ENDING A PROCEEDING EARLY

Default by defendant

9.1 If a defendant:

(a) does not file and serve a response or a defence within 14 days after service of the claim; or

(b) files a response within that time but does not file a defence within 28 days after the service of the claim:

[9.1.1] Restatement of applicable time limits See further rr.4.4(1), (3), 4.13(1)(a), (2) prescribing the time for filing a response (or defence in lieu) and r.4.13(1)(b) prescribing the time for filing a defence after first filing a response.

[9.1.2] Rule not limited to claims for debt or damages This rule is not, despite the contrary impression, confined to cases of the type contemplated by rr.9.2 or 9.3: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [58], [64]; *National Bank of Vanuatu v Tasaruru* [2005] VUSC 3; CC 217 of 2004.

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the claimant may file a sworn statement (a "proof of service") that the claim and response form was served on the defendant as required by Part 5.

[9.1.3] Proof of service a precondition to default judgment The proof of service is an important precondition to the entry of default judgment. It is critical that the proof of service is in proper form and is properly executed. It should state precisely where and when service of the claim was effected. Parties are often seen to file proof of service as a matter of course, before the other party is in default. It is suggested that this is a wasteful practice.

Default – claim for fixed amount

9.2 (1) This rule applies if the claim was for a fixed amount.

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[9.2.1] Proper characterisation of claim Problems arise when claimants fail properly to distinguish between claims for fixed amounts and other claims: See for example *VCMB v Dornic* [2009] VUCA 43; CAC 18&19 of 2009. The distinction derives from the former English rules in which a substantially identical distinction is made which is itself drawn from the distinction between what could be recovered in a suit under the old *indebitatus assumpsit* count and what could not. Similar distinctions, usually involving the words "liquidated and "unliquidated" are commonly to be found in rules of court in Commonwealth and other jurisdictions. Where a claim can be precisely calculated or otherwise fixed, default judgment should be sought under this rule. Where the claim is for general damages (even though these are required to be specified by r.4.10) or the amount of the claim must otherwise be assessed, the application for default judgment should be made under r.9.3. A claim for a specific sum (whether general or special, with or without calculations, particulars, etc) does not convert what is in substance an unliquidated claim into a liquidated (ie. fixed) claim: *Knight v Abbott* (1883) 10 QBD 11; *Lagos v Grunwaldt* [1910] 1 KB 41 at 48; *Abbey Panel & Sheet Metal Co v Barson Products* [1948] 1 KB 493 at 498-9. A judgment for an unliquidated claim entered as a liquidated claim is usually considered an irregularity and set aside *ex debito justitiae*: *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436;*Armitage v Parsons* [1908] 2 KB 410 at 417.

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(2) After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for the amount of the claim together with interest and costs. The request must be in Form 12.

[9.2.2] Snapping judgment Before seeking default judgment a party should, as a matter of professional courtesy, give warning to the other side, particularly where it is known that lawyers will be acting or that the proceedings are likely to be defended. See also *Dinh v Samuel* [2010] VUCA 6 at [43]; CAC 16 of 2009.

[9.2.3] Application must be in writing The application must, despite subr.7.2(2), be made in writing under this subrule: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [78].

(3) In the Magistrates Court, the request may be made orally.

(4) The court may give judgment for the claimant for:

[9.2.4] Default judgment discretionary The use of the word "may" highlights that there is no entitlement to default judgment, which is discretionary, and may be refused if there is some reason to suspect that injustice will result: *Charles v Shepherd* [1892] 2 QB 622 at 624-5; *Lombank v Cook* [1962] 3 All ER 491 at 493, 496, 498; [1962] 1 WLR 1133 at 1134, 1138, 1140; *Brenner v Johnson* [1985] VUSC 8; [1980-1994] Van LR 180; *Airtrade v Center Garage* [2001] VUSC 17; CC 25 of 1999. Accordingly, it follows that a court, when considering whether to pronounce default judgment ought to do more than merely verify the fact of default. A detailed analysis of the claim need not be undertaken on such an application and evidence need not necessarily be heard. The court should, however, confirm that the claim appears to disclose a proper cause of action and that the remedy sought appears to be properly calculated. *Charles v Shepherd* [1892] 2 QB 622 at 624-5; *Johnsen v Duks* [1963] NSWR 730 at 732; *Lombank v Cook* [1962] 3 All ER 491 at 493, 496, 498; *ANZ Bank v Dinh* [2005] VUCA 3; CAC 27 of 2005; *Lambu v Torato* [2008] PGSC 34 at [75], [82], [119].

