

## PRELIMINARY

### Citation and commencement

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

- [1.1] History The *Rules* were made on 28 February 1973 in exercise of the powers conferred upon the Rules Committee by s.22 of the *Western Pacific (Courts) Order in Council* 1961, which was itself made under the *Foreign Jurisdiction Act* 1890 (c.37). The validity of the *Order* appears to be beyond question: *Nyali v Attorney-General* [1956] 1 QB 1 at 14, 15.
- [1.2] Pre-Independence appeal Prior to Independence, the applicable procedure in appeals would have depended on whether French or British original jurisdiction had been invoked. If the former, the procedure of the *Cour de Justice de Paix à Compétence Étendue*, the *Cour d'Appel* (in Noumea) and subsequently the *Cour de Cassation* (in Paris) would have applied.
- [1.3] Rule making power First, s.30(1), *Courts* [Cap 122] (repealed) and subsequently, s.66(3), *Judicial Services and Courts* [Cap 270], permitted the making of rules relating to "practice and procedure". In relation to the Court of Appeal this power has never been utilised, except incidentally.
- [1.4] Post-Independence application No other appeal rules having been promulgated since Independence, the Court of Appeal has explained that the *Rules* continue to apply by reason of art.95(1) of the *Constitution* and are read with such adaptations as are necessary to bring them into conformity with the *Constitution*: *Leymang v Ombudsman* [1997] VUCA 10; CAC 3 of 1997; *Toara v Simbolo* [1999] VUCA 6; CAC 11 of 1998; *Atkinson v Gee* [2002] VUCA 1; CAC 17 of 2001 at [36].
- [1.5] Practice Direction The Chief Justice issued an important practice direction dated 2 April 2004 which deals with a number of routine matters of practice and procedure in appeals. See further CPR [1.1.7].
- [1.6] No application to criminal appeal In relation to criminal appeals, Parliament has covered the field of procedure with Part 11 of the *Criminal Procedure Code* [Cap 136] with the result that the *Rules* continue to have application only in relation to civil appeals.
- [1.7] Reopening a decision other than by appeal There is a limited scope to reopen the decision of a primary judge, without appeal, in the inherent jurisdiction. Such action is contrary to the public interest in the finality of litigation and is likely to be taken only in exceptional circumstances: *Re Barrell Enterprises* [1972] 3 All ER 631 at 636; [1973] 1 WLR 19 at 24. There is a greater scope to recall or vary interlocutory orders than final decisions: *Mullins v Howell* (1879) 11 Ch D 763 at 766. There is also greater scope to recall or vary orders which have not yet been sealed. Consent orders may also be set aside: see for example *Ansons Pty Ltd v Merlex Corp Pty Ltd* [2001] WASC 204 at [9]; (2001) 162 FLR 443 at 457. It is difficult precisely to define the categories, which are not closed, in which the jurisdiction will be invoked. Examples usually involve some inadvertence or misunderstanding by counsel or the court (*Monaco v Arnedo Pty Ltd* (1994) 13 WAR 522 at 524), fraud or suppression of facts (*Cabassi v Vila* (1940) 64 CLR 130 at 147) or other serious injustice. See further CPR [12.10.1], [13.2.3].

### Interpretation

#### 2 In these Rules, unless the context otherwise requires-

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

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

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

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

**“Court of Appeal” means the Fiji Court of Appeal;**

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

**“decision” includes any order, judgment or decree;**

- [2.4] Meaning of “decision” The definition probably derives from comments of the Privy Council in *Commonwealth v Bank of New South Wales* [1949] HCA 47; (1949) 79 CLR 497 at 625 as to the meaning of the word “decision” in the context of s.74 of the Australian Constitution which refers to an “appeal . . . from a decision of the High Court”. Their Lordships said that it “is an apt compendious word to cover ‘judgements, decrees, orders and sentences’”. It was used in the comparable context of the *Judicial Committee Acts* (UK) of 1833 and 1943 as a general term to cover “determination, sentence, rule or order” and “order, sentence or decree”. Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the “natural, obvious and prima-facie meaning of the word ‘decision’ is decision of the suit by the Court”. Only “decisions” can be the subject of appeal. It does not seem to matter, however, whether the decision under appeal is properly an order, judgment or decree, provided it is one of them: *Ah Toy v Registrar of Companies* (1985) 10 FCR 280 at 281; 61 ALR 583.
- [2.5] “Decisions” and “orders” The word “decision”, though defined to include “order”, is used in the *Rules* in contradistinction to the word “order” in relation to interlocutory matters. See for example r.21(1). This is slightly confusing as presumably it was intended to convey either that *final* “orders” are “decisions” or that interlocutory “orders” are treated as decisions *after* leave is granted. The use of the word “order” as a description of an interlocutory, as opposed to final, ruling is broadly in accordance with *Onslow v Inland Revenue* (1890) 25 QBD 465 at 466 (“a judgment is a decision obtained in an action, and every other decision is an order”). It is suggested that the real test as to differentiating between final (decisions) and interlocutory (orders) see CPR r.7.1.
- [2.6] “Decisions” compared to “reasons” An appeal lies against decisions but not against the reasons for the decision: *Lake v Lake* [1955] P 336 at 343-4, 347; [1955] 2 All ER 538 at 541-2, 543. Accordingly, a party who has been granted (all) the relief sought in the proceedings cannot appeal against the decision, even if it is thought that the reasoning is incorrect.
- [2.7] Decisions compared to administrative acts The court often takes steps in a purely administrative capacity. These are not appealable though they may be reviewable under Part 17, CPR: *Re Dunn & The Morning Bulletin Ltd* [1932] St R Qd 1 at 15, 16.

**“Governor” means the Governor of the Gilbert and Ellice Islands Colony;**

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

**“High Commissioner” means Her Britannic Majesty’s High Commissioner for the Western Pacific;**

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

**“High Court” means the High Court of the Western Pacific;**

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

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

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

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

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

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

**“Senior Magistrate” means the Senior Magistrate of the Gilbert and Ellice Islands Colony;**

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

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

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

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

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

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