

Examinable excerpts of

***Supreme Court (General Civil
Procedure) Rules 2015***

as at 2 October 2018

Order 4—Process in the Court

Part 1—General

4.01 How proceeding commenced

Except where otherwise provided by or under any Act or these Rules a proceeding in the Court shall be commenced by writ or by originating motion.

4.02 Interlocutory application

An interlocutory or other application in a proceeding made on notice to any person shall be by summons.

4.03 Names of parties

- (1) Except as provided by this Rule, a person who commences a proceeding shall be called a plaintiff and a person against whom a proceeding is commenced shall be called a defendant.
- (2) A person who commences a proceeding under Rule 32.03, 32.05, 37.02 or 75.06(3) shall be called an applicant and the person against whom the proceeding is commenced shall be called a respondent.
- (3) A person who commences a proceeding referred to in Rule 1.12 shall be called an applicant and the person against whom the proceeding is commenced shall be called a respondent.
- (4) A person who appeals shall be called an appellant and any other party to the appeal shall be called a respondent.
- (5) Where any appellant or respondent on an appeal is a party to a proceeding, the appellant or respondent shall be so identified in any document in the appeal by the expression "(Plaintiff)", "(Defendant)", "(Applicant)" or other description of party after the word "Appellant" or "Respondent" in the title of the document.

4.04 When writ required

- (1) Except as provided by Rules 1.12, 4.05 and 4.06 and Order 58, every proceeding shall be commenced by writ.

...

4.05 When originating motion required

- (1) A proceeding shall be commenced by originating motion—
 - (a) where there is no defendant to the proceeding;
 - (b) where by or under any Act an application is authorised to be made to the Court; or
 - (c) where required by these Rules.

...

4.06 Optional commencement by originating motion

A proceeding may be commenced by originating motion where—

- (a) it is unlikely that there will be any substantial dispute of fact; and
- (b) for that reason it is appropriate that there be no pleadings or discovery.

4.07 Continuance as writ of proceeding by originating motion

- (1) Where a proceeding in which there is a defendant is commenced by originating motion, but ought by or under any Act or these Rules to have been commenced by writ, or might in the opinion of the Court more conveniently continue as if commenced by writ—
 - (a) the Court may order that the proceeding continue as if it had been commenced by writ and may, in particular, order that any affidavits already filed in the proceeding shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof or that pleadings be served between the parties, and that the parties have discovery of each other; and
 - (b) by virtue of that order, the proceeding shall be taken to have been duly commenced for all purposes on the day the originating motion was filed.
- (2) Any reference in these Rules to a proceeding commenced by writ shall, unless the context otherwise requires, be taken to include a reference to a proceeding in respect of which an order has been made under paragraph (1).

4.08 Urgent case

In an urgent case, on the application of a person who intends to commence a proceeding and upon that person's undertaking to commence the proceeding within such time as the Court directs, the Court may make any order which the Court might make if the applicant had commenced the proceeding and the application were made in the proceeding.

Part 2—Certification requirements for proceedings

4.09 Overarching obligations certification

For the purposes of section 41(2) of the **Civil Procedure Act 2010**, the overarching obligations certification shall be in Form 4A.

4.09.1 Certification of prior overarching obligations certification

- (1) For the purposes of section 41(5)(a)(i) of the **Civil Procedure Act 2010**, the specified period is the period of two years prior to the date of the certification under section 41(5)(b) of that Act.
- (2) For the purposes of section 41(5)(b) of the **Civil Procedure Act 2010**, the certification by a legal practitioner as to prior overarching obligations certification in relation to a party referred to in section 41(5)(a) of that Act shall be in Form 4AB.

4.10 Proper basis certification

- (1) For the purposes of section 42(1C) of the **Civil Procedure Act 2010**, processes in the Court for the registration or enforcement of judgments are exempt from the proper basis certification requirements under the **Civil Procedure Act 2010**.
- (2) For the purposes of section 42(2) of the **Civil Procedure Act 2010**, the proper basis certification shall be in Form 4B.

Order 9—Joinder of claims and parties

9.01 Joinder of claims

A plaintiff may join any number of claims against a defendant—

- (a) whether the plaintiff makes the claims in the same or in different capacities; and
- (b) whether the claims are made against the defendant in the same or in different capacities.

9.02 Permissive joinder of parties

Two or more persons may be joined as plaintiffs or defendants in any proceeding—

- (a) where—
 - (i) if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all the proceedings; and
 - (ii) all rights to relief claimed in the proceeding (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions; or
- (b) where the Court, before or after the joinder, gives leave to do so.

9.03 Joinder of necessary parties

- (1) Except by order of the Court or as provided by or under any Act, where the plaintiff claims any relief to which any other person is entitled jointly with the plaintiff—
 - (a) all persons so entitled shall be parties to the proceeding; and
 - (b) any person who does not consent to being joined as a plaintiff shall be made a defendant.
- (2) Where the plaintiff claims relief against a defendant who is liable jointly with some other person and also liable severally, that other person need not be made a defendant to the proceeding.
- (3) Where persons are liable jointly, but not severally, under a contract, and the plaintiff in respect of that contract claims against some but not all of those persons, the Court may stay the proceeding until the other persons so liable are added as defendants.
- (4) The Court may make an order under paragraph (1) before or after the non-joinder.

9.04 Joinder inconvenient

Notwithstanding Rules 9.01 and 9.02, where any joinder of claims or of parties may embarrass or delay the trial of the proceeding or cause prejudice to any party or is otherwise inconvenient, the Court may order that—

- (a) there be separate trials;
- (b) any claim be excluded;
- (c) any party be compensated by an award of costs or otherwise for being required to attend, or be relieved from attending, any part of a trial in which that party has no interest;
- (d) any person made a party cease to be a party on condition that that party be bound by the determination of the questions in the proceeding or without any such condition.

9.05 Effect of misjoinder or non-joinder of party

A proceeding shall not be defeated by reason of the misjoinder or non-joinder of any party or person, and the Court may determine all questions in the proceeding so far as they affect the rights and interests of the parties.

9.06 Addition, removal, substitution of party

At any stage of a proceeding the Court may order that—

- (a) any person who is not a proper or necessary party, whether or not that person was one originally, cease to be a party;
- (b) any of the following persons be added as a party—
 - (i) a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or

- (ii) a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding;
- (c) a person to whom paragraph (b) applies be substituted for one to whom paragraph (a) applies.

9.07 Procedure for addition of party

- (1) A person shall not be added as a plaintiff without that person's consent signified in writing or in such other manner as the Court orders.
- (2) Unless the Court otherwise orders, an application by a person for an order adding the person as a party shall be supported by an affidavit showing the person's interest in the questions in the proceeding or the question to be determined as between that person and any party to the proceeding.
- (3) Without limiting Rule 9.06(b), where a person not a party to a proceeding for the recovery of land is in possession by himself or herself or by a tenant of the whole or any part of the land, the Court may order that the person be added as a defendant.

9.08 Defendant dead at commencement of proceeding

- (1) Where a cause of action survives against the estate of a deceased person, a person wishing to obtain a judgment in respect of that cause of action may, if no grant of representation has been made, bring a proceeding against the estate of the deceased.
- (2) Without limiting paragraph (1), a proceeding brought against "the estate of A.B. deceased" shall be taken to have been brought against the deceased's estate in accordance with that paragraph.
- (3) A proceeding commenced naming as defendant a person who was dead when the proceeding commenced shall, if the cause of action survives and no grant of representation had been made at the time the proceeding commenced, be taken to have been commenced against the estate of the deceased in accordance with paragraph (1).
- (4) A proceeding commenced naming as defendant a person who was dead when the proceeding commenced shall, if the cause of action survives and a grant of representation had been made at the time the proceeding commenced, be taken to have been commenced against the personal representative of the deceased as representing the estate of the deceased.
- (5) In a proceeding within paragraph (1) or (3), the Court—
 - (a) may—
 - (i) appoint a person to represent the estate of the deceased for the purpose of the proceeding; or
 - (ii) if a grant of representation has been made since the commencement of the proceeding, order that the personal

representative of the deceased be made a party to the proceeding; and

- (b) may order that the proceeding be carried on against the person so appointed or against the personal representative, as if that person or representative had been substituted for the estate.
- (6) Where, after the commencement of a proceeding within paragraph (1) or (3), the Incorporated Nominal Defendant has been appointed administrator ad litem of the estate of the deceased person under section 158 of the **Transport Accident Act 1986**, the Court may for the purpose of paragraph (5), if the cause of action falls within section 158 of that Act, order that the Incorporated Nominal Defendant be appointed to represent the estate of the deceased.
- (7) In any proceeding within paragraph (4), the Court may order that the personal representative of the deceased be made a party, and that the proceeding be carried on against the personal representative as representing the estate of the deceased.
- (8) An application for an order under paragraph (5) or (7) shall be made during the period of validity for service of the writ or other originating process, unless the Court otherwise orders.
- (9) Before making an order under paragraph (5) or (6), the Court may require notice to be given to—
 - (a) any insurer of the deceased who has an interest in the proceeding; and
 - (b) any person having an interest in the estate.
- (10) Where no grant of representation has been made any judgment or order given or made in the proceeding shall bind the estate of the deceased to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceeding.
- (11) In this Rule *grant of representation* means a grant of probate or administration in Victoria or the resealing of a foreign grant in Victoria.

