In *Kayuken v Harper*,[77] these were summarised as follows:

- What was the reason for the failure by the absent party to appear?
- Has there been an undue delay by the absent party in launching his proceedings for a new trial?
- Will the other party be prejudiced by an order for a new trial?

In that case, a writ was issued on 3 February 1986 and appearance entered on 17 February. Thereafter, the defendant's advocate took no steps and failed to advise his client or the plaintiff that he could no longer act (in the interim he had been appointed a government minister). Judgment in default was entered on 4 September 1986. The registrar declined to set it aside. On appeal, Chief Justice Ward considered the above factors, and whilst he was reluctant to save a lawyer from the consequences of his own negligence, allowed the appeal on the basis that there was a viable defence and that the defendant was not prejudiced.[78]

In *Sasape Marina Ltd v Bolton*,[79] the High Court of Solomon Islands was concerned with the first factor, that is, the reason why the defendant failed to appear. The court refused to set aside default judgment, after taking into account that the defendant's failure to answer proceedings was linked to his flight from the jurisdiction in a vessel which was under arrest.

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73 (1971) 1 Lloyd's Rep 554 at 555.

74 *Fiji Sugar Corporation v Mohammed Ismail* (1988) 34 FLR 81; *Westpac Banking Corporation v Manohan Aluminium Glass (Fiji) Ltd*, unreported, High Court, Suva, Civ Cas 67/1998, 29 June 1998.

75 See, for example, *Prakash v Chandra*, unreported, Court of Appeal, Fiji Islands, Civ App 37/95.

76 [1988] SPLR 138.

77 [1987] SILR 54.

78 In *Philip Mali v Jerry Rafe Okao*, unreported, High Court, Solomon Islands, Civ Cas 70/95, 29 February 1996, the judgment was set aside, even though the only reason for the failure to enter an appearance and the eight month delay in applying to set aside was inaction on the part of the solicitor. See also *Stephen Chow v Edward Hutaiwao*, unreported, High Court, Solomon Islands, Civ Cas 202/95, 17 October 1997.

79 Unreported, High Court, Solomon Islands, Civ Cas 118/1990, 21 February 1991.

This case can be contrasted with *Brenner v Johnson and Others*,[80] where the delay was also due to inaction by solicitors. Cooke CJ dismissed the application to set aside, with costs on the basis that the failure was due to an informed and deliberate choice by the defendants' solicitors not to oppose the original judgment. There was no room for the exercise of discretion, rather the party would be bound by the original decision not to contest the matter.

Brenner v Johnson and Others[81] is also useful in that it lists the cases where an application would normally be granted as being where:

- an illness caused a delay, or
- a genuine mistake was made as to when the case was being heard.

In many cases, both parties will be able to point to prejudice that they would suffer if judgment on the application to set aside is not in their favour. This was the case in the Samoan case of *Pacific Commercial Bank Ltd v Uria*.[82] The court noted that the defendant only responded to the claim after the plaintiff had applied for execution, which is often the case. However, whilst both parties would suffer injustice, the weight of the injustice to the defendant was greater and, accordingly, the judgment was set aside.

An example of a case where the court refused to set aside a judgment regularly obtained in default of notice of intention to defend, is provided by *Amalgamated Transport Ltd v Narbada Ben*.[83] The Court of Appeal, in upholding Jayaratne J's refusal to set aside, stated that the learned judge had taken into account all relevant factors, which in that case included:

- the circumstances in which default judgment was entered;
- the delay factor;
- the nature of the proposed defence;
- the concept of vicarious liability;
- the stage which assessment proceedings had reached;
- what transpired before the chief registrar;
- the relative hardship or possible injustice to the appellant if application was refused and to the respondent if it was granted;
- the history of the litigation from the time the cause of action arose.

It is open to the court to impose terms on setting aside a regular judgment.[84] For example, it may order money to be paid into court.[85]

80 (1980–88) 1 VLR180.
81 (1980–88) 1 VLR 180 at 189.
82 [1980–93] WSLR 331.
83 Unreported, Court of Appeal, Fiji, Civ App 62/90, 30 September 1992. See also *Samsul Nisha and Another v Amina Ah and Others,* unreported, High Court, Fiji, Civ App 535/92, 29 March 1996.
84 BPT *(South Sea) Company Ltd v Ashwin Dutt Sharma,* unreported, High Court, Fiji, Civ App 445/95, 10 May 1996. See to the contrary *White v Weston* [1968] 2 QB 647, CA.
85 *Vijay Prasad v Daya Ram,* unreported, Court of Appeal, Fiji, Civ App 61/90; *Bank of Hawaii v Maxwell John Reynolds,* unreported, High Court, Fiji, Civ App 559/96, 14 November 1997.

The costs of setting aside a regular judgment must normally be paid by the defendant, as was the case in *Kayuken v Harper.*[86] However, the power to award costs should not be used to punish the defendant.

In Tonga, a default judgment may be set aside under O13 r3 if the defendant satisfies the court that there was a good reason for not filing the defence in time and that there is an arguable defence on the merits.

In Samoa, judgment in default of defence or default of defence to counterclaim may be set aside.[87] The grounds for obtaining an order setting aside judgment are not specified. The case law relating to setting aside in other jurisdictions is likely to provide useful guidelines on the factors that will be relevant.

In Fiji, there are special rules governing setting aside a judgment after service by post.[88] If, after entry of judgment in default, the writ is returned to the plaintiff through the post, undelivered to the addressee, the plaintiff must make an *ex parte* application to the court to set aside the judgment or for directions. The application must be supported by affidavit stating the relevant facts and the order or direction sought.

1.9.3 Procedure

Application under the CPR, Fiji and Tongan Rules is by summons. An example of an application set in Fiji Islands is given in Sample Document W.

The Vanuatu Rules contain detailed provision as to procedure:[89]

The application:

(a) may be made at any time; and
(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
(d) must have with it a sworn statement in support of the application; and
(e) must be in Form 14.

The court's duties at the hearing are also specified as being to:[90]

(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
(c) consider whether an order for security for costs should be made; and
(d) make any other order necessary for the proper progress of the proceeding.

86 [1987] SILR 54.
87 R140 Samoa.
88 O13 r8(3) Fiji.
89 R9.5(2) Van.
90 R9.5(4) Van.

In Samoa, application may be made by oral application on the day on which the judgment is given, if both parties are present. Otherwise application is on notice.[91] Where it is sought to set aside a judgment for irregularity, the irregularity should be specified in the summons. Where the irregularity is apparent on the face of the record, no affidavit is necessary. In all other cases an affidavit is almost invariably required.[92] Where it is sought to set aside a regular judgment, it is a common practice to exhibit a draft defence to the affidavit, but this is not essential.[93]

91 R140(2) Samoa.

92 *Farden v Richter* (1889) 23 QBD 124; BPT *(South Sea) Company Ltd v Ashwin Dutt Sharma,* unreported, High Court, Fiji, Civ App 445/95, 10 May 1996; *Westpac Banking Corporation v Manohan Aluminium Glass (Fiji) Ltd,* unreported, High Court, Suva, Civ Cas 67/1998, 29 June 1998.

93 *Fiji Sugar Corporation v Mohammed Ismail* (1988) 34 FLR 75 at 81.

SAMPLE DOCUMENT W—SUMMONS TO SET JUDGMENT IN DEFAULT (REGULARLY OBTAINED) ASIDE (FIJI ISLANDS)

IN THE HIGH COURT OF FIJI ISLANDS
CIVIL ACTION NO 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

SUMMONS

Let all parties concerned attend before the Judge in chambers at the High Court, Suva, on the day of 2003, at o'clock, on the hearing of an application on the part of the Defendant for an order that the judgment entered in this action against the Defendant on the 18th day of March 2003, in default of his notice of intention to defend may be set aside and that the Defendant may be at liberty to acknowledge service and defend this action and that the costs of this application may be provided for.

Dated the day of 2003.

This summons was taken out by Loyer & Co, solicitors for the applicant whose address is 2007A, Victoria Parade, Suva.

2 SUMMARY JUDGMENT

Summary judgment is another method of bringing the action to an end without a full trial. However, unlike judgment in default there is a court hearing. The purpose of the application is to allow the plaintiff to get an early judgment in cases where there is no reasonable defence and to prevent the defendant from delaying judgment by filing an unmeritorious defence. The courts are cautious about granting summary judgment and it is only available on the ground that there is no defence to a particular claim or part of a claim.[94] Application should not be made for tactical purposes if the plaintiff knows there is an arguable defence.[95]

2.1 Conditions

There are five conditions for obtaining summary judgment under the CPR:

(a) The writ must be specially endorsed under O3 r5 or fall within O15, being a claim for specific performance.
(b) The defendant must have appeared to the writ.
(c) The plaintiff or the plaintiff's representative must be able to verify the facts on which the claim is based by affidavit.
(d) The plaintiff or his/her representative must be able to swear to their belief that there is no defence, by affidavit.
(e) The defendant must not satisfy the judge that there is a question in dispute that ought to be tried.[96]

Under the Fiji Rules, the conditions are the same, except that there is no need for special indorsement.[97] The only case where application is excluded is where libel, slander, malicious prosecution, false imprisonment, or fraud is alleged.[98] The conditions are similar under the Tongan and Vanuatu Rules, except that there is no need for a special indorsement and the defendant must have filed a defence.[99]

With regard to (e), what the defendant must prove is an arguable defence, not that it will definitely succeed. Thus, in *Westpac Corporation v John Bullock,*[100] Pathik J was of the opinion that the defendant would have 'an uphill battle trying to satisfy the Court' that the plea of *non estfactum* should be upheld. Nevertheless, he felt the defence was arguable and therefore refused to enter summary judgment.

Statutory interest may be awarded in a summary judgment.[101]

94 *Westpac Banking Corporation v John Bullock,* unreported, High Court, Fiji, Civ App 181/96, 22 August 1997.
95 *Dott v Brown* [1936] All ER 545.
96 O14 r1(a)CPR.
97 O14 r1(1) Fiji.
98 O14 r1(2) Fiji.
99 O13 r2 Tonga; r9.6(1) and (3) Van. In Vanuatu, the defence must have been served in addition to, or instead of, a response.
100 Unreported, High Court, Fiji, Civ App 181/96, 22 August 1997.
101 *Maganlal Brothers Ltd v LB Narayan & Company,* unreported, Court of Appeal, Fiji, Civ App 31/84, 15 November 1984.

Application for summary judgment is not provided for in the Samoan Rules. Even in the countries where it is provided for, it is not a common application. This is particularly the case in Fiji Islands. Nevertheless, it is a useful procedure, allowing a judgment to be obtained speedily where the defendant clearly does not have a defence. For example, if the defendant's only suggested defence is a point of law and the court can see that it is plainly misconceived, the matter can be disposed of without further costs being incurred. Another example is where a plaintiff sues on a dishonoured cheque and the defendant resists the claim on the basis of a set-off.[102] The courts have held that, short of fraud or total failure of consideration, bills of exchange and promissory notes must be treated as cash and honoured unless there is some good reason to the contrary. In cases of this kind there is a strong argument for its wider use.[103]

An example of the use of this procedure can be found in *Paia v Golden Springs (International) Co Ltd and North New Georgia Timber Corporation.*[104]

2.2 Time for making the application

Under the CPR and Fiji Rules, application for summary judgment must be made after appearance, but there is no other guidance as to the time when application should be made. Decided cases indicate that the application should normally be made within the time specified for the delivery of a defence.[105] That does not mean that summary judgment cannot be applied for after defence has been delivered, but the applicant must be able to show that the delay was justified.[106] The comments implying the contrary in *Lae and Karejama v Valahoana Company Integrated Development and Others*[107] should be disregarded. In that case, the court failed to distinguish between the summary judgment application before it and an application in default of defence.

Under the Tongan and Vanuatu Rules, application for summary judgment may only be made after defence has been filed.[108] In the case of the Vanuatu Rules, this is unfortunate as the Rules regulating applications in default of defence only allow application in the claims for a fixed amount or damages. Accordingly, in other types of claim the claimant cannot apply for default judgment or summary judgment in the absence of a defence being filed. As discussed above, the claimant's alternatives in such cases are to file a default application for damages under r9.3, in the hope that this will be accepted by the court, continue towards trial or apply for judgment under r18.10 on the basis of failure to comply with the Rules.

102 *Solomon Airlines Ltd v Nine Airlines Ltd*, unreported, High Court, Solomon Islands, Civ Cas 59/91, 8 May 1991.
103 *Ibid.*
104 Unreported, High Court, Solomon Islands, Civ Cas 149/97, 13 October 1997.
105 Once an application for summary judgment has been served, a defendant should not file a defence.
106 *Mercantile Credit v Fancourt* [1982] Qd R 531.
107 Unreported, High Court, Solomon Islands, Civ Cas 269/1999, 6 April 2000.
108 O14 r2 Tonga; r9.6(1) Van.

2.3 Procedure

Application under the CPR and Fiji Rules is by summons supported by affidavit.[109] In Vanuatu it is by application in Form 15 supported by sworn statement.[110] The affidavit or sworn statement must:

- verify the facts; and
- contain a statement of the deponent's belief that there is no defence to the claim or part of the claim.

Under the Vanuatu Rules, the deponent must also give reasons for the belief that there is no defence.[111] It is prudent to include this information in all jurisdictions. The summons must be returnable no less than 10 clear days after service, accompanied by a copy of the affidavit and any exhibits mentioned in it.[112] Under the Vanuatu Rules, the application and sworn statement must be served not less than 14 days before the hearing date.[113]

A defendant who intends to oppose an application for summary judgment should file an affidavit in reply.[114] However, this is not a strict requirement. In *Solomon Airlines Ltd v Nine Airlines Ltd,*[115] the defendant was allowed to rely on his filed defence to show a triable issue in relation to part of the claim.

There is no procedure for applying to set aside a summary judgment as there is in respect of a default judgment. This is because the court awards summary judgment after a hearing on the merits. Accordingly, the appropriate remedy for a dissatisfied party is an appeal. In this respect, the case of *Lae and Karejama v Valahoana Company Integrated Development and Others*[116] is misleading. It would appear that Kabui J confused the application for summary judgment with default proceedings, and the reference to the need to take care as the judgment might be set aside is inapplicable. The confusion is confirmed by his Lordship's use of the term 'summary judgment in default of defence'. As mentioned above, a summary judgment application is not predicated on the absence of a defence.

3 STRIKING OUT

The court has power, both pursuant to the Rules and by virtue of its inherent jurisdiction, to 'strike out' pleadings. This will usually have the effect of terminating the action, as either the action itself will be struck out or the defence will be and judgment may be entered. Alternatively, the action may be stayed where a pleading is struck out. Because of the serious consequences, the court's power to strike out has always been exercised

109 O14 r2 CPR; O14 r2 Fiji.
110 R9.6(3) Van.
111 R9.6(3)(b)(ii) Van.
112 O14 r2 CPR; O14 r2(3) Fiji.
113 R9.6(4)(c) Van.
114 R9.6(5)(a) Van.
115 Unreported, High Court, Solomon Islands, cc59/91, 8 May 1991.
116 Unreported, High Court, Solomon Islands, Civ Cas 269/1999, 6 April 2000.

sparingly.[117] An application will only be successful in plain and obvious cases.[118] If the defective pleading is capable of being cured by amendment, the court will normally make an order to that effect, rather than striking out.[119]

Not every writ or pleading which offends against the Rules will be subjected to sanctions. An applicant must show that he/she is in some way prejudiced by the breach as, for example, where it is unintelligible and the other party is therefore unable to answer it.[120]

3.1 Grounds for application under the Rules

3.1.1 No reasonable cause of action disclosed

Pursuant to O27 r4 CPR, O18 r18(1)(a) Fiji, r70 Samoa and O8 r6(1)(i) Tonga, the court has jurisdiction to strike out any pleading where no reasonable cause of action or answer is disclosed.

These provisions allow pleadings to be struck out in two situations:

- where the facts fail to reveal a cause of action or defence; or
- where the pleading is so badly drafted as to be incomprehensible.

In *Bavadra v Attorney-General*,[121] the Supreme Court of Fiji made it clear that this power is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue a case is weak and unlikely to succeed; it must be shown that no cause of action exists. Similarly, in *Mataskelekele v Abil*,[122] the Court of Appeal of Vanuatu held that in order to strike out a statement of claim, it had to be shown that it did not disclose any cause of action upon which the plaintiff had any reasonable prospects of success.[123] In *Peter Ma'uana v Solomon Taiyo* Ltd,[124] Muria CJ reviewed the authorities and concluded:

> The position under O27 r4 of the High Court Rules, therefore, must be that as long as the pleadings or statement of claim show some essential facts which disclose some cause of action or raise some question fit to be considered by the judge, the court would not strike out the pleadings or statement of claim on the ground that no reasonable cause of action has been disclosed. Even if the case is weak and not likely to succeed, that is not ground to strike out the pleadings.

117 *Vakaloloma v The Attorney-General of Fiji,* unreported, High Court, Fiji, Civ Cas 0293/1996, 26 November 1997.
118 *Ibid,* citing *Hubbock v Wilkinson* (1889) 1 QB 86 at 91.
119 *Kaufusi v Kingdom of Tonga,* unreported, Supreme Court, Tonga, Civ Cas 1310/1998, 1 March 1999.
120 *Davy v Garrett* (1878) 7 Ch D 473 at 486.
121 [1987] SPLR 95.
122 (1989–94) 2 VLR 512.
123 See also *Solomon Islands Navigation Services Ltd (In Liquidation) v Commissioner of Lands,* unreported, High Court, Solomon Islands, Civ Cas 30/94, 4 August 1995.
124 Unreported, High Court, Solomon Islands, Civ Cas 109/1997, 29 July 1997, at 3.

A clear example of pleadings that failed to disclose a cause of action is provided by *long v Tabai*.[125] In that case, the plaintiff issued a writ of summons and statement of claim seeking an injunction against the defendant for standing for election as *Berentitenti* of Kiribati in the pending election. The defendant applied to strike out the pleadings on the ground that they disclosed no reasonable cause of action. It was held that under s 32(2) of the Constitution of Kiribati, candidates for the office of *Berentitenti* had to be nominated from amongst those elected as members of the *Maneaba.* At the date of filing of the writ, the defendant had not been elected as a member of the *Maneaba* since the election was still to be held. Even assuming his election, it was not certain he would be nominated as a candidate for the office of *Berentitenti.* The application was therefore premature and could not succeed. Accordingly, the pleadings were struck out and the action dismissed.

Where the pleading under attack is the defence or the answer to counterclaim, an alternative to an application to strike out is an application for summary judgment. In both cases, an arguable defence or answer to counterclaim will defeat the application.[126]

The Tongan Rules contain two additional grounds for striking out a pleading, where:

- it is unclear, or may otherwise prejudice or delay the fair trial of the action;[127] or
- it is otherwise an abuse of process of the court.[128]

In *Kaufusi v Kingdom of Tonga,*[129] Chief Justice Ward of Tonga noted that the word 'unclear', in the first of these provisions, was an addition to the English rule on which the balance of this sub-rule was clearly based.[130] His Lordship found no authority to assist him in its interpretation and considered it to be a unique provision. He concluded that it meant 'so unclear that the other party cannot know with any certainty the case he has to answer'. In this respect, the provision adds little to the ground that the pleading discloses no reasonable cause of action. As discussed above, this ground would include cases where the pleading was so badly drafted as to be incomprehensible. The Tongan Rules would appear to be making this clear. The second provision is also based on the RSC[131] and merely confers in express terms the power that is exercised under the inherent jurisdiction in the other jurisdictions.

O27 r4 CPR, O18 r1 Fiji and O8 r6(1) Tonga may be compared with r70 Samoa, which confers a much more restricted jurisdiction to strike out:

> Where in any proceedings no cause of action is disclosed the Judge may, on the application of the defendant, order the proceedings to be struck out.

125 [1987] SPLR 161. See also *South West Forest Defence Foundation Inc v Executive Director, Department of Conservation and Land Management (WA)* (1998) 72 ALJR 837.
126 See, for example, *Esah Corporation Ltd v The Attorney-General (representing the Comptroller of Customs and Excise),* unreported, High Court, Solomon Islands, Civ Cas 132/1999, 23 December 1999.
127 O8 r6(1)(iii) Tonga.
128 O8 r6(1)(iv) Tonga.
129 Unreported, Supreme Court, Tonga, Civ Cas 1310/1998, 1 March 1999.
130 See O18 r19 RSC.
131 O18 r19 RSC.

The Vanuatu Rules do not confer power on the court to strike out on the grounds that no reasonable cause of action or defence is disclosed. However, in both Vanuatu and Samoa, it would appear that application may be made under the inherent jurisdiction to allow to strike out pleadings on the basis of failure to disclose a cause of action or defence or any of the grounds included in the Tongan Rules.

3.1.2 The action or defence is frivolous or vexatious

The court has a discretion to grant an application to strike out a pleading that is obviously frivolous, vexatious or obviously unsustainable. An example is an action joining solicitors merely in order to obtain discovery[132] or claiming gaming debts.[133]

The Vanuatu Rules do not confer power on the court to strike out on the grounds that the action or defence is frivolous or vexatious. However, application may be made on this basis under the inherent jurisdiction.

3.1.3 Non-compliance with the rules

The Vanuatu Rules confer power to strike out proceedings if the claimant does not:[134]

(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.

Proceedings to strike out under this rule are expressed to apply in the event of a claimant's default and would appear to be unavailable to deal with a defendant's breach of the Rules. However, a claimant may apply under r18.10 for a penalty to be imposed for failure to comply with the Rules.

Under the CPR, an application to strike out may also be made against a defendant who fails to comply with an order for discovery.[135] The equivalent remedy against a plaintiff who fails to comply with an order for discovery is an application to dismiss for want of prosecution.[136]

The Rules of most regional countries other than Vanuatu contain a related power to set aside proceedings in whole or part on the basis of non-compliance with the rules of court.[137] This power is dealt with in Chapter 1.

3.2 Grounds for application under the inherent jurisdiction

Apart from the rules, the court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process.[138] In such cases, it will strike out part of an indorsement of a writ;[139] or set aside service of it,[140] or will stay

132 *Burstall v Beyfus* (1884) 26 Ch D 35.
133 *Day v William Hill (Park Lane) Ltd* [1949] 1 KB 632.
134 R9.10(1) Van.
135 O33 r21 CPR.
136 *Ibid.*
137 O69 CPR; O2 Fiji; O6 Cooks; O2 r1 Nauru; r202 Samoa; O4 Tonga.
138 *Reichel v Magrath* (1889) 14 App Cas 665.
139 *Huntly v Gaskell* (No 1) [1905] 2 Ch 656.

or dismiss before the hearing actions which it holds to be frivolous or vexatious[141] and remove from its files any matter improperly placed thereon.[142]

An example of the use of this power is provided by *Picardie Holdings (NH) Ltd and Others v Waegemenn*.[143] The defendant entered a defence and counterclaim to the plaintiffs' claim for specific performance. The defence contained no denials, but alleged that the contract was frustrated on the basis of the Constitution, which required owners of land to negotiate new terms with custom owners, and the Land Reform Regulation 1980. The plaintiff applied under the inherent jurisdiction[144] to strike out the defence on the grounds that it contained no reasonable answer and the counterclaim on the grounds that it disclosed no reasonable cause of action. It was also alleged that both documents were frivolous and vexatious and an abuse of process of court. Cooke CJ held that the contract was 'anything but frustrated'. The defendant had been well aware of the legal position at the time of entering into the contract and in any event the Regulation was invalid and the Constitution did not prevent performance of the contract.

The inherent jurisdiction to strike out for abuse of process overlaps with the power to dismiss for want of prosecution. For example, delay that illustrates an intention not to bring a matter to trial may also be an abuse of process.[145] In such a case, a party may be able to dispose of the action without proving prejudice to the other side.[146]

3.3 Procedure

Application to strike out under the CPR, Fiji and Tongan Rules is by summons. In Samoa, application is made by motion in Form 14.[147] In countries other than Samoa, no evidence is allowed in support of an application to set aside on the grounds that no reasonable cause of action is disclosed.[148] In other cases, an affidavit in support may be, and usually is, filed in support.[149] In Solomon Islands, it has been held that, where application is made under both heads, affidavit evidence may be taken into account by the court in concluding that there is no reasonable cause of action, even though that evidence would not have been admissible if the application had been

140 *Watkins v NA Land Co* (1904) 20 TLR 534.
141 *Metropolitan Bank v Pooley* (1885) 10 App Cas 210.
142 *Nixon v Loundes* [1909] 2 Ir R 1.
143 (1980–88) 1VLR 5.
144 At the hearing, counsel for the plaintiff also relied on O27 r4 CPR.
145 See *Leafa Vitale v Porotesano Malifa,* unreported, Supreme Court, Samoa, Civ Cas 149/91, 27 June 1994, where such an application was unsuccessful.
146 For authority that striking out is permissible in such a case see *Grovit v Doctor* [1997] 1 WLR 640.
147 R65(c) Samoa.
148 *Attorney-General of Duchy of Lancaster v London & NW Ry* [1892] 3 Ch 278; *Kaufusi v Kingdom of Tonga,* Supreme Court, Tonga, Civ Cas 1310/1998, 1 March 1999; *Tikana and Others v Motui and Others and Attorney-General,* unreported, High Court, Solomon Islands, Civ Cas, 29/2001, 18 March 2002. But see *Peter Ma'uana v Solomon Taiyo Ltd,* unreported, High Court, Solomon Islands, Civ Cas 109/1997, 29 July 1997, where Muria CJ appears to have expected an affidavit to be filed. R65(1)(d) Samoa, suggests that an affidavit must be filed in an application under r70. In practice, this would appear to be unnecessary.
149 *Kaufusi v Kingdom of Tonga,* unreported, Supreme Court, Tonga, Civ Cas 1310/1998, 1 March

based solely on that ground. In *Samuel Saki and Others v Ross Mining (Solomon Islands) Ltd and Others*,[150] application to strike out was made under O27 r4 on the ground that the pleadings disclosed no reasonable cause of action and on the grounds that they were vexatious and an abuse of process. Palmer J held that if he were to have confined himself to the pleadings, the first ground would have failed. However, due to the second submission he was able to resort to the affidavit evidence and in the light of that evidence he held that the application succeeded on both grounds. Accordingly, the pleadings were struck out.

The admissibility of affidavit evidence on an application to strike out was considered in Samoa in *Peter Meredith & Co Ltd v Drake Solicitors Nominee Company Ltd and Others*.[151] In that case, the application to strike out was brought on the basis that the causes of action pleaded in the statement of claim were frivolous, vexatious and an abuse of process. Sapolu CJ considered whether an affidavit which sought to challenge the allegations of fact in the pleadings, and the legal conclusions alleged to be based on those facts, was admissible in support or reply to the motion to strike out. His Lordship said that such affidavits should be viewed cautiously as evidence of this kind was better dealt with at trial where it should be the subject of cross-examination. His Lordship cited with approval the words of Gault J in *Electricity Corporation Ltd v Geotherm Energy Ltd:*[152]

> [Lengthy] and contentious affidavits are not to be encouraged and are more likely to lead to an award of costs against an applicant than to the success of the strike out application.

In the present case, Sapolu CJ admitted the affidavits in so far as they might assist a proper understanding of a pleading or deal with undisputed factual material.

In *Peter Meredith & Co Ltd v Drake Solicitors Nominee Company Ltd and Others*,[153] Sapolu CJ also considered whether extensive argument was allowed on an application to strike out. His Lordship concluded that:

> It is open to counsel moving to strike out a claim as disclosing no cause of action or as frivolous, vexatious and an abuse of process to demonstrate even by extensive argument that a claim is so clearly untenable that it has no possible chance of success on any of those grounds that it should be struck out. Counsel opposing the strike out motion may also demonstrate even by extensive argument that a claim is tenable and should not be struck out. …In *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125, 130, Barwick CJ stated in relation to a motion to strike out a claim, 'I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed'. That statement was accepted by the New Zealand Court of Appeal in *Lucas & Son Ltd v O'Brien* [1978] 2 NZLR 289 and in *Takaro Properties Ltd v Rowling* [1976] 2 NZLR 314 and more recently applied by the High Court in *Brintons v Feltex* [1991] 2 3NZLR 677.[154]

150 Unreported, High Court, Solomon Islands, Civ Cas 169/97, 19 December 1997.
151 Unreported, Supreme Court, Samoa, 10 December 2001.
152 [1992] 2 NZLR 641 at p 646.
153 Unreported, Supreme Court, Samoa, 10 December 2001.
154 Citing also *EvK* [1995] 2 NZLR 239.

The application must specify precisely what order is being sought, for example, to strike out or to stay or dismiss the action or to enter judgment, and precisely what is being attacked. Whether the whole pleading or indorsement or only parts are being attacked must be specified and in the latter case the alleged offending parts should be clearly specified.[155]

No procedure is specified under the Vanuatu Rules and it is unclear whether application may be made by the defendant or whether the power to strike out may only be utilised by the court of its own motion.

3.4 Time for making the application

Although the application may be made at any stage of the proceedings, the application should always be made promptly and, as a rule, before the close of pleadings.[156]

4 DISMISSAL FOR WANT OF PROSECUTION

Dismissal for want of prosecution is the weapon in the defendant's armoury which is equivalent to the plaintiff's right to apply for judgment in default of appearance or defence.[157] Like an application for judgment in default, an application to dismiss for want of prosecution allows a party to apply to put an end to the case on the grounds that the other party has not taken steps required by the Rules and should be taken as abandoning the right to take part.

In most jurisdictions of the region, there are two sources of power to dismiss. The first is the Rules and the second is the inherent jurisdiction of the court.

4.1 Dismissal under the Rules

There are two stages at which the CPR provides for dismissal at the instance of the defendant. O29 r1 of the CPR provides that if the plaintiff does not deliver a statement of claim within the time provided, the defendant may apply to have the claim dismissed with costs. O38 r2(2) provides that an application for dismissal may be made if the plaintiff does not set the matter down for trial within the time fixed on the summons for directions.

The principle on which the court exercises its discretion to dismiss under the Rules is the same as when it is acting under its inherent jurisdiction. In practice, there is no distinction between the two types of applications. Where the Rules apply, it is common to include an application under the inherent jurisdiction as well.

155 *Williamson v London* (1879) 12 Ch D 787 at 790.
156 *Halliday v Shoesmith* [1993] 1 WLR1.
157 Under the Vanuatu Rules, it is unclear whether application may be made by the defendant or whether the power to strike out for want of prosecution may only be utilised by the court of its own motion.

The CPR also provide for a cause or matter to be struck out on application by the registrar, if there has been no proceeding for one year from the last step taken and neither party has given notice of intention to proceed as required by O64 r9.[158]

On the hearing of an application under O62 r1, the court will strike out the action unless one of the parties shows just cause why it should not be. If just cause is shown, the judge may order the action to proceed on such terms as to costs and otherwise as seems just.[159]

In Vanuatu, the court may strike out a proceeding without notice or a hearing if there has been no step in proceedings for six months.[160] If no step has been taken for three months, the court may give notice to the plaintiff to show cause why the proceedings should not be struck out and may strike out if the claimant does not appear or show cause.[161] There is no requirement to give notice if no step has been taken in the proceedings for a specified period of time. Presumably, this was thought to be unnecessary, as delays should be picked up by the court and a show cause notice issued after a three-month delay. It has yet to be seen whether the Vanuatu court will instigate an effective case management system which will pick up delays in all proceedings.