(a) the amount claimed by the claimant; and

(b) interest from the date of filing the claim at a rate fixed by the court; and

[9.2.5] Common law entitlement to pre-judgment interest Curiously, no other part of the *Rules* deals with pre-judgment interest. There is no general common law entitlement to pre-judgment interest and, absent a statutory basis, the power to award pre-judgment interest should not be assumed. It is unlikely that this rule alone could be sufficient to confer such an entitlement. At common law there was, in the absence of any contract, only a very limited range of cases in which interest could be awarded: *London, Chatham & Dover Rwy Co v South Eastern Rwy Co* [1893] AC 429 at 434; *President of India v La Pintada* [1985] AC 104 at 129-31; [1984] 2 All ER 773 at 789-90; [1984] 3 WLR 10 at 29-31. In the equitable jurisdiction there was always a wider jurisdiction: *Johnson v R* [1904] AC 817 at 822; *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388, 397; [1975] 2 WLR 389 at 393-4, 401-3; [1975] 1 All ER 849 at 855-6, 863-4. In appropriate cases it may be possible to award interest as a head of damage where a party has been kept out of funds to which they were entitled: See for example *Hadley v Baxendale* (1854) 9 Ex 341 at 354; [1843-60] All ER 461 at 465; 156 ER 145 at 151; *Hungerfords v Walker* (1989) 171 CLR 125 at 151, 152, 165; 84 ALR 119 at 134, 135, 145; 63 ALJR 210 at 219, 225.

[9.2.6] Statutory entitlement to pre-judgment interest There is no domestic legislation which confers a right to pre-judgment interest. The conventional wisdom seems to be that s.3 of the *Law Reform (Misclellaneous Provisions) Act* 1934 (UK) (as it stood prior to amendment by the *Administration of Justice Act* 1982) applies as an act of general application as at Independence. The *Law Reform Act* provides that interest may run from the time the cause of action arose whereas the rule provides only for interest from the date the claim was filed. It is unusual that a default judgment may carry interest only from the date of filing but a judgment after a hearing my carry interest from the date the cause of action arose. It is suggested that this discrepancy arises from the failure to harmonise the *Rules* and the Act and not as a result of any particular planning.

[9.2.7] Calculation and rate The approach to the calculation of pre-judgment interest is compensatory rather than punitive - to award what would be the amount that a person could receive from a normal bank investment during the relevant period: *Richard Lo v Sagan* [2003] VUCA 16; CAC 27 of 2003; *Air Vanuatu v Molloy* [2004] VUCA 17; CAC

19 of 2004; *Enterprise Roger Brand v Hinge* [2005] VUCA 21; CAC 13 of 2005. Under s.3(1)(a) of the *Law Reform (Misclellaneous Provisions) Act* 1934 (UK), the court may award interest at such rate as it thinks fit. This is conventionally 5% (as it was under O42 r16 of the Old Rules) however there would appear to be a wide and inexplicable variety of rates still claimed and, sometimes, awarded. The Court of Appeal has recently reiterated that 5% is the appropriate rate: *VCMB v Dornic* [2009] VUCA 43; CAC 18 of 2009. Interest awards do not compound: s.3(1)(a), *Law Reform (Miscellaneous Provisions) Act* 1934 (UK).

[9.2.8] Interest on general damages General damages are awarded in current money as at the date of trial and so it is not appropriate to award interest on such items as pain and suffering, loss of amenity, etc: *Alphonse v Tasso* [2007] VUSC 54 at [57]; CC 21 of 2005; *Commissioner of Police v Garae* [2009] VUCA 9 at [31]; CAC 34 of 2008.

(c) costs in accordance with Part 15.

(5) Default judgment must not be given in the Magistrates Court before the first hearing date.

(6) The claimant must serve a copy of the judgment on the defendant.

(7) If the defendant does not apply within 28 days of service to have the judgment set aside under rule 9.5, the claimant may:

[9.2.9] No limitation period This time frame does not create a limitation period for bringing an application to set aside a default judgment, which may be made at any time under subr.9.5(2): *Kontos v Laumae Kabini* [2006] VUSC 45; CC 110 of 2005.

(a) file a sworn statement that the judgment was served on the defendant as required by Part 5; and

(b) apply to the court for an enforcement order.