9.09 Change of party on death, bankruptcy

- (1) Where a party to a proceeding dies, but the cause of action survives, or where a party becomes bankrupt, the proceeding shall not abate by reason of the death or bankruptcy, but may be carried on in accordance with paragraph (2).
- (2) Where at any stage of a proceeding the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may order—
 - (a) that the other person be added as a party to the proceeding or made a party in substitution for the original party; and
 - (b) that the proceeding be carried on as so constituted.
- (3) Unless the Court otherwise directs, the person on whose application an order is made under paragraph (2)—

- (a) shall serve the order on every party to the proceeding and on every person who ceases to be a party or becomes a party as plaintiff by virtue of the order; and
 - (b) in the case of a person who becomes a defendant, shall serve that person personally with the order and with the writ or other originating process sealed in accordance with Rule 5.11.
- (4) A person upon whom originating process is served in accordance with paragraph (3) shall file an appearance in the proceeding within such time as the Court directs.
- (5) Where an order is made without notice to a person on whom the order is served, an application by that person to set aside or vary the order shall be made within 10 days after service.

9.10 Failure to proceed after death of party

- (1) Where a party dies, and a cause of action in the proceeding survives, but no order is made under Rule 9.09(2) substituting a personal representative of the deceased party as party, the Court, on application by a party or by a person to whom liability on the cause of action survives on the death, may order that unless an order for substitution is made within a specified time the proceeding be dismissed so far as concerns relief on the cause of action for or against the person to whom the cause of action or the liability thereon survives on the death.
- (2) On making an order under paragraph (1), the Court may, whether or not a grant of representation within the meaning of Rule 9.08(11) has been made, direct that if the proceeding is dismissed by virtue of the order, costs of the proceeding be awarded as follows—
- (a) if the plaintiff dies, to the defendant against the personal representative of the deceased out of the estate of the deceased;
 - (b) if the defendant dies, to the personal representative of the deceased against the plaintiff.
- (3) Where the plaintiff dies, the Court shall not make an order under paragraph (1) unless due notice of the application for it has been given to—
- (a) the personal representative, if any, of the deceased; and
 - (b) any other person having an interest in the estate of the deceased who, in the opinion of the Court, should be notified.
- (4) Where a defendant serves a counterclaim, this Rule shall apply, with any necessary modification, as if the plaintiff were the defendant and the defendant were the plaintiff.

9.11 Amendment of proceedings after change of party

- (1) Where an order is made under Rule 9.06 or 9.08—

- (a) the writ or other originating process filed in the Court shall, subject to Rule 27.02(5) and (6), be amended accordingly within the time specified in the order, and otherwise within 10 days after the making of the order; and
 - (b) a reference to the order, the date of the order and the date on which the amendment is made shall be indorsed upon such originating process.
- (2) The filing of a copy of the originating process amended and indorsed as required by paragraph (1) shall be a sufficient compliance with that paragraph.
- (3) Where an order is made under Rule 9.06 or 9.08 adding or substituting a person as defendant—
- (a) the proceeding against the new defendant commences upon the amendment of the filed originating process in accordance with paragraph (1) or (2);
 - (b) the plaintiff shall serve the amended originating process on that defendant within such time as the Court directs, and, unless the Court otherwise orders, it shall be served personally;
 - (c) unless otherwise ordered, where the new defendant is an added defendant, the proceeding shall be continued as if the new defendant were an original defendant, and where the new defendant is a substituted defendant, all things done in the course of the proceeding before it was commenced against the new defendant shall have effect in relation to the new defendant as they had in relation to the old defendant, except that the filing of appearance by the old defendant shall not dispense with the filing of appearance by the new.

9.12 Consolidation or trial together

- (1) Where two or more proceedings are pending in the Court, and—
- (a) some common question of law or fact arises in both or all of them;
 - (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
 - (c) for any other reason it is desirable to make an order under this Rule—

the Court may order the proceedings to be consolidated, or to be tried at the same time or one immediately after the other, or may order any of them to be stayed until after the determination of any other of them.

- (2) Any order for the trial together of two or more proceedings or for the trial of one immediately after the other, shall be subject to the discretion of the trial Judge.

9.13 Conduct of proceeding

The Court may give the conduct of the whole or any part of a proceeding to such person as it thinks fit.

Order 10—Counterclaim

10.01 Application of Order

This Order applies only to—

- (a) a proceeding commenced by writ; and
- (b) a proceeding in respect of which an order has been made under Rule 4.07(1).

10.02 When counterclaim allowed

- (1) A defendant who has a claim against the plaintiff may counterclaim in the proceeding.
- (2) Rule 9.01 applies to a counterclaim as if the plaintiff were the defendant and the defendant were the plaintiff.
- (3) A defendant who counterclaims shall plead the defendant's defence and the counterclaim in one document called a defence and counterclaim.

10.03 Counterclaim against plaintiff and another person

A defendant may join with the plaintiff as defendant to the counterclaim any other person, whether a party to the proceeding or not, who, if the defendant were to bring a separate proceeding, could be properly joined with the plaintiff as a party in accordance with Rule 9.02.

10.04 Procedure after counterclaim against another person

- (1) Where a defendant joins a person as defendant to the counterclaim under Rule 10.03, the defence and counterclaim shall contain a second title of the proceeding showing—
 - (a) who is plaintiff to the counterclaim; and
 - (b) who are defendants to the counterclaim.
- (2) The defendant shall serve on the person joined as defendant to the counterclaim a copy of the defence and counterclaim as follows—
 - (a) where the person so joined is already a party to the proceeding, the copy shall be served within the time fixed by Rule 14.04 for serving a defence;
 - (b) where the person joined is not already a party, the copy shall be served personally and, unless the Court otherwise orders, shall be served within 30 days after the expiration of the time fixed by Rule 14.04 for serving a defence.
- (3) The person joined as a defendant to the counterclaim shall, upon service of a copy of the defence and counterclaim, if not already a party, become a party and be in the same position as if that person had been sued as defendant in the ordinary way by the defendant making the counterclaim.

- (4) Without limiting paragraph (3), where the person joined as defendant to the counterclaim is not already a party to the proceeding, Orders 8, 11, 14 and 21 shall apply as if—
 - (a) the counterclaim were a writ the indorsement of claim on which constituted a statement of claim in accordance with Rule 5.04;
 - (b) the defendant making the counterclaim were a plaintiff in the party; and
 - (c) the person joined were a defendant in the proceeding.
- (5) A counterclaim served on a defendant to the counterclaim who is not already a party shall commence with a notice in Form 10A.
- (6) A notice of appearance by a defendant to a counterclaim who is not already a party shall be in Form 10B.

10.05 Trial of counterclaim

A counterclaim shall be tried at the trial of the claim of the plaintiff unless the Court otherwise orders.

10.06 Counterclaim inconvenient

Notwithstanding Rules 10.02 and 10.03, where a counterclaim may embarrass or delay the trial of the claim of the plaintiff or cause prejudice to any party or otherwise cannot conveniently be tried with that claim, the Court may—

- (a) order separate trials of the counterclaim and the claim of the plaintiff;
- (b) order that any claim included in the counterclaim be excluded;
- (c) strike out the counterclaim without prejudice to the right of the defendant to assert the claim in a separate proceeding;
- (d) order that any person joined as defendant to the counterclaim cease to be a party to the counterclaim.