4.2 Dismissal under the inherent jurisdiction

The inherent jurisdiction to dismiss for want of prosecution is more general. The court may exercise its discretion in respect of any delay. In order to succeed in an application, the following must be shown:

(a) prolonged delay by the plaintiff;
(b) that the delay is inexcusable;
(c) that the delay prejudices the fair trial of the action; and
(d) normally, that the limitation period has expired.

These criteria can be gleaned from the case of *Allen v Sir Alfred McAlpine & Sons Ltd*.[162] The action in that case arose out of a fatal accident in 1959. The pleadings were delivered in 1961. No further action was taken until 1967. The claim was struck out. The approach in *Allen v Sir Alfred McAlpine & Sons Ltd* was approved by the House of Lords in *Birkett v James*.[163] From both these decisions it would appear that in order for a delay to justify dismissal it must be 'inordinate and inexcusable'[164] or 'intentional and contumelious'.[165] What exactly these phrases mean is unclear, other than that the delay must be extraordinary.

158 O62 r1 CPR.
159 O62 r2 CPR.
160 R9.10(2)(d) Van.
161 R9.10(3) Van.
162 [1968] 2 QB 229.
163 [1978] AC 297.
164 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 268, *per* Salmon LJ.
165 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 259, *per* Diplock LJ.

Even if these criteria are fulfilled, the court may still refuse to exercise its discretion. Examples might be where the defendant has also been guilty of delay, or where the trial date has been fixed to begin in the near future.[166]

4.3 Procedure

Application under the CPR, Fiji and Tongan Rules is made by summons supported by affidavit addressing the factors relevant to the court's discretion. Where the application is made by the Registrar, as provided for in O62 r1 CPR, a summons is taken out, returnable before a judge in chambers in one month. The summons must be served on all parties to give them the opportunity to appear at the hearing and show cause why the writ should not be struck out.[167]

As mentioned above, a party who has taken no step in the proceedings for a year must give the other side one month's notice of his/her intention to proceed under the CPR.[168] Tactically, a party facing an application to dismiss for want of prosecution on the basis of failure to take a step within a year should immediately consider delivering a notice of intention to proceed to the other side. There is no set form for this notice and it is normally given by letter.

No procedure is specified under the Vanuatu Rules and it is unclear whether application may be made by the defendant or whether the power to strike out for want of prosecution may only be utilised by the court of its own motion.

4.4 Effect of an order for dismissal

The normal practice is for the court to make its order conditional. This is often referred to as a peremptory order. It requires the guilty party to take steps in the action within a certain number of days, failing which the action will automatically be dismissed.

If the order is absolute, or comes into effect through further default, it puts an end to the proceedings. In the rare case where an action is struck out within the limitation period it is theoretically possible for a second action to be brought on the same facts. However, this would normally be struck out as an abuse of process.[169]

The Vanuatu Rules make no provision for a conditional order, although presumably such an order could be made under the court's inherent jurisdiction. The Rules provide that the registrar must notify the parties if a proceeding is struck out.[170]

166 *Dutton v Spink and Beeching (Sales) Ltd* [1977] 1 All ER 287.
167 O62 r1 CPR.
168 O64 r9 CPR.
169 *Janov v Morris* [1981] 1 WLR 1389.
170 R9.10(4) Van.

5 DISCONTINUANCE

Another way in which proceedings may be determined prior to trial is by discontinuance. Under the CPR, the plaintiff may discontinue the whole or part of an action without leave at any time prior to receipt of the defence by notice in writing.[171] The Fiji Rules allow the plaintiff to discontinue without leave up to 14 days after receipt of the defence.[172] Under the CPR, the plaintiff is liable to pay the costs of the action.[173] After these time limits have expired, the leave of the court is necessary for discontinuance unless both parties consent.[174] Under the Tongan Rules, leave to discontinue an action is always required.[175] Under the CPR, a defendant may apply for leave to discontinue the defence or a counterclaim.[176] The Fiji and Tongan Rules allow the defence to be withdrawn at any time without consent but leave is required to withdraw a counterclaim.[177] The Tongan Rules expressly allow an application by summons for costs when a defence is withdrawn.[178]

The Samoan and Vanuatu Rules allow the plaintiff/claimant to discontinue the claim at any time by filing and serving a notice.[179] In Samoa, a memorandum of discontinuance in Form 23 is filed. In Vanuatu, a notice of discontinuance in Form 18 is required. In Samoa, the court may award costs, to the defendant of its own motion following discontinuance.[180] The Vanuatu Rules provide that a party against whom the claimant discontinues may apply to the court for costs against the claimant.[181] There is no provision for the defendant to discontinue the defence or a counterclaim. This apparent oversight requires an amendment to the Rules. The Vanuatu Rules differ in a major way from the CPR, Fiji and Samoan Rules in that they provide that a discontinued claim may not be revived.[182] The Tongan Rules do not deal with this point.

6 SETTLEMENT

It should always be borne in mind that proceedings may be brought to an end before, or even during trial, by settlement. If settlement is reached, the action may be discontinued by consent under the Rules discussed in the previous section.

As discussed in Chapter 2, the Civil Procedure Rules 2002 of Vanuatu have introduced

171 O21 r1 CPR.
172 O21 r2(1) Fiji.
173 O28 r1 CPR.
174 O28 r2; O21 r2(7).
175 O15 r1 Tonga.
176 O28 rr1 and 2 CPR.
177 O21 r(2) Fiji; O15 rr1(1) and 2(1) Tonga.
178 O15 r2(2) Tonga.
179 R9.9(1) and (2) Van.
180 R109(3) Samoa.
181 R9.9(3) Van.
182 R9.9(4)(a) Van. Cf O28 r1 CPR; O21 r4 Fiji and r110 Samoa.

a system of referral for mediation by the court. In particular, a judge may make a mediation order at a conference.[183] Such mediation provides another avenue for settling a case. Similarly, the pre-trial conference provided for under the Fiji and Vanuatu Rules provides another opportunity for settlement to occur.[184] This conference is discussed further in Chapter 11. Under the Fiji Rules, the judge may call the parties' solicitors into chambers to attempt to bring about a settlement before trial.[185]

183 R10.3(3) Van.
184 O34 r2 Fiji; r6.6 Van.
185 O34 r2(6) Fiji.

CHAPTER 11

TRIAL

1 INTRODUCTION

If a dispute cannot be settled or brought to a conclusion during the interlocutory stages of the proceedings, either party may bring the action to trial. The function of the trial is:

- to resolve disputes of fact; and
- to apply the relevant rule of law to the facts as found, so that the matter can be finally decided between the parties, by a judgment of the court.

Many of the rules of court were originally designed for trial by jury. However, in all countries of the region except Tonga, trial is now by judge alone.[1]

Some countries of the region provide for assessors to sit to assist the judge with specialised matters.[2] Most Rules also provide for appointment of a referee to deal with questions of a complex technical nature.[3]

In most jurisdictions, only litigants in person and practitioners admitted to practice have a right of audience before the court. For example, s 14(1) of the Legal Practitioners Act (Cap 16) and s 12 of the Legal Practitioners Act (Van)[4] prevent any unqualified person from carrying on or defending any action or acting as a legal practitioner to be heard or determined by any court.

2 PRELIMINARY ISSUES

As a general rule, all issues arising in a dispute should be dealt with at the same time.[5] However, there are some exceptional cases where questions or issues may be more conveniently or economically dealt with before the trial. There are three cases where this may be appropriate:

- where a preliminary issue of law has been identified;
- where a preliminary issue or question of fact has been identified; or
- where it is convenient to try the issue of liability first and to consider damages later.

O33 r4(2) of the Fiji Rules provides that in any action commenced by writ, different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others. O33 r7 Fiji goes on to empower the court to dismiss the action if the decision on the preliminary point substantially disposes of the matter. Special provision is

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1 A common exception is defamation actions. See, for example, Supreme Court Act 1981 (UK), s69.
2 O38 rr1(1) and 13 CPR; O33 rr2 and 6 Fiji. See further Chapter 3.
3 O38 rr14–21 CPR; O36 Fiji; rr111–114 Samoa; r12.7 Van.
4 Cap 119.
5 Generally, it is most cost effective to have one main hearing.

made for the case where an order is made for the issue of liability to be tried before consideration of damages.[6] In such a case, the party against whom the finding of liability is sought may make a written offer of acceptance of liability up to a specified proportion.[7] Such offer may be brought to the judge's attention after the issue of liability has been decided.[8]

The CPR are not so clear. A question of fact may be dealt with as a preliminary issue where the parties consent, or without consent in cases requiring a prolonged examination of documents or accounts or any scientific or local examination which cannot conveniently be tried in the usual manner.[9] A preliminary point of law may also be dealt with before the trial, either by consent[10] or by order of court.[11]

The Samoan Rules are not clear as to whether a question of fact may be set down as a preliminary issue. Rule 123 is headed 'Parties may state case on question of law', which suggests that it does not cover questions of fact. However, the content of para (1) of the Rule is not so restricted, merely saying that the parties may state a special case for the opinion of the court. Paragraph (4) states:

> On the argument of the questions of law raised in the special case the Court may give judgment in the action, or may order the issues of fact or any of them to be tried before giving judgment.

This suggests that the heading is correct. In practice, however, the Rule is taken as authorising consideration of a preliminary question of fact.[12]

By contrast, the Tongan section is a model of clarity. O23 r3 states:

> (1) The Court may order the separate trial of any question or issue arising in an action, whether of fact or law or mixed fact and law and whether or not it was raised on the pleadings.
> (2) On making a decision on any question or issue tried separately the Court may give final judgment in the action if that decision substantially disposes of the action or renders further trial unnecessary.

The Vanuatu Rules state that:[13]

> 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.

The CPR allow the parties to set down questions of law to be dealt with as preliminary issues (referred to as a 'special case')[14] by consent. In the absence of agreement, application

6 O33 r5(1) Fiji.
7 O33 r5(2) Fiji.
8 O33 r5(3) Fiji.
9 O36 r3 CPR.
10 O37 r1 CPR. Leave of the court is required where an infant or person of unsound mind is a party: O37 r4 CPR.
11 O37 r2 CPR.
12 In *Lealaisalanoa v Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* [1980–93] WSLR 321, Maxwell CJ said that he was 'in no doubt' about his jurisdiction to determine preliminary issues, although in that case the issue was one of law.
13 R12.4 Van.
14 A special case is a preliminary point of law separated from the main action by setting it out in a separate document.

for a preliminary issues hearing may be made by summons under the CPR, Fiji and Tongan Rules. A party raising a preliminary issue should usually apply at the hearing of the summons for directions. Where a preliminary point of law is to be dealt with as a special case under the CPR, the Rules require the special case to be put in documentary form.[15] It must be divided into paragraphs numbered consecutively and concisely state the facts and documents necessary to enable the court to decide on the questions raised.[16] To set the preliminary issues down for hearing, the CPR require a memorandum of entry to be filed in Form 21 in Appendix B.[17]

The court is also empowered to order that a question or issue be tried before trial of its own motion.[18]

The Samoan Rules require a special case to be separately framed stating such facts and documents as are necessary to decide the point.[19]

Under the Vanuatu Rules, preliminary issues of law may be decided at the trial preparation conference. Alternatively, application for a separate preliminary legal issues hearing may be made at that conference.[20] No mention is made of the appropriate time to apply for a preliminary hearing on a question of fact, but presumably this should also be raised at the trial preparation conference or at an earlier conference, if appropriate.

Issues of fact or law are rarely dealt with as preliminary issues in the courts of the South Pacific.[21] It is yet to be seen whether the case management procedures introduced in Vanuatu will result in an increased use of this procedure to save the time and expense of a full trial.

3 EVIDENCE

3.1 Notice to admit

3.1.1 Introduction

After the close of pleadings, most regional Rules provide that a party may seek to limit further the issues at trial by issuing a notice to admit facts.[22] This notice seeks an express admission from the other party of matters wholly or partly adverse to their case. A party may also issue a notice to admit documents.[23] This requires the other party to admit the authenticity of a document, so that it need not be formally proved at trial. A party served

15 O37 r3 CPR.
16 O37 r1 CPR.
17 O37 r5 CPR.
18 O37 r2 CPR; O36 r2 Fiji; O23 r3 Tonga.
19 R123(2) Samoa.
20 R6.6(4)(c) Van.
21 In England, the courts have made it clear that the procedure will rarely be appropriate: *Allen v Gulf Oil Refining Ltd* [1981] AC 101; *Tilling v Whiteman* [1980] AC 1.
22 O34 r4 CPR; O27 r2 Fiji; r63 Samoa; O21 r2 Tonga.
23 O34 r2 CPR; O27 r5(4) Fiji.

with a notice to admit who does not admit the facts or documents referred to in the notice, will have to pay the costs of proving them at trial. This will be the case even if the party who failed to admit the facts or documents is successful in the main action.[24]

The Fiji Rules provide for automatic admissions in the case of documents disclosed on discovery.[25] A party seeking to avoid deemed admissions must serve a notice that no such admissions are made within 21 days from the later of inspection of documents or the expiry of the time limited for inspection.[26]

The Vanuatu Rules do not entitle a party to serve a notice to admit, but it is clear that admission of facts may be dealt with at a conference. It is specified that parties must be in a position 'to agree on facts that have been admitted' at the trial preparation conference. This wording is slightly ambiguous and suggests that the request for admission and the response to the request will already have been exchanged. However, there is no indication in the Rules of when this might occur. It might be clearer to provide that parties must be in a position to request admissions of fact and respond to such a request at the trial preparation conference. The Rules state that 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 each other party'.[27] No provision is made as to admitting documents. It is provided that the judge may fix a date for the exchange of agreed bundles of disclosed documents[28] at the trial preparation conference,[29] but this is not the same as admitted documents. As mentioned above, the Fiji Rules provide that documents disclosed are taken to be admitted unless the party on whom the list is served files a notice that he/she does not admit a document on the list. This is also the case in many jurisdictions outside the region.[30] It may be that it was intended that documents disclosed in the list of documents would be deemed to be admitted under the Vanuatu Rules, but no deeming provision is expressly set out in the Rules.

3.1.2 Procedure

Under the CPR, the notice to admit must be served not later than seven days after the action has been set down for trial.[31] Under the Fiji Rules, a party must serve a notice to admit facts[32] or documents[33] not later than 21 days after the case is set down for trial. The notice to admit facts must be in Form 18 in Appendix B and the notice to admit documents in Form 17 in Appendix B of the CPR. In the case of failure to respond, the facts or documents are deemed to be admitted.[34]

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24 O34 r4 CPR; O34 r2(3) Fiji.
25 O27 r4 Fiji. This Rule is based on O27 r4 RSC, which provides for automatic admission in relation to documents disclosed on discovery.
26 O27 r4 Fiji.
27 R6.9 Van.
28 See further r8.17(2) Van in relation to 'agreed bundles of documents'.
29 R6.6(4)(a) Van. See also r8.17 Van.
30 See, for example, O27 r4 RSC.
31 O34 rr2(1) and 4 CPR.
32 O27 r2 CPR.
33 O27 r5(1) CPR.
34 O34 rr2(2) and 4 CPR; O27 r5(3) Fiji.

Notice that a fact or document is not admitted must be given within seven days after service of the notice to admit under the CPR.[35] Notice of admission of facts must be in Form 19 in Appendix B. There is no form for notice of admission of documents, but the form for notice of admission of facts can be adapted. Notice of non-admission must be served within 21 days of service of the notice to admit under the Fiji Rules.[36] No forms are specified under the Fiji Rules.

Rule 63 Samoa provides for notice to admit to be served at any time. Answer must be made within three days from service.[37] Rule 63(2)(b) provides that the court may allow such admission to be amended or withdrawn. The Samoan Rules specify that Form 11 must be used to answer a notice to admit.

The Samoan Rules specify that Form 10 must be used to give notice to admit and Form 11 must be used in answer.

O21 r1 Tonga provides for notice to admit to be filed at least one month before trial. If no admission is made in response within 14 days after service, the cost of proving those facts will be payable by the party failing to admit unless the court orders otherwise.[38] No forms are specified.

This procedure could be used in Joseph Wale's case. The second defendant has included in its defence:

- a denial that it employs the first defendant; and
- an allegation of contributory negligence.

If the plaintiff believes that the only real issue at trial will be whether the first defendant drove negligently, he should prepare and serve a notice to admit. An extract from this is contained in Sample Document X.

SAMPLE DOCUMENT X—EXTRACT FROM NOTICE TO ADMIT

> The facts and part of the defence, the admission of which is required, are:
> 1. That the Second Defendant employed the First Defendant at the time of the accident referred to in paragraph 1 of the Statement of Claim.
> 2. That the accident referred to in paragraph 1 of the Statement of Claim was not caused or contributed to by the negligence of the Plaintiff.

Where an admission is clear and disposes of part or whole of an issue in the action, the CPR and Fiji Rules permit application to be made for judgment.[39] Application may be made on the basis of formal or informal admissions.[40]

35 O34 rr2(1) and 4 CPR.
36 O27 r5(2) Fiji.
37 R63(2) Samoa.
38 O21 r2 Tonga.
39 O34 r6 CPR; O27 r3 Fiji.
40 *Re Beeny* [l894] 1 Ch 499.

The procedure for obtaining admissions is rarely used in the South Pacific. It will be interesting to see whether the case management techniques introduced in Vanuatu will lead to an increase in admitted facts or documents.

3.2 Notice to produce

3.2.1 Introduction

The general rule is that a party who relies on the contents of a document at trial must produce the original to prove those contents. If the original is in the possession of the other party, a notice to produce must be served. A party served with a notice to produce must either comply with the notice or forfeit the right to object to the production of secondary evidence.[41] If the party calling for production does not have secondary evidence or the original document is in the possession of a third party, the proper course is to serve a *subpoena duces tecum* on the party holding the documents.

The notice does not compel production, although non-compliance may lead to adverse inferences. There is no automatic costs penalty for failure to produce but there is a penalty under the CPR for calling for production of unnecessary documents (O34 r9).

Under the Fiji Rules, a person who serves a list of documents is deemed to have been served with a notice to produce at trial any of those documents which are in the possession, custody or power of the party serving the list.[42]

The Vanuatu Rules do not provide for a notice to admit to be served. Rule 8.17(1) provides that, 'The originals of all documents to be used at the trial must be brought to the trial'. This provision is unclear. Does this mean that each party must bring all original documents which he/she intends to use to trial or that each party must bring all documents which either party intends to use? If the latter is correct, how would a party know which documents were to be used by the other side? As the provision appears in Pt 8 of the Rules, which deals with disclosure, it appears likely that the intention was to compel a person who serves a list of documents to produce at trial any of those documents which are in the possession, custody or power of the party serving the list. As discussed above, a deeming provision to this effect is in place in Fiji. Until the doubt surrounding r8.17(1) is clarified, the only assured way of getting documents in the possession of the other party or a third person is to issue and serve a summons to give evidence,[43] which is the equivalent of a *subpoena duces tecum.*

3.2.2 Procedure

Under the CPR, notice to produce is given in Form 20 in Appendix B. No form is specified by the Fiji Rules. No time is stated for service of the notice, but it has been held in England that reasonable notice should be given.[44]

41 O34r8 CPR; O27r5(4) Fiji.
42 O27 r4(3) Fiji.
43 R11.15(1) Van. The summons must be personally served: r11.16 Van.
44 *Dwyer v Collins* (1852) 7 Exch 639.

3.3 Subpoenas

If a witness is reluctant to attend at trial, attendance can be compelled by issuing and serving a writ of *subpoena*.[45] This is a purely administrative action. A *praecipe* must be filled out and a fee paid.[46] Service of the *subpoena* must be effected personally.[47] Conduct money, namely a sum sufficient to cover the witnesses' expenses in travelling to and from court must be tendered when the *subpoena* is served.

There are two types of *subpoena:*

- *Subpoena ad testificandum*—requires a witness to attend and give oral evidence; and
- *Subpoena duces tecum*—requires a witness to attend and produce documents.

In Vanuatu, the term *subpoena* has been abandoned. Unfortunately, two new terms have been introduced. The term 'summons to give evidence' is used in the new Rules, but the term 'witness summons' is used in the Court (Witness Summons) Act.[48] In practice it seems likely that the shorter term, 'witness summons' will continue to be used.

The Court (Witness Summons) Act provides for the compulsory attendance in court by anyone served with a witness summons and prescribes a penalty of up to VT10,000 for failure to obey a summons.[49] This increases to a maximum of VT20,000 for a second offence.[50] It also provides that the witness summons must be served in accordance with the rules of court and accompanied by a translation.[51]

The Samoan Rules also use the term 'witness summons'. Rule 52 provides that a judge, registrar or deputy registrar may issue a witness summons to compel attendance or production of a document. The summons must be in Form 5. Service may be by a party or the court.[52]

The Tongan Rules do not specifically provide for issue of a *subpoena* or witness summons. The power to issue *subpoenas* is conferred on the Supreme Court by s 5 of the Supreme Court Act.[53] In practice, the magistrates' court form is amended by hand for use in the Supreme Court.[54]

3.4 Pre-trial conference

Under the Fiji Rules, where all parties are represented by solicitors, a pre-trial conference may be held to check that advantage has been taken of all available interlocutory procedures. The parties' representatives should try to reach agreement

45 O39 r36 CPR; O38 r14(3) Fiji.
46 O39 r30, Form 28, Appendix B CPR; O38 r1(9), Form 16, Appendix A Fiji. The fee under the CPR is SBD20: High Court Fees Rules 1998.
47 O39 r34 CPR; O38 r17 Fiji.
48 Cap 35 Van.
49 Sections.
50 *Ibid*.
51 Sections 3 and 4.
52 R53 Samoa.
53 Cap 10 Tonga.
54 This information was kindly supplied by A&A Attorneys of Nuku'alofa.

on any matters that might save time at trial. In particular, the following matters should be considered:[55]

(a) the possibility of obtaining admission of facts or documents;
(b) the holding of inspections and examinations;
(c) the discovery of documents;
(d) the exchange of experts' reports;
(e) the plans, diagrams, photographs, models and similar articles to be used at trial;
(f) the quantum of damages;
(g) the consolidation of trials.

If a solicitor refuses to attend at a pre-trial conference, the solicitor who requested it may apply for an order compelling attendance. At the conclusion of a pre-trial conference, the solicitors attending must draw up a minute containing a succinct statement of the matters agreed (if any) and the issues, whether of fact, law or procedure, remaining for determination.[56]

The Fiji Rules also specifically provide that the judge may call the solicitors representing the parties to his/her chambers prior to the trial with a view to bringing about agreement on any matters likely to curtail the duration of the trial or save costs.[57]

A pre-trial conference has also been introduced by the new Vanuatu Rules. It is referred to in the Rules as the trial preparation conference. Its purpose is stated to be:[58]

(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.

A trial preparation conference may be held by telephone if the judge and all parties are able to participate.[59] At the conference, the parties should be in a position to:[60]

(a) assist the judge in finally defining 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
(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

55 O34 r2 Fiji.
56 O34 r2(4) Fiji, as amended by High Court (Amendment) Rules 1993, r7.
57 O34 r3 Fiji.
58 R6.6(1) Van.
59 R6.10 Van.
60 R6.6(3) Van. The Vanuatu Rules do not contain a Rule 6.6(2).

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

The Rules go on to particularise matters that the judge may attend to at trial, as follows:[61]

(a) fix dates for the exchange of proofs of evidence[62] and agreed bundles of disclosed documents, if this has not been done; and
(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.

The judge must also fix the date and time within which any order made at the conference is to be complied with and record the order in writing.[63] If a party does not comply with an order made at a conference within the time fixed, the judge may order costs against the non-complying party or his/her lawyer.[64] The judge is also empowered to order that the party's claim or defence be struck out for failure to comply with an order made at the conference.[65]

3.5 Setting down for trial

Normally, an order will be made on the summons for directions specifying a time limit within which the plaintiff must set the action down for trial. If the plaintiff fails to set the action down, the defendant may do so instead.

The usual practice under the CPR is to file with the court a certificate of readiness for trial and two bundles of documents. Each bundle should contain:

- the writ;
- the pleadings, including any request for particulars;
- all orders made on the summons for directions.[66]

In Solomon Islands, the party setting down must also file a 'trial bundle' which may be amalgamated into the court bundle.[67] This should include copies of the following:

- experts' reports;
- witnesses' statements;
- summary of the issues by all parties;
- authorities to be used by all parties;
- any agreed documents.

The court bundle and the trial bundle must be paginated and indexed and should be agreed between and prepared jointly by the parties. If they cannot agree, the party

61 R6.6(4) Van.
62 It is unclear why proofs of evidence would be exchanged, as these are privileged. See below, text to notes 77 and 78.
63 R6.7 Van.
64 R6.8(1) Van.
65 R6.8(2) Van.
66 O38 r3.
67 Registrar's Circular 3/2000, 11 May 2000.

setting the action down should prepare it. The costs of preparation are costs in the cause.[68]

The certificate states that the parties are ready for trial and gives the current address of a litigant in person or the advocate for each side. A more extensive form of certificate has been prescribed in Solomon Islands, with the following additional requirements:

- certification that all directions have been complied with;
- a time estimate and statement as to whether the time estimate has been agreed with the other side or not;
- a statement that the party filing the certificate is aware of the obligation to inform the court promptly of any circumstance affecting the length of the trial or which may result in it not proceeding;
- confirmation of its service on all parties.[69]

If the case does not proceed to trial after it has been listed, a new certificate must be lodged together with a fresh fee.[70] After filing the certificate, a notice of trial will be sent out. The notice of trial sets the date, place and time of the trial and the name of the judge who has been allocated to preside.

Under the Fiji Rules, application for a trial date must be made by summons. In addition to the documents required to be filed, under the CPR, the summons must be accompanied by a statement in writing as to whether a pre-trial conference has been held. If it has not, the reasons must be given.[71] The Fiji Rules also require a hearing fee to be paid.[72] At the hearing of the summons, the registrar is required to ask whether his assistance would be likely to facilitate a settlement or compromise.[73] If it is not, the registrar may enter the action for trial.

Rule 100 of the Samoan Rules provides that on the filing of a statement of defence or counterclaim the court or registrar should adjourn the matter *sine die* until one of the parties files a request to set down in Form 20. This Form must be sent to the other side for signature before filing, but if the other side fails to sign it within 14 days, the matter can be set down unilaterally. Form 20 contains a certificate that all interlocutory matters have been attended to and gives a time estimate for the trial. On receipt of the request, the registrar fixes a date for the trial and gives not less than 14 days' notice of the hearing date in Form 21 to both parties.

In Tonga, provision for setting down is usually made on the hearing of summons for directions.[74]

Under the Vanuatu Rules, the trial date is fixed at the trial preparation conference.[75] A date is also fixed for exchange of agreed bundles of disclosed documents.[76] The Rules

68 *Ibid*.
69 *Ibid*.
70 *Ibid*.
71 O34 r2(5) Fiji, as amended by High Court (Amendment) Rules 1993, r6.
72 O34 r6 Fiji.
73 O34 r3 Fiji.
74 O19 r3(iii) Tonga.
75 R6.6(4)(d) Van.

also provide for the exchange of 'proofs of evidence'.[77] The purpose of this provision is unclear, as proofs of evidence are covered by legal professional privilege. There is nothing in the Rules to suggest an intention to restrict this privilege. The Rules do display an intention that experts' reports should be disclosed, but these are not usually referred to as proofs of evidence.[78] The civil procedure rules in some Australian jurisdictions empower the court to order the parties to serve each other with written statements of the evidence they propose to call, and the Vanuatu provision may have been copied from such a rule.[79] Until this provision is clarified by the court or by amendment, the reference can only be taken to refer to proofs in respect of which privilege has been waived.

In Solomon Islands, a Registrar's Circular provides that a direction that all witness statements be exchanged will normally be made in all actions.[80] The enforceability of this provision is doubtful. This is discussed further in Chapter 9.

4 ORDER OF TRIAL

4.1 Adjournment of trial

Superior courts in the region have inherent jurisdiction to order the adjournment of a trial either on application by a party or of its own motion. The CPR and Vanuatu Rules specifically empower the court to adjourn a trial at its discretion.[81] Under the CPR, the discretion is to be exercised on the basis of what is 'expedient for the interests of justice'.[82]

4.2 The right to begin

The party who bears the onus of proof begins.[83] Usually this will be the plaintiff. However, it could be the defendant if a legal presumption operates in the plaintiff's favour. For example, if the defendant is denying that there is a contract on the grounds that there was no intention to create legal relations and the contract is of a commercial nature, the defendant will begin. The defendant will also begin if he/she has made a plea of confession and avoidance.

Usually, the party who begins is also the party who has the last word. Accordingly, admissions may be made by a defendant as a strategy to obtain the right to begin.[84]

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76 R6.6(4)(a) Van.
77 *Ibid*.
78 R11.12(1) Van.
79 See, for example, Supreme Court Rules 1970, New South Wales, Pt 36 r4A.
80 Registrar's Circular 3/2000, Draft Direction no 5.
81 O39 r8 CPR; r12.3 Van.
82 O38 r8.
83 Under the Vanuatu Rules, the claimant presents first if s/he bears the burden of proof on any question: r12.1(3)(a) Van.
84 See, for example, *Portelli v Port Waratah Stevedoring Co Ltd* [1959] VR 195.

This will not be possible if any significant evidentiary onus rests on the plaintiff.[85] In any event, this is not such an important issue in the South Pacific region because trials are normally without jury.[86]

A party is not strictly bound by the content of the opening address. If other matters arise in the course of evidence, they may be dealt with.

4.3 Order of speeches

The order of speeches is usually as follows:[87]

(a) Opening address (usually by the plaintiff).
(b) Evidence of the party who opened. Witnesses are called and:
- are sworn (or affirmed);
- are examined in chief;
- are cross-examined by the other party;
- are re-examined by the first party;
- may be asked questions by the judge.

(c) Opening address by the defendant (or the plaintiff if the defendant opened).
(d) Evidence by the defendant. Witnesses are called and the same order followed as in (b).
(e) Closing address by the defendant. At this stage the evidence is summarised and the main submissions made.
(f) Closing address by the plaintiff.
(g) Judgment is given either immediately or, more usually, reserved to be given after consideration.
(h) Consideration of costs.[88]

There are two possible variations on this: submission of no case to answer and election to call no evidence.

4.3.1 Submission of no case to answer

After the evidence of the plaintiff, the defendant may submit that there is no case to answer. In cases tried by a judge alone, this is an unusual step to take. The judge is the arbiter of both fact and law and should not be asked to express a view on the evidence until after it has been presented. Further, if the plea is successful, in the event of an appeal there would have to be a retrial, which would duplicate the expense of bringing witnesses

85 Under the Vanuatu Rules, the defendant has the right to present first only if s/he bears the burden of proof on every question: r12.1(3)(b) Van.
86 Although there is a right to trial by jury in Tonga (O23 r2(2)), in practice this right is rarely exercised. The right to trial by jury in civil trials is enshrined in cl 99 of the Constitution of Tonga Cap 2.
87 O38 r9 CPR.
88 See further Chapter 12.

to court. Accordingly, such a plea will normally be allowed only if the defendant elects to call no evidence.[89]

4.3.2 Election to call no evidence

This option is available to the defendant even if he/she is not making a submission of no case to answer. It is fairly unusual, but might occur if the defendant hears the evidence of the plaintiff's witnesses and decides that it is incontrovertible.

Accordingly, there are three possible scenarios at trial and these are illustrated by Table 11.1.