Default – claim for damages

9.3 (1) This rule applies if the claim was for an amount of damages to be decided by the court.

[9.3.1] Proper characterisation of claim See further [9.2.1]. An application for default judgment in respect of a claim which is partly fixed and partly to be determined should be brought under this rule: *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [19].

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(2) After the claimant has filed a proof of service, the claimant may file a request for judgment against the defendant for an amount to be determined by the court. The request must be in Form 13.

[9.3.2] Application must be in writing The application must, despite subr.7.2(2), be made in writing under this subrule: *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [78].

(3) In the Magistrates Court, the request may be made orally.

(4) The court may:

(a) give judgment for the claimant for an amount to be determined; and

(b) either:

(i) determine the amount of damages; or

(ii) if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages.

(5) Default judgment must not be given in the Magistrates Court before the first hearing date.

(6) The claimant must serve on the defendant:

(a) a copy of the judgment; and

(b) if a conference is to be held to determine the amount of damages, a notice stating the date fixed for the conference.

Deciding the amount of damages

9.4 (1) A determination of the amount of damages must be conducted as nearly as possible in the same way as a trial.

(2) However, the court may give directions about:

(a) the procedures to be followed before the determination takes place; and

(b) disclosure of information and documents; and

(c) filing of statements of the case; and

(d) the conduct of the determination generally.

(3) After damages have been determined, the claimant must file judgment setting out the amount of damages and serve a copy of the judgment on the defendant, unless the defendant was present when the damages were determined.

(4) The judgment may be enforced in the same way as a judgment given after a trial.

Setting aside default judgment

E *SCR* O13r 9

9.5 (1) A defendant against whom a default judgment has been signed under this Part may apply to the court to have the judgment set aside.

[9.5.1] Inherent jurisdiction There was formerly an inherent jurisdiction to set aside an irregular judgment *ex debito justitiae*. So, a judgment on a claim which was not in fact served (eg. *White v Weston* [1968] 2 QB 647 at 659, 662; [1968] 2 All ER 842 at 846, 848; [1968] 2 WLR 1459 at 1465, 1467; *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [10]) or which is an abuse of process (eg. *Deputy Commissioner of Taxation v*

Abberwood (1990) 19 NSWLR 530 at 533) or a fraud (eg. *Wyatt v Palmer* [1899] 2 QB 106 at 110) should be set aside without detailed consideration of the merits of the defence: See for example *Brenner v Johnson* [1985] VUSC 8; 1 Van LR 180 at 181-3; *Barlow v Than* [1987] VUSC 18; [1980-1994] Van LR 315; *Tari v Harvey* [2006] VUSC 19; CC 163 of 2005. The continued existence of this inherent jurisdiction was put in doubt by the Court of Appeal in *ANZ Bank v Dinh* [2005] VUCA 3; CAC 27 of 2004 where the court overlooked an irregularity, describing it as "mere technicality of no substance". Subsequently, in *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [30] Treston J concluded that the effect of this decision was that even where a judgment was irregular it remained necessary to consider the merits of the defence in accordance with subr.(3)(b). Also, in *VCMB v Dornic* [2009] VUCA 43; CAC 18&19 of 2009 the court declined even to deal with an application to set aside default judgment in the inherent jurisdiction. The difficulty generated by this situation is that it creates an unfair advantage (and a strong temptation) to a claimant entering irregular judgment by requiring defendants to establish a good defence even in circumstances where a judgment was unfairly obtained. It is respectfully suggested that the matter may not be settled.

(2) The application:

(a) may be made at any time; and

[9.5.2] Effect of delay in making application Delay in applying to set aside a default judgment is not fatal but may be taken into consideration in the exercise of the court's discretion: *Evans v Bartlam* [1937] AC 473 at 480; [1937] 2 All ER 646 at 650. Delay coupled with significant prejudice may be compelling: *Harley v Samson* (1914) 30 TLR 450; *National Australia Bank v Singh* [1995] 1 Qd R 377 at 380.

(b) must set out the reasons why the defendant did not defend the claim; and

(c) must give details of the defendant's defence to the claim; and

[9.5.3] Method of giving details A common way to satisfy this paragraph is to attach a draft defence to the application. This may also save time in connection with subr.(4)(a). It is not, however, a requirement – especially in simple cases: *Eruiti Island Village v Traverso* [2009] VUSC 9 at [4]; CC 222 of 2005.