10.07 Stay of claim

Where the defendant by the defendant's defence admits the claim of the plaintiff and counterclaims, the Court may stay the original proceeding until the counterclaim is disposed of.

10.08 Counterclaim on stay etc., of original proceeding

A counterclaim may be prosecuted notwithstanding—

- (a) that judgment is given for the plaintiff in the original proceeding;
or
- (b) that the original proceeding is stayed, discontinued or dismissed.

10.09 Judgment for balance

Where the plaintiff succeeds on the claim and the defendant succeeds on the counterclaim and a balance in favour of one of them results, the Court may give judgment for the balance.

Order 11—Third party procedure

11.01 Claim by third party notice

Where a defendant claims as against a person not already a party to the proceeding (in this Order called *the third party*)—

- (a) any contribution or indemnity;
- (b) any relief or remedy relating to or connected with the original subject matter of the proceeding and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) that any question relating to or connected with the original subject matter of the proceeding should be determined not only as between the plaintiff and the defendant but also as between either or both of them and the third party—

the defendant may join the third party as a party to the proceeding and make the claim against that third party by filing and serving a third party notice.

11.02 Statement of claim on third party notice

A third party notice shall be—

- (a) in Form 11A; and
- (b) indorsed with a statement of claim.

11.03 Time for appearance

- (1) A third party notice shall state a time within which the third party may file an appearance in the proceeding.
- (2) The time under paragraph (1) shall be—
 - (a) where the notice is to be served within Victoria—not less than 10 days after service;
 - (b) where the notice is to be served out of Victoria—
 - (i) the time limited by Rule 8.04(b), (c), (d) or (e) in the case of appearance by a defendant to a writ, whichever is appropriate; or
 - (ii) the time limited by any order of the Court authorising service of the notice.

11.04 Filing and service of third party notice

- (1) A claim by third party notice shall be commenced by filing a third party notice in the Court whereupon the third party shall become a party to the proceeding.
- (2) A third party notice shall be filed and served on the third party in the same manner as originating process is filed and served on a defendant.

11.05 Time for third party notice

- (1) In a proceeding commenced by writ or a proceeding in respect of which an order has been made under Rule 4.07(1), a defendant may not file a third party notice until the defendant has first served a defence.
- (2) A defendant may file a third party notice—
 - (a) within 30 days after the time limited for the service of a defence;
or
 - (b) at any time with the leave of the Court or the consent in writing of the plaintiff and any other party who has appeared.

11.06 Leave to file third party notice

An application for leave to file a third party notice shall be made on notice to the plaintiff but the Court may direct notice to be given to any other party who has appeared.

11.07 Other requirements for service

- (1) A third party notice shall be served on the third party within 60 days after it is filed.
- (2) Notwithstanding paragraph (1), the Court may fix another period for the service of a third party notice either—
 - (a) before the notice is filed; or
 - (b) at the time it grants leave under Rule 11.05(2) to file the notice.
- (3) Where a third party notice has not been served on the third party, the Court, from time to time, by order may extend the period for service of the notice for such further period it thinks fit.
- (4) An order may be made under paragraph (3) before or after expiry of the period for service.
- (5) At the time of service of a third party notice on a third party there shall also be served a copy of—
 - (a) any order or consent under Rule 11.05(2);
 - (b) any order under paragraph (2) of this Rule made before the third party notice was filed fixing a period for service of the notice;
 - (c) any order under paragraph (3) of this Rule;
 - (d) the writ or other originating process;
 - (e) any pleadings or affidavits filed and served in the proceeding.
- (6) Within the period for service of the third party notice on the third party a copy of the notice shall be served—
 - (a) on the plaintiff; and
 - (b) on any other party who has appeared.
- (7) If a copy of the third party notice is not served in accordance with paragraph (6), the Court, on application by the plaintiff or the third party, may order that the questions between the plaintiff and the defendant be tried before and separately from the questions between the defendant and the third party.

11.08 Appearance by third party

- (1) A third party may file an appearance—
 - (a) within the time limited for appearance; or
 - (b) within such further time as the Court may allow.
- (2) A third party who files an appearance shall, on the same day, serve a sealed copy of the notice of appearance on the plaintiff.
- (3) Rules 8.05 and 8.06 apply, with any necessary modification, to an appearance by a third party under this Rule.

11.09 Defence of third party

- (1) A third party who files an appearance shall serve a defence to the statement of claim indorsed on the third party notice within 30 days after filing the appearance.
- (2) The third party may serve a defence to the statement of claim of the plaintiff by which the third party disputes the liability to the plaintiff of the defendant by whom the third party was joined on any ground not raised by that defendant in the defendant's defence.
- (3) Rules 14.05 to 14.10 apply, with any necessary modification, as if the claim by third party notice were a proceeding commenced by writ.
- (4) Where a third party files an appearance, the defendant by whom the third party was joined shall serve on the third party a copy of any pleading that may from time to time thereafter be served between the plaintiff and that defendant.

11.10 Counterclaim by third party

- (1) A third party who has a claim against the defendant may assert the claim in the proceeding by way of counterclaim and Rule 10.02 applies as if the claim by third party notice were a proceeding commenced by writ.
- (2) A third party who counterclaims may join the plaintiff as defendant to the counterclaim along with the defendant if the plaintiff and defendant could be joined properly as defendants in accordance with Rule 9.02 in a separate proceeding brought against them by the third party.

11.11 Default by third party

- (1) Where at the time any judgment is entered or given for the plaintiff against the defendant by whom the third party was joined the third party has not filed an appearance or after appearance has not served a defence, and the time limited for filing an appearance or serving a defence has expired—
 - (a) the third party—
 - (i) shall be taken to admit any claim stated in the third party notice; and

- (ii) shall be bound by the judgment between the plaintiff and the defendant insofar as it is relevant to any claim or question stated in the notice;
- (b) the defendant may at any time after satisfaction of that judgment or, with the leave of the Court, before satisfaction, enter judgment against the third party—
 - (i) for any contribution or indemnity claimed in the notice; and
 - (ii) with the leave of the Court, for any other relief or remedy claimed therein.
- (2) If a third party or the defendant by whom the third party was joined fails to serve any pleading within the time limited, the Court may give such judgment for the party not in default or make such order as it thinks fit.
- (3) The Court may set aside or vary any judgment or order under paragraph (1)(b) or (2).

11.12 Discovery and trial

Where the third party files an appearance—

- (a) the third party and the defendant by whom the third party was joined may have discovery of one another; and
- (b) unless the Court otherwise orders—
 - (i) the third party may attend and take part at the trial of the proceeding;
 - (ii) at the trial the questions between the defendant and the third party shall be tried concurrently with the questions between the plaintiff and the defendant; and
 - (iii) the third party shall be bound by the result of the trial.

11.13 Third party directions

- (1) Where the third party files an appearance, the Court may make any order or give any direction as follows—
 - (a) where the liability of the third party to the defendant by whom the third party was joined as third party is established, give judgment for that defendant against the third party;
 - (b) order that any claim or question stated in the third party notice be tried in such manner as it directs;
 - (c) give the third party leave—
 - (i) to defend the proceeding, either alone or jointly with any defendant; or
 - (ii) to attend and take part at the trial;
 - (d) generally make such orders and give such directions—

- (i) as are necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; and
 - (ii) as to the extent to which the third party is to be bound by any judgment or decision in the proceeding.
- (2) The Court—
 - (a) may make any order or give any direction under paragraph (1) either before or after any judgment in the proceeding has been entered or given for the plaintiff against the defendant; and
 - (b) may at any time vary or rescind any such order or direction.

11.14 Judgment between defendant and third party

- (1) Where a third party has been joined under this Order, the Court, at or after the trial of the proceeding or on its determination otherwise than by trial, may give judgment for the defendant by whom the third party was joined against the third party or for the third party against that defendant.
- (2) Unless the Court otherwise orders, where judgment is given for the plaintiff against the defendant and judgment is given for that defendant against a third party, the judgment against the third party shall not be enforced until the judgment against the defendant has been satisfied.