TABLE 11.1—ORDER OF PROCEEDINGS AT TRIAL

Normal order*	Order on submission of no case	Order on election to call no evidence
Opening address by plaintiff ('P')	Opening address by P	Opening address
Evidence by P	Evidence by P	Evidence
Opening address by Defendant ('D')	Submission of no case by D	Final address by P
Evidence by D	Reply by P	
	Judgment for D, if plea accepted	
	Costs	
Closing address by D if plea not accepted	Closing address by P	Opening address by D
Closing address by P if plea not accepted	Closing address by D	Closing address by D
Judgment	Judgment	Judgment
Costs	Costs	Costs
*It is assumed for the purpose of this Table that the plaintiff has the burden of proof.		

The normal order of events at trial has been changed in Vanuatu. The claimant presents his/her case first. The defendant will only open if he/she bears the burden of proof on every question.[90] However, the claimant does not have the right to the final closing address. Instead, the claimant or whoever has opened will make the first closing address, followed by the defendant or whichever party opened second.[91]

89 *Alexander v Rayson* [1936] 1 KB 169. A common exception occurs in the case of defamation actions (O34 r5). See, for example, *Portelli v Port Waratah Stevedoring Co Ltd* [1959] VR 195.
90 R12.1(3)(b) Van.
91 R12.1(4)(f) and (g) Van.

5 CONTENT AND CONTROL OF ADDRESSES

5.1 The opening address

The function of the opening address is to explain the whole of the case by reference to the pleadings and to explain documentary evidence and evidence that witnesses will give. Full advantage should be taken of this opportunity to make all points strongly and clearly. Counsel will commonly use the following pattern in the opening speech:

- Set out in chronological order the events that give rise to the case.
- Take the judge through the pleadings, summarising the formal parts of the pleadings and identifying paragraphs that reveal the real issues.
- Take the judge through the agreed evidence.

Once the opening speech is concluded, the plaintiff's evidence is called.

5.2 The closing address

Once the evidence for the defendant is concluded, counsel for the defendant makes a closing address to the court. This is followed by a closing address for the plaintiff. The following rules apply:

- The addresses must be relevant and justified by the evidence.
- The addresses must not mention a suitable verdict. In actions for general damages, counsel must not suggest to the judge the amount that should be awarded. Counsel should refer to any point in the evidence that is relevant to the assessment of quantum and previous relevant awards of the court may be referred to. These may be used as a basis for suggesting a range of figures.
- The source of funds from which any award will be paid, such as insurance moneys, should not be mentioned.

6 EVIDENCE

6.1 Witnesses

Normally, evidence is by oral examination of witnesses in open court.[92] The plaintiff's counsel calls his/her witnesses in turn and examines them in chief from the proofs of evidence. Since examination-in-chief is designed to elicit evidence favourable to a party's own case, two important restrictions are placed on it:

- The advocate must not ask leading questions on contentious matters. A question is leading if it is so framed as to suggest a particular answer.
- The advocate must not contradict the testimony of his/her own witness. Thus, if the witness says something other than what is stated in the proof of evidence, counsel must accept this.

92 O39 r1 CPR; O38 r1 Fiji; r61 Samoa; O24 r1 Tonga.

Once the examination-in-chief is over, counsel for the opposing party will cross-examine in an attempt to discredit answers given, or to elicit testimony favourable to the other party's own client. Counsel may ask leading questions and, of course, can refer the witness to any contradictory statement he/she has made. In cross-examination, each witness must be asked about all points that will be challenged in evidence by the other party's witness.[93] When cross-examination has concluded, the plaintiff's advocate has the right to re-examine on matters arising out of cross-examination.

The Vanuatu Rules have changed the position regarding evidence at trial. Evidence-in-chief in the Supreme Court is to be given by sworn statement in Form 3, although the court retains the right to order oral evidence to be given.[94] Sworn statements must be filed and served at least 21 days before the trial. A party who wishes to cross-examine a witness must give the other party notice of this at least 14 days before the trial.[95]

The Vanuatu Rules also provide for evidence to be given before trial.[96] As evidence-in-chief may now be given in the form of a sworn statement, this will only be necessary where the other party wishes to cross-examine the witness. The grounds for application for evidence to be presented before trial are that the witness will not be available to give evidence at the trial because of ill health or departure from Vanuatu, which will be permanent or at least for an extended period of time.[97]

6.2 Evidence by children and vulnerable persons

The Vanuatu Rules have introduced changes designed to bring the procedural rules relating to evidence from children and other vulnerable witnesses into line with England, Australia and many other jurisdictions.[98] Rule 11.10 Van provides that the court must take whatever steps are necessary to enable a child witness to give evidence without intimidation, restraint or influence. In particular, the court may allow the child to give evidence screened from the rest of the court or sit in a place other than the courtroom. It may also exclude everyone except the parties' lawyers while the child gives evidence, appoint a person to be with the child while the child gives evidence and do anything else that may assist the child to give evidence.[99]

The court may use these powers to protect other witnesses where the court is satisfied that they may be unable to give evidence without 'intimidation, restraint or influence'.[100]

93 This is known as the rule in *Browne v Dunne* (1894) 6 R 67.
94 R11.3 Van.
95 R11.7(4) Van. The court may extend or abridge this period.
96 R11.9 Van.
97 R11.9(2)(c) Van.
98 See, for example, Evidence Act 1977 (Qld), s 21A.
99 R11.10(2) Van.
100 R11.11 Van.

6.3 Expert witnesses

Under the Vanuatu Rules, a party who intends to call an expert witness must inform the other side and give them a copy of the expert's report at the first conference.[101] Parties are restricted to one expert witness in a field unless the court orders otherwise.[102] Under the Fiji Rules, experts' reports must be disclosed in personal injury cases and the number of experts is limited to two medical experts and one expert of any other kind.[102a] Whilst these matters are not covered by other regional Rules, directions may be given placing restrictions on the right to call expert evidence.

The Vanuatu and Fiji Rules also provide that the court may appoint its own expert witness.[103] If it does so, the Vanuatu Rules provide that a party may not call an expert witness in that field unless the court orders otherwise.[104] The Fiji Rules are not so restrictive and allow a party to call one expert of their own on the question reported on by the court expert.[105] The Vanuatu Rules provide that experts' costs are to be payable by the parties equally unless the court orders otherwise.[106] Under the Fiji Rules, both parties are jointly and severally liable for the expert's costs, but these will be treated as part of the costs of the cause and may be subject to a costs order made in accordance with the normal principles.[107] Further, if a party objects to the appointment of the court expert, the court may order the party applying for the appointment of a court expert to give security for the expert's remuneration.[108]

The Vanuatu Rules also contain a related provision applying 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. If the claimant refuses to undergo the examination without reasonable excuse, the court may order the proceedings be stayed or take the refusal into account when considering the claimant's evidence.[109]

6.4 Evidence by link

The Vanuatu Rules allow evidence to be given by telephone, video or any other form of communication, 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.[110] The court may do this whether the witness is in or outside Vanuatu.[111] A party wishing to present evidence by link must apply in writing and file a sworn statement setting out:[112]

(a) the name and address of the witness and the place where he/she will be giving evidence; and

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101 R11.12(1) and (3) Van. The first conference is governed by r6.3 Van.
102 R11.12(4) Van.
102a O25 r8(1)(b) and (d) Fiji.
103 O40 Fiji; r11.13 Van.
104 R11.13(4) Van.
105 O40 r6 Fiji.
106 R11.13(3) Van.
107 See Chapter 12.
108 O40 r5(1) Fiji.
109 R11.14 Van.
110 R11.8(1) Van.
111 R11.8(2) Van.
112 R11.8(3)(b) Van.

(b) the matters the witness will be giving evidence about; and
(c) 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
(d) the type of link to be used and the specific facility to be used; and
(e) any other matter that will help the court to make a decision.

In deciding whether to allow evidence by link, the court must take into account:[113]

(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.

Where evidence is given by telephone, the court must be satisfied of the identity of the witness and that the witness is giving evidence freely.[114]

The court may give directions about arrangements for the link and may end the giving of evidence by link if it considers the quality of the link unacceptable or that it is unfair to a party.[115]

6.5 Exhibits

Where a witness produces a plan or document or photograph or other object as original evidence, it becomes an exhibit in the case and is marked and kept by the associate to the judge.

113 R11.8(4) Van.
114 R11.8(5)(b) Van. The court may take into account a certificate by a magistrate, police officer or chief who was present when the witness gave telephone evidence: r11.8(6) Van.
115 R11.8(10) and (11) Van.

7 CONSEQUENCE OF FAILURE OF A PARTY TO ATTEND

The consequence of failure to attend at trial will depend on which party does not attend.

7.1 Where the plaintiff does not attend

Where the plaintiff does not attend, the defendant is entitled to judgment dismissing the claim.[116] In *Taso v Duch and Erika*,[117] the plaintiff failed to appear or give any explanation for his failure to attend. Saksak J commented that this was discourteous to the court and added that if there was some reason why a party could not attend, a note should be sent to the court to explain this. The case was dismissed. Under the Vanuatu Rules, the defendant does not have the right to have the claim dismissed, as the court may adjourn the trial to a fixed date instead.[118]

If the defendant has a counterclaim, it must be proved in the same way as a plaintiff must prove an undefended claim.[119] In *Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering Ltd*,[120] the Court of Appeal approved the entry of judgment on a counterclaim by the Supreme Court and said that, in the absence of a Tongan Rule on point, recourse could be had to the English procedure prescribed in O35 r1(2) RSC, whereby the court could enter judgment on a counterclaim if the plaintiff failed to appear at trial.[121]

Costs are usually entered against the plaintiff.

7.2 Where the defendant does not attend

If the defendant does not attend, the CPR, Fiji and Tongan Rules allow the plaintiff to proceed to prove the case (so far as he/she bears the burden) and to obtain judgment.[122] In contrast to judgment in default of defence, evidence must be adduced in the same way as at a contested hearing. Pleadings are particularly important here, as evidence and judgment are restricted to the issues raised on the pleadings.

The Samoan Rules 118 and 119 are to like effect, but r118 provides that a liquidated amount need not be proved if the defendant does not appear.[123] The introduction of a similar provision would be a sensible amendment to the CPR, Fiji and Tongan, provisions, as it would put the plaintiff in no less favourable position to that where judgment in default of defence is entered.

Under the Vanuatu Rules, the claimant does not automatically have the right to prove the claim, as the court may adjourn the trial to a fixed date instead.[124] However, the Rules

116 O38 r6 CPR; O35 r1 Fiji; r117 Samoa; O23 r3(4)(2) Tonga.
117 Unreported, Supreme Court, Civ Cas 10/1999, 14 June 2000.
118 R12.9(2)(a) Van.
119 R12.9(2)(c) Van.
120 Unreported, Civ Cas 15/1999, 23 July 1999.
121 See O2 r2(2) Tonga, applying the RSC in the absence of a relevant Tongan Rule.
122 O38 r5 CPR; O35 r1 Fiji; O23 r4(2) Tonga.
123 This is a sensible rule, which could usefully be adopted in other jurisdictions.
124 R12.9(1)(a) Van.

also provide that, in addition to the power to permit the claimant to establish the right to judgment, the court may give judgment without such proof.[125] This power could be used to enter judgment without proof in liquidated claims.

Costs are usually entered against the defendant.

7.3 Setting aside default judgment

A judgment in default of appearance at trial may be set aside by the non-attending party, but the court may impose such terms as it thinks fit in agreeing to do this.[126] For example, it may order that the costs of the trial will be the attending party's in any event. In deciding whether to set aside, the court will consider:

(a) the reason for the failure to appear;[127]
(b) whether there has been any delay in commencing proceedings for a new trial. This will be relevant only if it has prejudiced other parties;[128]
(c) whether the other party can be adequately compensated in costs;[129]
(d) whether a good purpose will be served by setting aside judgment.[130]

Therefore it must be shown that the case has some merit, although the mere fact that the case appears weak will not in itself merit refusal to set aside.

In *Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering Ltd,*[131] the Court of Appeal considered that an application to set aside judgment in default was not covered by the Tongan Rules and that consequently the position was governed by the English procedure prescribed in O35 r2. In fact, such an application is clearly governed by O23 r4(3), which permits such an application in the case of any judgment or order made in the absence of a party and allows an application to set aside provided it is made within 14 days after the trial.[132] Application under the Tongan Rules is by summons supported by affidavit.[133]

Under O38 r7 CPR, the application to set aside must be made within 21 days of the trial. In *Rhoda Tapuika v John Tagakule,*[134] Palmer J said that this period was to ensure that parties did not 'sleep on their rights and so that the plaintiff is not prejudiced by undue delay'.[135] In that case, the trial took place on 4 May 1995. The defendant did not appear. On 22 February 1996 the defendant was served with an order for oral examination. He then applied to have the judgment set aside on the basis that he mistook the trial date and had attended at court on 5 May 1995, only to be told that the matter had already been heard. Palmer J held that the first matter for consideration was whether there was a

125 R12.9(1) Van.
126 O38 r7 CPR; O35 r2 Fiji; r140 Samoa; O23 r4(1)(iii) Tonga.
127 *Doko, Tako and Koete v Gella Area Assembly and Others,* unreported, High Court, Solomon Islands, Civ Cas 166/2000, 23 January 2001.
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*
131 Unreported, Civ Cas 15/1999, 23 July 1999.
132 O23 r4(4)(b) Tonga.
133 O23 r4(4)(a) Tonga. A discretion to extend this period is provided for in O35 r2(2) RSC, which may be applied by virtue of O2 r2(2) Tonga.
134 Unreported, High Court, Solomon Islands, Civ Cas 378/93, 29 April 1996.
135 *Ibid,* at 3.

viable defence. In this case there was not and therefore the application was dismissed with costs to the plaintiff. His Lordship further stated that had there been a viable defence he would have considered the reason for the failure to appear and whether there had been any delay in applying to set aside. In this case, his Lordship held that had those factors been relevant he would still not have been satisfied that this was a case where judgment should be set aside.

In *Doko, Tako and Koete v Gella Area Assembly and Others*,[136] the applicants applied for judgment to be set aside and adduced evidence that their solicitor had not attended at the hearing as her office had been burnt down shortly before the hearing. She had written to the High Court asking for all cases in which she was involved to be adjourned to the New Year. Kabui J held that three guiding principles could be extracted from the English case law on applications to set aside judgment obtained in default, although they were not exhaustive. The first was whether there was a good reason why the other party did not attend at the hearing; the second was whether prompt application was made to set aside; and the third was whether there was good reason against the reopening of the case in terms of costs being the alternative remedy. In this case, the respondent argued that the originating summons disclosed no cause of action. His Lordship held that the mere fact that a case was weak would not necessarily be enough to merit refusal of the application to set aside, but where, as in this case, there was clearly no cause of action, the application would be refused.

As in the case of an application to set aside judgment in default of defence, the application to set aside judgment in default of appearance at trial is not an appeal. Any attempt to appeal at this stage will result in a dismissal.[137]

The Vanuatu Rules do not provide an avenue for setting aside judgment in default of attendance at trial. Proceedings may be reopened after trial only before judgment and if the court is satisfied that this is in the interests of justice.[138]

8 JUDGMENT AND ORDERS

8.1 Distinction between verdict, judgment and orders

The verdict is the finding of fact on the evidence. The judgment is the binding judicial decision of the court after the verdict is given. However, where there is no jury, this distinction has been blurred, as the findings of fact are pronounced as part of the reasons for the judgment. The distinction has been further eroded by the Vanuatu Rules, which state that the court's judgment includes its finding of fact.[139] Judgment will be pronounced

136 Unreported, High Court, Solomon Islands, Civ Cas 166/2000, 23 January 2001.
137 *Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering Ltd*, unreported, Supreme Court, Tonga, Civ Cas 15/1999, 23 July 1999.
138 R12.10 Van.
139 R13.1(1)(b) Van.

by the court either at the close of addresses or, if difficult questions are raised that will take time to consider, after an adjournment for consideration.[140]

Judgment must be distinguished from an order. Judgment is the final, binding judicial decision given in an action. All other decisions of the court, whether final or interlocutory, are orders, for example, an order made on application for security for costs or an order made at a directions hearing.

Another distinction is made between pronouncement of judgment and entry of judgment. The former is the announcement of the decision by the judge. It may be oral or it may be in writing. Entry of judgment is the formal step, whereby a final document is sealed and judgment is entered in the record. Judgment is dated and effective from the date of pronouncement, not the date of entry. If judgment is not given in court, judgment takes effect from the date of the filing of the documents for entry. These times are important, as a judge may alter any error or omission between pronouncement and entry.

8.1.1 Delivery of judgment

Some regional provisions provide that decisions must be given in open court, except where the parties have consented to some other mode of delivery. For example, s 10(9) of the Constitution of Solomon Islands provides:

> Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

This is part of the general requirement that parties must be kept informed, to ensure procedural fairness. As Palmer J commented, where it has been agreed that judgment will be mailed to the parties, 'care and accuracy must be exercised, as the rights of the parties to appeal are determined by this simple but vital process'.[141] Judgment must be sent out by registered mail or, if possible, hand delivered.

The Vanuatu Rules make specific provision that judgment may be given as soon as the trial ends or at a later time. Where it is given at a later time, the court may give its decision at the end of the trial or reserve the decision as well as judgment.[142] The judgment must be reduced to writing as soon as practicable.[143]

8.2 Amending judgment

Once judgment has been regularly entered, the court is said to *befunctus officio,* that is, its role is at an end. The judgment cannot be reviewed although there may be a right of

140 The technical term for this is *curia advisari vult.* Literally, this means 'the court wishes to be advised'. In law reports this is contracted to 'c.a.v.' or 'cur.adv. vult.'. It means that judgment is not delivered immediately, but after time taken for consideration.

141 *Tutue and Others v Noga,* unreported, High Court, Solomon Islands, Land Appeal Case 8/1999, 18 February 2002.

142 R13.2(1) Van.

143 R13.2(2) Van.

appeal within a specified time limit.[144] This applies to interlocutory orders as well as final ones, unless the Rules specifically provide for review.[145]

One exception to this is the 'slip rule', which applies where there has been a clerical error or accidental omission in a judgment or order. In such cases, the Rules of Court allow the court to correct the error on application by a party without an appeal. Application for correction under the slip rule under O32 r11 CPR, O20 r10 Fiji or O25 r5 Tonga, is by motion or summons.[146] The court also has inherent jurisdiction to correct a clerical mistake in a judgment or order or an error arising from an accidental slip or omission.

The Samoan Rules also allow a judge of the Supreme Court to amend a judgment in order to give effect to the true intent of the court.[147]

There is no provision for correction of a clerical error or accidental omission under the Vanuatu Rules.

9 INTEREST ON JUDGMENTS

Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (UK), which applies in Kiribati, Solomon Islands,[148] Tonga, Tuvalu and Vanuatu, allows the court to award interest on the whole or part of the amount recovered for all or part of the period between the cause of action arising and judgment at such rate as it thinks fit. In *Teta Ltd v Ullrich Exports Ltd*,[149] the Supreme Court of Tonga allowed a rate of 10%.

The equivalent enactment in Fiji is the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, s 3. Final judgment in default cannot include interest under these statutes, as its award is discretionary.[150]

The Australian authorities on interest on judgments were recently reviewed by the High Court of Australia in *Grincelis v House*.[151] It was made clear that the award of interest is to compensate the plaintiff for being kept out of money. Accordingly, a different rate of interest may be appropriate on damages representing economic loss, to take account of inflation since the time when the money was due.

144 See Chapter 14 for the specified time limits applying in South Pacific jurisdictions.
145 See, for example, O24 r17 Fiji, which allows for revocation or variation of an order for discovery or inspection on sufficient cause being shown. See further, Chapter 9.
146 These rules are based on and identical to O20 r11 RSC, except for the fact that the Fiji Rule refers to 'omissions' rather than 'omission'. For an example of the application of the Rule, see *Yee Bin? Store Ltd v Yvette Miu Pony Yuen,* unreported, High Court, Solomon Islands, Civ Cas 12/1997.
147 R125 Samoa.
148 Applied (in a different context) in *Cheung v Tanda* [1934] SILR 108.
149 [1981–88] Tonga LR 127.
150 This should be distinguished from the position where a statute gives a right to interest, such as the Bills of Exchange Act 1882 (UK), s 57.
151 (2000) 74 ALJR 1247.

CHAPTER 12

COSTS

1 INTRODUCTION

Litigation is expensive. For this reason the question of costs should be considered at the outset and kept in mind throughout the proceedings. Lawyers have a professional responsibility to inform the client of the likely costs and to update that information if there is any change. In some countries, free legal representation is available for certain types of cases.[1] It is essential to advise the client about such schemes and about any means of minimising costs.[2] This includes advice about alternative dispute resolution mechanisms.

This chapter deals mainly with contentious costs, that is, costs in cases where court proceedings have been initiated.[3]

2 PAYMENT INTO COURT

2.1 Purpose

If a party is willing to settle, but the offer put forward is rejected by the other side, the amount offered may be paid into court. This is a mechanism allowing the party who made the offer to put pressure on the other side to accept the settlement figure or take the risk of being made liable for the defendant's costs after payment in. This follows from the rule that a plaintiff who fails to obtain more than the amount paid into court under this procedure may be ordered to pay the defendant's costs from the date of payment in. Payment in can also be made by the plaintiff in respect of a counterclaim.[4] In such cases, it will be the defendant who will be liable for the plaintiff's costs from the date of payment in, if the court awards less than the payment in on the counterclaim.

The Vanuatu Rules have replaced the payment in provisions with a provision for a formal offer of settlement to be made. If a formal offer to settle is refused and the other party is successful but for less than the amount offered, or succeeds on less advantageous terms than the terms offered, the court may award costs against the other party.[5] The Rules also state that the court must take into account when considering the question of costs any offer to settle that was rejected.[6]

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1 For example, under the Public Solicitor's Act 1987 (SI).
2 Failure to advise a client fully about costs contravenes a lawyer's ethical and professional duties. See, for example, R*e An Application by Igaki Australia Pty Ltd* [1997] ANZ Conv R 527.
3 Costs arising in all other types of cases are known as non-contentious costs.
4 O24 r5 CPR; O22 r2 Fiji.
5 R9.7(10) Van.
6 R15.11 Van.

Automatic entitlement to costs is increasingly being used in legislation overseas as a penalty for failure to accept a reasonable settlement.[7]

2.2 The presumption

It is not an absolute rule that the plaintiff will have to pay the defendant's costs from payment in if the court awards less than the payment in. Costs are discretionary, but there is a presumption that the defendant's costs since payment in will be paid in these circumstances. The plaintiff will not be made liable for unnecessary costs.

2.3 Calculation of damages 'beating' payment in

In order to recover costs, the plaintiff must recover damages in excess of the payment in on the basis of heads of damages claimed at the date of the payment in. Heads of damages raised at a later stage are disregarded.[8]

The defendant should normally state what proportion of the payment into court represents interest. Otherwise, it is presumed that the sum paid in includes interest due to the date of the payment in. Interest recovered for the period between payment into court and judgment is ignored for the purpose of determining whether a payment in has been beaten.

2.4 Procedure

Payment in may be made at any time by lodging the money in court together with a notice of payment in.[9] Under the CPR, appearance must be lodged before payment in. Notice must be in Form 4 of Appendix B under the CPR and in Form 11 of Appendix 1 of the High Court Rules. A sample notice, based on the facts of Joseph Wale's case, is set out in Sample Document Y.

The Samoan Rules require payment in to be made within seven days after service of the summons.[10] Notice is in Form 22.

Under the Vanuatu Rules, the offer to settle must be in Form 16.[11] If the parties agree on settlement, both parties must sign the settlement form. This is then filed by the party who made the offer and a filed copy is served on the other side.[12] 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 in Form 17.[13] The application must be accompanied by a sworn statement that the other party has not complied with the terms of the settlement, as set out in Form 16.[14]

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7 See, for example, Work Cover Queensland Act 1996 (Qld), Part 11.
8 *Cheeseman v Bowaters UK Paper Mills Ltd* [1971] 1 WLR 1773 (CA), an English case, which would be likely to be followed in the region.
9 O24 r1 (1) CPR; O22 r1 Fiji; O16 r1 Tonga.
10 R103 Samoa.
11 R9.7(1) Van.
12 R9.7(3) Van.
13 R9.7(7)(a) Van.
14 R9.7(7)(b) Van.

SAMPLE DOCUMENT Y—NOTICE OF PAYMENT IN (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Jurisdiction no 1112/2003

BETWEEN:

JOSEPH WALE

Plaintiff

and

SIMON PITA

First Defendant

and

SOLBREAD (a Firm)

Second Defendant

and

SI REMOULDS LTD

Third Party

Take notice that the Second Defendant Solbread (a Firm) has paid into Court $20,000 and says that that sum is enough to satisfy the Plaintiff's claim for damages.

Dated the 1st day of May 2003.

.....

Advocate for the First Defendant

Solbread (a Firm)

To Jennifer Justice, the Plaintiff's advocate and

To Ann Advocate, advocate for the First Defendant Simon Pita and

To Peta Proctor, advocate for the Third Party.

The money paid into court may be paid out to the claimant on notice to the paying party within certain time limits or by order of the court. Under O22 r3 Fiji and O16 r5 Tonga, the time limit is 21 days from receipt of notice of payment. It is 14 days under O24 r2 CPR and three days under r104 Samoa. Notice of acceptance of payment in must be in Form 5 of Appendix B of the CPR; in Form 12 of Appendix 1 Fiji; and in Form 3 Tonga. No form is specified in the Samoan Rules. In all other cases, a court order is necessary.[15] The Samoan Rules are similar, but provide for payment out by consent as an alternative to court orders.[16]

In some jurisdictions, the defendant may be allowed to change his/her mind and withdraw the payment in, for example, if there has been a change in circumstances. In such a case, the original payment in is ignored in the calculation of costs, even if the plaintiff fails to beat the payment in which has been withdrawn.[17]

3 SECURITY FOR COSTS

3.1 Introduction

Application for security for costs is a procedure that exists to protect a defendant where a frivolous or weak action is commenced by an impecunious plaintiff. The plaintiff may be ordered to pay a specified sum of money into court within a specified time. If costs are awarded in the defendant's favour they can be paid from this fund. Rules of court governing security for costs must be read subject to legislation conferring power to order security for costs. For example, an order for security for costs against a company is permitted by s 379 of the Companies Act (SI).[18]

The analysis of the Samoan Supreme Court (Civil Procedure) Rules 1980 gives 'Security for Costs' as the heading of r209. It appears that the Rule intended was accidentally omitted from the Rules. Rule 209 deals with 'Right of Address', which is stated in the analysis to be the subject of r210. As the Rules stand, security for costs is only provided for in the case of an absconding debtor. Rule 184 provides that a plaintiff may apply for the arrest of a defendant debtor on the grounds that there is a good cause of action against the debtor and that there is probable cause for believing that the debtor is about to leave the jurisdiction and evade payment of the sum and that this will materially prejudice the plaintiff in the prosecution of the action. If satisfied in this regard, the court may issue a writ of arrest for imprisonment of up to three months unless and until payment of a sum as security.[19] A plaintiff company may be ordered to give security for costs under s 467 of the Companies Act 1955 (NZ) if it is proved that it is unlikely to be able to pay the defendant's costs if the action is unsuccessful.

It has been held that the Supreme Court has jurisdiction to order security for costs. Factors to be taken into account include the fact that the plaintiff is a foreigner and the

15 O24 r3 CPR; O22 r5 Fiji; O16 r7(2) Tonga.
16 R104(2) Samoa.
17 O22 r1(3) CPR; O16 r4 Tonga.
18 Cap 66.
19 R184(1) Samoa.

absence of reciprocal arrangements for enforcement of judgments between Samoa and the country in which the plaintiff is incorporated and does business.[20]

3.2 Grounds for award

Under the CPR, the award of security for costs is entirely discretionary.[21] The only case specifically mentioned in the CPR as entitling a party to apply for security for costs is where a plaintiff is ordinarily resident outside the jurisdiction.[22] In such circumstances, the award is still discretionary. The burden of proof is on the applicant to satisfy the court that its discretion should be exercised.[23]

O23 r1 of the Fiji Rules specifies that application for the exercise of the court's discretion may only be made on one of the following four grounds:

(a) that the plaintiff is ordinarily resident outside the jurisdiction;[24or]
(b) that the plaintiff is a nominal plaintiff, other than a plaintiff suing in a representative capacity and that there is reason to believe that the plaintiff will be unable to pay the costs; or
(c) that the plaintiff's address is not stated or is incorrectly stated in the writ; or
(d) that the plaintiff has changed address within the course of the proceedings with a view to evading the consequences of the case.

Under O17 r1 Tonga, grounds (a) and (c) apply but, in addition, the court may exercise its discretion on the more general ground that the plaintiff may be unable to pay the costs of the defendant if ordered to do so.[25] In *Bernhard Hoeller v Knab and Others*,[26] Ford J refused the defendant's application for security of costs, made on the basis of the plaintiff's use of the address, 'Vaka'eitu Island, Vava'u' in the pleadings, even though he was an Austrian citizen. His Lordship considered that this was not intentionally deceptive, because the plaintiff was resident on the island at that time and the statement of claim made his citizenship clear. With regard to the defendant's concern that the plaintiff would not be able to meet any costs award if unsuccessful, Ford J considered that items disputed in the claim could, in practice, be seen as security pending the outcome of the case. He also took into account the defendant's conduct of the proceedings, which involved a late adjournment application and various other indulgences, in deciding that the justice of the case did not warrant the making of an order.

20 *Bank of Hawaii v Enreco Ltd and Others*, unreported, Supreme Court, Samoa, Civ Cas S195/83, 15 August 1985.
21 O65 r4 CPR. See, for example, *Total Holdings Ltd v South Pacific Stores*, unreported, Supreme Court, Vanuatu, Civ Cas 96/95, 12 June 1996.
22 O65 r5 CPR.
23 *Tierney v Hastings Deering (SI) Ltd* [1990] SILR 171.
24 Cf *Geelong Holdings Ltd v Maxwell Hitchins*, unreported, Court of Appeal, Fiji, Civ App 57/90, 4 June 1992.
25 See also Supreme Court Act Cap 10 (Tonga), s 15, which provides that costs are in the discretion of the court.
26 Unreported, Supreme Court, Tonga, Civ Cas 976/00, 16 March 2001.

The Vanuatu Rules allow the court to order security if satisfied that:[27]

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

Other than in the case of a nominal plaintiff, insolvency or poverty of the plaintiff is not a ground for requiring security to be given,[28] although it may be relevant where the plaintiff is a company.[29]

In exercising its discretion, the court must have regard to all the circumstances of the case. The following factors have been held to be relevant:[30]

- the nature of the claim;
- whether the action was brought in good faith or was a sham;
- the plaintiff's prospects of success;
- any admissions;
- whether a payment into court has been made.

The Vanuatu Rules are more specific and provide that the court may have regard to any of the following matters:[31]

(a) the prospects of success of the proceeding;
(b) whether the proceeding is genuine;
(c) for rule 15.19(a), the corporation's finances;
(d) whether the claimant's lack of means is because of the defendant's conduct;
(e) whether the order would be oppressive or would stifle the proceeding;
(f) whether the proceeding involves a matter of public importance;
(g) whether the claimant's delay in starting the proceeding has prejudiced the defendant;
(h) the costs of the proceeding.

27 R15.19 Van.
28 *Cowell v Taylor* (1885) 31 Ch D 34 and cases there cited.
29 *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609. The insolvency of a body corporate is a specific ground for application under the Vanuatu Rules: r15.19(a) Van. It is also relevant under certain Companies Act provisions applying in the region, see for example, s 467 Companies Act 1955 (NZ).
30 *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at 625–27.
31 R15.20 Van.

3.3 Procedure

Application for security for costs under the CPR, Fiji and Tongan Rules is by summons, which should normally be supported by affidavit giving evidence of the matters relied on as justifying the order for payment of security.

