

21:

CIVIL:

FIRST HEARING

1 Introduction

At the first hearing, you will be concerned with some or all of the following:

- non-appearance of the parties;
- your ability to deal with the case;
- legal representation;
- the readiness of the parties to proceed with the case.

2 Preliminary Matters

At a First Hearing, there are a number of preliminary issues you must deal with prior to inquiring into the merits of the case itself.

2.1 Claimant Does Not Appear

If the claimant does not appear at the date of first hearing:

- you may adjourn the proceedings to a date you fix; or
- you may dismiss the claimant's claim and give judgment for the defendant; or
- with your permission, the defendant may call evidence to establish that he or she is entitled to judgment under a counterclaim against the claimant: *Rule 12.9(2) Criminal Procedure Rules*.

You may give directions about further dealing with the case, and must consider the question of costs: *Rule 12.9(3) Civil Procedure Rules*.

2.2 Defendant Does Not Appear

If the defendant does not appear at the date of first hearing:

- you may adjourn the proceedings to a date you fix; or
- you may give judgment for the claimant; or
- with your permission, the claimant may call evidence to establish that he or she is entitled to judgment against the defendant: *Rule 12.9(1) Criminal Procedure Rules*.

You may give directions about further dealing with the case, and must consider the question of costs: *Rule 12.9(3) Civil Procedure Rules*.

Despite the nearly identical provision to non-appearance for the claimant, the procedure you must follow for non-appearance of the defendant is very different.

You should do the following:

1. Ask the claimant as to the date of service of the claim on the defendant:
 - If the claimant says it has been less than 14 days since service of the claim, adjourn the matter until after the 14 day period.
2. Ask the claimant whether he or she has a sworn statement proving service of the claim on the defendant:
 - If the claimant does not have a sworn statement proving the time and manner in which the claim was served, adjourn the matter until the claimant can prove that he or she has complied with the rules of service.
3. If the claimant does have a sworn statement, check to see what date the claim was served on the defendant:
 - If it has been less than 14 days since the date of service, adjourn the matter;
 - If it has been more than 14 days since the date of service, decide whether the defendant has a likely defence and whether it would be unjust to give default judgment to the claimant.
4. If it would be unjust to give the claimant default judgment, set a new date for appearance and direct that notice be given to the defendant to appear on that date.
5. If it would be just to give the claimant default judgment, do so. See paragraph 7.3, below.

2.3 Personal Interest

Once the parties are before you, you must deal with any issues of personal interest that arise. Determine whether there is any reason you should not hear the case.

For further guidance, see Chapter 5, Judicial Conduct.

As well, it is usually at this stage of First Hearing that any objections from the parties as to your ability to hear the matter will arise.

If a party makes an application for you to disqualify yourself from hearing the matter, do the following:

1. hear from the party on his or her reasons for applying for your disqualification from the case.
2. hear from the opposing party.
3. make your decision on whether you should disqualify yourself:
 - if you reject the application for disqualification, you must give written reasons for the rejection to the applicant: *s21(4) Judicial Services and Courts Act*;
 - upon rejection, the applicant may appeal to the Supreme Court. During the appeal, you must adjourn the proceedings until the Supreme Court has heard and determined the appeal: *s21(3) Judicial Services and Courts Act*;
 - if you grant the application, transfer the case to another Magistrate.

2.4 Jurisdiction

You must always ensure that the matter is one within your jurisdiction. Ideally, you will have been able to determine this issue when you first read over the claim and defence in the file.

If, however, you discover that the case has changed in some material aspect which takes it outside your jurisdiction, strike out the proceeding and transfer it to the Supreme Court.

2.5 Unrepresented Defendant

Many defendants will arrive at First Hearing without having consulted a lawyer.

If the defendant shows a willingness to defend and there seems to be serious issues in the case, adjourn the proceeding and direct the defendant to the Public Solicitor for advice.

Direct that the defendant file a defence within 14 days or, if the case is complex, a longer time. Set a new date for hearing sometime after the date set for the filing of the defence.