11.15 Claim against another party

- (1) Where a party claims as against another party to the proceeding any relief of the kind described in Rule 11.01, the party may make the claim against the other party by filing and serving a notice in accordance with this Rule—
 - (a) within 60 days after the service on the party of the document in the proceeding by which the claim in respect of which the notice is served was made; or
 - (b) if when the document was served the other party was not a party, then within 60 days after the party became a party.
- (2) Paragraph (1) does not apply where the claim could be made by counterclaim in the proceeding.
- (3) No appearance to a notice under paragraph (1) shall be necessary if the party on whom it is served has filed an appearance in the proceeding or is a plaintiff, but otherwise this Order applies, with any necessary modification, as if—
 - (a) the defendant had filed and served a third party notice under Rule 11.01; and
 - (b) the party on whom the notice is served were a third party joined under that Rule.
- (4) Except as provided by paragraph (5), a notice under paragraph (1) shall, with any necessary modification—
 - (a) be in accordance with Form 11A; and

- (b) be indorsed with a statement of claim.
- (5) Where a party claims against another party to the proceeding contribution pursuant to Part IV of the **Wrongs Act 1958**, a notice under paragraph (1) shall be in accordance with Form 11B.

11.16 Fourth and subsequent parties

- (1) Where a third party has filed an appearance this Order applies, with any necessary modification, as if the third party were a defendant.
- (2) Where a person joined as a party (in this Order called a *fourth party*) by a third party under this Order has filed an appearance, this Order as applied by this Rule shall have effect as regards such further person and any other further person or persons so joined and so on successively.
- (3) A third or subsequent party may not make a claim against another person whether that person is a party to the proceeding or not by notice under this Order without the leave of the Court.

11.17 Counterclaim

Where a defendant has served a counterclaim, this Order applies, with any necessary modification, as if the defendant were the plaintiff and the plaintiff were the defendant.

Order 13—Pleadings

13.01 Formal requirements

- (1) Every pleading shall bear on its face—
 - (a) the description of the pleading; and
 - (b) the date on which it is served.
- (2) A pleading shall be divided into paragraphs numbered consecutively, and each allegation so far as practicable shall be contained in a separate paragraph.
- (3) A pleading which is settled by counsel shall be signed by that counsel, and if it is not so settled, it shall be signed by the solicitor for the party, or if there is none, by the party.

13.02 Content of pleading

- (1) Every pleading shall—
 - (a) contain in a summary form a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved;
 - (b) where any claim, defence or answer of the party arises by or under any Act, identify the specific provision relied on; and
 - (c) state specifically any relief or remedy claimed.
- (2) A party may, by that party's pleading—

- (a) raise a point of law;
- (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.

13.03 Document or conversation

The effect of any document or the purport of any conversation, if material, shall be pleaded as briefly as possible, and the precise words of the document or conversation shall not be pleaded unless those words are themselves material.

13.04 Fact presumed true

A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the opposite party unless the other party has specifically denied it in that party's pleading.

13.05 Condition precedent

An allegation of the performance or occurrence of any condition precedent necessary for the claim or defence of a party shall be implied in that party's pleading.

13.06 Implied contract or relation

Where it is alleged that a contract or relation between any persons is to be implied from a series of letters or conversations or other circumstances, it shall be sufficient to allege the contract or relation as a fact, and to refer generally to the letters, conversations or circumstances without setting them out in detail.

13.07 Matter which must be pleaded

- (1) A party shall, in any pleading subsequent to a statement of claim, plead specifically any fact or matter which—
 - (a) the party alleges makes any claim or defence of the opposite party not maintainable; or
 - (b) if not pleaded specifically, might take the opposite party by surprise; or
 - (c) raises questions of fact not arising out of the preceding pleading.
- (2) In a proceeding for the recovery of land—
 - (a) the indorsement of claim on the writ or, if that indorsement does not constitute a statement of claim, the statement of claim shall describe the land so that it is physically identifiable;
 - (b) the defendant shall plead specifically every ground of defence on which the defendant relies and a plea that the defendant or the defendant's tenant is in possession of the land is not sufficient.
- (3) A claim for exemplary damages shall be specifically pleaded together with the facts on which the party pleading relies.

13.08 Subsequent fact

A party may plead any fact or matter which has arisen at any time, whether before or since the commencement of the proceeding.

13.09 Inconsistent pleading

- (1) A party may, in any pleading, make inconsistent allegations of fact if the pleading makes it clear that the allegations are pleaded in the alternative.
- (2) A party shall not in any pleading make any allegation of fact, or raise any new claim, inconsistent with any allegation made or claim raised in a previous pleading by that party.
- (3) Paragraph (2) shall not affect the right of a party to amend, or apply for leave to amend, that party's previous pleading so as to plead the allegations or claims in the alternative.

13.10 Particulars of pleading

- (1) Every pleading shall contain the necessary particulars of any fact or matter pleaded.
- (2) Without limiting paragraph (1), particulars shall be given if they are necessary—
 - (a) to enable the opposite party to plead;
 - (b) to define the questions for trial; or
 - (c) to avoid surprise at trial.
- (3) Without limiting paragraph (1), every pleading shall contain particulars of any—
 - (a) misrepresentation, fraud, breach of trust, wilful default or undue influence which is alleged; or
 - (b) disorder or disability of the mind, malice, fraudulent intention or other condition of the mind, including knowledge or notice, which is alleged.
- (4) The pleading of a party who claims damages for bodily injury shall state—
 - (a) particulars, with dates and amounts, of all earnings lost in consequence of the injury complained of;
 - (b) particulars of any loss of earning capacity resulting from the injury;
 - (c) the date of the party's birth;
 - (d) the name and address of each of the party's employers commencing from the day being 12 months before the party sustained the injury, the time of commencement and the duration of each employment and the total net amount, after deduction of tax, that was earned in each employment.

- (5) In a proceeding for libel the indorsement of claim on the writ or, if that indorsement does not constitute a statement of claim, the statement of claim shall state sufficient particulars to identify the publication in respect of which the proceeding is commenced.
- (6) Particulars of debt, damages or expenses which exceed three folios shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document—
 - (a) has already been served and, if so, when; or
 - (b) is to be served with the pleading.

13.11 Order for particulars

- (1) The Court may order a party to serve on any other party particulars or further and better particulars of any fact or matter stated in the party's pleading or in an affidavit filed on that party's behalf ordered to stand as a pleading.
- (2) The Court shall not make an order under paragraph (1) before service of the defence unless the order is necessary or desirable—
 - (a) to enable the defendant to plead; or
 - (b) for some other special reason.
- (3) The Court may refuse to make an order under paragraph (1) if the party applying for the order did not first apply by letter for the particulars the party requires.

13.12 Admission and denials

- (1) Except as provided in paragraph (3), every allegation of fact in any pleading shall be taken to be admitted unless it is denied specifically or by necessary implication or is stated to be not admitted in the pleading of the opposite party, or unless a joinder of issue under Rule 13.13 operates as a denial of it, and a general denial of the allegations, or a general statement that they are not admitted, shall not be sufficient.
- (2) Where the party pleading intends to prove facts which are different to those pleaded by the opposite party, it shall not be sufficient for the party merely to deny or not to admit the facts so pleaded, but the party shall plead the facts the party intends to prove.
- (3) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be taken to be denied unless specifically admitted.

13.13 Denial by joinder of issue

- (1) No reply or subsequent pleading merely joining issue shall be served.
- (2) At the close of pleadings a joinder of issue on the pleading last served shall be implied.
- (3) No joinder of issue, express or implied, shall be made on a statement of claim or counterclaim.

- (4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading upon which issue is joined unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the joinder of issue operates as a denial of every other allegation.

13.14 Money claim as defence

Where a defendant has a claim against a plaintiff for the recovery of a debt or damages, the claim may be relied on as a defence to the whole or part of a claim made by the plaintiff for the recovery of a debt or damages and may be included in the defence and set off against the plaintiff's claim, whether or not the defendant also counterclaims for that debt or damages.

13.15 Counterclaim

This Order applies, with any necessary modification—

- (a) to a counterclaim as if it were a statement of claim; and
- (b) to a defence to counterclaim as if it were a defence.

Order 22—Summary judgment

Part 1—General

22.01 Scope of Order

This Order applies to all civil proceedings in the Court to which, in accordance with section 4 of the **Civil Procedure Act 2010**, that Act applies.

22.02 Interpretation

- (1) In this Order, a reference—
 - (a) to a plaintiff includes a reference to a plaintiff by counterclaim; and
 - (b) to a defendant includes a reference to a defendant by counterclaim.
- (2) Without limiting paragraph (1), expressions used in this Order, unless the contrary intention appears, have the same meaning as in Part 4.4 of Chapter 4 of the **Civil Procedure Act 2010**.