Application under the Vanuatu Rules is made orally unless the complexity of the case requires a written application.[32] It would appear that the application should be made at the first conference.[33]

As discussed above, the Samoan Rules only provide for security for costs in the case of an absconding debtor. Application for the arrest of a defendant debtor is in Form 48. If the application is successful, the court issues a writ of arrest in Form 49.[34]

4 RECOVERY OF COSTS

4.1 Introduction

The award of costs is discretionary.[35] However, the general rule is that 'costs follow the event'. This means that the successful party will normally get his/her costs.[36] The reason for this is obviously that the successful party should be able to recover the cost of getting his/her rights recognised.

As a general proposition, costs are awarded as an indemnity. However, this does not mean that they provide a full indemnity. Rather they are in the character of an indemnity or compensation for what the successful party has had to pay to his/her lawyer. Accordingly, a party cannot obtain an order for costs that provides them with a bonus. For example, in *Gundry v Sainsbury*,[37] a solicitor agreed to act *pro bono* for a client in a county court action. It was held that the defendant should not be ordered to pay costs as the plaintiff was not entitled to recover more than he had to pay out. The principle that a self-represented party should not be allowed to recover costs is included in the Vanuatu Rules.[38]

Costs are at the discretion of the court, but this discretion must be exercised judicially in accordance with established principles in relation to the facts of the case. The width of the discretion was demonstrated in England in *TGA Chapman Ltd v Christopher*,[39] where the Queen's Bench ordered an insurer to pay the costs of the action, even though it had not been made a party until after trial, as it had taken over the conduct of the action and acted unreasonably in defending it. If the court takes into account extraneous matters

32 R15.18(2) Van.
33 R6.4(2)(b)(v) Van.
34 R184(1) Samoa.
35 O65 r1 CPR; O62 r3(3) Fiji.
36 O62 r3(3) Fiji; r15.1(2) Van.
37 [1910] 1 KB 645.
38 R15.4(b) Van. The recovery of disbursements, such as court fees, is allowed: r15.4(a) Van.
39 [1997] TLR 401.

and this was the overriding reason for the decision on costs, this will be grounds for an appeal.[40]

4.2 Governing rules

There are a number of rules that apply to the award of costs. The principal ones are dealt with here.

4.2.1 Costs to follow the event

The general rule is that costs follow the event and thus the successful party will obtain an order for costs against the unsuccessful party.[41] However, there is no absolute rule that the successful party is entitled to costs. This was confirmed in the region in *Chow Chiu Lan v Basdeo Sharma.*[42]

4.2.2 Where a party is only partly successful costs may be divided

Where a case involves a number of issues, the court may divide the issues and isolate the costs involved in each. It may then order that the extra costs incurred on issues on which the successful party did not succeed will be paid by the successful party. Another way of dividing costs is to award a percentage of the taxed costs in favour of the successful party.

Difficulties have arisen in cases where the defendant counterclaims and either:

(a) both the claim and the counterclaim succeed; or
(b) they both fail.

As costs follow the event, the normal order in a case such as (a) will be for the plaintiff to get the costs of the claim and the defendant to get the costs of the counterclaim.[43] In (b) the defendant will get the costs of the claim and the plaintiff will get the costs of the counterclaim.

Arguably, however, the counterclaim costs less because the claim has prepared the ground for it. For example, it is not necessary to prepare a writ or pay a writ fee in relation to the counterclaim. In *Medway Oil and Storage Co v Continental Contractors,*[44] the claim and the counterclaim were dismissed with costs. It was held that the only costs which could be recovered in respect of the counterclaim were those which would not have been incurred but for the counterclaim. It was also held that it is not possible to apportion costs that properly belong to the action between the claim and counterclaim. For example, it was said that half of the writ fee cannot be apportioned to the counterclaim. However, it was also stated that costs incurred in common can be divided, for example, a single fee for counsel, preparation of brief covering both

40 *RB Patel Ltd v JP Bajpai & Co Ltd and Others* (1987) 33 FLR 92.
41 *The Civil Service Co-operative Society Ltd v The General Steam Navigation Co* [1903] 2 KB 756. O62 r3(3) Fiji; r15.19(2) Van.
42 (1964) 10 FLR 222. See also *Benjamin Charles Berwick v Ram Singh and Another* (1977) 23 FLR 101.
43 See r15.15 Van.
44 [1929] AC 88.

proceedings. Sometimes there may be a fine dividing line between costs properly belonging to the action which cannot be divided and costs incurred in relation to both proceedings which can.

4.2.3 A successful party may be deprived of costs for wrongful conduct

A successful party may be deprived of costs where the court considers that this is justified by the circumstances of the case.

The rule according to which a successful party may be deprived of costs was summarised in *Ritter v Godfrey*,[45] where it was said that a successful party will be awarded costs unless:

(a) the successful party induced the other party to sue;
(b) the successful party did something calculated to occasion unnecessary litigation and expense;
(c) the successful party did something wrongful in the course of the transaction on which the action is based.

In *Ritter v Godfrey,* the plaintiff sued the defendant, a doctor, for damages in negligence on the basis of the doctor's conduct during the plaintiff's wife's confinement. The defendant, in the course of correspondence concerning the charge, wrote back in terms of levity and in somewhat insulting terms suggesting the case should be submitted to arbitration by professional experts and that the loser should give £20 to charity. The judge refused costs even though the defendant was successful, mainly because of the attitude shown by the correspondence. However, this was reversed by the Court of Appeal on the grounds that the correspondence did not reveal adequate grounds for depriving the successful party of costs.

The discretion to deprive a successful party of costs may be used where a party has started litigation in a court higher than necessary. For example, the Vanuatu Rules provide that the Supreme Court may award 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.[46] This Rule does not apply if the claim involves an important issue or a complex question of law.[47]

The Fiji Rules contain a general provision that costs will not be allowed if a party has acted unreasonably or improperly and in such case may be ordered to pay the costs of the other side.[48] The Fiji and Vanuatu Rules specifically provide that the court may award part of the costs against parties who should have agreed to certain matters at a pre-trial conference but refused to do so, if such an agreement would have curtailed the duration of the trial or saved costs.[49] The Fiji and Vanuatu Rules also provide that costs shall not follow the event in other specific instances. For example, where an application has been made to extend the time allowed by the Rules, the costs of the application are to be paid by the person making the application.[50]

45 [1920] 2 KB 47 at 60.
46 R15.9(1) Van.
47 R15.9(2) Van.
48 O62 r10 Fiji.
49 O34 r2(7) Fiji; r15.9(2) Van.
50 O62 r6 Fiji; r15.13 Van.

4.3 Interlocutory orders for costs

During the course of litigation, the court may often be called upon to decide questions of costs. It may make one of the following recognised orders for costs.[51]

4.3.1 Costs in any event

This is an order made during interlocutory stages. If an interlocutory application has been necessitated by the fault of one of the parties, the court may order the innocent party's costs of the application to be paid by the other side 'in any event', that is, regardless of who succeeds at trial.[52] Under the Fiji Rules, an order for 'costs' has the same effect as an order for 'costs in any event'.[53]

4.3.2 Costs in the cause or application

This is an order made during interlocutory stages. The party who obtains an order for costs at trial will be entitled to the costs of the hearing in respect of which such an order was made. This order is made where the court is not prepared to make a decision at the interlocutory stage, but considers it more appropriate for the matter to be decided after the trial. This will usually be the case where the interlocutory application is made in the normal course of events leading up to trial.

4.3.3 Costs thrown away

Where part of the proceedings have been ineffective, the costs wasted may be ordered to be paid by the guilty party, irrespective of who succeeds at trial. For example, where a default judgment has been set aside, the costs wasted in obtaining the judgment and attending at the hearing to set aside may be awarded in favour of the applicant, unless the judgment was irregular.[54]

4.3.4 No order as to costs

The parties pay their own costs.

4.3.5 Order silent as to costs

If an order made on an interlocutory application does not mention costs, costs will belong to the party who is awarded costs at trial, as if the order had been for costs in the cause.

If an application is unopposed, both parties are entitled to costs in the cause.

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51 O62 r3(6) Fiji defines the effect of common terms used in orders for costs.

52 Where a party insists on proof of a fact which s/he is well aware to be true, the court may order the costs of proof to be the other side's in any event: *Tierney v Hastings Deering (SI) Ltd* [1990] SILR 171.

53 O62 r3(6) Fiji.

54 A judgment that does not comply with the rules, or to which the plaintiff is not entitled on the pleadings, is irregular.

4.3.6 Costs reserved

If a court is unsure about who should be entitled to costs on an interlocutory application, for example, because further evidence is required to ascertain whose version of events is correct, the court may reserve the question of costs. These costs will not be recoverable subsequently unless an order is made specifically dealing with them.

4.3.7 Costs for time wasted

In Vanuatu, a specific provision has been introduced to deal with the situation where costs have been incurred unnecessarily. Rule 15.25 provides that the costs of the whole or part of the proceedings may be awarded against a party who:

(a) does not appear at a conference or hearing after receiving notice of the date and time; or
(b) does not file and serve a document within the time ordered by the court; or
(c) has otherwise wasted the time of the court or other parties.

Costs for time wasted must be paid within the period the court orders, being not less than seven days.[55] If the costs are not paid within the period fixed by the court, the court may order that the proceeding, or part of it, be struck out.[56]

4.3.8 Cost to be paid by advocate

If an advocate has caused delay or unnecessary cost through misconduct or default, costs may be awarded against the advocate personally.[57] Under the Fiji Rules,[58] a legal representative may also be ordered to pay a wasted hearing fee where the advocate is responsible for an interlocutory hearing or trial being adjourned unnecessarily.[59]

The Vanuatu Rules also provide for a costs order to be made against a party's lawyer personally. This is known as an order for wasted costs.[60] The Rules provide that such an order may be made if the party brings a proceeding that is lacking in legal merit and which a reasonably competent lawyer would have advised the party not to bring.[61] It also allows costs to be awarded personally against a lawyer if the court is satisfied that the costs of the proceedings were increased because the lawyer did not appear when required to, was not ready to proceed or otherwise wasted the time of the court, or incurred unnecessary expense for the other party.[62] The court must not make an order for costs against a lawyer personally without giving the lawyer an opportunity to be heard.[63]

55 R15.25(6) Van.
56 R15.25(7) Van.
57 O65 rr3 and 8 CPR; O62 r11 Fiji; r15.25(5) Van.
58 As amended by High Court (Amendment) Rules 1998.
59 O32 r18(2) and O34 r6(2) Fiji.
60 R15.26 Van.
61 R15.26(1) Van.
62 R15.26(2) Van.
63 R15.26(3) Van.

The common law rule allowing costs to be awarded against a party's legal representative personally has been applied in Samoa. In AG *Smyth and Co Ltd v Nanai Fa'apu'a,*[64] the Supreme Court followed the New Zealand case of *Porter v Coleman,*[65] where the court had reduced the costs awarded on the basis that the court received no assistance from counsel as to authorities or general principles.

4.4 Costs orders at trial

There are four costs related orders that counsel may need to ask for at the end of a trial.

4.4.1 Special costs

Special costs are those that only come up in special cases. An example is the cost of taking evidence abroad.

4.4.2 Reserved costs

Where an order reserving costs has been made at an interlocutory stage, no costs are allowed unless the court makes an order. For this reason it is imperative to keep a running record of any interlocutory costs orders and to have a note of these on hand at trial so that they can be dealt with at the appropriate time. In *Taubmans Paints (Fiji) Ltd v Faletau and Trident Heavy Engineering Ltd ,*[66] it was noted by the Court of Appeal that this had not been done and that further application to the trial court would be necessary to remedy the matter.

4.4.3 General costs

There is no right to general costs without an order, even if a party is successful. If the court orders 'costs of the trial', this means that only the cost of the conduct of the trial itself may be recovered. The costs of the interlocutory stages will not be recoverable. Such an order might be appropriate if a party was not represented prior to the trial.

4.4.4 Certificate for counsel

In most jurisdictions of the region, it is necessary to get the court to certify specifically for an increase in costs if the circumstances of the case have necessitated unusual expenditure. The most common cause for application is where overseas counsel has been instructed. Only if the court certifies that the matter was a fit one for overseas counsel to be instructed, will the costs of such counsel be recoverable.

64 [1950–59] WSLR 137.
65 (1909) 28 NZLR 1110 at 1113.
66 Unreported, Court of Appeal, Tonga, Civ App 15/1999, 23 July 1999.

In *DJ Graphics Ltd v The Attorney-General and Solomon Islands Ports Authority,*[67] Palmer J considered an application for a certificate for overseas counsel. He said:

> I think there has been some misunderstanding as to what the term 'certification for overseas counsel' means, especially in the case of party/party costs. When a certification for overseas counsel is given in such circumstances, it does not mean that the overseas counsel can charge his overseas rates. All it means is that the Taxing Master (the Registrar of the High Court) would consider granting in general the following costs:
>
> costs pertaining to counsel's return airfares,
>
> reasonable hotel and incidental expenses in the place of trial during trial,
>
> some allowance may be considered for travelling time and transportation costs and
>
> other necessary expenses.
>
> [See *Jordan v Edwards* [1979] PNGLR 420.]
>
> The decision as to whether to grant a certification for overseas counsel however, remains a matter of discretion for the presiding judge or taxing master. In the case of *Jordan v Edwards (ibid)* at page 421, the learned Judge, Prentice CJ, of the Supreme Court of Justice of Papua New Guinea, listed a number of factors which the Court should take into account:
>
> > When considering whether an exception should be made in terms of the court's rule—the court, I believe, should take into account as the principal factors—the difficulty of the case (in particular whether it involves complex matters of law); the nature and extent of the rights involved; the expertise reasonably required or the nature of the particular lis; whether the smallness of the profession and of the country might cause embarrassment to the employment of resident counsel; and above all the necessity of keeping costs as low as possible and access to advice as wide and as even as possible.[68]

In *DJ Graphics Ltd v The Attorney-General and Solomon Islands Ports Authority,* no certificate was granted.

A certificate was also refused in *Best v Owner of Ship 'Glenelg' (No 2).*[69]

A certificate is not required in Tonga, but overseas counsel's fees will be allowed only where the court is convinced that local counsel could not have dealt with the case. In *Christine Uta'atu v Commodities Board (No 2),*[70] it was recognised that there was a dearth of fully qualified lawyers and that until more qualified lawyers were available, private litigants were entitled to seek advice from overseas lawyers in more complex cases.

A certificate is not required in Vanuatu either, but the engagement of overseas counsel will be a factor to be scrutinised in the consideration of whether costs are fair and reasonable

67 Unreported, High Court, Solomon Islands, Civ Cas 40/95, 15 June 1995.
68 A line is missing from the quotation from *Jordan v Edwards* in the transcript of the judgment in *DJ Graphics Ltd v The Attorney-General and Solomon Islands,* but this has been replaced in this quotation.
69 (1980–88) 1VLR 48.
70 [1990] TLR 48.

and more specifically, 'whether the level of expertise was appropriate to the nature of the work'.[71]

5 TAXATION

5.1 Introduction

After costs orders have been made by the court, the parties can choose to agree the amount of those costs.[72] Agreement avoids the time and expense involved in the taxation of costs. Under the CPR and Fiji Rules, agreement requires the court's sanction in proceedings brought on behalf of a person under a disability[73]

If costs cannot be agreed, application can be made for costs to be 'taxed' by the court. As this is a fairly complicated process, it is usually only pursued in larger cases. In smaller cases, the common course in most countries of the region is to abandon costs.

In Samoa, Tonga and Vanuatu, the Rules provide for costs to be assessed by the court immediately after a costs order is made, whether at trial or on an interlocutory application.[74] Obviously, this will only be possible in simpler cases where costs issues are straightforward or where the parties are agreed as to the amount of costs.

5.2 Bases of taxation

In many countries of the region, costs are classified under similar heads, although the exact names of those heads differ. In Fiji and Vanuatu the position has recently been simplified. Only two heads remain: the standard basis and the indemnity basis.[75] The standard basis equates with party and party costs, which are discussed below. The indemnity basis is also discussed below.

In Samoa, costs are not classified in this way. There is a sliding scale of costs, with three different 'heads'. The amount allowed is determined by the amount recovered if the plaintiff succeeds, or the amount claimed if the defendant succeeds.[76] This amount fixes the head of recovery. Where relief other than money is claimed, either instead of or in addition to a money claim, the court or the registrar will fix the head of costs which applies. Regardless of the applicable head of costs, a maximum of $1,000 may be awarded. The only variation on this under the Samoan Rules, is that the 'whole costs of the action' may be awarded. If a certificate to this effect is given by the court, costs may be claimed for the whole action in accordance with the relevant 'head', rather than up to the usual

71 R15.8(3)(d) Van.
72 R15.1(3) Van.
73 O24 r9(1) CPR; O80 r8 Fiji.
74 The Supreme Court (Fees and Costs) Rules 1971 (Samoa) and r5(1) Samoa; O29 r2 Tonga; rr15.2(2) and 15.7(1) Van.
75 O62 rr3 and 12 Fiji; r15.5 Van.
76 Second Schedule, para 30.

maximum of $1,000.[77] The bases of taxation in the other countries of the region are set out below.

5.2.1 *Party and party costs*

Even if an order is made in a party's favour, that does not mean that that party will be fully reimbursed. This is because costs are usually only recoverable on a 'party and party' basis. Only costs which are reasonable and necessary for the proper conduct of the case will be recoverable on this basis.[78] Thus, for example, if a client is particularly worried about the case and telephones his/her solicitor once a day for reassurance, the solicitor's charges for dealing with those calls will not all be recoverable. The equivalent under the Fiji Rules is the 'standard basis', which is defined as 'all costs reasonably incurred'.[79] The term 'standard basis' is also used by the Vanuatu Rules and is defined as including, 'all costs necessary for the proper conduct of the proceeding and proportionate to the matters involved in the proceeding'.[80]

5.2.2 *Costs on a common fund basis*

These costs were formerly known as costs on a 'solicitor and client basis out of a common fund'. The terminology has been changed in some jurisdictions to avoid confusion with solicitor and own client costs.[81] Where costs are payable, not by an individual, but out of a common fund, for example, a trust fund or estate, costs may be ordered to be paid on a common fund basis out of that fund. Such orders therefore occur more often in equity matters. The main difference is that more items will be recoverable than would be the case on a party and party basis. Exactly how much is allowed will be up to the taxing officer's discretion, but generally there is a more generous approach as to what is 'necessary'. In *Kituru Ghemu v Clerk to Marovo Local Court and Jim Kolikeda,*[82] an application for costs on this basis was rejected as there was no common fund from which costs could be paid. This head no longer exists under the Fiji Rules.

Under the CPR, the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to property may not be paid out of a common fund without a court order (O65 r10).

5.2.3 *Costs on an indemnity basis*

In some jurisdictions, costs may be recoverable on an indemnity basis, which is sometimes known as a 'solicitor and client' basis. The term 'indemnity basis' is to be preferred as it

77 Second Schedule, para 31.
78 O29 r4 Tonga. *Smith v Buller* (1875) LR 19 Eq 475.
79 O62 r12(1) Fiji.
80 R15.5(1) Van.
81 For example, in *Kituru Ghemu v Clerk to Marovo Local Court and Jim Kolikeda,* unreported, High Court, Solomon Islands, Civ Cas 93/95, 30 June 1997, the second defendant claimed solicitor and own client costs, when the proper claim was for solicitor and client costs. See also *John Kilatu v Kalena Timber Co Ltd and Others,* unreported, High Court, Solomon Islands, Civ Cas 236/94, 5 June 1996.
82 Unreported, High Court, Solomon Islands, Civ Cas 93/95, 30 June 1997.

avoids confusion with the term 'solicitor and own client', which is discussed below. The Vanuatu Rules define costs on an indemnity basis as:[83]

> …all costs reasonably incurred and proportionate to the matters involved in the proceeding, having regard to:
>
> (a) any costs agreement between the party to whom the costs are payable and the party's lawyer; and
> (b) charges ordinarily payable by a client to a lawyer for the work.

Costs on an indemnity basis were explained in *EMI Records Ltd v Ian Cameron Wallace Ltd*[84] as being all costs incurred other than those of an unreasonable amount or unreasonably incurred. Provided that costs are reasonable and have been reasonably incurred, it is not necessary to establish that they were necessary or proper.

5.2.4 Trustee's costs

The general rule is that a trustee is entitled as of right to full indemnity out of the trust estate for all costs, shares and expenses properly incurred.[85] However, an order for trustee's costs will not be made if the trustee has been guilty of misconduct.[86]

5.2.5 Solicitor and own client costs

These are the costs that the client has to pay his/her own solicitor as a matter of contract. These costs arise in all cases where a solicitor does work for a client on a commercial basis, not just in litigation. This will be an appropriate basis for taxation only where a client disputes his/her own solicitor's bill.[87]

5.3 Scales of costs

In some jurisdictions, there is a scale of costs and the taxing officer's discretion must be exercised within the scale of costs laid down. In Solomon Islands, the CPR have been amended to add a Scale of Costs.[88] The new Order, O66 r13, provides that costs must be between the lower scale and the higher scale in Appendix J. The court can order an increase in the scale of costs.[89] In *Gemstar Seafood Ltd v Bycroft*,[90] Kabui LJ refused to certify an increase to allow costs to be recovered at the rate of SBD650.00 per hour. His Lordship stated that the court would only certify for an increase in the scale fees if the circumstances of the case warranted this. By analogy with English cases on a similar provision, his Lordship was of the view that it would need to be shown that the case required special attention or, as it was put by Buckley J in *Assets Development Company Ltd v Close Brothers*

83 R15.5(2) Van.
84 [1893] Ch 59.
85 O65 r1 CPR; O62 r29 Fiji; *Re Beddoe* [1893] 1 Ch 547.
86 *Re Sarah Knight's Will* (1884) 26 Ch D 82.
87 Solicitor and own client taxations are dealt with in O26 r26 Fiji; O29 r4(2) Tonga.
88 LN 22/75.
89 Appendix J, para 43 CPR.
90 Unreported, High Court, Solomon Islands, Civ Cas 370/99, 24 April 2002.

& Co,[91] 'special grounds arising out of the nature and importance or difficulty or urgency of the case'. In this case there was no evidence of such circumstances. Surprisingly, however, Kabui LJ ordered costs to be paid on an indemnity basis, in spite of the fact that the applicant's summons sought costs on a 'party and party basis'. The reasons for awarding costs on this basis were not stated.

In *John Kilatu v Kalena Timber Co Ltd and Others*,[92] the originating summons having been summarily dismissed, the first defendant applied by notice of motion for an increase of costs to be certified under para 43 to allow costs to be assessed on a solicitor and own client basis. Muria CJ held that para 43 had obviously been added to impart a general discretion to a judge to certify for an increase in the maximum set out in the higher scale in Appendix J if he thought fit to do so in the circumstances of the case. In that case, an increase was ordered. Unfortunately, the circumstances of the case that justified this increase were not stated in the judgment. As the costs allowable have not been increased since their introduction in 1975 and are very low, it is arguable that an increase is justified in every case.[93]

The Fiji Rules contain a scale of costs in Appendix 4. The costs allowable were increased in 1998.[94]

The new Vanuatu Rules contain a scale of costs for magistrates' court costs but, surprisingly, they do not contain a scale for Supreme Court costs.[95] In *Vanuatu Commodities Marketing Board v Edwin Lesseggman*,[96] a case decided under the CPR, it was held that, as there was no scale of costs in force, the English common law applied and that this justified allowing the going hourly rate of 20,000 vatu per hour. Similarly, in BHP *Steel Building Products (Vanuatu) Ltd v Marchand*,[97] a claim for costs on a 'solicitor-own-client basis…based on the rate of VT20,000 per hour', was held to be reasonable. In fact, 20,000 vatu was the charge out rate by the solicitors to their own clients. Allowing the hourly rate charged by solicitors to their own clients on taxation on a party and party basis costs cannot be said to represent the law of England correctly.[98] Further, as no provision regarding the scale of costs under the CPR is in force outside Solomon Islands, it is arguable that O71 CPR should have come into play and the scale of costs currently applying in the High Court in England should have been applied.[99] However, this argument no longer applies, as the CPR are no longer in force in Vanuatu. It has yet to be seen whether courts in Vanuatu will continue to allow the solicitor and own client charge out rate to be recovered under the standard basis of costs.

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91 [1900] 2 Ch 717.
92 Unreported, High Court, Solomon Islands, Civ Cas 236/94, 5 June 1996.
93 The maximum allowed for preparation, issue and service of a writ, including taking instructions and affidavit of service, is SBD15.
94 R6, High Court (Amendment) Rules 1998, LN 72/98.
95 R15.10(3) and Sched 2 Van.
96 Unreported, Supreme Court, Vanuatu, Civ Cas 16/96, 21 August 1997.
97 Unreported, Supreme Court, Vanuatu, Civ Cas 83/1996, July 1998.
98 The decision is also questionable on the basis that costs had already been taxed by the registrar as taxing master. A review of that decision was applied for and refused by the same judicial officer, who in the meantime had been elevated to the Supreme Court bench. The current decision was a second application for the same relief before a different judge. This should have been rejected.
99 O71 CPR provides that in the absence of an applicable rule under the CPR, recourse is to be had to the rules applying in the High Court of England.

In Samoa, the scale of costs is contained in the Second Schedule of the Supreme Court (Fees and Costs) Rules 1971, as amended.[100] The total costs may not exceed $1,000, unless the court certifies that the whole costs of the action are payable.[101]

5.4 The taxation process

Taxation of costs is the process of scrutinising itemised bills of costs to see which items should be allowed. Taxation is done by the taxing officer who is usually a registrar. The taxing officer has a discretion as to what may be allowed, but this must be exercised within the boundaries of any costs orders made by the court during the proceedings. For example, if costs have been awarded on a party and party basis, the taxing officer must exercise his discretion as to what is allowed within that scale. The most common objection to costs items is that solicitor and own client items have been included in a bill when costs are only payable on a party and party basis.

5.5 Procedure

5.5.1 Preparation of a bill or statement

A bill in taxable form must be prepared and filed at court.[102] Preparation of a bill in taxable form is a complicated exercise and requires particular skill.[103] The CPR provide that the bill should be lodged as soon as possible but do not specify its form.[104] The standard approach, based on English procedure, is to set out the bill in numbered paragraphs, each describing the work done, the rate charged and any factors which justify the rate. It has a number of columns on the right hand side in which amounts are set out, with a column on the far right left blank for the taxing officer to indicate items that he/she is reducing or deleting. It commences with a short narrative, indicating the issues, the circumstances, the date when instructions were received and when the matter ended. It also indicates the status of the persons concerned with the legal work.

Under the Fiji Rules, the bill must be drawn up and filed within three months from the making of the costs order.[105] The Rules specify that professional charges and disbursements must be entered in separate columns and every column must be added up.[106]

The Tongan Rules allow a bill to be lodged in summary form and only require details of the amount of time spent in preparation of pleadings, general preparation for trial and in court, counsel's fees and other disbursements.[107]

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100 Supreme Court (Fees and Costs) Rules 1971, Amendment No 1 WSR 1976/18.
101 R31 Samoa.
102 O62 r29(7)(c) Fiji. The Fiji Rules also require a copy of the order for costs, a statement giving particulars of the parties and certain other papers and vouchers to be filed with the application for taxation: O62 r29(7) Fiji.
103 In England, this task is often done by a specialist from outside the legal firm.
104 O57 r1 CPR.
105 O62 r29(1) CPR.
106 O62 r29(7)(c)(i) CPR.
107 O29 r3(2) Tonga.

In Vanuatu, a practice grew up under the CPR of filing a 'note of costs' or 'skeleton' bill of costs, which was not itemised, but merely summarised work done and gave the total time spent. This type of bill was more appropriate for a summary assessment. The Court of Appeal made it clear that an itemised bill was appropriate in the case of a solicitor and own client dispute as to a solicitor's costs.[108] The same logic applies to a disputed *inter partes* bill. In any event, the content of the bill is now governed by r15.7(3) of the new Vanuatu Rules, which specifies that the statement of costs must set out:

(a) each item of work done by the lawyer, in the order in which it was done and numbered consecutively; and
(b) the amount claimed for each item; and
(c) the amount disbursed for each item; and
(d) the lawyer's rate of charge.

The statement of costs must be filed and served on the other party within the time fixed by the judge.[109]

5.5.2 The taxation hearing

Under the CPR, a summons for taxation should be lodged with the bill of costs as soon as possible after the making of the award.[110] Two clear days' notice of the hearing is required. The party applying for taxation serves the bill on all interested parties. At the appointed time, the bill is considered and the parties or their legal representatives may make representations.

Under the Fiji Rules, after filing, an appointment for taxation is made by the court and endorsed on the bill.[111] The party applying for taxation serves the bill on all interested parties. At the appointed time, the bill is considered and the parties or their legal representatives may make representations. The High Court Registry gives all parties entitled to be heard not less than 14 days' notice of the date fixed for the hearing of the application for taxation.[112] The party whose bill is being taxed is responsible for serving a copy of the bill on all parties and notice must be given to the registry that this has been done.[113] The Fiji Rules also allow for 'provisional' taxation and 'short and urgent' taxation in certain circumstances.[114]

Where assessment is not possible at the time of the award, application may be made under the Samoan Rules to the registrar, to fix the head of the scale of costs under which costs may be allowed.[115]

108 *Hudson & Co v Greater Pacific Computers Ltd,* unreported, Court of Appeal, Vanuatu, Civ App 7/1997, 8 October 1997.
109 R15.7(4) Van.
110 O57 r1 CPR.
111 O62 r21 Fiji.
112 O62 r30(1) Fiji.
113 O62 r30(3) Fiji.
114 O62 rr31 and 32 Fiji.
115 R5(2) Samoa.

The Tongan Rules provide that taxation may be applied for within 28 days of the costs order.[116] Under the Tongan Rules, the paying party is required to notify the court if the bill is disputed.[117] If no such notice is given within 14 days, the bill is taxed without attendance of the parties.[118] If notice of dispute is given, an appointment is fixed and taxation proceeds as in the other jurisdictions.[119]

Under the Vanuatu Rules, the judge making the costs award will fix a date for the determination of costs.[120] The judge must determine an amount that is fair and reasonable. In deciding this, the judge may have regard to:

(a) the skill, labour and responsibility shown by the party's lawyer; and
(b) the complexity, novelty or difficulty of the proceeding; and
(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
(e) where the legal services were provided; and
(f) the circumstances in which the legal services were provided; and
(g) the time within which the work was to be done; and
(h) the outcome of the proceeding.

Rule 15.8 also requires the judge to consider whether it was reasonable to carry out the work to which the costs relate. It is not clear how this provision interrelates with the basis of costs set out in r15.5. It would be clearer if the judge was placed under a duty to consider whether the work done was necessary (where costs have been awarded on a standard basis) or reasonable (where costs have been awarded on an indemnity basis).

116 O29 r3 Tonga.
117 O29 r3(4)(i) Tonga.
118 O29 r3(4)(ii) Tonga.
119 O29 r3(4)(iii) and (iv) Tonga.
120 R15.7(2)(b) Van.

CHAPTER 13

EXECUTION

1 INTRODUCTION

Execution has been defined as the enforcement of judgments and orders.[1] This definition should be distinguished from the narrower use of the word 'execution', to describe the process of enforcement by means of a writ of execution. The Vanuatu Rules replace the term 'execution' with the plain English term 'enforcement'.[2]

One striking difference between civil proceedings and criminal proceedings is that verdict and judgment do not necessarily mark the end of judicial involvement in a civil case. If the losing party does not comply with the civil judgment, it may be necessary to enforce the judgment by taking execution proceedings. Generally, it is not necessary to serve a demand to comply with a judgment or order prior to enforcing it.[3] However, it is necessary to serve the judgment and to ensure that any time limit given for complying with the judgment has been allowed.