3 Mediation

If you consider mediation may help resolve some or all of the issues in dispute and no party raises a substantial objection, you may refer a matter for mediation: *Rule 10.3(1) Civil Procedure Rules*.

Substantial objections to mediation include:

- the parties do not consent to mediation;
- the nature of the dispute makes it unsuitable for mediation; or
- anything else which suggests that mediation will be futile, unfair or unjust to a party:
Rule 10.3(2) Civil Procedure Rules.

Remember that mediation is voluntary and a party may withdraw from mediation at any time:
Rule 10.6 Civil Procedure Rules. For this reason, only refer parties that seem willing to mediate.

If mediation is appropriate, make a mediation order.

Content of Mediation Order

The mediation order must set out enough information to inform the mediator of the dispute and the present stage of the proceeding between the parties, including:

- the statements of the case;
- the issues; and
- any other relevant matters: *Rule 10.5(1) Civil Procedure Rules.*

In the mediation order, you may include directions about:

- the mediator's role;
- time deadlines; and
- any other relevant matters: *Rule 10.5(2) Civil Procedure Rules.*

Suspend Proceedings

During the period of mediation, suspend the proceedings: *Rule 10.11 Civil Procedure Rules.*

Settlement

If a settlement is reached, it must be:

- written down, signed and dated by the mediator and the parties; and
- filed with the Court: *Rule 10.9(1) Civil Procedure Rules.*

You may then approve the settlement and make any orders to give effect to the mediated agreement: *Rule 10.9(2) Civil Procedure Rules.*

If the mediation is unsuccessful and no settlement is reached, the proceedings may continue to trial. See Chapter 22, The Civil Trial.

4 Adding and Removing Parties

When inquiring into the case, you may order that a person becomes 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*.

4.1 Third Party

A defendant may file and serve a third party notice on any person not a party to the proceedings to claim 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
- state 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*.

4.2 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.*

5 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.*

6 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*.

7 Defence Not Filed – Next Steps

If the parties are present and you have dealt with all preliminary matters, you must inquire into whether or not a defence has been filed.

If all parties are present, and the defence has not been filed, do the following:

1. Ask the defendant whether he or she wishes to defend the claim.

7.1 Defendant Wishes to Defend the Claim

2. If the defendant wishes to defend, inquire as to the date when he or she was served with the claim.
 - If the claimant was served over 14 days before the date of First Hearing, inquire into why the defendant has not filed a response or defence.
 - ⇒ If there has been a sufficient reason for the failure to file a defence, order the defendant to file a defence within 14 days. Adjourn the case to a later date.
 - ⇒ If the defendant does not have a sufficient reason, consider awarding default judgment to the claimant. See paragraph 7.3 Default Judgment, below.
 - If the claimant was served less than 14 days prior to the date of First Hearing, the defendant's expressed desire to defend will serve as a response. Order the defendant to file a defence within 14 days. Adjourn the case to a later date.

7.2 Defendant Does Not Wish to Defend the Claim

3. If the defendant does not wish to defend, ask the claimant to briefly lay out his or her claim. Ensure that a valid claim against the defendant exists.
4. Ask the defendant if he or she has anything to say regarding the matter. For example, he or she may dispute the amount of the claim.
5. Give judgment for the claimant. See Chapter 23, Civil Judgment.
6. Make any applicable orders.
7. Consider any applicable costs. See Chapter 24, Costs.

7.3 Default Judgment

Importantly, you must not give default judgment before the date of the First Hearing: *Rule 9.2(5) and 9.3(5) Civil Procedure Rules*.

If the defendant does not file and serve a response or defence within the applicable time, the claimant may file a sworn statement (proof of service) that the claim and response form were lawfully served on the defendant: *Rule 9.1 Civil Procedure Rules*. See Chapter 20, Civil Pre-Trial Matters for the dates and methods of service.

Claim for Fixed Amount

If the claim was for a fixed amount, the claimant may file a request for judgment against the defendant for the amount of the claim, together with interest and costs. This request may be made orally or in Form 12: *Rules 9.2(2),(3) Civil Procedure Rules*.