Part 2—Application by plaintiff for summary judgment

22.03 Application by plaintiff for judgment

An application under section 61 of the **Civil Procedure Act 2010** by a plaintiff in a civil proceeding for summary judgment in the proceeding shall be made in accordance with this Part of this Order.

22.04 Summons and affidavit in support

- (1) An application shall be made by summons supported by an affidavit—
 - (a) verifying the facts on which the claim or the part of the claim to which the application relates is based; and
 - (b) stating that in the belief of the deponent the defence to the claim or the defence to the relevant part of the claim—
 - (i) has no real prospect of success; or
 - (ii) has no real prospect of success except as to the amount of the claim or as to the amount of the relevant part of the claim.
- (2) Where a statement in a document tends to establish a fact within paragraph (1) and at the trial of the proceeding the document would be admissible by or under the **Evidence (Miscellaneous Provisions) Act 1958**, the **Evidence Act 2008** or any other Act to verify the fact, the affidavit under paragraph (1) may set forth the statement.
- (3) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out and, having regard to all the circumstances, the Court considers that the statement ought to be permitted.
- (4) The plaintiff shall serve the summons and a copy of the affidavit or affidavits and of any exhibit referred to in the affidavit or affidavits on the defendant not less than 14 days before the day for hearing named in the summons.

22.05 Defendant to show cause

- (1) The defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.
- (2) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out.
- (3) Unless the Court otherwise orders, the defendant shall serve a copy of any affidavit and of any exhibit referred to in the affidavit or affidavits on the plaintiff not less than three days before the day for hearing named in the summons.

22.06 Affidavit in reply

- (1) Where the defendant serves an affidavit under Rule 22.05, the Court may by order allow the plaintiff to rely upon an affidavit in reply.
- (2) Rule 22.04(2) and (3) apply, with any necessary modification, to an affidavit in reply made under this Rule.

22.07 Cross-examination on affidavit

- (1) The Court may order any party or the maker of any affidavit—
 - (a) to attend and be examined and cross-examined; or
 - (b) to produce any documents, or copies of or extracts from those documents.

- (2) Where a party is a corporation, the Court may make an order under paragraph (1) in respect of any director, manager, secretary or other similar officer of the corporation or any person purporting to act in any such capacity.

22.08 Hearing of application

- (1) Subject to Part 4.4 of Chapter 4 of the **Civil Procedure Act 2010**, on the hearing of an application the Court may—
 - (a) dismiss the application;
 - (b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate, having regard to the nature of the relief or remedy claimed;
 - (c) give the defendant leave to defend with respect to the claim or the part of the claim to which the application relates either unconditionally or on terms as to giving security, paying money into court, time, the mode of trial or otherwise; or
 - (d) with the consent of all parties, and notwithstanding Rule 77.03(1), dispose of the proceeding finally in a summary manner.
- (2) The Court may stay execution of any judgment given under paragraph (1)(b) until after the trial of any other claim or counterclaim which remains outstanding in the proceeding as between the relevant parties.

22.09 Assessment of damages

Where the Court gives summary judgment under section 63 of the **Civil Procedure Act 2010** for damages or the value of goods to be assessed, the assessment shall be made in accordance with Order 51.

22.10 Judgment where debt amount unascertained

Where on an application under section 61 of the **Civil Procedure Act 2010** for summary judgment on a claim for a debt the amount of the debt is not established to the satisfaction of the Court, and where if the amount were established the Court would give summary judgment on the claim under section 63 of that Act, the Court may—

- (a) make a declaration as to liability for the debt and order that its amount be ascertained in such manner as the Court directs; and
- (b) give leave to enter judgment for the debt once the amount is ascertained.

22.11 Directions

- (1) Where on an application under section 61 of the **Civil Procedure Act 2010** for summary judgment leave is given to defend or summary judgment is given on a claim or part of a claim but execution of the judgment is stayed pending the trial of an outstanding claim or counterclaim or of the proceeding, as the case may be, the Court may give directions as to the further conduct of the proceeding.
- (2) The Court—

- (a) may direct that an affidavit made under this Order shall serve as a defence or defence and counterclaim;
- (b) may order the proceeding to be forthwith set down for trial; and
- (c) may define the questions to be tried.

22.12 Continuing for other claim or against other defendant

Where the plaintiff obtains summary judgment under section 63 of the **Civil Procedure Act 2010** on a claim or part of a claim against any defendant, the plaintiff may continue with the proceeding for any other claim or for the remainder of the claim or against any other defendant.

22.13 Judgment for delivery up of chattel

Where the Court gives summary judgment under section 63 of the **Civil Procedure Act 2010** for the delivery up of a specific chattel, it may order the party against whom judgment is given to deliver up the chattel without giving the party an option to retain it on paying the assessed value of the chattel.

22.14 Relief against forfeiture

A tenant may apply for relief after summary judgment for possession of land on the ground of forfeiture for non-payment of rent has been given under section 63 of the **Civil Procedure Act 2010** as if the judgment were given after trial.

22.15 Setting aside judgment

The Court may set aside or vary any judgment given against a party who does not attend on the hearing of an application under section 61 of the **Civil Procedure Act 2010**.

Part 3—Application by defendant for summary judgment

22.16 Application by defendant for judgment

An application under section 62 of the **Civil Procedure Act 2010** by a defendant in a civil proceeding for summary judgment in the proceeding shall be made in accordance with this Part of this Order.

22.17 Summons

The application shall be made by summons.

22.18 Affidavit in support

- (1) If the defendant intends to rely on an affidavit in support of the application, the affidavit shall be filed with the summons.
- (2) Where a statement in a document tends to establish a fact upon which the defendant relies and at the trial of the proceeding the document would be admissible by or under the **Evidence (Miscellaneous Provisions) Act 1958**, the **Evidence Act 2008** or any other Act to verify the fact, the affidavit may set forth the statement.

- (3) An affidavit relied upon by the defendant may contain a statement of fact based on information and belief if the grounds are set out and, having regard to all the circumstances, the Court considers that the statement ought to be permitted.
- (4) The defendant shall serve the summons and a copy of any affidavit in support and of any exhibit referred to in the affidavit on the plaintiff not less than 14 days before the day for hearing named in the summons.

22.19 Plaintiff to show cause

- (1) The plaintiff may show cause against the application by affidavit or otherwise to the satisfaction of the Court.
- (2) An affidavit under paragraph (1) may contain a statement of fact based on information and belief if the grounds are set out.
- (3) Unless the Court otherwise orders, the plaintiff shall serve a copy of any affidavit and of any exhibit referred to in the affidavit on the defendant not less than three days before the day for hearing named in the summons.

22.20 Affidavit in reply

- (1) Where the plaintiff serves an affidavit under Rule 22.19, the Court may by order allow the defendant to rely upon an affidavit in reply.
- (2) Rule 22.18(2) and (3) apply, with any necessary modification, to an affidavit in reply made under this Rule.

22.21 Cross-examination on affidavit

- (1) The Court may order any party or the maker of any affidavit—
 - (a) to attend and be examined and cross-examined; or
 - (b) to produce any documents, or copies of or extracts from those documents.
- (2) Where a party is a corporation, the Court may make an order under paragraph (1) in respect of any director, manager, secretary or other similar officer of the corporation or any person purporting to act in any such capacity.

22.22 Hearing of application

Subject to Part 4.4 of Chapter 4 of the **Civil Procedure Act 2010**, on the hearing of an application the Court may—

- (a) dismiss the application;
- (b) give such judgment for the defendant against the plaintiff on the claim or the part of the claim to which the application relates as is appropriate (including the grant of any appropriate stay of the proceeding), having regard to the nature of the relief or remedy claimed; or
- (c) with the consent of all parties, and notwithstanding Rule 77.03(1), dispose of the proceeding finally in a summary manner.

22.23 Setting aside judgment

The Court may set aside or vary any judgment given against a party who does not attend on the hearing of an application under section 62 of the **Civil Procedure Act 2010**.