Execution proceedings may take one of a number of forms, depending on the type of judgment and the circumstances of the non-complying party. The main distinction, in terms of types of judgment is between:

- enforcing money judgments; and
- enforcing other judgments.

A flow chart of the procedure for the enforcement of money judgments is contained in Schedule 4 of the Vanuatu Rules. This has been reproduced as a flow chart in Part 4 of Appendix 1 to this book. Schedule 4 of the Vanuatu Rules also includes a separate flow chart of the procedure for the enforcement of non-money judgments. This is reproduced in Part 5 of the Appendix 1 to this book.

2 ENFORCING MONEY JUDGMENTS

Under the CPR and Fiji Rules, a judgment for payment of money is normally enforced by using one or more of the following methods:

- oral examination of the judgment debtor, to discover details of assets, liabilities and ability to pay the debt;
- seizure and sale of the judgment debtor's goods or land to pay the creditor (writ of *fieri facias*);
- garnishment of wages or debts owed to the judgment debtor by others. Garnishment involves the judgment debtor's wages or money owed to the judgment debtor being paid direct to the judgment creditor;

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1 *Re Overseas Aviation Engineering Ltd* [1963] Ch 24 at 46, *per* Harman LJ.
2 Part 14 Van.
3 O45 r1(1) CPR. O46 r2 Fiji and O26 r4 Tonga follow O46 r2 RSC. They specify the cases where leave to issue a writ of execution is necessary. By implication, in other cases leave is not necessary.

- obtaining a charging order over the debtor's property, so that the charged items cannot be disposed of without satisfaction of the debt;
- issue of a judgment summons, calling on the judgment debtor to show cause why he/she should not be imprisoned for failure to pay.

These possibilities require examination in turn.

2.1 Oral examination

Oral examination is the means used to discover if the judgment debtor has any means of paying the judgment. If the creditor does not know much about the judgment debtor's income or assets he/she cannot make an informed decision about methods of enforcement.[4]

Ideally, inquiries about these matters should have been made before commencing litigation, as it may be pointless to obtain judgment if the judgment debtor cannot pay However, in the Pacific countries where there are no inquiry agents, it may be difficult to ascertain these details at the outset. After judgment, the court will provide formal assistance in this regard.

The policy behind the oral examination procedure was stated in *Maclain Watson & Co Ltd v International Tin Council (No 2)*[5] to be 'to prevent a defendant removing its assets from the jurisdiction or concealing them within it so as to deny a successful plaintiff the fruits of his judgment'.

The nature of oral examination was considered in *Republic of Costa Rica v Strousberg*,[6] where Jessell MR pointed out that the debtor 'must answer all questions fairly directed to ascertain from him what amount of debts is due, from whom due and to give all necessary particulars to enable the plaintiffs to recover under a garnishee order'. It was also said by James LJ that, The examination is not only intended to be an examination, but to be a cross-examination and that of the severest kind'.

The wording of the Samoan Rules appears not to allow oral examination to assist enforcement of a money judgment. Rule 169 states that:

> Where any difficulty arises, in or about the execution of enforcement of any judgment or order for some relief other than the payment of money, the Judge or Registrar may on the application of any party interested make such order for the attendance and examination of any party or otherwise as may be just.

However, in practice, this has been interpreted as if a comma was placed after the word 'judgment', to allow oral examination to aid enforcement of a money judgment.

The Tongan Rules do not mention oral examination. As there is no provision on point, O2 r2(2) Tonga permits recourse to the RSC where O48 provides for an application to be made for oral examination.

The Vanuatu Rules have replaced oral examination with an enforcement conference. The purpose of this is to find out how the 'enforcement debtor' proposes to pay the

4 O45 r32 CPR; O48 r1 Fiji.
5 [1987] 3 All ER 886 at 891, *per* Millett J.
6 (1880) 16 Ch D 8.

judgment debt.[7] Unless an enforcement order is made after judgment is given, an enforcement conference is a necessary step in all proceedings to enforce money judgments. At the conference the court makes an enforcement order stating how the judgment is to be satisfied.[8]

2.1.1 Procedure

Under the CPR, application is made *ex parte,* by filing three copies of the order in Form 45, Appendix B, together with a supporting affidavit and the fee. The court then inserts a return date. The judgment creditor must arrange personal service on the judgment debtor, at least two days before the hearing of the application. In *Tong v Kayuken Pacific Ltd and Another,*[9] it was held that an affidavit in support sworn by the plaintiff's lawyer, rather than the plaintiff, was irregular. However, it was not a material irregularity meriting setting aside the order for oral examination.

O48 r1 of the Fiji Rules also requires an *ex parte* application to be made and personal service on the judgment debtor.

The Samoan and Tongan Rules are silent as to procedure, but in both cases application should be made *ex parte,* together with a supporting affidavit.[10] The judgment debtor should then be personally served with the order.

The Vanuatu Rules provide that immediately after giving a judgment that includes a money order, the court must ask the enforcement debtor how he/she proposes to pay the money and either make an enforcement order or fix a date for an enforcement conference.[11] The date fixed must be within 28 days after the date of the money order or, if it is not possible to fix a date within that period, as soon as practicable afterwards.[12] If the enforcement debtor is present when the court fixes the date for the enforcement conference, the court must tell the enforcement debtor to come to court on the date of the conference and bring sufficient documents to enable him/her to give a fair and accurate picture of his/her financial circumstances. If the enforcement debtor is not present, the court must issue a summons in Form 24 requiring the enforcement debtor to come to court on the appointed date and bring the necessary documentation.[13] If the enforcement debtor does not attend at the conference the court may issue a warrant of arrest.[14] The court may also issue a summons to a third party to attend the conference and give evidence about the enforcement debtor's affairs.[15] After examination of the enforcement debtor at the conference the court must:[16]

(a) if the parties have agreed on payment, make an enforcement order in the terms of the agreement; or

7 R14.5 Van.
8 R14.4 Van.
9 [1990] SILR 188.
10 O48 RSC applies to this effect in Tonga.
11 R14.3(1) Van.
12 R14.5(2) Van.
13 R14.3(3) Van.
14 R14.6 Van.
15 R14.5(4) Van.
16 R14.7(3) Van.

(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.

2.2 Writ of *fieri facias*

Under the CPR and Fiji Rules, seizure and sale of the judgment debtor's property takes place through the issue of a writ *of fieri facias*.[17] A similar procedure, known as issue of a writ of distress, is available under O26 r1(a) and O26 r7 of the Tongan Rules. In Samoa, the writ is known as a writ of sale.[18] In Vanuatu, the equivalent is an enforcement warrant for seizure and sale of property.[19]

The property sold may be moveable[20] or immovable property.[21] Under the Vanuatu Rules, the property that may be seized is classified as real or personal.[22] Where the debtor has an equitable interest only in land or shares in a private company, a charging order may be a better method of execution.[23] Under the CPR, wearing apparel, bedding and tools of the judgment debtor's trade up to the value of $50 are exempt from attachment.[24]

The first step in the execution process is for the sheriff to take possession of the goods. In the case of moveable property, the CPR theoretically require possession to be taken by actual seizure.[25] In practice, the sheriff often leaves the goods where they are because of storage problems and takes 'walking possession'. This means that the sheriff informs the debtor that the goods are now, notionally, in the sheriff's possession and obtains the agreement of the debtor not to move the goods.[26] In the case of land, shares or other immovable property, attachment is by written order of the sheriff prohibiting the alienation of property.[27] Actual possession may also be taken.[28] In the case of negotiable instruments, these are seized by the sheriff and brought into court.[29] Where the property consists of shares in a public company, attachment is by written order prohibiting the registered owner of the shares or any officer of the company from transferring them, receiving or paying any dividends.[30]

17 O46 r1 CPR; O45 r1(1)(a) Fiji. The writ *of fieri facias* is often referred to as a writ of execution or a writ of fi fa.
18 R172 Samoa.
19 R14.16 Van.
20 O46 rr1 and 5 CPR.
21 O46 rr1 and 7 CPR.
22 R14.16(1) Van.
23 A receiver might also be appointed to deal with such interest or shares by way of equitable execution.
24 O45r40CPR
25 O46 r5 CPR.
26 *Bissicks v Bath Colliery Co Ltd* (1978) 3 Ex D 174.
27 O46 rr7 and 15 CPR.
28 O46 r7 CPR.
29 O46 r9 CPR.
30 O46r15CPR.

2.2.1 Procedure

The appropriate procedure for the issue of all writs of execution is contained in O45 r11 of the CPR and O46 r6 of the Fiji Rules. The CPR require a *praecipe* to be completed in accordance with Form 37 or 44 in Appendix B.[31] An example is given below in Sample Document Z. This must be filed, together with two copies of the draft writ in Form 10 of Appendix G. An example is given in Sample Document A1. The court will then issue the writ in that form and deliver it to the sheriff. Under the Fiji Rules, the *praecipe* must be in Form 22 of Appendix 1. Under the Tongan Rules, it is Form 6. The Samoan Rules provide for a *praecipe* to be in Form 45 and the writ in Form 46.

Under the Vanuatu Rules, application is made for an enforcement warrant by filing:[32]

(a) an application in Form 25; and
(b) a copy of the enforcement order; and
[(c) omitted from the published Civil Procedure Rules 2002 (Vanuatu)]
(d) two copies of the form of warrant; and
(e) a sworn statement made not earlier than two business days before filing the application, 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.

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.[33] The enforcement warrant is dealt with by an enforcement officer.[34]

31 Where a certificate has been given under an Exchange Control Act, application should be in Form 42 of Appendix B. See also, Form 37 which appears to be a duplication of Form 44, presumably inserted erroneously due to the fact that writs of execution are dealt with generally in O45 and writs of *fieri facias* are specifically dealt with in O46.
32 R14.12(1) Van.
33 R14.12(2) Van.
34 R14.13(2) Van.

SAMPLE DOCUMENT Z—*PRAECIPE* (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Case No 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

PRAECIPE

Seal a writ of *fieri facias* directed to the Sheriff of Honiara against Aseri Toga of West Kola'a Ridge in Honiara upon a judgment dated the 1st day of June 2003 for the sum of $32,000 debt and $40 costs and interest.

Indorsed to levy $32,040 and interest thereon at 5% per annum from the 1st day of June 2003 and costs of execution.

Dated the 4th day of June 2003

.....

Jennifer Justice

Advocate for the Plaintiff

SAMPLE DOCUMENT A1—WRIT OF *FIERI FACIAS* (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Case No 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

WRIT OF FIERI FACIAS

ELIZABETH II, by grace of God, of the United Kingdom of Great Britain and Northern Ireland and of her other Realms and Territories Queen, Head of Commonwealth, Defender of the Faith.

We command you that of the goods and chattels of Aseri Toga in your bailiwick you cause to be made the sum of $32,000 and also interest thereon at the rate of 5 per centum per annum from the 1st day of June 2003, which said money and interest thereon was lately before us in our Court in a certain action wherein Outboards Plus Ltd is the Plaintiff and Aseri Toga Defendant by a judgment of our said court bearing date the 1st day of June 2003, adjudged to be paid by the said Aseri Toga to Outboards Plus Ltd, together with certain costs in the said judgment mentioned, in these sum of $40 as appears by the said judgment. And that of the goods and chattels of the said Aseri Toga in your bailiwick you further cause to be made the said sum of $40 together with interest thereon at the rate of 5 per centum per annum from the 1st day of June 2003 and that you have that money and interest before us in our said Court immediately after execution hereof to be paid to the said Outboards Plus Ltd in pursuance of the said judgment. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after execution thereof. And have there then this writ.

Witness Registrar of the Court the day of July in the year of our Lord two thousand and three.

Indorsement

Levy $32,040 and $6 costs of execution etc. and also interest on $32,000 at 5 per centum per annum from the first day of June 2003, until payment; besides Sheriff's poundage, officers' fees, costs of levying and all other legal incidental expenses.

This writ was issued by Jennifer Justice advocate for the Plaintiff who resides in Honiara.

The defendant is a fisherman and resides at 99 Beach Road, Honiara in your bailiwick.

Indorsed to levy $32,040 and interest thereon at 5% per annum from the 1st day of June 2003 and costs of execution.

Dated the 4th day of June 2003

.....

2.3 Garnishee order

These proceedings involve the wages or debts owed to the judgment debtor by others being paid direct to the judgment creditor. Some moneys held on behalf of a judgment debtor are prevented by statute from being attached. An example is money held by the Solomon Islands National Provident Fund. In *ANZ Banking Group Ltd v Solomon Audio & Video Services,*[35] the plaintiff sought to attach money standing to the judgment debtor's credit in the National Provident Fund. The court held that s 38(1) of the Solomon Islands National Provident Fund Act 1973 was an absolute bar to the funds of a member being attached, sequestrated or levied in respect of any debt or claim whatsoever.

In Vanuatu, the equivalent procedure is a warrant for redirection of debts and earnings.[36]

35 Unreported, High Court, Solomon Islands, Civ Cas 65/92.
36 R14.22–14.32 Van.

2.3.1 *Procedure*

Again, this is a two-stage procedure, application being made *ex parte* supported by affidavit. An order *nisi* is then made, calling on the garnishee and judgment debtor to attend before the court on the date specified in the order to show cause why the order should not be made absolute.[37] The affidavit must show:

- judgment has been given;
- it is still unsatisfied;
- how much is outstanding;
- the person or body which is indebted to the judgment debtor;
- that person or body is within the jurisdiction.[38]

The Fiji Rules require the last known address of the judgment debtor to be stated as well.[39] Where the garnishee is a bank with more than one branch, O49 r2(d) requires the name and address of the branch at which the judgment debtor's account is believed to be held to be given or a statement that this information is not known.

The Tongan procedure is contained in O26 r9. The contents of the affidavit are the same as under the Fiji Rules.[40] Unlike the other jurisdictions, in Tonga the application must be referred to a judge. If he/she is satisfied that an order to show cause should be made, this will be issued in Form 9.

The equivalent Samoan Rule is r142 and procedure is governed by r144. Rule 144 read together with Form 31 governs the content of the affidavit. Evidence that the garnishee is within the jurisdiction is not required. It must be stated whether or not the debt is in respect of wages.

All Rules require personal service of the order on the judgment debtor and the garnishee, but the length of notice required differs. Under the CPR and Tongan Rules, service must be effected at least seven days prior to the hearing.[41] Under the Fiji Rules, 15 days' notice is required.[42] The Samoan Rules require 10 clear days' notice.[43]

The advantage of this two-stage procedure is that once the *ex parte* order *nisi* is made and served it will bind the debt specified in the hands of the garnishee.[44] This prevents the risk of funds being disposed of, as they might be if the application was made on notice.

In Vanuatu, application is made for an enforcement warrant by filing an application in Form 25 together with the other documents referred to above.[45] In deciding whether to issue the warrant, the court must consider whether the enforcement debtor will be left with sufficient means to pay his/her necessary living expenses and any other known

37 O48 CPR; O45 r1(1) and O49 CPR.
38 O48 r1 CPR.
39 O49 r2(a) Fiji.
40 O26 r9(2) Fiji.
41 O48 r1 CPR; O26 r9(3)(iii) Tonga.
42 O49 r3(1)(a) Fiji.
43 R145 Samoa.
44 O48 r2 CPR; O49 r3(2) Fiji; r145 Samoa; O26 r9(3)(iv) Tonga.
45 R14.12(1) Van. See the procedure for obtaining a warrant for seizure and sale of property discussed above.

liabilities; whether unreasonable hardship would be imposed on the enforcement debtor; and whether it is appropriate to issue the warrant, having regard to the nature and the amount of the debt.[46]

2.4 Charging order

A charging order is an order imposing a charge on specified property of the judgment debtor for the purpose of securing the amount of a judgment debt. A charging order means that the charged property cannot be disposed of without satisfaction of the debt. There is no procedure for imposing a charging order under the CPR so recourse must be had to the RSC under O71. The Vanuatu Rules refer to a charging order as an enforcement warrant charging property.[47]

Generally, a charging order may be taken over land or securities.[48] Regional rules allow the imposition of a charging order, but differ as to the property that can be charged:

- RSC (applying by virtue of O71) in countries where CPR apply:
  (a) land or interest in land;[49] or
  (b) securities in the form of government or registered stock and accrued dividends or interest on such stock.[50]
- Fiji:
  (a) land;[51] or
  (b) securities in the form of government or registered stock and accrued dividends or interest on such stock.[52]
- Samoa:
  any real or personal property other than an interest of a Samoan in any Samoan customary land.[53]
- Tonga:
  (a) land or interest in land;
  (b) securities in the form of government or registered stock and accrued dividends or interest on such stock and units in unit trusts; or
  (c) funds in court.[54]

46 R14.22(2) Van.
47 R14.33 Van.
48 O50 RSC, supplementing the CPR by virtue of O71 CPR.
49 O50r1(1) RSC.
50 O50r2RSC.
51 O50 r1 Fiji. The Rule does not confer substantive jurisdiction but is expressed to apply to 'any order which by virtue of any enactment' empowers the court to impose a charge on land.
52 O50 r2 Fiji.
53 R177 Samoa.
54 O26 r11(1) Tonga specifically provides for the application of the power to issue a charging order in s 1 of the Charging Orders Act 1979 (UK). The power is to be exercised in accordance with O26 r11. Section 2 of the Act, defining the assets over which a charging order may be taken, also applies both as a statute of general application and by implication from O26 r11.

- Vanuatu:
  (a) annuities;
  (b) debentures, shares, stocks, bonds and other marketable securities;
  (c) interests in managed investment schemes; or
  (d) units of shares or marketable securities.[55]

Land may not be charged under the Vanuatu Rules but it may be the subject of a warrant for seizure and sale.[56]

2.4.2 Procedure

Rules other than the CPR and Vanuatu Rules provide that application for a charging order is made *ex parte* supported by an affidavit for an order *nisi*.[57] If the application is successful, an order will be issued specifying the return date, at which time the judgment debtor must attend to show cause why a charging order should not be made. If no sufficient cause is shown, the order nisi will be made absolute. The Tongan Rules provide Form 12 for this purpose.[58]

As the CPR do not contain a procedure for obtaining a charging order, the RSC are followed, in accordance with O71 CPR.[59] It is a two-stage procedure, commencing with an *ex parte* application supported by affidavit to show cause.[60] On grant of the application, an order *nisi* is issued and forwarded to the debtor, with a return date for the hearing of the application to make the order absolute.[61] The use of RSC, Form 75 has been approved for the show cause order in Solomon Islands.[62] If there is a danger of the debtor disposing of the assets prior to the order absolute, the application for the order *nisi* may be accompanied by a request for an injunction.[63] Such application should be supported by evidence contained in the affidavit supporting the application of the order *nisi.*

In Vanuatu, application is made for an enforcement warrant by filing an application in Form 25 together with the other documents referred to above.[64]

2.5 Judgment summons

This method of enforcement applies to all types of judgments, not only money judgments. It is available in all countries where the Debtors Act 1869 (UK) applies to

55 R14.33 Van.
56 R14.16. Customary land may not normally be the subject of an enforcement warrant: R14.39 Van.
57 O50 r1(3) Fiji; r178 Samoa; O26 r11(2)(i) and Form 11 Tonga.
58 O26 r11(4)(ii) Tonga.
59 *Vanuatu Abbatoirs Ltd v Livestock Development Authority,* unreported, High Court, Solomon Islands, Civ Cas 184/1999, 9 May 2000.
60 O50 r5 RSC.
61 O50r6RSC
62 *Vanuatu Abbatoirs Ltd v Livestock Development Authority,* unreported, High Court, Solomon Islands, Civ Cas 184/1999, 9 May 2000, p 4.
63 O50 r9.
64 R14.12(1) Van. See the procedure for obtaining a warrant for seizure and sale of property discussed above.

punish a judgment debtor who is able to pay, but has chosen not to.[65] Fiji has its own Debtors Act[66] and the power to imprison under that Act is specifically preserved by O45 r1(3) Fiji, which states that other enforcement procedures mentioned are without prejudice to this remedy.[67] In Samoa, judgment summonses are governed by the Judgment Summonses Act 1965. Section 6 empowers the Supreme Court to commit a debtor to prison for up to six months for non-payment of a judgment debt. Such an order will be made if the judgment debtor has or has had sufficient means to pay but has not done so.[68]

2.5.1 Procedure

There is no specific provision in the CPR or Tongan Rules as to how an application under the Debtors Act should be made. Accordingly, the English procedure is followed[69] and application is made by summons, supported by an affidavit adducing evidence that the debtor has the means to pay the judgment debt but has not done so. The corresponding procedure in the Solomon Islands magistrates' court was discussed in *Batuna Enterprises v Ratu*,[70] where the judgment creditor applied to the High Court for review of the magistrate's dismissal of a judgment summons. The affidavit in support was based on hearsay evidence and the judgment debtor failed to attend at the hearing, thus depriving the judgment creditor of the opportunity to examine him on oath as to his means. The High Court held that hearsay evidence or the opinion of the judgment creditor was insufficient to found a punitive order, but this did not mean that only direct evidence of actual means would suffice. Affidavit evidence of a 'reasonably direct character', such as evidence of employment or lifestyle or purchase of costly goods would suffice as *prima facie* evidence, which the judgment debtor would have to displace.

Procedure under the Judgment Summonses Act 1965 (Samoa) is governed by the Judgment Summonses Rules 1965.[71] Rule 5 provides that an application must be supported by affidavit. Application must be made in Form 3 of the Rules, which is a combined form of affidavit and application.[72] A judgment summons is then issued by the court in Form 5, calling on the judgment debtor to appear. It must be served personally on the judgment debtor at least 10 clear days prior to the hearing. If the application is successful, a warrant of committal will be issued.[73]

65 *Woodley v Woodley* (1993) *The Times,* 15 March 1993, CA.
66 Cap 32.
67 Cf *Sundarjee Brothers Ltd v Coulter,* unreported, Supreme Court, Fiji, Civ App 756/1986, 12 August 1986, in which s 6 of the Debtors Act, which allows for the issue of a warrant of arrest for an absconding defendant, was declared unconstitutional and therefore void.
68 Section 9.
69 O71 CPR.
70 Unreported, High Court, Solomon Islands, Civ Cas 52/1990, 11 April 1990.
71 As amended by 1982/20 and 1988/19.
72 Where the judgment summons is sought against a firm, a supplemental affidavit in Form 4 must also be lodged.
73 Section 15.

3 ENFORCING OTHER JUDGMENTS

Judgments will not always be given in monetary terms. For example, the court may award specific performance or an injunction. In the case of judgments other than money judgments, failure to comply with the judgment may amount to contempt of court and a wrongdoer who wilfully refuses to comply may be committed to prison. This is part of a superior court's inherent jurisdiction, but is usually also provided for by the Rules.[74]

There will also be occasions when a judgment debtor's interests in property cannot be taken in execution under any of the processes specified in the Rules. In such cases, those interests may generally be reached by the appointment of a receiver. This is known as equitable execution and is discussed further below.

The Vanuatu Rules require the court to deal with enforcement immediately after giving judgment. The court must ask the person against whom the order is made how he/she proposes to comply with the order and must either make an enforcement order or fix a date for an enforcement conference. At the enforcement conference, the debtor may be examined as to how he/she proposes to comply with the non-money order. Presumably, the court will then make an enforcement order stating how the judgment is to be satisfied, although this is not made clear in the Rules.[75] If the order is not complied with, the creditor may apply for an enforcement warrant.

In other South Pacific jurisdictions, application may be made by writ to enforce a judgment that is not in monetary terms.[76] This is the equivalent of an enforcement warrant in Vanuatu. There are several types of writs and the type to be issued will depend on the nature of the judgment and what is being sought. The main writs are as follows:

- writ of sequestration;
- writ of attachment;
- writ of possession;
- writ of delivery.

3.1 Writ of sequestration

This writ is provided for by O46 r2 CPR and O45 rr1(1)(f), 2(1)(c) and 4(1)(i) Fiji. It is available to enforce compliance with an order to carry out a specific act or make a payment into court. It can be used to enforce judgment for delivery of any property other than land or money. For example, it could be a consequence of failure to obey an injunction. The judgment relied on must state a time limit for the doing of the act in question, in order for such a writ to be used. Under a writ of sequestration, the sheriff is empowered to go onto the debtor's land and take his possessions and receive any income from the land until the judgment is complied with.

There is no equivalent under the Vanuatu Rules, although r14.48 states that a non-money order requiring a person to do or refrain from doing an act may be enforced

74 O47 r7 CPR; O45 r1(1)(e) and O52 Fiji; O26 r2(b)and O26 r3 Tonga.
75 See r14.7 Van for the position relating to enforcement of money orders.
76 O47 r7 CPR; O45 r1(1)(e) Fiji.

by seizing the person's property. It is not made clear how an application for this enforcement procedure is made. Presumably an enforcement warrant should be applied for.

3.1.1 Procedure

A writ of sequestration may only be issued after the judgment has been served and the time limited for doing the act in question has expired. The writ may then be issued without leave. Form 10 in Appendix G of the CPR and Form 25, Appendix 1, Fiji are provided for that purpose.

3.2 Writ of attachment

This writ is provided for by O47 CPR. It may be taken out when it is sought to enforce any judgment other than a money judgment.[77] The defendant is imprisoned for failure to comply with the judgment requiring him/her to do, or abstain from doing, a certain act. Leave of the court is required before such a writ can be issued.[78]

There is no equivalent under the Vanuatu Rules.

3.3 Writ of possession

This writ is used to secure a judgment for possession of land. It is provided for by O49 CPR, O45 r2 Fiji and r173 Samoa. It is taken out when it is sought to enforce a judgment for the delivery of possession of land. Leave of the court is required under O49 r1(1) CPR. It is also required under O45 r2(2)(a) Fiji, except in mortgage actions to which O88 applies. The Samoan equivalent is r173.

The equivalent procedure under the Vanuatu Rules is an enforcement warrant for possession of land.[79]

There is no equivalent in the Tongan Rules. Writs of possession of land may be enforced in the Land Court,[80] but houses are specifically exempted from seizure. The exemption is contained in the prescribed form rather than in the Land Court Rules and it is doubtful whether forms can make a substantive change.[81] However, the exemption may be a consequence of the fact that houses are outside the jurisdiction of the Land Court. This is because of the unique system of hereditary entitlements in Tonga, where houses do not accrete to the land. Rather, they are severable and more properly described as goods.[82]

In *Bank of Tonga v Kolo*,[83] Hampton CJ held that a mortgagee's remedy was to obtain judgment for delivery of goods and proceed by writ of delivery. However, there are two difficulties with this course, which are discussed at para 3.4 below. The best course

77 O45 r7 CPR.
78 O47 r2 CPR.
79 R14.46 Van.
80 See Chapter 3, pp 40 and 57.
81 However, in *Bank of Tonga v Malolo and Malolo*, unreported, Supreme Court, Tonga, Civ Cas 877/2000, 6 May 2000, Ford LJ appears to have assumed this to be an effective exemption.
82 *Kolo v Bank of Tonga*, unreported, Supreme Court, Tonga, 7 August 1998.
83 [1995] Tonga LR 168.

would appear to be to allow application for a writ of possession to be made under O45 r3 RSC, applied by virtue of O2 r2(2). This course has received judicial approval in *Bank of Tonga v Malolo and Malolo*.[84] Departing from the views of Hampton CJ, Ford LJ said:

> It seems to me there is indeed a lack of procedure in the area and, in the circumstances, it appears appropriate to call in aid the English writ of possession procedure, modified as may be necessary to exclude any reference to the land itself apart from what may be required to identify the location of the dwellinghouse in any particular case.

As pointed out by his Lordship, to deny mortgagees access to a writ of possession would mean that a house owner would effectively be precluded from ever using his/ her home as security for a loan. As his Lordship put it, 'a lending bank is unlikely to be very interested in advancing loan money over the security of a dwellinghouse which was protected from seizure in the event of default'.

3.3.1 Procedure

Application for leave to issue a writ of possession is made *ex parte* supported by affidavit. Under the CPR, a *praecipe* in Form 39 of Appendix B must be filed, containing details of the order giving leave. The writ is in Form 4 of Appendix G. Application under the Samoan Rules is made in Form 45 and a writ issued in Form 47 (r 173(2) Samoa). In Fiji, the writ of possession must be in Form 24 of Appendix 1.[85]

All the goods and persons on the premises should be ejected by the sheriff.[86]

Under the Vanuatu Rules, application for an enforcement warrant for possession of land is made by filing an application with two copies of the warrant and a sworn statement stating that the order has not been complied with.[87]

3.4 Writ of delivery

A judgment for delivery of goods may be enforced by a writ of delivery. This writ is provided for by O50 CPR, O45 r3 Fiji, r173 Samoa and O26 r8 Tonga. The equivalent under the Vanuatu Rules is an enforcement warrant for delivery of goods.[88]

As discussed above, in Tonga houses do not accrete to the land, but come within the definition of goods.[89] In *Bank of Tonga v Kolo,*[90] Hampton CJ held a writ of delivery could be used to enforce an order against a dwelling house. However, there are two difficulties with this course. First, the writ directs the police officer in charge to seize the dwelling house and 'deliver it to a convenient place where it may be collected'. This would be totally impractical in most cases. Secondly, the prescribed form of writ exempts a debtor's

84 *Bank of Tonga v Malolo and Malolo,* unreported, Supreme Court, Tonga, Civ Cas 877/2000, 6 May 2000, at p 6.
85 O45 r11(3) Fiji.
86 In *R v Wandsworth County Court* [1975] 1 WLR 1314, it was made clear that there was power to eject everyone from the premises including non-parties.
87 R14.43(1) Van.
88 R14.47 Van.
89 *Kolo v Bank of Tonga,* unreported, Supreme Court, Tonga, 7 August 1998.
90 [1995] Tonga LR 168.

dwelling house. Whilst it is doubtful whether forms can make a substantive change in practical terms, this might prevent the issue of the writ and would certainly prevent the police officer from acting.

3.4.1 Procedure

Under the CPR, no leave is necessary. A *praecipe* must be filed in Form 41 of Appendix B together with a draft writ in Form 5, 6 or 7 of Appendix G. Procedure under the Fiji Rules is similar. A *praecipe* must be filed together with the judgment or an office copy.[91] Application for a writ of specific delivery[92] is made on notice by summons.[93] The writ must be in Form 23 in Appendix 1.[94]

Application under the Samoan Rules is made in Form 45 and a writ issued in Form47.[95]

Under the Tongan Rules, the writ is prepared in Form 6 and simply filed at the Registry.[96]

Under the Vanuatu Rules, application for an enforcement warrant for delivery is by filing an application with two copies of the warrant and a sworn statement stating that the order has not been complied with.[97] Unless the court orders otherwise, the warrant must be issued without a hearing.[98] The court must give the warrant to an enforcement officer to be enforced.[99]

3.5 Appointment of a receiver

In some circumstances it may not be possible to take a judgment debtor's interest in property through the execution processes specified in the Rules. In such cases, application may be made to appoint a receiver by way of equitable execution.[100] Receivership orders are a last resort.[101] The order authorises the receiver to receive rents, profits and moneys receivable in respect of the judgment debtor's interest in specified property.[102]

In deciding whether it is just and convenient to appoint a receiver, the court will have regard to the amount of the debt claimed, the amount likely to be recovered by the receiver and the probable cost of such appointment.[103] The receiver will normally be required to

91 O46 r6.
92 Delivery of the named goods without the alternative of paying their assessed value.
93 O45 r3(2) CPR.
94 O45 r11(2) CPR.
95 R173(2) Samoa.
96 O26 r7(1) Tonga.
97 R14.43(1) Van.
98 R14.43(2) Van.
99 R14.43(3) Van.
100 If necessary, this can be supplemented by an injunction.
101 *Machine Watson & Co Ltd v International Tin Council* [1988] Ch 1.
102 O53 r14 CPR; O45 r2(a) Fiji. O45 r2(a) Fiji only mentions the appointment of a receiver as a mode of enforcement of a judgment for the payment of money into court. However, the equitable powers of the court may be used in respect of other judgments.
103 O53 r14 CPR; r14.36(2) Van.

give security to account for receipts in the form of a guarantee.[104] The receiver is usually remunerated by payment of a salary or allowance.[105]

3.5.1 Procedure

Application is by summons supported by affidavit dealing with the matters relevant to the exercise of the court's discretion.[106] O26 r10 Tonga provides that the affidavit shall contain:

- the name and last known address of the judgment debtor;
- details of the judgment or order to be enforced and the amount unpaid;
- details of the property in respect of which the receiver is to be appointed; and
- the name of the proposed receiver.