(d) must have with it a sworn statement in support of the application; and

[9.5.4] Condescension to particulars by appropriate deponent The sworn statement should condescend to particulars of the nature of the defence: *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004.The deponent should, if possible, be someone personally connected with the matters giving rise to the defence and the reasons why judgment was allowed to be entered.

(e) must be in Form 14.

(3) The court may set aside the default judgment if it is satisfied that the defendant:

[9.5.5] Relevant considerations Other matters may be taken into account in the exercise of discretion, but the court must be satisfied of at least the matters (a) and (b): *Brenner v Johnson* [1985] VUSC 8; 1 Van LR 180; *Nelson v A-G* [1995] VUCA 1; CAC 7 of 1995; *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004; *Westpac v Brunet* [2005] VUSC 148; CC 237 of 2004 at [82]; The court may also set aside a default judgment in its inherent jurisdiction if the justice of the case so requires: See [9.5.1].

(a) has shown reasonable cause for not defending the claim; and

[9.5.6] Meaning of "reasonable cause" It is necessary that the reasons advanced for not defending the claim be "good" reasons: *Temakon v Vanuatu Commodities* [2007] VUSC 20; CC 26 of 2004 at [17]. There may be some scope for taking into account the nature and strength of a defence advanced under paragraph (b) when considering what would constitute "reasonable cause" under this paragraph in the circumstances of a particular case: *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004.

(b) has an arguable defence, either about his or her liability for the claim or about the amount of the claim.

[9.5.7] Meaning of "arguable" It is necessary only to show that the defence is "arguable", not that it is likely to succeed. See also [9.5.1]. See for example *Joel v Kalpoi* [2009] VUSC 59; CC 136 of 2003 at [18].

(4) At the hearing of the application, the court must:

(a) give directions about the filing of the defence and other statements of the case; and

(b) make an order about the payment of the costs incurred to date; and

[9.5.8] Usual costs orders It is suggested that the distinction between "regular" and "irregular" judgments is useful in deciding the costs consequences of a successful application under this rule. If the judgment was "irregular" the proper order for costs should be that the party entering the default judgment pay the costs of the application. If the judgment is "regular" the proper order for costs should be that the party applying to set aside the judgment pay the costs of the application and those thrown away.

(c) consider whether an order for security for costs should be made; and

[9.5.9] Where proposed defence is shadowy The court may impose security if the proposed defence is shadowy: *Richardson v Howell* (1892) 8 TLR 445 at 446.

(d) make any other order necessary for the proper progress of the proceeding.

(5) These Rules apply to the proceeding as if it were a contested proceeding.

Summary judgment

E *CPR* r24.2, 24.4
E *SCR* O14r 1

9.6 (1) This rule applies where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claimant's claim.

[9.6.1] Parties to whom procedure is available This procedure is expressed to be available only to claimants and, due to the definition of "claimant", may not be available to counterclaimants, support for which proposition might be found in *Narai v Foto* [2006] VUSC 77; CC 175 of 2004 at [19] in the context of security for costs. It is suggested that there is no good reason why a claimant could not make an application in respect of one of several defendants: *Stainer v Tragett* [1955] 1 WLR 1275 at 1283; [1955] 3 All ER 742 at 748. Subrule (7) suggests that an application may be made in respect of a part of a claim.

[9.6.2] Meaning of "real prospect" The test propounded by Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91 at 92 was whether the prospect is realistic rather than fanciful. This test has been adopted by the Court of Appeal: *Bokissa v RACE* [2003] VUCA 22; CAC 21 of 2003.

(2) The claimant may apply to the court for summary judgment.

[9.6.3] Application may be made at any time The application may be made at any time, however, it is appropriate that such applications be made as soon as possible after the defence is filed as the policy underlying the summary judgment procedure is to uphold indisputable claims at an early stage and so avoid the costs, etc associated with full proceedings: *Swain v Hillman* [2001] 1 All ER 91 at 92. The court may be disinclined to exercise its discretion in favour of an applicant who has delayed.

(3) An application for summary judgment must:

(a) be in Form 15; and

[9.6.4] Application to be in writing The application may not be made orally under subr.7.2(2) but must be made in writing under this subrule: *Gidley v Mele* [2007] VUCA 7; CAC 34 of 2006. See also *Maltape v Aki* [2007] VUCA 5; CAC 33 of 2006. Although strict compliance with forms is not required (see r.18.9), that part of Form 15 which contains the date of first hearing is necessary to be included and completed for the form to be effective: *Hapisai v Albert* [2008] VUSC 3; CC 107 of 2007 at [23], [3], [11]. See further subr.(4)(b).