Upon granting the judgment, the claimant must serve a copy on the defendant: *Rule 9.2(6) Civil Procedure Rules*.

If the defendant does not apply within 28 days to have the default judgment set aside, the claimant may:

- file a sworn statement that the judgment was lawfully served on the defendant; and
- apply for an enforcement order: *Rule 9.2(7) Civil Procedure Rules*.

Claim for Damages

If the claim was for an amount of damages to be decided by the Court, the claimant may file a request for judgment against the defendant for an amount to be determined by the Court. The request may be made orally or in Form 13: *Rules 9.3(2),(3) Civil Procedure Rules*.

You may give judgment for the claimant for an amount to be determined, and either:

- determine the amount of damages; or
- if there is not enough information to determine the amount, fix a date for a conference or hearing to determine the amount: *Rule 9.3(4) Civil Procedure Rules*.

The claimant must then serve a copy of the judgment and, if necessary, a notice stating the date fixed for the conference to determine the amount of damages: *Rule 9.3(6) Civil Procedure Rules*.

Deciding amount of damages

You must conduct the determination of the amount of damages as nearly as possible in the same way as a trial: *Rule 9.4(1) Civil Procedure Rules*.

You may, however, give directions about:

- procedures to be followed before the determination takes place;
- disclosure of information and documents;
- filing of statements of the case; and
- conduct of the determination generally: *Rule 9.4(2) Civil Procedure Rules*.

After you have determined the amount of damages, the claimant must file the judgment setting out the amount of damages and serve a copy on the defendant, unless the defendant was present when the damages were determined: *Rule 9.4(3) Civil Procedure Rules*.

The judgment may then be enforced in the same way as a judgment given after trial: *Rule 9.4(4) Civil Procedure Rules*.

Setting Aside Default Judgment

After default judgment has been awarded, a defendant may still apply to have the judgment set aside: *Rule 9.5(1) Civil Procedure Rules*.

The defendant's application:

- may be made at any time;
- must set out the reasons why the defendant did not defend the claim;
- must give details of the defendant's defence to the claim;
- must have an accompanying sworn statement in support of the application; and
- must be in Form 14.

You may set aside default judgment if you are satisfied that the defendant:

- has shown reasonable cause for not defending the claim; and
- has an arguable defence, either on liability or about the amount of the claim: *Rule 9.5(3) Civil Procedure Rules*.

Upon hearing the application, you must:

- give directions about the filing of the defence and other statements of the case;
- make an order about the costs incurred up to that date;
- consider whether an order for security for costs should be made; and
- make any other order necessary for the progress of the proceeding: *Rule 9.5(4) Civil Procedure Rules*.

8 Defence Filed – Next Steps

If all parties are present and the defence, counterclaim and applicable replies have been filed, you may be able to:

- hear the case immediately; or
- adjourn the case to a later date and order the parties to prepare for trial.

8.1 Immediate Hearing

Sometimes all parties are ready to proceed with a defended hearing. For an immediate hearing, all applicable sworn statements will need to have been filed and all witnesses will need to be present or have had their evidence otherwise taken.

In this case, proceed to hear the matter or adjourn the case to later in the day. See Chapter 22, The Civil Trial.

8.2 Hearing at a Later Date

Typically, the parties will not be ready to proceed with an immediate hearing of the case at First Hearing. In this case, do the following:

1. Give the claimant and defendant an opportunity to explain their positions. Along with the claim and defence, this will allow you to determine which facts are agreed upon by the parties and which are the issues for determination.

2. Direct the claimant to file sworn statements from his or her witnesses and disclose these statements to the defendant. Typically 14 days is given, but the circumstances of the case will determine how long you should give the claimant to file these sworn statements.
3. Direct the defendant to respond to the sworn statements upon receiving them. Again, typically 14 days is given to respond, but the circumstances of the case will determine what is appropriate.
4. Set a hearing date for sometime after the date set for the filing of all sworn statements and responses.
5. Order the parties to have their witnesses ready for the date.
6. Deal with any interlocutory applications. See Chapter 20, Civil Pre-Trial Matters.