O26 r1 Tonga also requires the summons to be served at least seven days before the hearing date.

Under the Vanuatu Rules, application is made for an enforcement warrant for appointing a receiver by filing:[107]

(a) an application in Form 25; and
(b) a copy of the enforcement order; and
(c) two copies of the form of warrant; and
(d) a sworn statement made not earlier than two business days before filing the application…

The required content of the affidavit is set out above.

3.6 Committal

Contempt of court may take many forms. The most common form is defiance of a court order. Although the object of contempt proceedings is to punish for disobedience, they may also have the effect of forcing compliance with the court's order and in this respect they amount to a method of enforcement.

Contempt of court is a complicated procedure under the CPR. The Rules perpetuate the former English practice whereby contempt is punishable in some cases by attachment and in others by committal.[108] This unsatisfactory position no longer exists in Fiji or Tonga where the remedy is now by committal for all cases of contempt.[109]

104 O53 r15 and Form 47 in Appendix B CPR.
105 O53 r15 CPR; O26 r10(5) Tonga.
106 *Re Hartley* (1892) 66 LT 588.
107 R14.12(1) Van.
108 O61 CPR. For a brief history, see the *Supreme Court Practice,* 1966, London: Sweet & Maxwell, p 101 *et seq*.
109 O52 Fiji; O26 r12(1) Tonga.

The Vanuatu Rules provide that a non-money order requiring a person to do or refrain from doing an act may be enforced by punishment for contempt.[110] Contempt proceedings are dealt with in r18.14 Van which provides that in the case of contempt after proceedings have finished, the other party may apply to reopen the proceedings and for the defaulting party to be punished for contempt. The application must have with it a sworn statement giving details of the contempt and must be served personally.[111]

There is no statutory authority to commit for contempt of court in Samoa, but Art 111 of the Constitution defines law as including 'any law for the time being in force' and this includes English common law and equity. Contempt of court is a recognised part of common law[112] and it has been held that the Supreme Court has inherent jurisdiction to punish contempt of court by attachment or committal.[113]

Committal for breach most commonly arises in relation to injunctions,[114] but other orders may be couched in such a way as to render failure to comply with them a contempt. Committal results in imprisonment of the wrongdoer for a fixed period or until the contempt is purged.

3.6.1 Procedure

Leave to apply for an order of attachment or committal is normally required. Application for leave is made *ex parte* to a judge by summons supported by affidavit.[115] The affidavit must verify the facts and state:

- details of the order or undertaking;
- the name and address of the person sought to be committed; and
- the grounds upon which committal is sought.

Once leave has been granted, application should be by notice of motion. The Fiji Rules provide that the motion must be entered within 14 days of leave being granted or else it will lapse.[116] The CPR and the Fiji Rules provide that, unless service of the notice is dispensed with, the notice must be served at least eight clear days before the hearing.[117]

The procedure for applying for a person to be punished for contempt is not specified in the Vanuatu Rules. Presumably it is by application supported by a sworn statement.

110 R14.48(3)(a) Van.
111 R18.14(4) Van.
112 *R v Gray* 69 LJQB 502.
113 *Re Tapu Leota* [1960–69] WSLR 106 confirms the power in criminal proceedings.
114 See, for example, *Hitukera v Hyundai Timber Company Ltd and Maepeza,* unreported, High Court, Solomon Islands, Civ Cas 132/92.
115 O61 rr2 and 21(1) CPR; O52 r2(1) and (2) Fiji; O26 r12(3) Tonga.
116 O52 r3(2) Fiji.
117 O61 r4(1) CPR; O52 r3(1) and (4) Fiji.

4 STAY OF EXECUTION

A judgment debtor who is unable to pay, or who wishes to put forward other reasons why judgment should not be enforced, may apply for a stay of execution. In Vanuatu this is referred to as suspension of enforcement.[118]

4.1 Procedure

A stay of execution may be applied for at the hearing fixed by order *nisi* or by summons. In either case, the application for a stay should be supported by affidavit setting out the grounds of the application and including a full statement of the judgment debtor's means. Stay of execution, provided payment is made by instalments, is a common order on such an application.[119] An example is given in Sample Document A2 below.

The Vanuatu Rules provide that application for suspension of an enforcement order is made by filing an application supported by a sworn statement.[120] The application must be served on the person in whose favour the order is made at least seven working days before the application is to be heard.[121] The court may 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.[122] It may make any other orders it considers appropriate, including another enforcement order.[123]

118 R14.40 Van.
119 See Jacob J (ed), *Chitty and Jacob,* 21st edn, 1986, London: Sweet & Maxwell, Form 881.
120 R14.40(1) and (2) Van.
121 R14.40(2)(b) Van.
122 R14.40(3)(a) Van.
123 R14.40(3)(b) Van.

SAMPLE DOCUMENT A2—ORDER STAYING EXECUTION (SOLOMON ISLANDS)

IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Case No 1111/2003

BETWEEN:

OUTBOARDS PLUS LTD

Plaintiff

and

ASERI TOGA

Defendant

ORDER FOR STAY OF EXECUTION

On hearing the barristers and solicitors for both sides and on reading the affidavit of Aseri Toga dated the 1st day of July 2003,

It is ordered that:

1 there be a stay of execution so long as the Defendant pays the judgment debt and costs by instalments at the rate of $200 per month on the 1st day of each month;

2 the first instalment be paid on the 1st day of August 2003;

3 if the Defendant should make default in the payment of the said instalments or any part thereof on the due date, the stay be forthwith removed in respect of the whole outstanding balance at the time of such default; and

4 the Plaintiff be then at liberty forthwith to issue execution by writ of *fieri facias* on the said judgment and costs.

Dated the 24th day of July 2003

.....

CHAPTER 14

APPEAL PROCEDURE

1 INTRODUCTION

Appeal courts are not constituted in each South Pacific country on a permanent basis due to lack of resources, but usually sit between one and four times each year to deal with accumulated appeals.[1] Courts of Appeal hear appeals from two sources. First, they hear appeals from first instance decisions of superior courts of regional countries, sitting in their original jurisdiction. Secondly, they hear appeals from decisions made by the superior courts acting in their appellate jurisdiction. In Cook Islands,[2] Niue, Kiribati and Tuvalu, a further appeal is allowed to the Privy Council in England. Fiji Islands allows a further appeal to the Supreme Court, which is a second internal appeal court. This chapter deals with procedure in appeals to the Court of Appeal only.

2 RULES OF COURT

2.1 Distinction between regional rules

There is no common set of rules governing appeal procedure in the countries of the region. The Court of Appeal Rules 1973 (WP), made pursuant to the Western Pacific (Courts) Order in Council 1961, operate in three countries of the region: Kiribati, Tuvalu and Vanuatu.[3] They originally applied in Solomon Islands as well,[4] but were repealed by the Court of Appeal Rules 1983 (SI).[5] The 1973 Rules are based on the Court of Appeal Rules (Fiji) which were made originally in 1954, but have been amended on several occasions since.[6] The 1973 Rules and the Fiji Rules still have a lot in common. There are also similarities between these Rules and other regional Court of Appeal rules. The Court of Appeal Rules 1981 (Cooks) are almost identical to the Court of Appeal Rules 1961 (Samoa) and are obviously based on them.

The Rules that apply in each country of the region and the standard abbreviation used to refer to each are set out in Table 14.1.

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1 See Chapter 3 for a description of the place of appeal courts in the court hierarchy of each regional country. See Pulea, M, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) Pacific Perspective 1 for a discussion of the historical perspective, and Mataitoga, I, 'South Pacific Court of Appeal' (1982) 11(1) Pacific Perspective 70 for a discussion of some of the points which favour the present system in preference to a regional appeal court.

2 For a survey of the relationship between the Privy Council and the Cook Islands see Frame, A, 'The Cook Islands and the Privy Council' (1984) 14 VUWLR 311.

3 These Rules revoked the Court of Appeal Rules (No 2) 1956. 4 Brought into force by LN 40/73 (SI).

5 Section 39. RIO (which required the payment of fees in civil appeals) and the First Schedule (which prescribed the fees payable in civil appeals) were retained as a transitional measure.

6 See LN 177/1968 (Fiji); LN 86/1970 (Fiji); LN 112/1970 (Fiji); LN 67/1977 (Fiji); LN 51/1984 (Fiji); LN 41/1985 (Fiji).

TABLE 14.1—RULES OF COURT GOVERNING APPEALS FROM FIRST INSTANCE DECISIONS OF SUPERIOR COURTS OF THE REGION

COUNTRY	RULES AND AUTHORITY UNDER WHICH THEY WERE MADE
COOK ISLANDS	Court of Appeal Rules 1981, made pursuant to the Judicature Act 1980–81, s 102 (referred to in this chapter as 'Court of Appeal Rules 1981 (Cooks)' or the 'Cook Islands Rules')
FIJI ISLANDS	Court of Appeal Rules, made pursuant to the Court of Appeal Act, Cap 12, s 39 (referred to in this chapter as 'Court of Appeal Rules (Fiji)' or the 'Fiji Rules')
KIRIBATI	Court of Appeal Rules 1973, made pursuant to the Western Pacific (Courts) Order in Council 1961 (referred to in this chapter as 'Court of Appeal Rules 1973 (WP)')
MARSHALL ISLANDS	Civil Procedure Act, Cap 1, 29 MIRC
NAURU	High Court Rules 1952, made pursuant to the Judiciary Act 1903 (Cwlth), s 86 and applying by virtue of Appeals Act 1972 (Nauru), s 52
NIUE	Court of Appeal (Civil) Rules 1997 (NZ), made pursuant to the Judicature Act 1908 (NZ), s 51C
SAMOA	Court of Appeal Rules 1961, made pursuant to the Judicature Act 1961, s 40 (referred to in this chapter as 'Court of Appeal Rules 1961 (Samoa)' or the 'Samoan Rules')
SOLOMON ISLANDS	Court of Appeal Rules 1983, made pursuant to the Constitution, s 90 (referred to in this chapter as 'Court of Appeal Rules 1983 (SI)')
TOKELAU	Court of Appeal (Civil) Rules 1997 (NZ), made pursuant to the Judicature Act 1908 (NZ), s 51C
TONGA	Court of Appeal Rules 1990, made pursuant to the Court of Appeal Act 1966 (referred to in this chapter as 'Court of Appeal Rules 1990 (Tonga)' or the 'Tongan Rules')
TUVALU	Court of Appeal Rules 1973, made pursuant to the Western Pacific (Courts) Order in Council 1961 (referred to in this chapter as 'Court of Appeal Rules 1973 (WP)')
VANUATU	Court of Appeal Rules 1973, made pursuant to the Western Pacific (Courts) Order in Council 1961(referred to in this chapter as 'Court of Appeal Rules 1973 (WP)')

This book concentrates on the Court of Appeal Rules 1973 (WP) and the Rules governing appeals in Fiji Islands, Samoa, Solomon Islands and Tonga, with occasional reference to the Cook Islands Rules.

2.2 Procedure in cases outside the Rules

Where a situation arises that is not provided for in the Rules, the Court of Appeal Rules 1973 (WP) provide that recourse must be had to the Western Pacific High Court (Civil Procedure) Rules[7] ('CPR'), which are dealt with in the preceding chapters of this book. If this source does not supply an answer, recourse may be had to the practice and procedure prevailing at that time in the Court of Appeal of England.[8] Subject to the Court of Appeal Rules (Fiji), the High Court Rules 1988 (Fiji) apply to civil proceedings in the Court of Appeal.[9] As under the 1973 Rules, if there is no relevant provision in the High Court Rules, recourse may be had to the practice and procedure prevailing at that time in the Court of Appeal of England.[10] The Court of Appeal Rules 1961 (Samoa) do not provide for the position where there is a gap in the Rules, except in the absence of an applicable form, where the Supreme Court practice is to prevail.[11] The Judicature Act (Samoa) provides that, subject to the provisions of the Act and the Civil Procedure Rules, practice and procedure 'shall be such as the Court thinks in each case to be most consistent with natural justice and convenience'.[12] Presumably the Supreme Court (Civil Procedure) Rules 1980 would be the source of first recourse in the absence of an applicable rule. In Tonga, if the Court of Appeal Rules do not provide for a situation, recourse may be had to the rules 'for the time being' governing appeals to the Court of Appeal in England.[13] The Court of Appeal Rules 1983 (SI) are silent as to position if the Rules do not cover a procedural point.

2.3 Forms

The Court of Appeal Rules 1983 (SI) prescribe forms for the most common procedural steps. These forms are contained in the Schedule to the Rules. The Rules contain a general rule or order providing that the forms are to be adapted to meet the circumstances of the case:

> Where in these Rules there is a reference to a Form, that Form shall be the Form as set out in the First Schedule with such necessary adaptations to conform with the circumstances of the case.[14]

The Court of Appeal Rules 1990 (Tonga) prescribe the form of a notice of appeal,[15] notice of application,[16] notice of order of a single judge[17] and consent to

7 R6.
8 Court of Appeal Rules 1973 (WP), r7(a).
9 Court of Appeal Rules (Fiji), r6. References in the Court of Appeal Rules (Fiji) to the Supreme Court should presumably be read as referring to the High Court, as that court changed its name in 1988: Judicature Decree 1988.
10 Court of Appeal Rules (Fiji), r7(a).
11 Court of Appeal Rules 1961 (Samoa), r39. Similar provision is made in Court of Appeal Rules 1981 (Cooks), r33.
12 1961, s 39.
13 Court of Appeal Rules 1990 (Tonga), O2 r2.
14 Court of Appeal Rules 1983 (SI), r43.
15 Form 1.
16 Form 2.
17 Form3.

determination of appeal on written submissions.[18] The forms are appended to the Rules.

Neither the Court of Appeal Rules 1973 (WP) nor the Court of Appeal Rules of Fiji or Samoa prescribe forms for civil appeals. They do provide forms for criminal appeals and it would appear that these may be adapted in some cases for use in civil appeals.[19] In fact, even though the forms are drafted in a criminal context, the Court of Appeal Rules 1961 (Samoa) provide that the forms should 'as far as practicable be used for all documents filed in the Court of Appeal'.[20] Rule 39 goes on to say that, in the absence of an applicable form, the document should be based on the practice (which presumably means the drafting practice) of the Supreme Court. The Cook Island Rules 1981 make almost identical provision.[21]

2.4 Failure to comply with the Rules

Non-compliance with the Rules may be waived by the Court of Appeal.[22] Under the Western Pacific and Samoan Rules, non-compliance may only be waived if it was inadvertent and the court or a judge (in the case of Samoa, the President of the Court) may require the non-compliance to be remedied before the appeal proceeds.[23] The Solomon Islands Rules confer wider jurisdiction and allow the court or a judge to impose such terms or conditions as they see fit on the permission to proceed.[24] The Court of Appeal Rules 1983 (SI) expressly retain the right of the court or a judge to strike out the appeal for non-compliance with the Rules where it is inappropriate to waive the requirement.[25] This power no doubt exists in the other jurisdictions, as the result would be the same if the court refused to grant a waiver.

The regional rules specifically empower the Court of Appeal to extend the time limits imposed by the Rules.[26]

3 PARTIES AND REPRESENTATION

The Court of Appeal Rules 1983 (SI) empower the Court of Appeal to add or substitute a party in the proceedings on application or of its own motion. The court may also order any other person to be served if it considers this to be in the interests of justice. In particular,

18 Form 4.
19 The Schedule containing nine forms was added to the Samoan Court of Appeal Rules in 1964 by the Court of Appeal Rules 1961, Amendment No 1.
20 Court of Appeal Rules 1961 (Samoa), r39.
21 Court of Appeal Rules 1981 (Cooks), r33.
22 Court of Appeal Rules 1973 (WP), r!6; Court of Appeal Rules 1983 (SI), r47; Court of Appeal Rules 1961 (Samoa), r38. The Court of Appeal Rules 1990 (Tonga) contain no express power to waive compliance with the Rules, but s 13 of the Court or Appeal Act Cap 9 confers a discretion on the Court to entertain an appeal on any terms which it may think just.
23 Court of Appeal Rules 1973 (WP), r16; r38. Court of Appeal Rules 1961 (Samoa). R32 Court of Appeal Rules 1981 (Cooks) is identical to r38, Court of Appeal Rules 1961 (Samoa).
24 R47(1).
25 R47(2).
26 Court of Appeal Rules 1983 (SI), r47; Court of Appeal Rules 1961 (Samoa), r7; Court of Appeal Rules 1990 (Tonga), O4 r1.

the Court may make the Director of Public Prosecutions a party to an appeal or application in a criminal matter that has been prosecuted privately.[27]

The Court of Appeal Rules 1983 (SI) provide for appearance by an individual in person or through a barrister or solicitor. However, if a party is not a natural person, it must be represented by a barrister or solicitor unless the court orders otherwise.[28]

Neither the Court of Appeal Act (Fiji) nor the Court of Appeal Rules 1961 (Samoa) deal specifically with parties or representation. However, addition or substitution of a party may be made by reference to the High Court Rules (Fiji)[29] and the Supreme Court (Civil Procedure) Rules 1980 (Samoa)[30] respectively

The Court of Appeal Rules 1990 (Tonga) provide that the court or a judge may direct service on any person.[31]

4 APPLICATION FOR LEAVE TO APPEAL

4.1 Leave requirements

The right of appeal is bestowed by the Court of Appeal Act or an equivalent piece of legislation.[32] Appeal usually lies as of right in appeals from the superior court sitting at first instance. However, there is often a requirement that the dispute exceed a minimum monetary amount.[33] In some countries, leave is required where the appeal is from a decision made in the superior court's appellate jurisdiction and is on the grounds of an error of fact rather than a question of law.[34] Leave is also normally required where the appeal is from an interlocutory order.[35] Where an appeal lies as of right, the notice of appeal may normally be filed without leave or notice to the other side (although such notice should be given as a matter of courtesy). However, in Samoa, leave is required in all cases, although this is granted automatically if the applicant is entitled to appeal as of right.[36] There is an apparent contradiction between allowing appeals as of right and insistence on a Supreme Court order granting leave before bringing an appeal 'whether as of right or not'.[37] Presumably, s 54(1) of the Judicature Act 1961 (Samoa) is designed to provide an opportunity for the court to impose a condition that security of costs be paid and to set the amount and time limit

27 R5.
28 R6.
29 Applying by virtue of Court of Appeal Rules (Fiji), r6.
30 As discussed above, there is no specific authority for having recourse to the Supreme Court Rules.
31 O6 r1.
32 See further Chapter 3.
33 For example, Samoa (Judicature Act 1961, s 51) and Tonga (Court of Appeal Act Cap 9, s 10(1)).
34 *Ibid*.
35 For example, Court of Appeal Rules 1973 (WP), r21(1).
36 Judicature Act 1961 (Samoa), ss 51 and 54(1).
37 *Breckwold and Co Ltd v Samoa Iron and Steel fabrication Ltd* (No 3) [1970–79] WSLR 196 confirms the effect of s 54(1).

for payment.[38] Special leave to appeal may be given by the Court of Appeal of Samoa in any case in which it thinks fit.[39]

4.2 Time limits

Under the Court of Appeal Rules 1983 (SI), applications for leave to appeal must be made within 14 days of the decision appealed from.[40] The Court of Appeal Rules 1973 (WP) allow 30 days from the date of the decision in which to apply for leave to appeal.[41] The Court of Appeal Rules 1990 (Tonga) give a more generous time limit of 42 days from the date of the decision.[42] No time limit is specified under the Court of Appeal Rules (Fiji). Under the Judicature Act 1961 (Samoa), application for leave to appeal had to be made at the time when judgment was given or within 21 days afterwards. However, the subsection containing this time limit has been repealed.[43] The absence of a time limit in which to appeal is obviously unsatisfactory in terms of finality.

4.3 Form of application

The Court of Appeal Rules 1983 (SI) provide for applications for leave to appeal to be in prescribed Form B. A sample notice of application for leave to appeal is contained in Sample Document A3.

In Samoa, Form 1, which is a notice of appeal or application for leave to appeal, should be adapted from the criminal context in which it is drafted.[44]

In Tonga, application is made in Form 2, which is a general notice of application. O7 r1 provides that application may be made *ex parte* supported by affidavit.

No form or guidance on content is given in the Court of Appeal Rules (Fiji). However, Form 4 in the Second Schedule to the Rules is a notice of application for leave to appeal against conviction or sentence in criminal cases and may be adapted for use in civil cases.

There is no applicable form in the Court of Appeal Rules 1973 (WP), but it is provided that application is to be by summons.[45]

38 Judicature Act, s 54(3).
39 Judicature Act 1961 (Samoa), s 63.
40 Court of Appeal Rules 1983 (SI), r10(2).
41 Court of Appeal Rules 1973, rr20 and 21(2).
42 O5 r1.
43 Judicature Amendment Act 1992/3 (Samoa), s 6.
44 Court of Appeal Rules 1961 (Samoa), r39 provides that the criminal forms should be adapted for use in civil cases.
45 R21(2).

SAMPLE DOCUMENT A3—APPLICATION FOR LEAVE TO APPEAL (SOLOMON ISLANDS)

IN THE COURT OF APPEAL
FOR SOLOMON ISLANDS

Case No 11/2003

BETWEEN:

ASERI TOGA

Appellant

(Applicant)

And

OUTBOARDS PLUS LTD

Respondent

APPLICATION FOR LEAVE TO APPEAL

TO Outboards Plus Ltd, Respondent

ASERI TOGA having been the defendant in Case No 1111/2003 in the High Court seeks leave to appeal from a judgment or order of that court as follows:

The appellant appeals against that part of the judgment awarding costs in favour of the plaintiff (respondent).

The grounds of appeal upon which leave to appeal should be granted are:

1. The Court erred in the exercise of its discretion in failing to take into account relevant facts and in particular the defendant's offer to settle prior to the issue of proceedings.
2. The Court erred in law in refusing to admit evidence of the defendant's offer to settle prior to the issue of proceedings.

Dated this 13th day of June 2003

.....

Ann Advocate

Barrister and Solicitor for the Appellant

4.4 Hearing of applications for leave

The Court of Appeal Rules 1973 (WP) provide for applications for leave to be heard in chambers[46] by a single High Court judge or, in Kiribati or Tuvalu, by a judge or a senior magistrate.[47] If leave is refused, application for leave may be made to the Court of Appeal[48]

The Court of Appeal Acts of Fiji and Solomon Islands provide for applications to be heard by a single judge of the Court of Appeal.[49] Leave may also be given by the High Court judge who made the original order.[50]

The Samoan Rules provide that the leave is to be given by the Supreme Court.[51] There is no express provision as to the constitution of the court to grant leave, but the Court of Appeal Act provides that all powers of the court may be exercised by a single judge[52]

In Tonga, application for leave to appeal may be determined by a single judge of the Court of Appeal without a hearing.[53]

5 COMMENCEMENT OF APPEALS

5.1 Time limits

The time limit for lodging a notice of appeal under the Court of Appeal Rules 1973 (WP) and the Court of Appeal Rules 1983 (SI) is 30 days from the decision complained of, calculated from the date upon which the judgment or order of the court below was signed, entered or otherwise perfected.[54] Where leave to appeal is required, time for filing the notice of appeal runs from the date on which the applicant is informed of the grant of leave.[55] This provision leaves room for doubt. Does this mean that the date of the order granting leave will not be relevant, but only the date on which that order is received by the applicant? If, for example, the applicant's solicitor does not collect the order from his/her High Court pigeonhole until three days after the order is signed, will time only begin to run from that later date? This provision requires amendment to clarify the matter and it is suggested that the last clause of the subsection be amended to read 'shall start from the date on which the order granting leave is signed'. In any case where the order

46 R21(2).
47 Court of Appeal Act 1973 (WP), s 21.
48 *Ibid*.
49 Court of Appeal Act Cap 12 (Fiji), ss 12 and 20(a); Court of Appeal Act Cap 6 (SI), s 19(a). See also Court of Appeal Rules (Fiji), r26(2); Court of Appeal Rules 1983 (SI), r!7.
50 Court of Appeal Act Cap 12 (Fiji), s 12(2)(e) and (f); Court of Appeal Act Cap 6 (SI), s 11(2)(e) and (f).
51 Judicature Act 1961, s 54.
52 Judicature Act 1961, s 32.
53 O7 r1.
54 Court of Appeal Rules 1973 (WP), r21(2); Court of Appeal Rules 1983 (SI), r10(1). See, O43 rr3–5 CPR for the date of entry of judgment.
55 Court of Appeal Rules 1983 (SI), r10(3).

granting leave is not conveyed promptly to a party, the court may extend the period pursuant to its general jurisdiction to do so.[56]

A similar problem arises under the Court of Appeal Rules 1961 (Samoa), where the time for filing notice of appeal is 30 days from 'the time when the appellant first had notice' of the decision appealed from.[57] The time limit may be extended under r19. The Court of Appeal Rules 1981 (Cooks) use the same wording, except that the time limit for bringing an appeal is 21 days.[58]

Under the Court of Appeal Rules (Fiji), notice of appeal must be filed and served within six weeks from the date when the judgment was 'signed, entered or otherwise perfected'.[59] In the case of appeal from interlocutory orders, the notice of appeal must be filed and served within 21 days from the date when the order was 'signed, entered or otherwise perfected'.[60] These time limits may be extended by leave of a single judge of the Court of Appeal.[61]

The Court of Appeal Rules 1990 (Tonga) allow 42 days in which to file a notice of appeal.[62] Time runs from the date of decision appealed from.[63] If leave to appeal was required, the notice of appeal must be filed within 14 days of the grant of leave.[64]

5.2 Notice of appeal

The Court of Appeal Rules 1973 (WP) and the Court of Appeal Rules in Fiji Islands, Samoa and Solomon Islands provide for appeals to be by notice of appeal.[65] The Court of Appeal Rules 1983 (SI) provide that the notice is to be in Form A.[66] A sample notice of appeal is contained in Sample Document A4. The notice must state whether the whole or only part of the judgment or order is appealed from and, in the case of appeal from part, the part in question must be specified.[67] The grounds of appeal must be specified and parties will not be permitted to depart from these grounds without leave of the Court.[68]

56 Court of Appeal Rules 1983 (SI), r47.
57 Court of Appeal Rules 1961 (Samoa), r18.
58 Court of Appeal Rules 1981 (Cooks), r17. The time may be extended under r!8.
59 Court of Appeal Rules (Fiji), r16(a).
60 Court of Appeal Rules (Fiji), r16(b).
61 Court of Appeal Act Cap 12, s 35.
62 Court of Appeal Rules 1990 (Tonga), O5 r1(1).
63 O5 r2(1).
64 Court of Appeal Rules 1990 (Tonga), O5 r1(2).
65 Court of Appeal Rules 1973 (WP), r!9; Court of Appeal Rules 1983 (SI), r8(1); Court of Appeal Rules (Fiji), r15(1); Court of Appeal Rules 1961 (Samoa), r4. See also Court of Appeal Rules 1981 (Cooks), r4.
66 Court of Appeal Rules 1983 (SI), r8(2).
67 Court of Appeal Rules 1973 (WP), r19(2); Court of Appeal Rules 1983 (SI), r8(2)(a); Court of Appeal Rules (Fiji), r15(2); Court of Appeal Rules 1961 (Samoa), r10.
68 Court of Appeal Rules 1973 (WP), r5; Court of Appeal Rules 1983 (SI), r8(2)(b); Court of Appeal Rules 1961 (Samoa), rr5 and 10. The position under the Court of Appeal Rules 1973 (WP) is obscured by r27(4) which conflicts with r5. R27(4) empowers the Court of Appeal to exercise any of its general powers regardless of the fact that this exceeds the matters covered in the notice of appeal or respondent s notice.

In Fiji, Form 4 contains a notice of appeal drafted in a criminal context, which may be adapted to a civil appeal. In Samoa, the notice is in the form of a notice of motion.[69] Form 1 should be adapted to a civil context.

Under the Tonga Rules, the notice must be substantially in Form 1.[70] A sample notice in Form 1 is contained in Sample Document A5.

The Court of Appeal Rules 1973 (WP) and the Fiji and Samoan Rules provide that the court is not confined to the grounds of appeal pleaded but that it must not base its decision on any other ground unless the respondent has had the opportunity to argue the point.[71]

The notice of appeal must also state the order sought in lieu of the judgment appealed from.[72] This is not expressly required in Samoa or Cook Islands, either by the Rules or Form 1, which is the form specified for the notice of appeal in criminal cases, but it is still desirable to include it.

5.3 Filing and copies

The notice of appeal must be filed with the registrar of the Court of Appeal[73] or, under the Court of Appeal Rules 1973 (WP) and the Fiji Rules, the registrar of the High Court.[74] In practice, the registrar of the High Court and the registrar of the Court of Appeal is usually the same person. In the case of an application in Fiji, this must be the registrar in Suva.[75] Under the 1973 Rules, the registrar may require a sufficient number of copies to be filed to allow for service on each party and a file copy.[76] The Court of Appeal Rules 1983 (SI) require four copies of documents to be filed on A4 size paper.[77]

Under the Court of Appeal Rules 1990 (Tonga), sealed copies are required to be served. Accordingly, the appellant must file sufficient copies to allow for service on every party directly affected by the appeal plus a copy for the court file.[78] Neither the Court of Appeal Rules 1973 (WP) nor the Samoan Rules specify the number of copies to be filed, although the Samoan Rules specify that the original and four copies of a cross-appeal must be filed.[79] In practice, sufficient copies should be filed to allow for service on each party plus a copy for the court file.

69 R10.
70 Court of Appeal Rules 1990, O5 r1(3).
71 Court of Appeal Rules 1973 (WP), r5, proviso; Court of Appeal Rules (Fiji), r5, proviso; Court of Appeal Rules 1961 (Samoa), r5, proviso. See also Court of Appeal Rules 1981 (Cooks), r4.
72 Court of Appeal Rules 1973 (WP), r19(3); Court of Appeal Rules 1983 (SI), r8(2)(c); Court of Appeal Rules (Fiji), r15(3); Court of Appeal Rules 1990 (Tonga), O5 r2(3)(ii).
73 Court of Appeal Rules 1961 (Samoa), rr4 and 10; Court of Appeal Rules 1990 (Tonga), O5
74 Court of Appeal Rules 1973 (WP), r20; Court of Appeal Rules (Fiji), r4.
75 Court of Appeal Rules (Fiji), r4.
76 Court of Appeal Rules 1973 (WP), r19(5).
77 R42.
78 See Court of Appeal Rules 1990 (Tonga), O6 r2.
79 R11(2).