Part 4—Application by or against third or subsequent party

22.24 Third or subsequent party

- (1) A party who has joined a third or subsequent party to a civil proceeding may apply to the Court for summary judgment against the third or subsequent party on the ground that the defence or part of the defence of that party has no real prospect of success.
- (2) A party joined as a third or subsequent party to a civil proceeding may apply to the Court for summary judgment on the ground that the claim made against the party or part of that claim has no real prospect of success.
- (3) Part 2 of this Order applies, with any necessary modifications, to an application under paragraph (1).
- (4) Part 3 of this Order applies, with any necessary modifications, to an application under paragraph (2).
- (5) The Court may order that a claim made by or against a third or subsequent party proceed to trial if the Court is satisfied that, despite there being no real prospect of success, the claim should not be disposed of summarily because—
 - (a) it is not in the interests of justice to do so; or
 - (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

Order 23—Summary stay or dismissal of claim and striking out pleading

23.01 Stay or judgment in proceeding

- (1) Where a proceeding generally or any claim in a proceeding—
 - (a) is scandalous, frivolous or vexatious; or
 - (b) is an abuse of the process of the Court—the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.
- (2) Where the defence to any claim in a proceeding is scandalous, frivolous or vexatious, the Court may give judgment in the proceeding generally or in relation to any claim.
- (3) In this Rule—

- (a) a claim in a proceeding includes a claim by counterclaim and a claim by third party notice; and
- (b) a defence includes a defence to a counterclaim and a defence to a claim by third party notice.

23.02 Striking out pleading

Where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading—

- (a) does not disclose a cause of action or defence;
- (b) is scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial of the proceeding;
or
- (d) is otherwise an abuse of the process of the Court—

the Court may order that the whole or part of the indorsement or pleading be struck out or amended.

* * * * *

23.04 Affidavit evidence

- (1) On an application under Rule 23.01 evidence shall be admissible for any party by affidavit or, if the Court thinks fit, orally.
- (2) On an application under Rule 23.02 no evidence shall be admissible on the question whether an indorsement of claim or pleading offends against that Rule.
- (3) Rule 22.07 or Rule 22.21, as the case requires, applies to an affidavit under paragraph (1).

23.05 Declaratory judgment

No proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Order 26—Offers of compromise and offers to compromise on appeal

Part 1—Interpretation

26.01 Definitions

In this Order, unless the context or subject matter otherwise requires—

business day means a day on which the office of the Court is open as specified in Rule 3.08;

claim includes a counterclaim and any claim made in accordance with Order 11;

defendant includes a defendant by counterclaim and a party against whom a claim is made in accordance with Order 11;

ordinarily applicable basis means—

- (a) in respect of costs incurred before 1 April 2013, party and party basis;
- (b) in respect of costs incurred on or after 1 April 2013, standard basis;

plaintiff includes a defendant who serves a counterclaim and a party who makes a claim in accordance with Order 11.

Part 2—Offers of compromise

26.02 Offers of compromise generally

- (1) A party may, in respect of any claim in a proceeding, serve on another party an offer of compromise on the terms specified in the offer.
- (2) An offer of compromise in respect of a claim may be on terms that take into account any other claim made in the proceeding between the parties.
- (3) An offer of compromise must—
 - (a) be in writing and prepared in accordance with Rules 27.02 to 27.04; and
 - (b) contain a statement to the effect that it is served in accordance with this Order.
- (4) An offer of compromise must state either—
 - (a) that the offer is inclusive of costs; or
 - (b) that costs are to be paid or received, as the case may be, in addition to the offer.

26.03 Time for making, accepting etc. offer

- (1) An offer of compromise may be served at any time before verdict or judgment in respect of the claim to which it relates.
- (2) A party may serve more than one offer of compromise.
- (3) An offer of compromise may be expressed to be limited as to the time the offer is open to be accepted after service on the party to whom it is made, but the time expressed shall not be less than 14 days after such service.

- (4) A party on whom an offer of compromise is served may accept the offer by serving notice of acceptance in writing on the party who made the offer before—
 - (a) the expiration of the time specified in accordance with paragraph (3) or, if no time is specified, the expiration of 14 days after service of the offer; or
 - (b) verdict or judgment in respect of the claim to which the offer relates—whichever event is the sooner.
- (5) An offer of compromise shall not be withdrawn during the time it is open to be accepted, unless the Court otherwise orders.
- (6) An offer of compromise is open to be accepted within the period referred to in paragraph (4) notwithstanding that during that period the party on whom the offer is served makes an offer of compromise to the party who served the offer of compromise, whether or not the offer made by the party served is made in accordance with this Part.
- (7) Upon the acceptance of an offer of compromise that states that costs are to be paid or received in addition to the offer, then, unless the offer otherwise provides or the Court otherwise orders—
 - (a) such costs are to be paid or received in respect of the claim up to and including the day the offer was served;
 - (b) liability for any costs in respect of the claim in relation to any subsequent period shall be in the discretion of the Court; and
 - (c) any party to the accepted offer may apply for the taxation of the costs.

26.03.1 Time for payment

An offer of compromise providing for payment of a specified sum of money to a party shall, unless it otherwise provides, be taken to be an offer providing for payment of that sum within 28 days after acceptance of the offer.

26.04 Effect of offer

An offer of compromise made in accordance with this Part shall be taken to be an offer of compromise made without prejudice, unless the offer otherwise provides.

26.05 Disclosure of offer to Court

- (1) No statement of the fact that an offer of compromise has been made shall be contained in any pleading or affidavit.
- (2) Where an offer of compromise has not been accepted, then, except as provided by Rule 26.08(6), no communication with respect to the offer shall be made to the Court on the trial of the proceeding until after all questions of liability and the relief to be granted have been determined.
- (3) Paragraphs (1) and (2) do not apply where an offer of compromise provides that the offer is not made without prejudice.

26.06 Party under disability

A person under disability may make or accept an offer of compromise, but no acceptance of an offer made by a person under disability and no acceptance by a person under disability of an offer shall be binding until the Court has approved the compromise.

26.07 Withdrawal of acceptance

- (1) A party who has accepted an offer for the payment to that party of a sum of money may withdraw the acceptance if—
 - (a) the sum of money is not paid—
 - (i) within the time provided by the offer; or
 - (ii) where no time is specified by the offer, within 28 days after acceptance of the offer; and
 - (b) the Court, on the application of the party who accepted the offer, gives leave.
- (2) A party seeking the leave of the Court under paragraph (1)(b) may also seek orders—
 - (a) to restore the parties as nearly as practicable to each party's position in the proceeding at the time of acceptance; and
 - (b) as to the further conduct of the proceeding.

26.07.1 Failure to comply with accepted offer

If, after acceptance of an offer of compromise, a party to the accepted offer defaults in complying with that party's obligations under the offer, any non-defaulting party to the accepted offer may apply to the Court for an order—

- (a) giving effect to the accepted offer;
- (b) staying or dismissing the proceeding if the plaintiff is in default;
- (c) striking out the defendant's defence if the defendant is in default; or
- (d) that a claim, not the subject of the offer, shall proceed.

26.07.2 Multiple defendants

- (1) Rule 26.07.1 does not apply if—
 - (a) two or more defendants are alleged to be jointly, or jointly and severally, liable to the plaintiff for a debt or damages; and
 - (b) rights of contribution or indemnity appear to exist between the defendants.
- (2) Notwithstanding paragraph (1), Rule 26.07.1 applies if—
 - (a) in the case of an offer made by the plaintiff, the offer—
 - (i) is made to all defendants; and
 - (ii) is an offer to compromise the claim against all of them; or

- (b) in the case of an offer made to the plaintiff—
 - (i) the offer is to compromise the claim against all defendants;
and
 - (ii) if the offer is made by two or more defendants, those defendants offer to be jointly, or jointly and severally, liable to the plaintiff for the whole amount of the offer.