(b) have with it a sworn statement that:

E *CPR* r22.1

(i) the facts in the claimant's claim are true; and

[9.6.5] Content of sworn statement Only the facts necessary to the cause of action need to be verified. If the statement of the case is properly drawn, the sworn statement will be very simple and may refer to the statement of the case: *May v Chidley* [1894] 1 QB 451 at 453; *Roberts v Plant* [1895] 1 QB 597 at 605. If the statement of the case is found to contain deficiencies, it may be amended at or before the summary judgment hearing: *Cegami Investments Ltd v AMP Financial Corp (NZ) Ltd* [1990] 2 NZLR 308 at 314. Any important documents should be exhibited or the relevant parts reproduced in the body of the sworn statement: *Scott v Public Trustee* [1942] VLR 206; [1942] ALR 303. If the claimant knows of some particular matter which the defendant is likely to raise by way of defence but which is unsustainable, the claimant ought to anticipate it and deal with it. Of course, the claimant cannot be expected to anticipate defences of which it has no notice: *Greenbank Ltd v Haas* [2000] 3 NZLR 341 at [19].

(ii) the claimant believes there is no defence to the claim, and the reasons for this belief.

[9.6.6] Onus The claimant bears the onus of satisfying the court that there is no defence: *Gemeinwirtschaft v City of London Garage* [1971] 1 All ER 541 at 549; *Singh v Kaur* (1985) 61 ALR 720 at 722.

[9.6.7] What sworn statement should contain and by whom made The application will be defective if the deponent fails to depose to this belief. The conventional form of words is "I verily believe that there is no defence to this action". Where the claim seeks damages to be assessed, the deponent should swear that there is no defence "except as to the amount of damages": *Dummer v Brown* [1953] 1 QB 710 at 721; [1953] 2 WLR 984 at 992; [1953] 1 All ER 1158 at 1164. The statement should be made by the claimant, not by its lawyer: *National Bank of Vanuatu v Tambe* [2007] VUSC 105; CC 237 of 2007 at [2].

E *CPR* r24.5(2)

(4) The claimant must:

(a) file the application and statement; and

(b) get a hearing date from the court and ensure the date appears on the application; and

[9.6.8] General observations See also [9.6.4]. Unfortunately, getting a hearing date from the court is easier said than done. Delays at this stage are common.

(c) serve a copy of the application and sworn statement on the defendant not less than 14 days before the hearing date.

E *CPR* r24.5(1)

(5) The defendant:

(a) may file a sworn statement setting out the reasons why he has an arguable defence; and

[9.6.9] What sworn statement should contain This should deal specifically with the claim and must "condescend to particulars": *Wallingford v Directors of the Mutual Society* [1880] 5 AC 685 at 699, 704; *ANZ v Dinh* [2005] VUCA 3; CAC 27 of 2004. It should also depose to the belief that there is a "good defence". The defendant will not later be limited to the defences raised in this sworn statement: *Ray v Newton* [1913] 1 KB 249 at 258. The court will not look closely at factual disputes and will not need to be satisfied of the truth of the assertions contained in the sworn statement, but it is important that these assertions are unequivocal: *Local Courier Service Pty Ltd v Kesha* (1995) PRNZ 690.

(b) must serve the statement on the claimant at least 7 days before the hearing date.

E *CPR* r24.5(3)(b)

(6) The claimant may file another sworn statement and must serve it on the defendant at least 2 days before the hearing date.

[9.6.10] When further sworn statement should be filed There will be no purpose in filing another sworn statement if the defendant's sworn statement has disclosed a defence with a reasonable prospect of success. A mere contradiction by the claimant would be pointless as the court cannot resolve factual inconsistencies on sworn statements in a summary fashion. The purpose of filing additional sworn statements is, generally, to cure any defect or omission in the original sworn statement or to show why a defence of which the claimant had no previous notice is unsustainable.