SAMPLE DOCUMENT A4—NOTICE OF APPEAL (SOLOMON ISLANDS)

IN THE COURT OF APPEAL
FOR SOLOMON ISLANDS

Case No 11/2003

BETWEEN:

ASERI TOGA

Appellant

AND

OUTBOARDS PLUS LTD

Respondent

NOTICE OF APPEAL

TO (1) The Registrar of the Court of Appeal

(2) Outboards Plus Ltd, Respondent

ASERI TOGA having been the Defendant in Case No 1111/2003 in the High Court hereby gives notice of appeal against the judgment or order of that court given on the 1st day of June 2003.

The Appellant appeals against the whole of the judgment.

The grounds of appeal are:

1. The Court erred in law in failing to apply the Sale of Goods Act 1893 (UK).
2. The Court erred in fact in failing to give due weight to the evidence that the goods supplied were not of merchantable quality and/or were not fit for purpose.

The Appellant seeks the following judgment in lieu of that appealed from:

(1) Judgment for the Defendant (Appellant);

(2) Costs of the Defendant (Appellant) to be paid by the Plaintiff (Respondent).

Dated this 25th day of June 2003

.....

Ann Advocate

Barrister and Solicitor for the Appellant

NB Under Rule 16 of the Court of Appeal Rules you will not, without leave of the Court, be able to argue on the hearing of appeal any ground not contained in the Notice of Appeal.

SAMPLE DOCUMENT A5—NOTICE OF APPEAL (TONGA)

IN THE COURT OF APPEAL OF TONGA

Appeal No 11/03

On appeal from the Supreme Court of Tonga

BETWEEN:

ASERI TOGA

Appellant

AND

OUTBOARDS PLUS LTD

Respondent

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved as soon as Counsel can be heard on behalf of the above named Appellant on appeal from the judgment /order of Mr Justice Brown given at the trial of this action on the 1st day of June 2003 whereby it was adjudged that judgment be entered for the Plaintiff with costs to be taxed if not agreed.

The Appellant appeals against the whole of the judgment.

FOR AN ORDER that

(1) Judgment be entered for the Defendant (Appellant);

(2) Costs of the Defendant (Appellant) be paid by the Plaintiff (Respondent).

ON THE GROUNDS that:

1. The Court erred in law in failing to apply the Sale of Goods Act 1893 (UK).
2. The Court erred in fact in failing to give due weight to the evidence that the goods supplied were not of merchantable quality and/or were not fit for purpose.

AND FURTHER TAKE NOTICE that the Appellant consents to the appeal being determined on written submissions in accordance with section 15 of the Court of Appeal Act

Dated this 25th day of June 2003

.....

Ann Advocate

Lawyer for the Appellant
of PO Box 779, Nuku'alofa

To Outboards Plus Ltd, Respondent of
PO Box 569, Nuku'alofa

5.4 Service

Under the Court of Appeal Rules 1973 (WP), service is by the registrar of the High Court.[80] Under the Fiji and Solomon Islands Rules, service is to be in the same manner as service of High Court process.[81] The Fiji Rules require service of the notice on the Chief Registrar of the High Court as well as on the parties.[82] The Samoan Rules require the appellant to serve the notice of appeal on every party directly affected by the appeal.[83]

Under the Tongan Rules, the notice of appeal must be served by the party lodging it on every party directly affected by the appeal and on any other person the court directs to be served.[84] The notice and any other document to be served must be served personally or, where a lawyer is on the record as representing the party to be served, the lawyer may be served.[85] In each case, service is by delivery of a sealed copy.[86] The Tongan Rules also provide that, where a party is represented by a lawyer on the record, service must be effected by the lawyer or one of the lawyer's employees.[87] If a party is not represented by a lawyer, service by and on that party must be effected through a court officer.[88] Immediately after service of any document the server must endorse the original with details of the time, date, place and mode of service and how the server knew the identity of the person served.[89] The endorsement must then be filed with the registrar as evidence of proper service.[90]

6 NOTICE OF CROSS-APPEAL AND RESPONDENT'S NOTICE

The fact that the appellant is not prepared to accept the lower court's judgment does not necessarily mean that the respondent is content with it. The respondent may wish to object to the decision, or some part of it, as well, for the same or for different reasons. A respondent to an appeal who wishes to challenge the Court of Appeal's judgment must file a notice of cross-appeal. Under the Court of Appeal Rules 1983 (SI) the cross-appeal must be filed with the registrar within 21 days of the date of service of the notice of appeal.[91] The cross-appeal must be in Form A, with the necessary adaptations. Another situation that may arise is where the respondent is satisfied with the judgment, but does not agree with the reasons on which it was based. A respondent wishing to contend on appeal that the decision of the High Court should be affirmed on grounds other than those relied on by the court itself must file a respondent's notice in Form C. An example of a respondent's notice is shown in Sample Document A6.

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80 ZR19(4)(a).
81 Court of Appeal Rules (Fiji), r11; Court of Appeal Rules 1983 (SI), r41(1).
82 R15(4).
83 R10.
84 O6 r1.
85 O6 rr2 and 3(b).
86 O6 rr2 and 3(b).
87 O6 r3(a).
88 O6 r4.
89 O6 r6(1).
90 O6 r6(2).
91 R14(1).

SAMPLE DOCUMENT A6—RESPONDENT'S NOTICE (SOLOMON ISLANDS)

IN THE COURT OF APPEAL
FOR SOLOMON ISLANDS

Case No 11/2003

BETWEEN:

ASERI TOGA

Appellant

And

OUTBOARDS PLUS LTD

Respondent

RESPONDENT'S NOTICE

TO ASERI TOGA

OUTBOARDS PLUS LTD having received a Notice of Appeal hereby gives notice that it contends that the decision of the High Court should be affirmed on grounds other than those relied upon by that court.

And that in support of that contention it relies upon the following grounds:

The Court erred in law in failing to apply the Sale of Goods Act 1893 (UK).

Dated this 10th day of July 2003

.....

Jennifer Justice

Barrister and Solicitor for the Respondent

Under the Court of Appeal Rules 1961 (Samoa), the cross-appeal must be filed within 10 days of the date of service of the notice of appeal.[92] The cross-appeal is filed with the registrar and served on the appellant on the same day.[93] The form of cross-appeal is not prescribed, but the Rules specify that it must state fully the particulars in respect of which a variation of the decision is sought.[94] In practice, it is adapted from the notice of appeal. The Court of Appeal Rules 1981 (Cooks) do not provide for a cross-appeal or any response to be filed by the respondent.

Under the Court of Appeal Rules 1973 (WP), the Court of Appeal Rules (Fiji) and the Court of Appeal Rules 1990 (Tonga), the cross-appeal is referred to as a respondent's notice. This is the case whether the respondent is challenging the decision, in whole or part, or only the grounds on which it was based.[95]

Under the Court of Appeal Rules 1973 (WP), the notice must be filed with the registrar of the High Court within 21 days.[96] In Tonga, the notice must be filed with the registrar of the Court of Appeal within 42 days.[97]

Under the Court of Appeal Rules (Fiji), the respondent's notice must be served on all parties directly affected within 21 days of service of the notice of appeal.[98] Within two days after service, four copies of the respondent's notice must be 'furnished' to the registrar of the Court of Appeal.[99] It would seem from the use of the word 'furnish' as opposed to the word 'filed', used in relation to the notice of appeal,[100] that the respondent's notice is not required to be filed. However, r4 provides that all applications must 'ordinarily' be filed. In practice, respondent's notices are normally filed with the registrar of the Court of Appeal.

The respondent's notice is not attached to the Court of Appeal Rules 1971 (WP), (Fiji) or 1990 (Tonga) as a form, but the Rules specify that, if it is sought to vary or set aside the judgment, the order sought in lieu must be stated.[101] In all cases, the grounds of the respondent's contention must be stated concisely.[102] The respondent will be restricted to the grounds stated in the notice unless the court gives leave to rely on an additional ground.[103] The Fiji Rules and the Court of Appeal Rules (WP) 1973 also restrict the respondent to the relief requested in the notice, unless the court gives leave otherwise.[104] This restriction would no doubt be applied in Tonga as well, under the general rule restricting parties to their pleadings.[105]

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92 R11(1).
93 R11(2).
94 R11(3).
95 Court of Appeal Rules (Fiji), r19(4); Court of Appeal Rules 1973 (WP), r23(4); Court of Appeal Rules 1990 (Tonga) O5 r3.
96 Court of Appeal Rules 1973 (WP), r23(4).
97 O5 r3(1).
98 Court of Appeal Rules (Fiji), r19(4).
99 R19(5).
100 R15(4).
101 Court of Appeal Rules (Fiji), r19(1); Court of Appeal Rules 1973 (WP), r23(1); Court of Appeal Rules 1990 (Tonga), O5 r3(2)(a).
102 Court of Appeal Rules (Fiji), r19(1) and (4); Court of Appeal Rules 1973 (WP), r23(1) and (2); Court of Appeal Rules 1990 (Tonga), O5 r3(2)(b).
103 Court of Appeal Rules (Fiji), r19(3); Court of Appeal Rules 1973 (WP), r23(3); Court of Appeal Rules 1990 (Tonga), O5 r3(3).
104 Court of Appeal Rules (Fiji), r19(3); Court of Appeal Rules 1973 (WP), r23(3).
105 See Chapter 8, note 4.

7 INTERLOCUTORY MATTERS

7.1 Application

Under the Court of Appeal Rules 1973 (WP) and the Court of Appeal Rules (Fiji), all interlocutory applications are by summons in chambers.[106]

No form is prescribed for interlocutory applications under the Solomon Islands Rules. Applications may be dealt with in chambers.[107] In applications to be heard by a single judge, the registrar places before the judge the application and the record of the court below or such part as is sufficient to enable the judge to consider and determine the appeal.[108] The Rules appear to envisage that the application will be accompanied by written submissions by the applicant as r17(5) provides that the respondent's submissions are to be in writing. Interlocutory applications are dealt with on the papers, but the judge may require further written submissions.[109] There is an appeal from the decision of a single judge to the full court.[110]

Under the Court of Appeal Rules 1990 (Tonga) all interlocutory applications are commenced on notice in Form 2 supported by affidavit.[111] A party served with notice of an interlocutory application may lodge affidavit evidence in reply within 14 days of service of the notice.

7.2 Amendment of notice of appeal, cross-appeal or respondent's notice

Under the Court of Appeal Rules 1973 (WP), the court's leave is required to amend a notice of appeal or respondent's notice.[113] Under the Fiji Rules, the notice of appeal or respondent's notice may be amended without leave not less than 14 days before the appeal is listed to be heard, by service of a supplementary notice on all parties to the appeal.[114] Amendment may be made at any stage with the leave of the Court of Appeal.[115] After service, four copies of the supplementary notice must be furnished to the registrar.[116]

There is no provision for amendment under the Solomon Islands Rules, but the proviso to r16, which restricts parties to the terms of notices filed, provides for amendment of a notice by leave of the Court of Appeal or a single judge at any time.

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106 Court of Appeal Rules (Fiji), r26(13); Court of Appeal Rules 1973 (WP), r28.
107 R44.
108 R17(2).
109 R18(1). Whilst it is not provided for in the Rules, an opportunity to make oral submissions at a hearing is sometimes given in applications to a single judge.
110 R18(3).
111 O7 r2(1).
112 O7 r2(2).
113 R24.
114 R20(1)(b).
115 R20(1)(a). The power to give leave to amend may be exercised by a single judge: Court of Appeal Act Cap 12, s 20(c).
116 R20(2).

Similarly, there is no provision for amendment under the Samoan Rules, but the amendment may be permitted by leave of the Court of Appeal or the President of the Court under the general powers in r38.[117]

Under the Tongan Rules, the notice of appeal or respondent's notice may be amended without leave not less than 28 days before the appeal is listed to be heard, by filing with the registrar of the Court of Appeal a supplementary notice.[118] If the appeal is to be determined on written submissions,[119] the supplementary notice may be filed at any stage before the documents are sent to the members of the court.[120]

7.3 Security for costs

Under the Court of Appeal Rules 1973 (WP) and the Court of Appeal Rules 1983 (SI), the registrar may fix the amount payable as security for the costs of the appeal.[121] Under the Court of Appeal Rules 1973 (WP), the Court of Appeal itself has power to order additional security for costs.[122] Under the Fiji Rules, the appellant must apply to the registrar within 30 days of service of the notice of appeal to fix the amount of security for costs or to dispense with this requirement.[123] Again, the Court of Appeal has power to order further security.[124]

In Samoa, payment of security for costs is a condition of all appeals and the amount[125] and the time[126] for payment is set at the hearing of the application for leave to appeal.[127] For that reason, an order granting leave to appeal is required in all cases, even where the appeal is as of right.[128] This is a confusing process and might be better replaced with a directions hearing in cases where appeal is as of right. Where leave is required, directions as to security for costs and any other matters could still be made at the hearing of the application for leave.

There is no provision for security for costs in the Court of Appeal Act or Court of Appeal Rules of Tonga. Such security could, however, be ordered by reference to the English Court of Appeal rules.

7.4 Stay pending appeal

The Court of Appeal Rules 1973 (WP), the Court of Appeal Rules (Fiji) and the Court of Appeal Act 1983 (SI) provide that, unless otherwise ordered, an appeal does not operate

117 Court of Appeal Rules 1981 (Cooks), r32 is identical.
118 O5 r(2)(a).
119 See above and O8.
120 O5 r4(2).
121 R22; r12(1)(iii).
122 R29.
123 R17(1)(c).
124 R30.
125 The amount must not exceed $200: R54(3).
126 The time allowed for payment must not exceed two months.
127 Judicature Act 1961 (Samoa), s 54(3). See *Lamosi v Nelson Mackenzie Ltd*, Court of Appeal, Samoa, Civ App 5/95, 30 August 1995.
128 Judicature Act 1961 (Samoa), s 54(1).

as a stay of execution.[129] In *Tori and Others v Morris & Price and Others,*[130] Kabui J discussed the two conflicting principles that have to be balanced by the court when considering whether a stay should be granted. On the one hand, a successful litigant at first instance should not be deprived of the fruits of his success.[131] On the other, an appellant should be allowed to exercise the right to appeal even if it means the court having to make an order for a stay.[132] His Lordship cited the following passage from para 455 of 17 *Halsbury's Laws of England:*[133]

> The court has an absolute and unfettered discretion as to the granting or refusing of a stay and as to the terms upon which it will grant it and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing…

The Judicature Act (Samoa) and the Tongan Rules also provide that an appeal does not operate as a stay.[134]

7.5 Setting down

The Court of Appeal Rules 1973 (WP) provide that the registrar of the High Court is responsible for the preparation of the record.[135] There are no documents that must automatically form part of the record. Rather the emphasis is on keeping the record as concise as possible. In particular, purely formal documents are excluded and special care is to be taken to avoid duplication.[136] A list of excluded documents must be included in the record.[137] On completion of the record, a certified copy and five uncertified copies are sent by the registrar to the registrar of the Court of Appeal.[138] The cost of preparation, copying and certifying the record must be paid by the appellant, but may be recovered as costs in the appeal.[139] Parties may apply for a copy of the record but must pay for the cost of this themselves.[140] Notice of the hearing date is fixed by the registrar of the Court of Appeal at the direction of the President of the Court and served by the registrar on all parties to the appeal.[141]

In Vanuatu, changes have been made to the procedure for preparation of the appeal book by practice direction.[142] Approximately four weeks prior to the Court of Appeal sitting, a review date is allocated. The applicant must find out the date of the review from

129 Court of Appeal Rules 1973 (WP), r26(1); Court of Appeal Rules (Fiji), r25; Court of Appeal Rules 1983 (SI), r11(5). For an example of facts that may be relevant in an application for a stay, see *Attorney-General of Fiji v Pacoil Fiji Ltd,* unreported, Court of Appeal, Fiji, Civ App ABU0014/1999S, 13 August 1999.
130 Unreported, High Court, Solomon Islands, Civ Cas 007/2001, 28 June 2001.
131 See *TheAnnot Lyle* [1886] 11 PD 114.
132 See *Wilson v Church (No 2)* [1879] 12 Ch D 454.
133 (1973) 4th edn, 17 *Halsbury's Laws of England,* para 455.
134 Judicature Act 1961 (Samoa), s 58; Court of Appeal Rules 1990 (Tonga), O9.
135 Court of Appeal Rules 1973 (WP), r25(1).
136 R25(1).
137 R25(1).
138 R25(2).
139 R25(4).
140 R25(3).
141 R30.
142 Chief Justice's Practice Direction, 27 July 2000 (Van).

the court and notify the respondent. The appellant must bring all documents intended to be included in the appeal book to the hearing and must be ready to tell the registrar what the issues in the appeal are and why the documents are required. The respondent must do the same for any additional document that he/she wishes to include in the appeal book. After the review hearing, the appellant must produce the appeal book and lodge five copies with the court at least 14 days prior to the hearing.

Under the Fiji Rules, the Chief Registrar of the High Court is responsible for the preparation of the record.[143] The registrar may give the parties the opportunity to be heard as to the documents to be included and any disputed question may be submitted to a single judge of the High Court for directions.[144] In common with the 1973 Rules, there are no documents that must automatically form part of the record. Again, emphasis is on keeping the documents included to a minimum.[145] A list of the excluded documents must be included in the record.[146] The record must also include a note of any objection to a document, so that this can be taken into account when costs orders are made.[147] On completion of the record, a certified copy and four uncertified copies are sent by the Chief Registrar to the registrar of the Court of Appeal.[148] Parties are entitled to a copy on payment of the prescribed fee.[149] Notice of the hearing date is fixed by the registrar on direction from a judge and served by the registrar on all parties to the appeal.[150]

The Court of Appeal Rules 1983 (SI) provide for the record to be prepared by the registrar after payment by the appellant of the costs of preparation.[151] Four copies are required plus sufficient extra copies to allow each of the parties to have one copy each. The record includes copies of the following documents, so far as they are necessary for the proper disposal of the appeal:[152]

(a) process and pleadings;
(b) affidavits;
(c) transcript of the notes of evidence;
(d) documentary exhibits;
(e) reasons for the judgment or order under appeal;
(f) the formal judgment or order under appeal;
(g) the notice of appeal;
(h) the respondent's notice.

143 Court of Appeal Rules (Fiji), r18(1).
144 R18(1).
145 R18(2).
146 R18(2).
147 R18(3).
148 R18(5).
149 R18(6).
150 R31.
151 R19(1). See r12(1)(b)(i) regarding payment of the costs of preparation of the record.
152 R19(3). The registrar should consult with the parties before omitting parts of the proceedings from the record: r19(4).

After preparation of the record, the registrar must, on the direction of the President of the Court of Appeal, list the case for the next convenient session and serve notice of the proposed hearing date on all the parties.[153]

The Samoan Rules provide for the appellant to prepare the record.[154] The record includes copies of the following documents:[155]

(a) the pleadings;
(b) any interlocutory orders with all motions, affidavits and other documents filed;
(c) notes of evidence taken at trial;
(d) all exhibits to which reference is necessary at the hearing of the appeal;
(e) a list of exhibits not forming part of the record;
(f) the judgment appealed from;
(g) notice of cross-appeal, if any;
(h) order granting leave to appeal, if any.

The record and six copies are then lodged with the registrar, together with a *praecipe*[156] to set the appeal down.[157] The time limit for setting down is three months from the date of filing the notice of appeal or order granting leave to appeal.[158]

Under the Tongan Rules, the record is prepared by the registrar of the Court of Appeal and consists of:

(a) the notice of appeal, any respondent's notice and supplementary notice;
(b) every written submission;
(c) the pleadings and orders in the action;
(d) if requested by a party,[159] a transcript of the evidence in the lower court;
(e) all documentary exhibits relevant to the stated grounds of appeal;
(f) a list of all other exhibits relevant to the stated grounds of appeal; and
(g) the judgment appealed from.

A copy must be given to each party.[160] The registrar may set the appeal down for hearing any time after the expiry of the time for lodging the respondent's notice.[161]

153 R20.
154 R13. Court of Appeal Rules 1981 (Cooks), r13 is identical.
155 *Ibid*.
156 *'Praecipe'* is the name given to the form used to record the particulars of a document that the party completing it is requesting the court to issue.
157 R14. Court of Appeal Rules 1981 (Cooks), r14 is identical.
158 *Ibid*.
159 O8 r3(1) provides that a transcript of proceedings will not be prepared unless requested by a party. A charge of one palanga a page is payable: O8 r2(3).
160 O8 r4(3)(b).
161 O8 r4(2).

8 HEARING

8.1 Mode of hearing

Appeals are by way of rehearing.[162] The Court of Appeal has power to order a new trial of some or all of the issues in a case.[163] Under the Court of Appeal 1973 (WP) and the Fiji Rules, it may not take this step on the ground of improper admission or rejection of evidence unless there has been a substantial miscarriage of justice.[164]

The Tongan rules provide that the appeal may be determined either on an oral hearing or on written submissions. In the case of an oral hearing, counsel must lodge four copies of skeleton arguments and, where appropriate, a chronology of events, at least 14 days before the hearing date.[165] In the absence of directions to the contrary from the court, the case for the appellant is presented first. The case for the respondent is then presented and the appellant may then reply.[166]

8.2 Procedure if a party fails to appear

Under the Court of Appeal Rules 1973 (WP), if the appellant fails to appear, the appeal may be dismissed unless the appellant has included in the record a statement of intention not to appear and a written statement of arguments in support of the appeal.[167] If the respondent fails to appear, the appeal may proceed in his/her absence.[168] Any written submissions filed by the respondent in accordance with the Rules must be taken into account.[169] If the appeal is dismissed or allowed in the absence of a party, he/she may apply within 30 days of receiving notice of the decision for the rehearing of the appeal. Application will only be granted if good reason is shown for the failure to appear.[170]

The position in Solomon Islands is similar. If the appellant fails to appear, the appeal may be dismissed unless the appellant has delivered a written statement of arguments in support of the appeal.[171] There is no express power to proceed in the absence of the respondent. However, the court has all the powers of the High Court, which include the power to allow the appeal to proceed in the absence of the respondent.[172] Any written submissions filed by either party must be taken into

162 Court of Appeal Rules 1973 (WP), r27(2), proviso; Court of Appeal Rules (SI), r21(1); Court of Appeal Rules (Fiji), r!5(1).
163 Court of Appeal Rules 1973 (WP), r31(1); Court of Appeal Rules (Fiji), r23(1); Court of Appeal Rules 1973 (SI), r23(c); Court of Appeal Rules 1961 (Samoa), r25.
164 Court of Appeal Rules 1973 (WP), r31(2); Court of Appeal Rules (Fiji), r23(2).
165 O8 r4(4). The time limit was increased from seven days by LN 31/93 Tonga.
166 O8 r4(5).
167 R32(2).
168 R32(3).
169 R32(4). A statement of argument must be filed at least 14 days before the date fixed for the hearing: r32(4).
170 R32(6).
171 R21(6).
172 Court of Appeal Act Cap 6 (SI), s 12; O38 r5 CPR.

account.[173] The Court of Appeal may set aside a dismissal on good cause being shown and the appeal re-listed. The Court may impose such terms as it sees fit on the setting aside.[175]

The Court of Appeal Rules 1961 (Samoa) provide that, if the appellant fails to appear and is proved to have been served with a notice of hearing, the case is dismissed with costs. However, the court has the power to re-enter the case for hearing on such terms as it thinks fit.[176] If the respondent fails to appear and is proved to have been served, the Rules also provide for an *ex parte* hearing.[177]

The Court of Appeal Rules (Fiji) do not expressly provide for judgment in default of appearance at the hearing. However, the court has all the 'powers and duties' of the High Court, which includes the power to dismiss the appeal in the absence of appearance by the appellant or to proceed *ex parte* in the absence of the respondent.[178]

As discussed above, appeals in Tonga may be determined without a hearing. There is no provision for judgment in default in the case of an oral hearing. However, as in Solomon Islands and Fiji Islands, the court has power to dismiss the appeal or to allow the appellant to proceed in the absence of the respondent by virtue of the fact that it has all the powers of the Supreme Court.[179]

8.3 Adjournments

The Court of Appeal Rules 1983 (SI) allow the Court of Appeal to adjourn the hearing either generally or to a specified date.[180] The Court of Appeal Rules (Samoa) provide that the court may adjourn the appeal on such terms as it thinks fit.[181] The Cook Islands Rules make similar provision.[182]

The Court of Appeal Rules 1973 (WP), the Court of Appeal Rules (Fiji) and the Court of Appeal Rules 1990 (Tonga) do not expressly provide for adjournment. However, the Court of Appeal in those countries may rely on the fact that it has all the powers of the superior court to grant an adjournment.[183]

8.4 Facts not pleaded

As a general rule, a party is not allowed to base grounds of appeal on facts which were not pleaded in the court below. To do otherwise would mean that the respondent has to answer a different case without the benefit of evidence which the respondent might have

173 R21(3). A statement of argument must be filed at least 14 days before the date fixed for the hearing: r21(2).
174 R21(6).
175 R21(6).
176 R21. Court of Appeal Rules 1981 (Cooks), r20 is identical.
177 R22. Court of Appeal Rules 1981 (Cooks), r21 is identical.
178 High Court Rules (Fiji), O35 r1.
179 Court of Appeal Act Cap 9 (Tonga), s 11; Supreme Court Rules 1991 (Tonga), O23 r4.
180 R23(e).
181 1961, r6.
182 1981, r6.
183 Court of Appeal Rules 1973 (WP), r27(1); Court of Appeal Rules (Fiji), r22; Court of Appeal Act Cap 9 (Tonga), s 11.

called in rebuttal at trial. An exception may be made where the facts have only come to light since the hearing at first instance. The Court of Appeal Rules 1961 (Samoa) provide that 'a party may allege facts essential to the issue which have come to his knowledge after the date of the decision from which the appeal is brought'.[184]

In *Isileli Tavake Cocker v Hiva Cocker and Sione Cocker,*[185] the Supreme Court of Tonga was asked to give leave for the appellant to adduce fresh evidence on appeal. This evidence was related to facts which had not been pleaded or raised at trial. In dismissing the application, Ward CJ held that, if such evidence were to be admitted, it would mean that the defendants had to face a totally new line of attack from the plaintiff on appeal.[186] His Lordship referred to *The Tasmania*[187] where it was stated that a point:

> …not taken at the trial and presented for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing on the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box.

Ward CJ considered that the test had been strictly applied for good reason. The case before him did not pass any of the relevant tests and leave to adduce new evidence was denied.

8.5 New evidence

In general, the Court of Appeal will not hear new evidence on the appeal. However, the court may, at its discretion, receive further evidence and admit documents if this is in the interests of justice.[188] On appeals from a final judgment and appeals after a hearing on the merits, leave to adduce further evidence is normally required and will only be given where there are special grounds.[189] No leave is required if the evidence relates to matters which have occurred since the decision appealed from.[190]

The Court of Appeal Rules 1961 (Samoa) specifically provide that it is not open to a party to adduce new evidence without the leave of the court,[191] unless the evidence relates to facts which have come to light since the date of the decision appealed from.[192] The

184 R23(1).
185 Unreported, Supreme Court, Tonga, Civ App 8/01, 17 January 2002.
186 *Ibid,* p 2.
187 [1890] 15 App Case 223 at 225, *per* Herschell LJ.
188 Court of Appeal Rules 1973 (WP), r27(2); Court of Appeal Rules (Fiji), r2(1); Court of Appeal Rules (SI), r21(1), proviso and r22.
189 Court of Appeal Rules 1973 (WP), r27(2), proviso; Court of Appeal Rules (Fiji), r2(1), proviso; Court of Appeal Rules (SI), r22(3).
190 Court of Appeal Rules 1973 (WP), r27(2), proviso; Court of Appeal Rules (Fiji), r2(1), proviso; Court of Appeal Rules (SI), r22(3), proviso.
191 R23(1) and (2) and Judicature Act 1961, s 57.

exceptions to this rule were considered in Tonga in *Isileli Tavake Cocker v Hiva Cocker and Sione Cocker.*[193] In that case, the appellant sought to call evidence that the signature on a document was not genuine and that the appellant's father had been subjected to undue influence over an allotment of land. Neither matter was pleaded and neither was raised at the trial. Ward CJ referred to *Ladd v Marshall,*[194] where Denning LJ set out three principles which the court would apply when considering an application to call fresh evidence:

> To justify the reception of fresh evidence…three conditions must be fulfilled: 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.

In *Isileli Tavake Cocker v Hiva Cocker and Sione Cocker,*[195] Ward CJ held that the evidence which the applicant sought to adduce was known at the time of the trial. As such, it failed the first of the three conditions and, in view of the basis upon which the case was decided, it also failed the second.

8.6 Judgment

Under the Court of Appeal Rules 1973 (WP), the registrar of the High Court must notify any party who was not present or represented at the appeal of the result.[196] If neither party was present at the appeal, the court is not required to deliver its judgment in open court but may deliver it in writing and serve it on the parties.[197]

The Court of Appeal Act (Fiji) provides that the court delivering the judgment need not be constituted by the same judges when judgment is delivered and that it may be pronounced in such terms as the court thinks appropriate, provided that the full terms must be made available in writing to the parties.[198]

The Solomon Islands Rules do not provide that judgment must be given in open court, but s 11(9) of the Constitution[199] provides that all proceedings, 'including the announcement of the decision of the court' must be held in public.

The Court of Appeal Rules 1961 (Samoa) provide that the court may draw inferences of fact and give any judgment or make an order which the court considers should have been made and to make any further order as the case may require.[200] The Court of Appeal

192 R23(1).
193 Unreported, Supreme Court, Tonga, Civ App 8/01, 17 January 2002.
194 [1954] 1 WLR 1489 at 1491.
195 Unreported, Supreme Court, Tonga, Civ App 8/01, 17 January 2002.
196 R34(2). In theory, the registrar of the Court of Appeal must notify the registrar of the High Court of the decision and any orders or directions (r34(1)(a)), but this requirement is a vestige of the time when these courts were in separate countries. Today these offices are held by the same person.
197 Court of Appeal Rules 1973 (WP), r32(7).
198 Section 18.
199 1978.
200 R24.

may affirm, reverse or vary the judgment appealed from. It may set the judgment aside and order a new trial or make any order it thinks fit.[201]

Under the Tongan Rules, judgment may be unanimous or the opinion of a majority. Only one judgment may be given, but a dissenting member of the Court may briefly state his/her reasons for dissenting.

9 COSTS

Costs may be taxed under the Court of Appeal Rules 1973 (WP), the Fiji Rules and the Solomon Islands Rules.[202] The registrar of the Court of Appeal is the taxing officer.[203] The Court of Appeal Rules 1961 (Samoa) provide that costs shall be in accordance with the scale in the Second Schedule but the court has an overriding discretion.[204]

The Court of Appeal Rules 1990 (Tonga) make no provision as to costs in civil appeals. However, the Court of Appeal Act states that no costs shall be allowed to either side on the hearing and determination of an appeal under the criminal part of the Act.[205] This suggests that the award of costs is envisaged in civil appeals and the Court has power to award costs by virtue of the fact that it may exercise all the power of the Supreme Court.[206]

201 Judicature Act 1961, s 56 and Court of Appeal Rules 1961, r25.
202 Court of Appeal Rules 1973 (WP), r33(1); Court of Appeal Rules (Fiji), r32; Court of Appeal Rules 1983 (SI), r45.
203 Court of Appeal Rules 1973 (WP), r13; Court of Appeal Rules (Fiji), r9; Court of Appeal Rules 1983 (SI), r45.
204 R26. Court of Appeal Rules 1981 (Cooks), r23 is identical.
205 Cap 9, s 25(1).
206 Court of Appeal Act Cap 9, s 11; Supreme Court Rules 1991, O29.