26.08 Costs consequences of failure to accept

- (1) This Rule applies to an offer of compromise which has not been accepted at the time of verdict or judgment.
- (2) Where an offer of compromise is made by a plaintiff and not accepted by the defendant, and the plaintiff obtains a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders, the plaintiff shall be entitled—
 - (a) if the claim of the plaintiff is for damages for or arising out of death or bodily injury, to an order against the defendant for the plaintiff's costs in respect of the claim taxed on an indemnity basis;
 - (b) in the case of any other claim of the plaintiff, to an order against the defendant for the plaintiff's costs in respect of the claim before 11.00 a.m. on the second business day after the offer was served, taxed on the ordinarily applicable basis and for the plaintiff's costs thereafter taxed on an indemnity basis.
- (3) Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders—
 - (a) the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim before 11.00 a.m. on the second business day after the offer was served, taxed on the ordinarily applicable basis; and
 - (b) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter taxed on the ordinarily applicable basis.
- (4) Where an offer of compromise is made by a defendant and the plaintiff unreasonably fails to accept the offer and the claim to which the offer relates is dismissed or judgment on the claim is entered in favour of the defendant, then unless the Court otherwise orders—
 - (a) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim until 11.00 a.m. on the second business day after the offer was made, taxed on the ordinarily applicable basis; and

- (b) the defendant shall be entitled to an order against the plaintiff in respect of the defendant's costs after the time referred to in paragraph (a) taxed on an indemnity basis.
- (5) Where a plaintiff obtains judgment for the recovery of a debt or damages and—
- (a) the amount for which the Court pronounces judgment includes an amount for interest or damages in the nature of interest; or
 - (b) by or under any Act the Court awards the plaintiff interest or damages in the nature of interest in respect of the judgment amount—

for the purpose of determining the consequences as to costs referred to in paragraphs (2) and (3) the Court shall disregard so much of the amount recovered by or awarded to the plaintiff for interest or damages in the nature of interest as relates to the period after the day the offer of compromise was served.

- (6) For the purpose only of paragraph (5), the Court may be informed of the fact that the offer of compromise was served, and of the date of service, but shall not be informed of its terms.
- (7) Paragraphs (2), (3) and (4) shall not apply unless the Court is satisfied by the party serving the offer of compromise that that party was at all material times willing and able to carry out the party's part of what was proposed in the offer.
- (8) Where the plaintiff obtains judgment for the recovery of a debt or damages, and the amount of the debt or the damages was not in dispute, but only the question of liability, paragraph (2) shall not apply unless the Court is satisfied that the plaintiff's offer was of a genuine compromise.

26.08.1 Pre-litigation offers

- (1) If—
- (a) a party, before a proceeding has commenced, has made an offer in writing to another party (whether or not expressed to be without prejudice) to compromise any claim made in the proceeding on the terms specified in the offer; and
 - (b) the offer was open to be accepted for a reasonable time, but was not accepted; and
 - (c) the offeror obtains an order or judgment in respect of the claim no less favourable to the offeror than the terms of the offer—

the Court shall take those matters into account in determining what order for costs to make in respect of the costs of the proceeding.

- (2) In exercising its discretion as to costs in accordance with paragraph (1), the Court may order that the offeree pay all or part of the offeror's costs of the proceeding taxed on a basis other than the ordinarily applicable basis, from—
- (a) the day the offer was made;

- (b) the commencement of the proceeding; or
- (c) any other time that the Court thinks fit.

* * * * *

26.10 Contributor parties

- (1) If two or more parties (the *contributor parties*) may be held liable to contribute towards an amount of debt or damages that may be recovered from the contributor parties, any of those contributor parties may, without prejudice to that contributor party's defence, make an offer to another contributor party, to contribute, to a specified extent, to the amount of the debt or damages.
- (2) If an offer is made by a contributor party (the *first contributor party*) and not accepted by another contributor party, and the first contributor party obtains a judgment against the other contributor party more favourable than the terms of the offer, then, unless the Court otherwise orders, the first contributor party is entitled to an order that the contributor party who did not accept the offer pay the costs incurred by the first contributor party—
 - (a) before 11.00 a.m. on the second business day after the offer was served—on the ordinarily applicable basis; and
 - (b) after the time referred to in paragraph (a)—on an indemnity basis.

26.11 Transitional

Order 26 of the former Rules as in force immediately before 1 September 2013 continues to apply to any offer of compromise served under Part 2 or Part 3 of that Order before that date.

Part 3—Offer to compromise on appeal

26.12 Appeal to Court of Appeal

- (1) Where a copy of—
 - (a) an application for leave to appeal;
 - (b) a notice of appeal to the Court of Appeal;
 - (c) an application for leave to cross-appeal; or
 - (d) a notice of cross-appeal to the Court of Appeal—has been served, a party may serve on another party an offer to compromise the application, appeal or cross-appeal (as the case may be) on the terms specified in the offer.
- (2) The offer may be on terms that take into account any application, appeal or cross-appeal of the other party.
- (3) Where in relation to a matter being an application for leave to appeal, an appeal, an application for leave to cross-appeal or a cross-appeal—

- (a) a party has made an offer in writing to the other party (whether or not expressed to be without prejudice) to compromise the matter on the terms specified in the offer;
- (b) the offer was open to be accepted for a reasonable time, but was not accepted; and
- (c) the party making the offer obtains an order on the matter no less favourable to that party than the terms of the offer—

the Court of Appeal shall take those things, and also the stage at which the offer was made, into account in determining what order for costs to make in respect of the matter or, where appropriate, in respect of the matter and the proceeding more generally.

- (4) The Court of Appeal, in exercising its discretion as to costs in accordance with paragraph (3), may order that the party on whom the offer to compromise was served pay the costs of the party who made the offer, taxed on a basis other than the ordinarily applicable basis—
 - (a) from the commencement of the matter;
 - (b) from the day the offer was served; or
 - (c) from any other time that the Court thinks fit.
- (5) Unless the offer to compromise provides that the offer is not made without prejudice, no statement of the fact that an offer to compromise has been made shall be contained in any affidavit and no communication with respect to the offer shall be made to the Court of Appeal until the matter has been determined save as to costs.

Order 29—Discovery and inspection of documents

29.01 Application and definition

- (1) Except where the Rules of this Order otherwise provide, the Order applies only—
 - (a) to a proceeding commenced by writ; and
 - (b) to a proceeding in respect of which an order has been made under Rule 4.07(1).
- (2) In this Order *possession* means possession, custody or power.

29.01.1 Scope of discovery

- (1) Unless the Court otherwise orders, discovery of documents pursuant to this Order is limited to the documents referred to in paragraph (3).
- (2) Paragraph (1) applies despite any other rule of law to the contrary.
- (3) Without limiting Rules 29.05 and 29.07, for the purposes of this Order, the documents required to be discovered are any of the following

documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given—

- (a) documents on which the party relies;
 - (b) documents that adversely affect the party's own case;
 - (c) documents that adversely affect another party's case;
 - (d) documents that support another party's case.
- (4) Notwithstanding paragraph (3)—
- (a) if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is given, the party giving discovery is not required to discover that document;
 - (b) a party required to give discovery who has, or has had in the party's possession more than one copy, however made, of a particular document is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.
- (5) For the purposes of paragraph (3), in making a reasonable search a party may take into account—
- (a) the nature and complexity of the proceeding;
 - (b) the number of documents involved;
 - (c) the ease and cost of retrieving a document;
 - (d) the significance of any document to be found; and
 - (e) any other relevant matter.

29.02 Notice for discovery

- (1) Where the pleadings between any parties are closed, any of those parties, by notice for discovery served on any other of those parties, may require the party served to make discovery of all documents which are or have been in that party's possession and which, in accordance with Rule 29.01.1, are required to be discovered.
- (2) A notice for discovery shall be in Form 29A.
- (3) A notice for discovery served before the pleadings are closed shall be taken to have been served on the day after the pleadings close.

29.03 Discovery after notice

A party upon whom a notice for discovery is served shall make discovery of documents within 42 days after the later of—

- (a) service of the notice; or
- (b) the day upon which the notice is taken by virtue of Rule 29.02(3) to have been served.

29.04 Affidavit of documents

- (1) An affidavit of documents for the purpose of making discovery of documents shall be in Form 29B and shall—
 - (a) identify the documents which are or have been in the possession of the party making the affidavit;
 - (b) enumerate the documents in convenient order and shall describe each document or, in the case of a group of documents of the same nature, shall describe the group, sufficiently to enable the document or group to be identified;
 - (c) distinguish those documents which are in the possession of the party making the affidavit from those that have been but are no longer in that party's possession, and shall as to any document which has been but is no longer in the possession of the party—
 - (i) state when the party parted with the document; and
 - (ii) the party's belief as to what has become of it;
 - (d) where the party making the affidavit claims that any document in that party's possession is privileged from production, state sufficiently the grounds of the privilege.
- (2) If a party required to give discovery in accordance with Rule 29.01.1 does not, in making a reasonable search as required by Rule 29.01.1, search for a category or class of document, the party must include in the affidavit of documents a statement of—
 - (a) the category or class of document not searched for; and
 - (b) the reason why.

