

**19:**

**CIVIL:**

**MANAGEMENT OF PROCEEDINGS**



# 1 General Organisation for Court

Before going to Court:

- ensure your clerk has prepared the case list for the day;
- if necessary, ensure that you have a police orderly present;
- if there are chamber matters, deal with them quickly so that Court can start at the appointed time.

In Court:

- start Court on time and rise at the expected time. This is not only for your benefit but also for counsel and Court staff.

## 2 Applying the *Civil Procedure Rules*

The *Civil Procedure Rules* (the *Rules*) apply in all civil proceedings, unless the proceeding is one for which other rules under an enactment apply: *Rule 1.6 Civil Procedure Rules*.

If a situation arises which is not covered by the *Rules*, you may give whatever directions are necessary to determine the matter according to substantial justice: *Rule 1.7 Civil Procedure Rules*.

See *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23; Civil Appeal Case No 19 of 2003.

### 2.1 Overriding Objective

The overriding objective of the *Civil Procedure Rules* is to enable all Courts to deal with cases justly: *Rule 1.2(1) Civil Procedure Rules*.

This includes, as far as practicable:

- ensuring all parties are on an equal footing;
- saving expense;
- dealing with the case in ways that are proportionate to the importance, complexity, amount of money and financial position of each party;

- ensuring the case is dealt with speedily and fairly; and
- allotting an appropriate share of Court resources, while taking into account the needs of other cases: *Rule 1.2(2) Civil Procedure Rules*.

Whenever you are dealing with any matters of civil procedure or interpreting the *Civil Procedure Rules*, you must keep the overriding objective in mind: *Rule 1.3 Civil Procedure Rules*.

Parties to a proceeding must help the Court to act in accordance with the overriding objective: *Rule 1.5 Civil Procedure Rules*.

You may even allow a party to re-open a proceeding after trial but before judgment if you are satisfied that it is necessary to ensure substantial justice is done: *Rule 12.10 Civil Procedure Rules*.

## 2.2 Duty to Manage Cases

The *Civil Procedure Rules* demand that you actively manage cases: *Rule 1.4(1) Civil Procedure Rules*.

Actively managing cases includes:

- encouraging parties to cooperate with each other during the proceeding;
- identifying issues in dispute at an early stage;
- deciding which issues need to be resolved through trial and resolving all other issues without a hearing;
- deciding the order in which issues are to be resolved;
- encouraging alternative dispute resolution when appropriate and facilitating its use;
- helping parties to settle the whole or part of the case;
- fixing a timetable for the case or controlling its progress;
- considering whether the benefits of taking a step in the proceeding justify the costs;
- dealing with as many aspects of the case as you can at the one time;
- dealing with the case without the parties attendance when appropriate;
- taking advantage of technology available to you; and
- giving directions to ensure the trial goes ahead quickly and efficiently: *Rule 1.4(2) Civil Procedure Rules*.

## **2.3 Failure to Comply with *Civil Procedure Rules***

While you should always strive to comply with the *Civil Procedure Rules* and encourage parties, lawyers and Court staff to do the same, a failure to comply with the *Rules* is treated as an irregularity and does not necessarily make the proceeding, document, step taken or order made a nullity: *Rule 18.10(1) Civil Procedure Rules*.

However, if there has been a failure to comply with the *Rules*, you may:

- set aside all or part of the proceedings;
- set aside a step taken;
- declare a document or step taken to be ineffectual;
- declare a document or step taken to be effectual;
- make another order that could be made under the *Rules*;
- make an order dealing with the proceeding generally that you consider appropriate: *Rule 18.10(2) Civil Procedure Rules*.

## **2.4 Extending and Shortening Time for Doing an Act**

You should always try to ensure that steps in a proceeding faithfully comply with the times set out in the *Rules*. However, on your own initiative or on the application of a party you may extend or shorten any time set out in the *Rules* for doing an act: *Rule 18.1(1) Civil Procedure Rules*.

If a party is applying for the extension or shortening of the time, the application may be made either before or after the time for doing the act has ended: *Rule 18.1(2) Civil Procedure Rules*.