(7) If the court is satisfied that:

E *CPR* r24.2(a)(ii)

(a) the defendant has no real prospect of defending the claimant's claim or part of the claim; and

[9.6.11] Basis on which court determines application See further [9.6.2]. It must be remembered that it is not the purpose of the summary judgment procedure to conduct a mini-trial by attempting to evaluate conflicting factual evidence. Rather, it eliminates those defences which are not fit for trial at all: *Swain v Hillman* [2001] 1 All ER 91 at 94-5 (approved by the Court of Appeal in *Bokissa Investments v RACE Services* [2005] VUCA 22; CAC 21 of 2003). That does not mean, however, that the court has to accept everything said by a party in the sworn statements. In some cases it may be clear that there is no real substance in factual assertions, particularly if contradicted by contemporary documents or independent evidence: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341. In such situations, issues which are dependent upon those factual assertions may be summarily disposed of to save the cost and delay of trying an issue the outcome of which is inevitable: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [95]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125; *Equant v Ives* [2002] EWHC 1992 (Ch) at [16]; *ED&F v Patel*

[2003] EWCA Civ 472 at [10]. Generally, the simpler the case, the better a candidate for summary judgment: *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244; [1965] 2 All ER 871 at 874**;** *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [93]; [2003] 2 AC 1; [2001] 2 All ER 513; [2001] Lloyd's Rep Bank 125.

[9.6.12] Part claims It is clearly suggested that summary judgment is available as to part of a claim. The word "claim" is not co-extensive with "cause of action" and the court is entitled to give summary judgment as to liability and as to quantum, where both are indisputable: *Australian Guarantee Corp (NZ) Ltd v McBeth* [1992] 3 NZLR 54 at 59.

E *SCR* O14r3(1)
E *CPR* r24.2(b)

(b) there is no need for a trial of the claim or that part of the claim, the court may:

[9.6.13] When there is a "need for trial" It may be that this paragraph merely makes allowance for subr.(9), however there are several rare circumstances which, under the former English rule, have been said to provide a reason for continuing to trial: See for example *Daimler v Continental Tyre & Rubber* [1916] 2 AC 307 at 326; [1916-7] All ER 191 at 197; *Miles v Bull* [1969] 1 QB 258 at 266; [1968] 3 All ER 632 at 637-8; [1968] 3 WLR 1090 at 1096; *Bank fur Gemeinwirtschaft v City of London Garages* [1971] 1 WLR 149 at 158; [1971] 1 All ER 541 at 548.

[9.6.14] Residual discretion The use of the word "may" suggests that, even if the criteria in paras (a) and (b) are satisfied, there is nevertheless a discretion as to whether summary judgment will be given. Although the discretion appears to be unlimited, it is likely that it is of the most residual kind and will only rarely be used to refuse judgment: *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 2 All ER 508 at 515; *Pemberton v Chappell* [1987] 1 NZLR 1 at 5. See for example *Waipa District Council v Electricorp* [1992] 3 NZLR 298 (pending judicial review claim which might result in basis of liability being quashed).

(c) give judgment for the claimant for the claim or part of the claim; and

[9.6.15] As to part claims see [9.6.12].

E *CPR* r24.6(b)

(d) make any other orders the court thinks appropriate.

E *CPR* r25.14

(8) If the court refuses to give summary judgment, it may order the defendant to give security for costs within the time stated in the order.

[9.6.16] Circumstances justifying order for security Security may be ordered if the proposed defence satisfies the "reasonable prospect" test but is "shadowy" (*Van Lynn v Pelias* [1968] 3 WLR 1141 at 1146; [1968] 3 All ER 824 at 827; [1969] 1 QB 607 at 614), suspicious *(Lloyd's Banking Co v Ogle* (1876) 1 Ex D 262 at 264; *Wing v Thurlow* (1893) 10 TLR 53; *Fieldrank Ltd v Stein* [1961] 1 WLR 1287 at 1289; [1961] 3 All ER 681 at 683) or where the case is very nearly one where summary judgment ought to be given (*Ionian Bank v Couvreur* [1969] 1 WLR 781 at 787; [1969] 2 All ER 651 at 656; *M V Yorke Motors v Edwards* [1982] 1 WLR 444 at 450; [1982] 1 All ER 1024 at 1028).

(9) The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law.

[9.6.17] Scope of limitation under rule See further [9.6.2], [9.6.10]. This subrule should not be read to limit summary judgment only to those exceptional cases or those in which the facts are entirely free of dispute: *Miller v Garton Shires* [2006] EWCA Civ 1386 at [11].