8.3 Summary Judgment

Summary judgment applies where the defendant has filed a claim but the claimant believes the defendant has no real prospect of successfully defending the claim: *Rule 9.6(1) Civil Procedure Rules*.

Similar to default judgment, summary judgment applies **only if** a defence has been filed.

A claimant's application for summary judgment must:

- be in Form 15; and
- have with it a sworn statement that the facts in the claimant's claim are true and state the claimant's belief that there is no defence to the claim and the reasons for this belief: *Rule 9.6(3) Civil Procedure Rules*.

Upon filing the application and sworn statement, the claimant must:

- get a hearing date from the Court and ensure the date appears on the application; and
- serve a copy of the application and sworn statement on the defendant a minimum of 14 days prior to the hearing date: *Rule 9.6(4) Civil Procedure Rules*.

Upon receiving the application and sworn statement, the defendant:

- may file a sworn statement setting out the reasons why he or she has an arguable defence; and
- must serve the statement on the claimant a minimum of seven days prior to the hearing date: *Rule 9.6(5) Civil Procedure Rules*.

Upon receiving the defendant's sworn statement, the claimant may file another sworn statement in response and serve it on the defendant a minimum of two days prior to the hearing date: *Rule 9.6(6) Civil Procedure Rules*.

If you are satisfied that the defendant has no real prospect of defending part or all of the defendant's claim and there is no need for a trial on that part or all of the claim, you may:

- give judgment for the claimant for part or all of the claim; and
- make any other appropriate orders: *Rule 9.6(7) Civil Procedure Rules*.

You must not give summary judgment against a defendant if you are satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law: *Rule 9.6(9) Civil Procedure Rules*.

If you refuse to give summary judgment, you may still order the defendant to give security for costs within the time stated in the order: *Rule 9.6(8) Civil Procedure Rules*.

9 Interlocutory Orders During a Proceeding

At anytime during a proceeding a person may apply for an interlocutory order.

9.1 Content of the Application

The application must:

- be signed by the applicant or the applicant's lawyer; and
- name, as defendant, anyone whose interests are affected by the order sought; and
- state what the applicant applies for; and
- have with it a sworn statement by the applicant setting out the reasons why the order should be made (unless there are no questions of fact regarding the order or the facts are already known to the Court): *Rule 2.7(2), 7.2(4) Civil Procedure Rules*.

9.2 Urgent Interlocutory Applications

In urgent situations you may dispense with a written application and allow an oral application.

You may allow an **oral** application if:

- the application is for urgent relief; and
- the applicant agrees to file a written application within the time you order; and

- you consider the matter an appropriate one:
 - because of the need to protect persons or property; or
 - to prevent the removal of persons or property from Vanuatu; or
 - because of other circumstances that justify making the order: *Rule 7.6 Civil Procedure Rules*.

If the interlocutory order sought is one outside your jurisdiction (such as an Order to Protect Property under *Rule 7.8* or Order to Seize documents under *Rule 7.9*), direct the applicant to apply to the Supreme Court for the order.

10 Disclosure

As part of the preparation for trial, each party to a proceeding must disclose the documents upon which he or she intends to rely at trial: *Rule 8.27(1) Civil Procedure Rules*.

A party discloses a document by giving a copy to each other party a minimum of 14 days before the trial: *Rule 8.27(2) Civil Procedure Rules*.

A party may apply for an order that another party disclose particular documents: *Rule 8.28(1) Civil Procedure Rules*.

You may order disclosure of the documents if you are satisfied that:

- the documents are relevant to the issues;
- disclosure is necessary to decide the matter fairly; or
- for any other reason the documents should be disclosed: *Rule 8.28(2) Civil Procedure Rules*.

If you order that documents are to be disclosed, you may also order that all or part of *Part 8, Division 1 Civil Procedure Rules* be followed: *Rule 8.28(3) Civil Procedure Rules*.