# **3 Dealing with Parties and Claims**

One of your roles in managing civil proceedings is to ensure that all parties who should be represented are represented in the proceeding. For parties who are under a legal incapacity, who die, or who become bankrupt during a proceeding, you will have to use the Court's power to ensure that, if possible, the proceeding continues.

Another part of your role in managing civil proceedings is to ensure that there are a minimum of proceedings by ensuring all proper parties and claims are included in one proceeding and that anyone unnecessary is excluded.

### **3.1 Persons Under a Legal Incapacity**

A child or person with impaired capacity is under a legal incapacity and cannot start or defend a proceeding alone: *Rule 3.8(1) Civil Procedure Rules*.

A person with impaired capacity is any person who is incapable of making the decisions required to be made by a party to conduct the proceeding: *Rule 20.1 Civil Procedure Rules*.

A child is any person under 18 years of age: *Rule 20.1 Civil Procedure Rules*.

A person under a legal incapacity can only start or defend a proceeding through a litigation guardian: *Rule 3.8(3) Civil Procedure Rules*.

You may appoint a litigation guardian for this purpose: *Rule 3.8(2) Civil Procedure Rules*.

Once appointed, anything required of the person under a legal incapacity may be done by the litigation guardian: *Rule 3.8(4) Civil Procedure Rules*.

### **3.2 Death of a Party**

#### **Defendant Dies Before Proceeding Starts**

If, at the start of the proceeding, the defendant is dead and the cause of action continues after the death, the proceeding must be brought against the personal representative: *Rule 3.9(2) Civil Procedure Rules*.

If the claimant knows the defendant is dead, he or she must name the estate of the deceased person as the defendant: *Rule 3.9(2) Civil Procedure Rules*.

After a personal representative is appointed, all documents must name the personal representative as the defendant: *Rule 3.9(2)(e) Civil Procedure Rules*.

#### **Claimant Dies During Proceeding**

If the claimant dies during a proceeding and the cause of action continues after death, then the proceeding may be continued by the deceased's personal representative: *Rule 3.9(1) Civil Procedure Rules*.

You may give whatever directions are necessary to allow the personal representative to continue the proceeding: *Rule 3.9(1) Civil Procedure Rules*.

### **3.3 Bankruptcy, Death or Legal Incapacitation of Party During Proceedings**

If any party dies, becomes bankrupt or becomes legally incapacitated during a proceeding, a person may only take another step in the proceeding, for or against the party, with your permission and in accordance with your directions: *Rule 3.10(1) Civil Procedure Rules*.

If a party becomes bankrupt or dies, you may:

- order the party's trustee or personal representative or someone else to be substituted as a party; and
- make other orders about the proceeding: *Rule 3.10(2) Civil Procedure Rules*.

You may also require notice to be given to anyone with an interest in the deceased party's estate before making such an order: *Rule 3.10(4) Civil Procedure Rules*.

If you appoint someone other than a personal representative to be substituted for a deceased party and later another person is appointed as a personal representative, the first person must give all documents in the proceeding to the personal representative as soon as practicable: *Rule 3.10(4) Civil Procedure Rules*.

### **3.4 Representative Party**

One or more persons with the same interest in the subject matter may start or defend a proceeding, representing **all** persons who have the same interest and who could have been parties: *Rule 3.12(1) Civil Procedure Rules*.

At any stage of the proceeding, you may appoint one or more parties or another person to represent the persons having the same interest. If you appoint a person other than a party to the proceedings to represent all persons, you must also order that person to become a party: *Rules 3.12(2),(3) Civil Procedure Rules*.

Any order made against a representative party may only be enforced against a person not named as a party with your leave: *Rule 3.12(4) Civil Procedure Rules*.

Any application for leave to enforce such an order must be served on the person as if the application were a claim: *Rule 3.12(5) Civil Procedure Rules*.

### **3.5 Adding and Removing Parties**

When inquiring into the case, you may order that a person become a party to a proceeding if the person's presence is necessary to make a decision fairly and effectively in the proceeding: *Rule 3.2(1) Civil Procedure Rules*. This can be done upon application or on your own motion.