[9.6.18] Area of developing law It is not appropriate to award summary judgment on a case which raises issues in a developing area of law: *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298 at [2], [62], [76]; *Equitable Life Assurance v Ernst & Young* [2003] EWCA Civ 1114 at [40].

[9.6.19] Requirement to identify circumstances in which subrule is invoked If there is said to be such a matter of fact or law which militates against summary judgment, this ought to be precisely identified and not baldly asserted: *Kalsakau v Dinh* [2005] VUCA 7; CAC 6 of 2004.

[9.6.20] Meaning of "difficult question of law" Whether a "difficult question of law" is raised is a matter for the court which should grant summary judgment if it is satisfied that the defence is really unarguable: *Cow v Casey* [1949] 1 KB 474 at 481; *European Asian Bank v Punjab & Sind Bank* (No2) [1983] 2 All ER 508 at 516; 1 WLR 645 at 654.

[9.6.21] Effect of counterclaim The fact that a defendant might have a good counterclaim or set-off does not necessarily mean that leave to defend ought to be given: *Rotherham v Priest* (1879) 49 LJQB 104. Where there is a good set-off or counterclaim (unless wholly unrelated to the claim), the court may give summary judgment on the claim but stay enforcement until the set-off or counterclaim is dealt with.

Offers of settlement, Supreme Court

9.7 (1) A party to a proceeding in the Supreme Court may make an offer of settlement by sending Form 16 to the other party to the proceeding.

[9.7.1] Relationship to Calderbank letters The procedure under this rule is independent of the possibility of making a "Calderbank" offer (see *Calderbank v Calderbank* [1975] 3 All ER 333 at 342-3; (1976) Fam 93 at 105-6; [1975] 3 WLR 586 at 596-7). See further r.15.11 as to costs consequences.

(2) The offer is without prejudice to the first party's case.

(3) If the parties agree on settlement:

(a) both parties must sign the settlement form; and

(b) the party who made the offer must file the form and serve a copy on the other party.

(4) The terms of settlement must be complied with as set out in the settlement form.

(5) If a proceeding is settled under this rule, the court must:

(a) note on the file that the matter has been settled; but

(b) must not enter judgment in favour of the claimant.

(6) If the terms of the settlement are not complied with as set out in the settlement form, the other party may file an application for judgment.

[9.7.2] Terms upon which judgment may be obtained Presumably the judgment for which the innocent party can apply is judgment on the terms of settlement rather than on the original action. This is suggested by subr.(9). On this assumption, the important difference between settlement under this rule and by other methods is here illustrated – a party may avail itself of a summary procedure to remedy a breach of the settlement rather than having to return to court with fresh proceedings as upon a settlement by contract. There may be difficulty determining whether a party has "complied" in complex cases or where the other party contests the breach. Subrule (9) makes no provision for how the court may proceed in this situation.

(7) An application for judgment must:

(a) be in Form 17; and

(b) have with it a sworn statement that the party has not complied with the terms of the settlement as set out in the settlement form.

(8) The applicant must:

(a) file the application and statement; and

(b) get a hearing date from the court and ensure the date appears on the application; and

(c) serve a copy of the application and sworn statement on the other party not less than 14 days before the hearing date.

(9) If the other party does not appear on the hearing date, the court may give judgment for the applicant in accordance with the settlement as set out in the settlement form.

(10) If:

(a) a party offers to settle under this rule but the other party refuses the offer; and

(b) the other party is successful but for less than the amount offered on the offer to settle claim form, or for less advantageous terms than the terms offered on the offer to settle claim form;

the court may award costs against the other party.

[9.7.3] Costs discretionary The word "may" preserves the court's discretion, as in assessing the appropriate consequences of a "Calderbank" offer. See further [15.11.2] as to the measurement of success.

Settlement, Magistrates Court

9.8 (1) If the parties to a proceeding in the Magistrates Court decide to settle, they may tell the magistrate.

(2) The magistrate must:

(a) record the case as being settled; and

(b) note in the file the details of settlement; and

(a) not enter judgment for any party.

(3) If either party does not comply with the settlement, the other party may apply to the court for the case to be re-opened, whether or not the magistrate has struck the case out under subrule (5).

(4) The magistrate may re-open the case if he or she is satisfied that the party has not complied with the settlement.

(5) If the parties did not tell the magistrate they settled the case, the magistrate may:

(a) set the case aside for 6 months; and

(b) strike the case out under rule 9.10, if nothing has been heard from either party after 6 months.