CHAPTER 15

CONCLUSION

1 THE NEED FOR CHANGE

1.1 Unsuitable frameworks

With the exception of the new Vanuatu rules, the civil procedure rules applying in the region are in need of review. Tuvalu has already embarked on this. As discussed in Chapters 1 and 3, the courts and the rules are based on overseas models. As with introduced substantive law, there was little consideration of their suitability as a framework for small island countries. In particular, procedure for dealing with cases involving customary law was not explored even though it was recognised by some regional constitutions as a formal source of law at least equivalent to common law and equity.[1] Customary institutions and procedures might usefully have been employed to deal with some civil disputes in a familiar and acceptable way.[2] Instead, there was an assumption that the 'coloniser's' approach was the correct one.[3] It has since been admitted that this is not necessarily the case and the overseas models have themselves been extensively reformed.

Attempts have been made in some countries to have customary law, arising in disputes regarding land or minor civil matters,[4] dealt with in special courts. These courts are usually referred to as 'customary courts',[5] although this description is misleading if it is taken to suggest that they are traditional bodies or apply customary procedure.[6] In any event, there is often a means of re-entry into the formal system via an appeal on law or by application for judicial review, which brings the rules of civil procedure back into play.

1.2 Weaknesses in civil systems

1.2.1 Courts

Regional courts suffer from lack of resources. There is fierce competition for development funds in these small island countries. Further, funds are usually part of the budget for the Ministry of Justice as a whole. In Vanuatu, particularly, the Chief Justice has repeatedly

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1 In some countries it ranks below common law and equity; in others it is only a source of law in certain types of dispute. See further, Corrin Care, J, 'Wisdom and Worthy Customs' (2002) 80 Reform 31.

2 Customary dispute resolution was at best tolerated, until native courts were introduced with a view to allowing village affairs to be governed by customary law. See further, Corrin Care, J *et al, Introduction to Customary Law,* 1999, London: Cavendish, p 3.

3 This assumption was already being questioned in England during this period. See, for example, the amusing portrayal of proceedings in the Court of Chancery in Dickens, C, *Bleak House,* 1998, Oxford: OUR

4 Customary law does not, generally, distinguish between criminal and civil law.

5 For example, the local courts in Solomon Islands. See further, Chapter 3.

6 See further, Corrin Care, J, 'Wisdom and Worthy Customs' (2002) 80 Reform 31 at p 33.

called for a separate budget for the courts and pointed out that the present system threatens the separation of powers. Lack of resources can inhibit the civil process in numerous ways, ranging from lack of personnel and poor library facilities to shortages of photocopying paper.

1.2.2 General weaknesses

General weaknesses in the current systems of civil procedure operating in the region include:

- Archaic language (for example, the use of the words 'herein' and 'thereof').
- Latin phrases (for example, the use of *'ad testificandum'* and *'ex parte'*).
- Unnecessarily complex procedures (for example, outside Vanuatu, rules modelled on the RSC retain the distinction between actions and matters.[7] Another example is the difference between general and special indorsement, which governs the right to apply for summary judgment under the CPR).[8]
- Unnecessarily complex distinctions between procedures in different levels of courts.
- Complicated forms.
- Delays, particularly those caused by adjournments when one of the parties is not ready.[9]
- Lack of provision for cases involving customary law.

Some of these weaknesses have been eradicated or ameliorated in Vanuatu.

1.2.3 Particular weaknesses

Just two examples of the types of weaknesses in the current regional Rules, explored in the preceding chapters, are:

- Complicated originating process

  Rules based on the old English model require a different form to be used to commence proceedings, depending on a difficult distinction between actions and matters. Further, in interlocutory applications, there is a choice between a summons and a notice of motion.[10]

- Outdated scales of costs

  A striking example is the scale introduced in 1975 in Solomon Islands, which has not been changed since.[11] A maximum of SBD15 is allowed for issue of the writ. This often results in a pyrrhic victory for the successful party. In fact, the cost of drawing up a bill of costs in taxable form, which is an art in itself, may outweigh the sum awarded.

7 See further, Chapter 5.
8 O3 r5 and O14 r1 CPR.
9 See the remarks of Byrne J in *Suva City Council v KW March Limited,* unreported, High Court, Fiji Islands, Civ App 957/82, 15 May 1997.
10 See further, Chapter 9.
11 High Court (Amendment) Rules LN 23/1975. See further, Chapter 12.

2 APPROACHES TO REFORM

The most radical approach to the reform of civil procedure would be to eradicate the existing courts system and replace it with alternative dispute resolution forums with simplified procedures. These forums could incorporate regional structures and methods of dispute resolution. An example of attempts to do this in village level disputes can be seen in the Village Fono Act 1990, Samoa. An example of an attempt relating to the resolution of customary land disputes is the Customary Land Tribunal Act 2002, Vanuatu.

In Vanuatu, where the most recent reform of the rules has taken place, a less dramatic approach has been taken. The Rules Committee has replaced the existing Rules, but without departing from the general, introduced pattern of civil procedure. Notwithstanding, whilst the Committee has considered some recently reformed rules operating in other jurisdictions, it has not slavishly followed any of these. Rather, it has thoroughly considered each Order of the High Court (Civil Procedure) Rules 1964 and tried to make it simpler and more effective. Further, an admirable effort has been made to introduce case management techniques and offer the opportunity of alternative dispute resolution. There are a few discrepancies in the Rules, but this is only to be expected with such an ambitious innovation. The Rules Committee plans to review the Rules at the end of the first year of operation and, no doubt, these wrinkles will then be ironed out.

Tonga also made new Rules in 1991 that came into force on 1 January 1992. These Rules are the briefest of the regional provisions and rely heavily on the English Rules to fill any resulting gaps. They contain no concessions to case management or alternative dispute resolution and perpetuate the unreformed English model of civil procedure. However, these Rules are, in many ways, preferable to the complicated High Court (Civil Procedure) Rules 1964. The brevity of the Tongan Rules has a lot to recommend it and, in the hands of experienced judges, the rules seem to fulfil their role well.

In Fiji Islands, the Rules were replaced in 1988 to incorporate changes that had taken place in England. Since then, reforms have been implemented on a piecemeal basis, particularly in 1998, when some attempt was made to deal with delays and wasted court time.[12] In particular, the amending Rules attempted to reduce delay by introducing costs penalties for unnecessary adjournments and expressly provided for costs orders to be made against lawyers personally.

The least radical means of reforming the Rules is to make minor changes on an *ad hoc* basis. This approach has been followed by the Rules Committee in Solomon Islands. Changes have been introduced between 1967 and 1998.[13] These are mainly of a minor nature, for example, the addition of service message to the permitted methods of substituted service.[14] A more extensive change was made in 1980, when judicial power

12 High Court (Amendment) Rules 1998, LN 72/1998 (SI).

13 High Court (Civil Procedure) (Amendment) Rules 1967, LN 104/1969 (SI); High Court (Civil Procedure) (Amendment) Rules 1967, LN 14/1971 (SI); High Court (Amendment) Rules, LN 22/1975 (SI); High Court (Amendment) Rules, LN 23/1975 (SI); High Court (Amendment) Rules, LN 86/1975 (SI); High Court (Amendment) Rules, LN 55/1980 (SI); Constitutional Provisions Rules of Court 1982, LN 9/1982 (SI); High Court (Amendment No 1) Rules, LN 4/1985 (SI).

14 High Court (Amendment No 1) Rules, LN 4/1985 (SI).

was conferred on the registrar to determine a wide range of interlocutory matters and to give final judgment in some instances.[15] Changes were also introduced to accommodate appeals for the Customary Land Appeal Court.[16] The High Court (Civil Procedure) Rules 1964 stand unchanged in Kiribati and Tuvalu. In Tuvalu, a review of the Rules is currently being undertaken. It is intended to replace the High Court (Civil Procedure) Rules 1964 with a simpler and shorter set of Rules.

3 BENCHMARKS

3.1 A guide to reform

Before embarking on the reform process, countries of the region need to assess what they are attempting to achieve. One way of doing this is to set out the benchmarks of a fair, efficient and acceptable system of civil courts and procedure.

3.2 Constitutional guarantees

In many countries of the region, the Constitution has already set a general benchmark. The fundamental rights provisions sometimes guarantee the right to take a case to court or make some other provision about the right to a fair trial. This may be in a general form of 'protection of the law', as in Cook Islands[17] and Vanuatu,[18] or in a more specific form, as shown in Table 15.1.

15 High Court (Amendment) Rules, LN 55/80 (SI).
16 *Ibid*.
17 Constitution of the Cook Islands 1964, s 64(1)(b).
18 Constitution of Vanuatu, Art 5(1)(d).

TABLE 15.1—CONSTITUTIONAL PROVISIONS RELATING TO CIVIL PROCEDURE

Fiji Islands	Civil litigants are entitled 'to have the case determined within a reasonable time'.[19]
Kiribati	Civil litigants are entitled to 'a fair hearing within a reasonable time'.[20]
Nauru	Civil litigants are entitled to be 'fairly heard and within a reasonable time'.[21]
Samoa	Civil litigants are entitled to 'a fair and public hearing within a reasonable time'.[22]
Solomon Islands	Civil litigants are entitled to 'a fair hearing within a reasonable time'.[23]
Tonga	'No one shall be intimidated into giving evidence against himself nor shall the life or property or liberty of anyone be taken away except according to law.'[24] 'It shall not be lawful for any judge or magistrate to adjudicate or for any juryman to sit in any case in which one of his relations is concerned either as a plaintiff defendant or witness: Nor shall any judge or magistrate sit in any case which concerns himself: Nor shall any judge or magistrate or juryman on any pretence receive any present or money or anything else from anyone who is about to be tried nor from any of the defendant's friends but all judges magistrates and jurymen shall be entirely free and shall in no case whatever be interested or biased on the discharge of their duties.'[25]
Tuvalu	Civil litigants are entitled to 'a fair hearing within a reasonable time'.[26]

These guarantees contain a mandate to all arms of government to strive to achieve an efficient court system. Whilst they are more often resorted to in the context of demands for the reform of criminal procedure, they may be equally useful in focusing attention on the need for reform in the civil sphere.

19 Constitution Amendment Act 1997 (Fiji), s 29(3).
20 Constitution of Kiribati, s 10(8).
21 Constitution of Nauru, s 10(9).
22 Constitution of Samoa, Art 9(1).
23 Constitution of Solomon Islands, s 10(8).
24 Constitution of Tonga, s 14.
25 Constitution of Tonga, s 15.
26 Constitution of Tuvalu 1986, s 22(11).

3.3 More specific benchmarks

Building up from these general benchmarks, more particular goals might be articulated for reform of civil procedure in the region. By way of example, Lord Woolf concluded that to ensure access to justice a civil litigation system should:[27]

(a) be just in the results it delivers;
(b) be fair in the way it treats litigants;
(c) offer appropriate procedures at a reasonable cost;
(d) deal with cases with reasonable speed;
(e) be understandable to those who use it;
(f) be responsive to the needs of those who use it;
(g) provide as much certainty as the nature of particular cases allows; and
(h) be effective, adequately resourced and organised.

These benchmarks would appear to be universally applicable and could be adopted with only minor changes, including, perhaps, a specific recognition of the needs of the unique regional legal systems, which incorporate customary law as a formal source of law. For example, following on from Lord Woolf's para (c), which acknowledges the need for appropriate procedures in a general way, the following benchmark might be inserted: accommodate the particular needs of customary law.

The Civil Procedure Rules 2002 of Vanuatu are the only Rules to include benchmarks. Rule 1.2(1) states an overriding objective, which is 'to enable the courts to deal with cases justly'. Paragraph (2) of the Rule goes on to specify that:

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

(a) ensuring that all parties are on an equal footing; and
(b) saving expense; and
(c) dealing with the case in ways that are proportionate:
    (i) to the importance of the case; and
    (ii) to the complexity of the issues; and
    (iii) to the amount of money involved; and
    (iv) to the financial position of each party; and
(d) ensuring that the case is dealt with speedily and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

These objectives have much in common with those put forward by the Woolf Committee. However, the Woolf objectives provide that the civil system should be 'adequately resourced', which puts emphasis on ensuring that there are adequate resources for all cases. The Vanuatu rules, on the other hand, only aim to allocate to a

27 Lord Woolf, *'Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales'*, 1996, London: HMSO, p 3.

case 'an appropriate share of the court's resources, while taking into account the need to allot resources to other cases'. Whilst there is a need to be realistic in a young nation, when read with para (c), there may be cause for concern. This introduces a principle of proportionality based on 'the importance of the case', 'the complexity of the issues', 'the amount of money involved' and 'the financial position of each party'. Proportionality, based on these principles, will presumably be the guiding factor in allocating resources. This leaves it open to the court to treat cases involving smaller claims as less worthy of resources. It is possible that the need to have regard to 'the financial position of each party' is designed to prevent, for example, an international company with a multi-million vatu claim from being given preferential treatment to an individual with a claim which is small in monetary terms, but which represents all his/her resources.

Paragraphs (e) and (f) of the Woolf objectives provide that the system should 'be understandable to those who use it' and 'be responsive to the needs of those who use it'. It might have been useful to express similar goals in the Vanuatu objectives, given the vast disparity in education and means of different members of society. Express mention of the need to respond to customary law and other local circumstances might also have been considered in Vanuatu. For example, the need to accommodate different languages might have been worthy of specific mention, given that there are three official languages and over 100 local languages in Vanuatu.

4 PROPER USE OF THE RULES

Whilst the Rules in many regional countries are undeniably in need of reform, it should also be said that the existing Rules are not used to best effect. This text describes the steps in a civil action, from initiation of proceedings to trial. In practice, however, civil actions cannot be regarded as following a standard path. Rules are often flouted without the other side taking the point and time limits are frequently ignored. Accordingly, another approach to reform, and one already called on in Fiji Islands and Vanuatu, is to increase the penalties for failing to adhere to the Rules and to allow the court to impose these of its own motion.

The rules of court are only tools. Their effectiveness depends on the user. In the framework of the adversarial system, the main users are the parties or their lawyers. Within the boundaries provided by professional ethics, a skilful lawyer will use every opportunity to use the Rules to their clients' advantage and to shorten or avoid a trial. Slavish adherence to 'standard' procedure and computer generated precedents should always be avoided.

Further, procedural opportunities to challenge weak cases at an early stage, to shorten the trial process by reducing the issues to be tried, or even to bring the case to an early conclusion without a trial, are underutilised. More specifically, the following procedures are often ignored or misapplied:

- application for further and better particulars;
- interrogatories;
- summary judgment (whilst applications for judgment in default are common within the region, applications for summary judgment are rarely made);
- payment into court;
- notice to admit facts or documents;
- costs.

Apart from using the Rules to the clients' best advantage, a good lawyer must use imagination in considering alternative methods of dispute resolution and possible means of settlement. A good lawyer is not necessarily one who always succeeds in court. Rather, he/she is one who seeks the best solution for the client.

Reform based on improved practice under the existing Rules, might be further pursued through continuing legal education, possibly on a compulsory basis for those wishing to practise in the civil sphere. This might assist in ensuring that existing Rules and/or any new Rules are used to best advantage. Fiji has already introduced such a system.

5 THE FUTURE

Vanuatu has made an impressive start to regional reform of civil procedure. Tuvalu is not far behind. The reform of civil procedure in other countries of the South Pacific is overdue. Consideration of the rules of court in this text highlights some of the deficiencies. Many of the Rules are outdated. They are often expressed in archaic language and are based on Rules applying in other countries, which are not necessarily suitable in the South Pacific. Outside Vanuatu, amendments and revisions to date have consisted largely of incorporation of some of the latest changes in the overseas Rules on which the regional Rules are based. It is suggested that a more comprehensive approach to reform is called for.

In recent years, the interest in alternative dispute resolution has increased. The search for alternative means of dealing with civil disputes has been driven by the delays and expense associated with court hearings. It has also been motivated by the increasing recognition that court proceedings do not always generate the best solution. In addition to the established models, such as arbitration, mediation and conciliation, traditional means of dispute resolution might be explored with a view to extending their use or incorporating some of their techniques into civil procedure. Advantage might be taken of overseas experience and the opportunity taken to leap to the forefront of thinking on resolution of civil disputes, rather than gradually changing existing procedural rules on a piecemeal basis. Radical reform would be expensive. However, regional co-operation, with a view to devising uniform South Pacific civil rules might be one means of reducing costs and producing appropriate regional rules.

The search for a regional jurisprudence has begun. Side by side with this should go a search for new legal systems and legal institutions. What better time will there be to continue with the reform of civil procedure and the courts in the South Pacific?

APPENDIX

PART 1

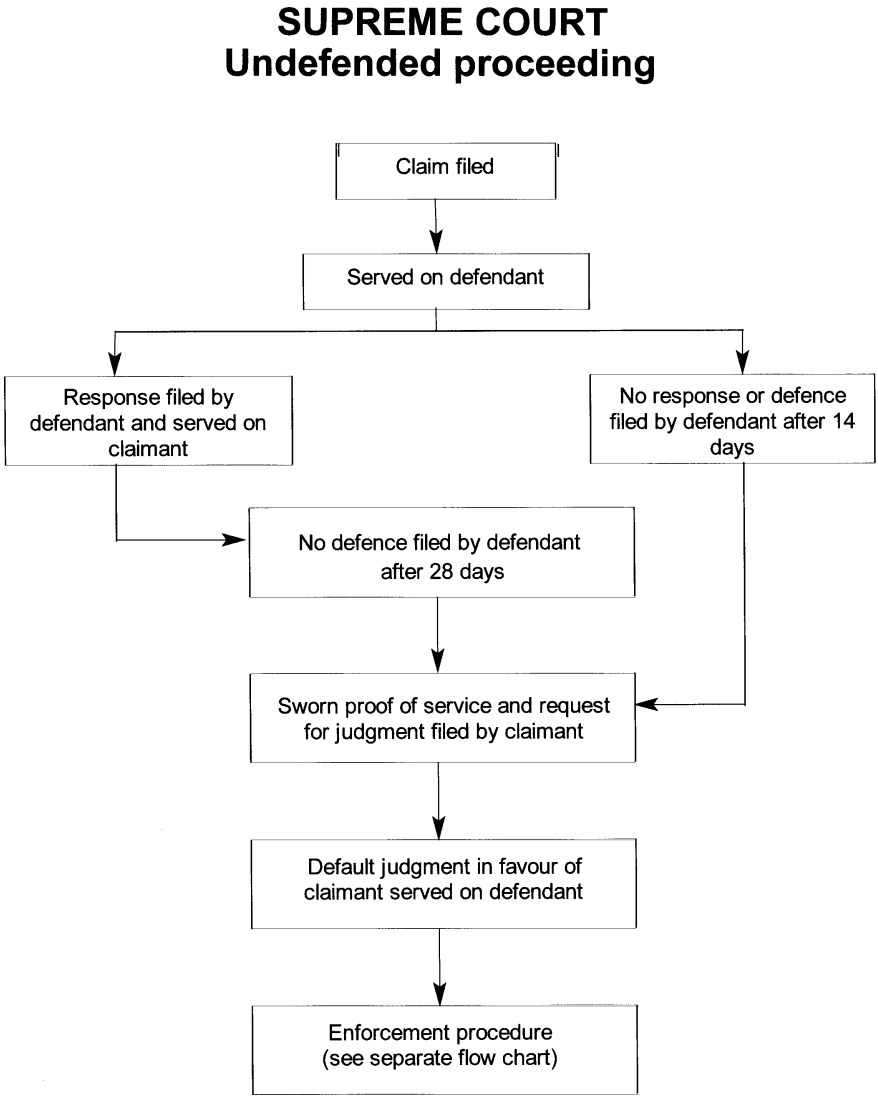
TYPICAL STAGES IN A CIVIL ACTION UNDER THE CPR OR FIJI RULES

Ending Proceedings Early	MAIN PROCEDURAL STAGES	Other Possibilities
	ISSUE OF WRIT WITH OR WITHOUT STATEMENT OF CLAIM ENDORSED OR ATTACHED	*Ex parte* applications.
	SERVICE OF WRIT	Renewal of writ if not served within 12 months.
	ISSUE AND SERVICE OF STATEMENT OF CLAIM IF NOT SERVED WITH WRIT	
Judgment in default of appearance or notice of intention to defend.	MEMORANDUM OF APPEARANCE or NOTICE OF INTENTION TO DEFEND	Application for further and better particulars of defence. Third party proceedings.
	DEFENCE and COUNTERCLAIM (if any)	
Judgment in default of answer to counterclaim. Summary judgment.	REPLY and ANSWER TO COUNTERCLAIM (if any)	Notice to admit facts or documents. Notice disputing facts or documents.
Application to strike out whole or part of a pleading.	CLOSE OF PLEADINGS	
Offer to settle. Discontinuance.	DISCOVERY AND INSPECTION OF DOCUMENTS	Application for interrogatories.
Application to dismiss for want of prosecution.	SUMMONS FOR DIRECTIONS	All remaining interlocutory applications issued.
	SETTING DOWN FOR TRIAL	Check evidence. Issue subpoenas.
Judgment in default of attendance at trial.	TRIAL	
	COSTS	Taxation of costs.
	EXECUTION	
	APPEALS	

PART 2

NORMAL COURSE OF AN UNDEFENDED CIVIL ACTION IN THE SUPREME COURT OF VANUATU

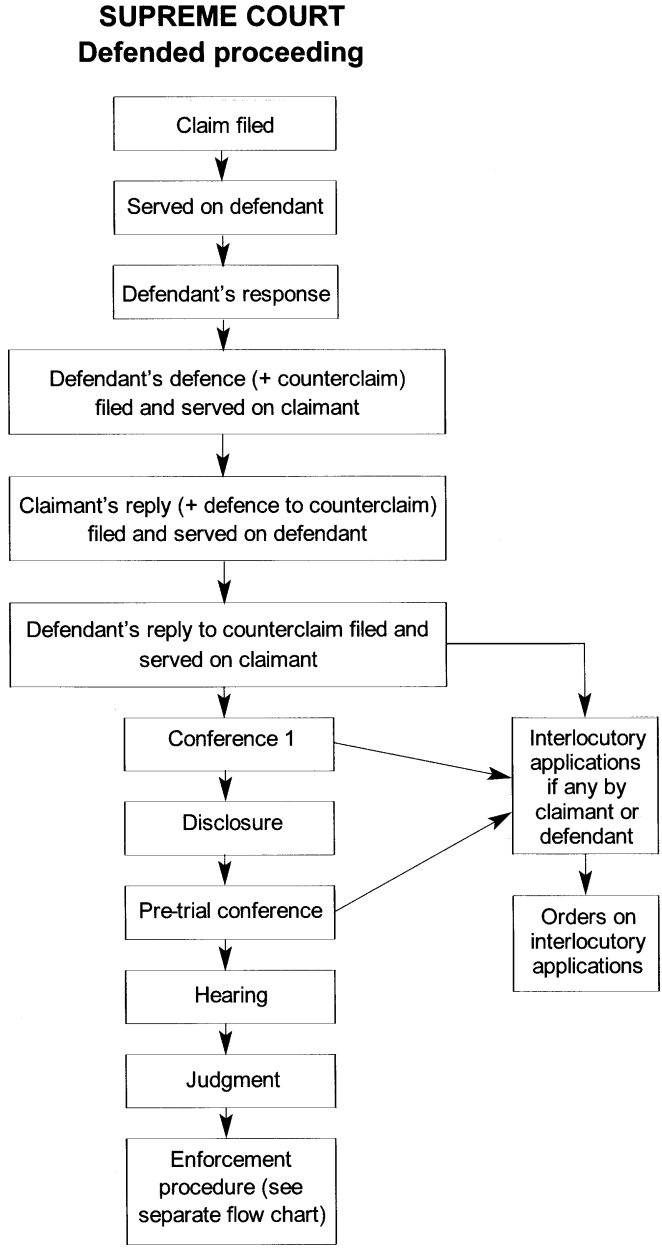
(Schedule 4, Civil Procedure Rules 2002 (Van))



PART 3

NORMAL COURSE OF A DEFENDED CIVIL ACTION IN THE SUPREME COURT OF VANUATU

(Schedule 4, Civil Procedure Rules 2002 (Van))



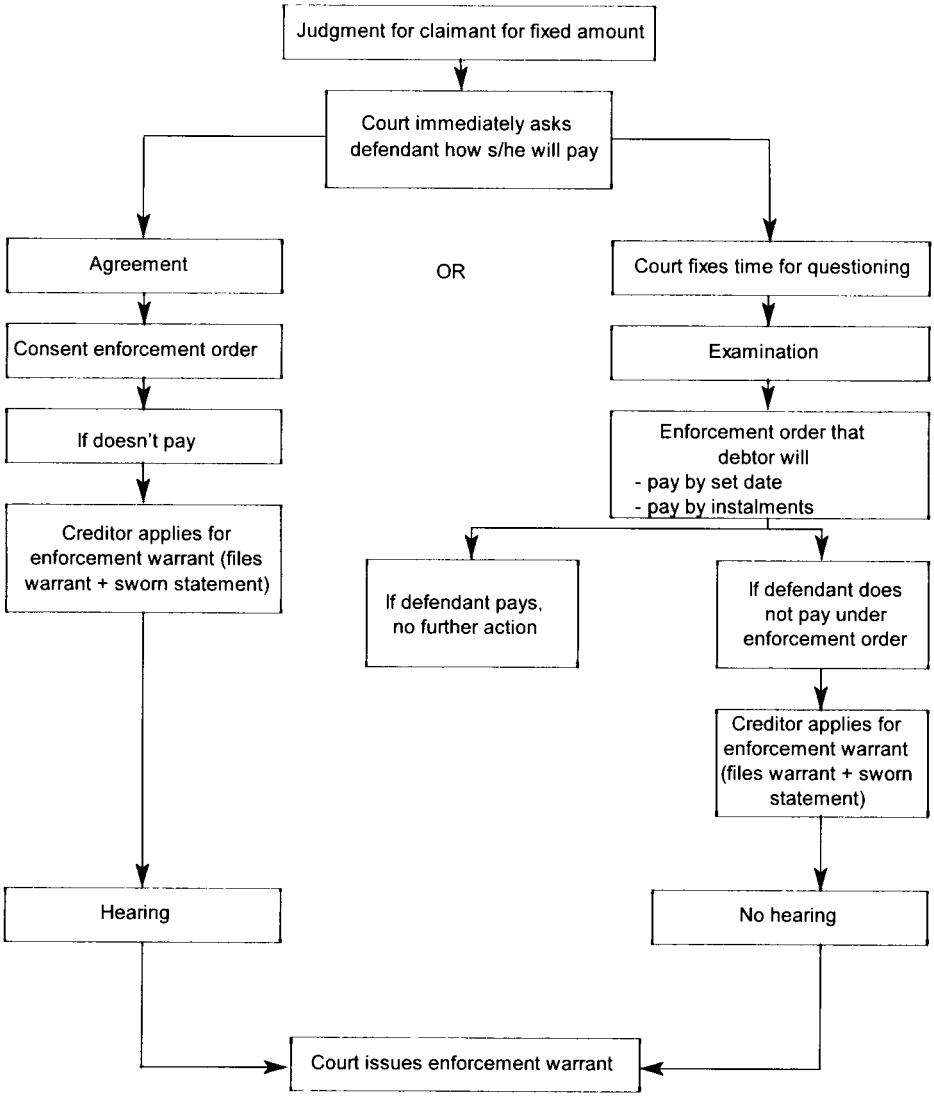
PART 4

ENFORCEMENT OF MONEY ORDERS IN THE SUPREME COURT OF VANUATU

(Schedule 4, Civil Procedure Rules 2002 (Van))

SUPREME COURT AND MAGISTRATES' COURT

Enforcement of money order



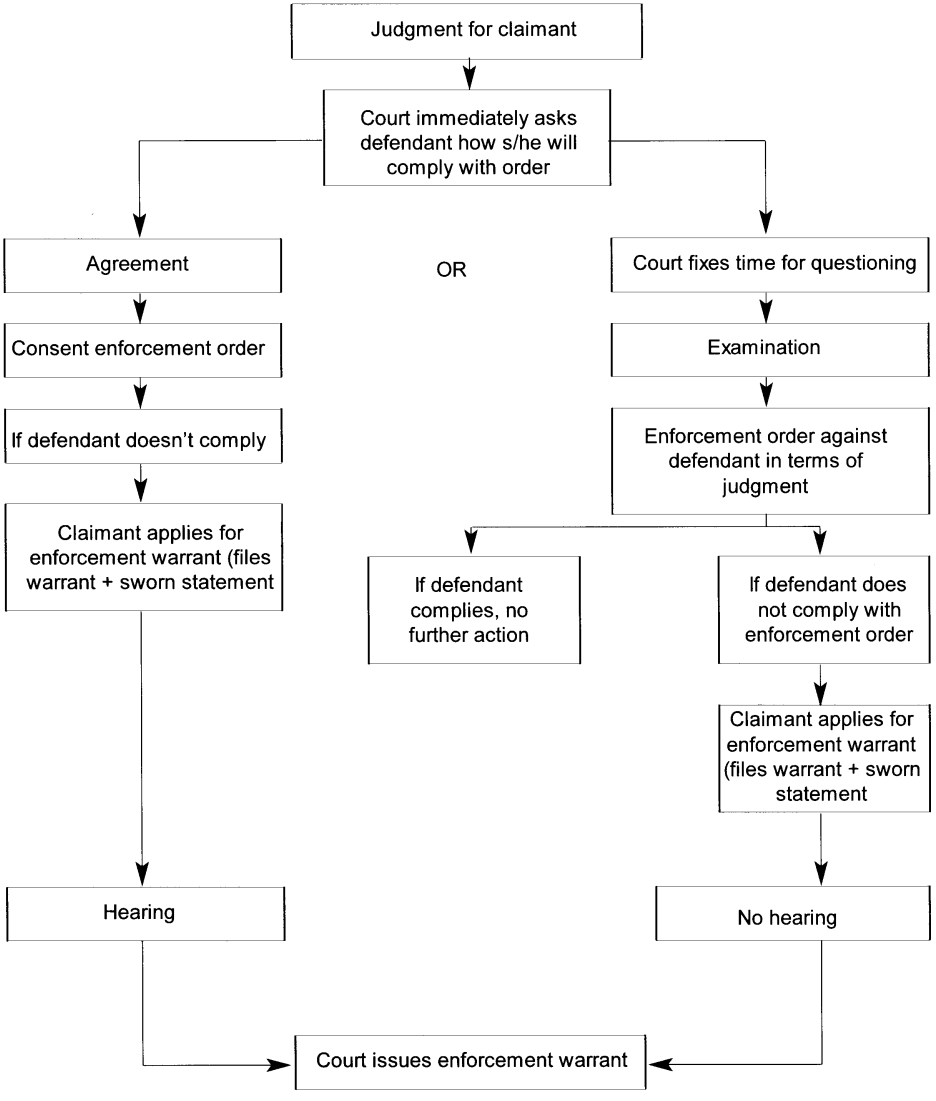
PART 5

ENFORCEMENT OF NON-MONEY ORDERS IN THE SUPREME COURT OF VANUATU

(Schedule 4, Civil Procedure Act 2002 (Van))

SUPREME COURT AND MAGISTRATES' COURT

Enforcement of non-money order



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