Similarly, you may order that a party be removed from the proceedings if:

- the person's presence is unnecessary to make a decision fairly and effectively in the proceeding; or
- for any other reason you consider that the person should not be a party to the proceeding: *Rule 3.2(2) Civil Procedure Rules.*

Either a party to the proceeding or a person affected by the proceeding may apply to **add** a party: *Rules 3.2(3),(4) Civil Procedure Rules.*

Only a party to the proceeding may apply to **remove** a party: *Rule 3.2(3)(b) Civil Procedure Rules.*

An application for adding or removing a party must be accompanied by a sworn statement setting out the reasons why the person should be added or removed as a party: *Rule 3.2(5) Civil Procedure Rules.*

When making an order regarding adding or removing parties, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules.*

### **Third Party**

A defendant may file and serve on any person not a party to the proceedings a notice (a third party notice) to state a claim for a contribution, indemnity or other remedy: *Rule 3.7(1) Civil Procedure Rules.*

The third party notice must:

- be in Form 4,
- state that the defendant claims the contribution, indemnity or other remedy; and
- that the person is party to the proceeding from the date of service: *Rules 3.7(1),(2) Civil Procedure Rules.*

Once served, the person becomes a party to the proceeding with all rights and obligations as if the defendant had started a proceeding against the person: *Rule 3.7(4) Civil Procedure Rules.*

If the third party notice is filed after the defence is filed, the defendant must obtain leave of the Court: *Rule 3.7(3) Civil Procedure Rules.*

### **Amending Documents**

After an order is made changing the parties to a proceeding, the applicant for the order must:

- file an amended claim showing the new party and the date of the order;
- serve the amended claim on the new party; and



- if the order added or changed a defendant, serve the amended claim on the continuing party: *Rule 3.6(1) Civil Procedure Rules.*

The amended claim must be filed and served:

- within the time fixed by the order; or
- within 14 days of the order, if no time was fixed: *Rule 3.6(2) Civil Procedure Rules.*

If the order added or substituted a defendant, unless you order otherwise, everything done in the proceeding before the order was made has the same effect for the new defendant as for the old defendant: *Rule 3.6(3) Civil Procedure Rules.*

### **3.6 Joining and Separating Claims**

You may order that several claims against one person be included in one proceeding if:

- a common question of law or fact is involved in all the claims;
- the claims arise out of the same transaction or event; or
- for any other reason you consider the claims should be included in the same proceeding: *Rule 3.3(1) Civil Procedure Rules.*

You may order that several claims against one person be separated into different proceedings if:

- the claims may be more effectively dealt with separately; or
- for any other reason you consider that the claims should be heard as separate proceedings: *Rule 3.3(2) Civil Procedure Rules.*

A party may apply for the joining or separating of claims, or you may do this on your own motion: *Rule 3.3(3) Civil Procedure Rules.*

When making an order regarding joining or separating claims, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules.*

### **3.7 Consolidating Proceedings**

You may order several proceedings be heard together if:

- the same question is involved in each proceeding;
- the decision in one proceeding will affect the other; or
- for any other reason you consider the proceedings should be heard together: *Rule 3.4 Civil Procedure Rules.*

When making an order regarding consolidating proceedings, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

## **4 Adjourments**

At or before a trial, you may adjourn the trial: *Rule 12.3 Civil Procedure Rules*.

Adjourning a case has a useful role if used properly. It allows parties to prepare themselves to present their best case and recognises that delays do sometimes happen.

Adjourning a case should not be used merely as a delaying tactic so that parties are not diligent in their preparation.

The most common reasons for adjourning a case are:

- a party does not appear;
- the witnesses of one of the parties do not appear;
- legal representation is being sought;
- a new issue has been raised and a party needs time to prepare a response.

## **5 Contempt of Court and Other Misbehaviour**

Occasionally, you may decide that a witness, party or member of the public is in contempt of Court. You will need to deal with this person by the following processes.

### **5.1 Contempt of Court by Failing to Appear**

A person who fails to attend Court when summoned, fails to give evidence, or produce documents without a lawful excuse may be found in contempt of Court: *Rule 11.19 Civil Procedure Rules*.