Discontinuing proceeding

9.9 (1) The claimant may discontinue his or her claim at any time and for any reason.

(2) To discontinue the claimant must:

(a) file a Notice of Discontinuance in Form 18; and

(b) serve the notice on all other parties.

(3) If there are several defendants:

(a) the claimant may discontinue against one or some only,

(b) and the claimant's claim continues in force against the others.

(4) If the claimant discontinues:

(a) the claimant may not revive the claim; and

[9.9.1] No non-suit The rules displace the option of a "non-suit": *Inter-Pacific Investments v Sulis* [2007] VUSC 21; CC 8 of 2006.

(b) a defendant's counterclaim continues in force; and

(c) the party against whom the claimant discontinued may apply to the court for costs against the claimant.

[9.9.2] Usual costs order The usual consequence of discontinuance would be an order for costs and this result is automatic under rules of court in many other jurisdictions. Parties considering discontinuance would be well advised to give thought to negotiating the terms of discontinuance with the other side.

Striking out

9.10 (1) This rule applies if the claimant does not:

[9.10.1] Inherent jurisdiction This rule is additional to the court's inherent power to dismiss a proceeding for want of prosecution, as to which see generally *Allen v Sir Alfred McAlpine* [1968] 2 QB 229 at 245, 258; [1968] 2 WLR 366 at 370, 382; [1968] 1 All ER

543 at 547, 555; *Birkett v James* (1978) AC 297 at 318; [1977] 3 WLR 38 at 46; [1977] 2 All ER 801 at 804. There is also an inherent jurisdiction to strike out a case as an abuse of process which may be shown by a party's inactivity: *Grovit v Doctor* [1997] 1 WLR 640 at 647-8; [1997] 2 All ER 417 at 424**;** *Arbuthnot Latham Bank* v *Trafalgar Holdings* [1998] 1 WLR 1426 at 1436-1437; [1998] 2 All ER 181 at 191-2.

(a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or

(b) comply with an order of the court made during a proceeding.

[9.10.2] Relevant considerations The court has a general discretion to strike out a case where there has been a failure of compliance with a rule or order. That does not mean that in applying the overriding objective a court will necessarily or usually strike out proceedings under this rule: *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 at 1933; [1999] 4 All ER 934 at 940; *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005. Blatant and persistent disregard of orders is likely to lead to an order under this rule: *Kere v Kere* [2004] VUSC 88; CC 153 of 2002. The common law principles relating to striking out for want of prosecuction are not binding as to this rule but may continue to be generally relevant as to the dictates of justice: *Nasser v United Bank of Kuwait* [2001] EWCA Civ 1454 at [27], [29].

(2) The court may strike out a proceeding:

[9.10.3] Order is interlocutory in nature Such an order is interlocutory in nature, with the result that leave is required to appeal: *Miller v National Bank of Vanuatu* [2006] VUCA 1; CAC 33 of 2005; cf orders made under r.18.11.

(a) at a conference, in the Supreme Court; or

(b) at a hearing; or

(c) as set out in subrule (3); or

[9.10.4] Requirement of notice The apparently unqualified discretion conferred by this rule should in fact be read together with r.18.11. Only in the circumstances mentioned in paragraph (d) can the court strike out a proceeding without notice. In all other cases, the procedure laid down above or in r.18.11 must be followed: *Esau v Sur* [2006] VUCA 16; CAC 28 of 2005.

(d) without notice, if there has been no step taken in the proceeding for 6 months.

[9.10.5] General observations This power appears to be very seldom invoked. It is uncertain whether this is intended or because case management systems within the court fails to identify such proceedings. It is not uncommon for parties to write to the court, inviting them to strike out proceedings. It is suggested that this is not inappropriate, provided that the letter is copied to the claimant, who will then undoubtedly display a flurry of activity.

(3) If no steps have been taken in a proceeding for 3 months, the court may:

(a) give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and

[9.10.6] General observations Such notices are very rare. It is uncertain whether this is intended or because case management systems within the court fails to identify such proceedings. It is not uncommon for parties to write to the court, inviting them to schedule an appearance. It is suggested that this is not inappropriate, provided that the letter is copied to the claimant, which will then undoubtedly display a flurry of activity.

(b) if the claimant does not appear, or does not show cause, strike out the proceeding.

(4) After a proceeding has been struck out, the Registrar must send a notice to the parties telling them that the proceeding has been struck out.