## 5.1 Contempt in the Hearing of Court

If it appears that a person is guilty of contempt in your hearing, you may:

- direct the person be brought before the Court; or
- issue a warrant for the person to be arrested and brought before the Court: *Rule 18.13(1) Civil Procedure Rules.*

When the person is brought before you for contempt of Court, you must:

- explain to the person how he or she committed the contempt;
- ask the person to give reasons why he or she should not be punished for the contempt;
- decide the matter in any way you think appropriate; and
- order the person punished or discharged: *Rule 18.13(2) Civil Procedure Rules.*

If you cannot deal with the matter immediately, you may order the person:

- to be kept in custody;
- to be released; or
- to be released on conditions: *Rule 18.13(3) Civil Procedure Rules.*

## 5.3 Contempt By Not Complying With an Order

### During Proceeding

If a person fails to comply with an order of the Court or an undertaking given to the Court **during** a proceeding:

- you may initiate proceedings for contempt; or
- another party may apply for an order that the first person be punished for contempt: *Rule 18.14(2) Civil Procedure Rules.*

### After Proceeding

If a person fails to comply with an order of the Court or an undertaking given to the Court **after** a proceeding, another person may apply to reopen the proceeding and ask that the first person be punished for contempt: *Rule 18.14(3) Civil Procedure Rules.*

### Application

If a person applies for an order that the first person be punished for contempt, the application:

- must have an accompanying sworn statement giving details of the contempt; and
- must be served personally on the first person: *Rule 18.14(4) Civil Procedure Rules.*

After hearing the matter, you may do any or all of the following:

- fine the person;
- order the person imprisoned for a period you decide;
- release the person, with or without conditions; or
- order that a body corporate's property be seized: *Rule 18.14(5) Civil Procedure Rules*.

#### **5.4 Failing to Comply with Order to Advance Proceedings**

If a party fails to comply with an order dealing with progress or steps to be taken in a proceeding, the party entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her: *Rules 18.11(1),(2) Civil Procedure Rules*.

The application must:

- set out the details of the failure to comply;
- be accompanied by a sworn statement in support of the application; and
- be filed and served, with the sworn statement, on the non-complying party a minimum of 3 business days before the date of hearing: *Rule 18.11(3) Civil Procedure Rules*.

#### **Hearing**

At the hearing, you may:

- give judgment against the non-complying party;
- extend the time for complying with the order;
- give directions; or
- make another order: *Rule 18.11(4) Civil Procedure Rules*.

Regardless of which option you choose to deal with the non-complying party, you may still use your power to punish for contempt of Court: *Rule 18.11(5) Civil Procedure Rules*.

You should not make an order to strike out the proceeding without providing the parties an opportunity to address all fundamental issues. See *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23; Civil Appeal Case No 19 of 2003.

#### **5.5 Vexatious Litigant**

If you believe that a person is a vexatious litigant, refer the question to the Supreme Court: *Rule 18.12(2) Civil Procedure Rules*.

If the Supreme Court declares the person to be a vexatious litigant, the person may not start a proceeding without leave of the Court: *Rule 18.12(7) Civil Procedure Rules*.

## 5.6 Penal Code Offences

In addition to the powers from the *Civil Procedure Rules* to deal with misbehaviour, there are a number of offences relating to misleading justice that may arise occasionally. These are:

- *ss74, 75 Penal Code*; perjury;
- *s76 Penal Code*; making false statements;
- *s77 Penal Code*; fabricating evidence;
- *s78 Penal Code*; destroying evidence;
- *s79 Penal Code*; conspiracy to defeat justice;
- *s80 Penal Code*; false statements by interpreters;
- *s81 Penal Code*; deceiving witnesses; or
- *s82 Penal Code*; offences relating to judicial proceedings.

Familiarise yourself with these offences so that you are able to deal with them in Court, should the need arise.

## 6 Miscellaneous

### 6.1 Lawyer Beginning or Ceasing to Act

If a lawyer begins to act for a party **during** a proceeding or ceases to act for a party, he or she must:

- file a notice (Form 35) as soon as practicable; and
- serve a notice on each other party to the proceeding: *Rule 18.8(1) Civil Procedure Rules*.

The notice becomes effective after the last service: *Rule 18.8(2) Civil Procedure Rules*.

Despite filing the notice, you may still make an order for costs against the lawyer personally under the *Civil Procedure Rules*: *Rule 18.8(3) Civil Procedure Rules*.