29.05 Order limiting discovery

In order to prevent unnecessary discovery, the Court may, before or after any party is required to make discovery by virtue of a notice for discovery served in accordance with Rule 29.02, order that discovery by any party shall not be required or shall be limited to such documents or classes of document, or to such of the questions in the proceeding, as are specified in the order.

29.05.1 Order for general discovery

At any stage of a proceeding, the Court may order any party to give discovery in accordance with Rule 29.01.1.

29.05.2 Order for expanded discovery

- (1) At any stage of a proceeding, the Court may, by order, expand a party's obligation to give discovery beyond that required by Rule 29.01.1.
- (2) Without limiting any power of the Court, an order under paragraph (1) may specify any document or class of document to which the expanded obligation relates.

29.06 Co-defendants and third party

- (1) A defendant who has pleaded shall be entitled to obtain from the party making discovery a copy of any affidavit of documents served on—

- (a) the plaintiff by any other defendant to the proceeding;
 - (b) any other defendant by the plaintiff.
- (2) Where the defendant has served a counter-claim joining another person with the plaintiff as defendant to the counter-claim in accordance with Rule 10.03, paragraph (1), with any necessary modification, applies as if—
- (a) the defendant were the plaintiff; and
 - (b) the plaintiff and the other person were the defendants.
- (3) A third party who has pleaded shall be entitled to obtain from the party making discovery a copy of any affidavit of documents served—
- (a) by the plaintiff on the defendant by whom the third party was joined;
 - (b) on the plaintiff by that defendant.

29.07 Order for discovery

- (1) In a proceeding within Rule 29.01, notwithstanding that the pleadings between any parties are not closed, the Court may order that any of those parties make discovery of documents to any other of those parties.
- (2) In a proceeding not within Rule 29.01, the Court may at any stage order any party to make discovery of documents.
- (3) An order under paragraph (1) or (2) may be limited to such documents or classes of document, or to such questions in the proceeding, as the Court thinks fit.

29.08 Order for particular discovery

- (1) This Rule applies to any proceeding in the Court.
- (2) Where, at any stage of a proceeding, it appears to the Court from evidence or from the nature or circumstances of the case or from any document filed in the proceeding that there are grounds for a belief that some document or class of document relating to any question in the proceeding may be or may have been in the possession of a party, the Court may order that party to make and serve on any other party an affidavit stating—
 - (a) whether that document or any, and if so what, document or documents of that class is or has been in that party's possession; and
 - (b) if it has been but is no longer in that party's possession, when the party parted with it and that party's belief as to what has become of it.
- (3) An order may be made against a party under paragraph (2) notwithstanding that the party has already made or been required to make an affidavit of documents.

29.09 Inspection of documents referred to in affidavit of documents

- (1) A party upon whom an affidavit of documents is served in accordance with Rule 29.03 or in accordance with an order made under Rule 29.07 or 29.08 and a party to whom an affidavit of documents is supplied in accordance with Rule 29.06 may, by notice to produce served on the party making the affidavit, require that the party produce the documents in that party's possession referred to in the affidavit (other than any which that party objects to produce) for inspection.
- (2) A party upon whom a notice to produce is served in accordance with paragraph (1) shall, within seven days after that service, serve on the party requiring production a notice appointing a time within seven days after service of the notice under this paragraph when, and a place where, the documents may be inspected.
- (3) A notice to produce under paragraph (1) shall be in Form 29C.
- (4) A party to whom documents are produced for inspection under this Rule may take copies of the documents.
- (5) For the purpose of paragraph (4), taking a copy of a document includes photocopying the document, and if the party to whom a document is produced states that the party wishes to have it photocopied, the party producing the document shall at that party's option either—
 - (a) allow the other party to photocopy the document at such place as the parties agree; or
 - (b) supply the other party with a photocopy of the document.
- (6) Unless the Court otherwise orders, the cost of a photocopy of a document supplied to a party in accordance with paragraph (5) shall—
 - (a) be borne by that party in the first instance and be ultimately a cost in the proceeding; and
 - (b) be in the amount allowed in Appendix A for copy documents.

29.10 Inspection of documents referred to in pleadings and affidavits

- (1) This Rule applies to any proceeding.
- (2) Where, in the originating process filed by a party or in any pleading, interrogatories or answers, affidavit or notice filed by a party, reference is made to a document, any other party, by notice to produce served on that party, may require that party to produce the document for inspection.
- (3) Except as provided by paragraph (4), Rule 29.09, with any necessary modification, applies to the production and inspection of a document under this Rule.
- (4) A party upon whom a notice to produce is served under paragraph (2) shall not be required to produce a document for inspection where—
 - (a) the party claims that the document is privileged from production, and that party makes and serves on the other party an affidavit in which the party—
 - (i) makes that claim; and

- (ii) states sufficiently the grounds of the privilege;
- (b) the document is not in that party's possession, and the party makes and serves on the other party an affidavit in which the party—
 - (i) states that fact; and
 - (ii) states to the best of the party's knowledge, information and belief where the document is and in whose possession it is; and
 - (iii) where the document has been but is no longer in the party's possession, when the party parted with it and the party's belief as to what has become of it.

(5) A notice to produce under paragraph (2) shall be in Form 29C.

29.11 Order for discovery

Where a party—

- (a) fails to make discovery of documents in accordance with Rules 29.03 and 29.04;
- (b) fails to serve a notice appointing a time for inspection of documents as required by Rule 29.09 or 29.10;
- (c) objects to produce any document for inspection;
- (d) offers inspection unreasonable as to time or place; or
- (e) objects to allow any document to be photocopied or to supply a photocopy of the document—

the Court may order the party to do such act as the case requires.

29.12 Direction as to documents

- (1) Where a party is entitled under this Order to inspect a document which consists of—
 - (a) a video tape, audio tape, disc, film or other means of recording, the Court may give directions—
 - (i) for the screening or playing thereof; and
 - (ii) for the making by or supply to the party of a transcript of the recording (insofar as it can be transcribed) or a copy of the recording;
 - (b) information which has been processed by or is stored in a computer, the Court may give directions for making the information available.
- (2) On an application under paragraph (1), the Court may make an order for the costs and expenses of the party against whom an order giving directions is sought.
- (3) The Court may make an order giving directions on condition that the party applying give security for the costs and expenses of the party against whom the order is made.

29.12.1 Default notice

- (1) This Rule shall not limit the power of the Court under Rule 24.02.
- (2) If a party required to make discovery of documents fails to make discovery within the time limited by these Rules or fixed by any order of the Court, the party entitled to the discovery may serve on that party a notice in Form 29D.
- (3) If, within seven days after service of a notice under paragraph (2), the party on whom the notice is served does not make discovery, the Court may order—
 - (a) if the party required to make discovery is the plaintiff, that the proceeding be dismissed;
 - (b) if the party required to make discovery is a defendant, that the defendant's defence, if any, be struck out.
- (4) This Rule, with any necessary modification, applies to a counterclaim and to a claim by third party notice as if the counterclaim or the third party claim were a proceeding.
- (5) For the purpose of Rule 21.02(1), a defendant whose defence is struck out in accordance with paragraph (3) shall be taken to be a defendant who, being required to serve a defence, does not do so within the time limited for that purpose.
- (6) The Court may set aside or vary an order made under paragraph (3).

29.13 Inspection of document by Court

Where an application is made for an order under Rule 29.11 and a claim is made that the document is privileged from production or objection to production is made on any other ground, the Court may inspect the document for the purpose of deciding the validity of the claim or objection.

29.14 Default on discovery

- (1) Without limiting Rule 24.02, a party who does not within the time limited comply with an order under Rule 29.08(2) or 29.11, or an order under Rule 29.12(1) giving directions shall be liable to committal.
- (2) Service on the solicitor for a party of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order but the party may show in answer to the application that that party had no notice or knowledge of the order.
- (3) A solicitor on whom such an order made against the solicitor's client is served and who fails without reasonable excuse to give notice of the order to the solicitor's client shall be liable to committal.

29.15 Continuing obligation to make discovery

A party who has made an affidavit of documents is under a continuing obligation to make discovery of documents with respect to documents of which the party obtains possession after making the affidavit.

29.16 Discovery after directions

If the Court gives directions about discovery or inspection of documents, no party may, without further order, serve notice for discovery on any other party except in accordance with those directions.

29.17 Transitional provision—Supreme Court (Chapter I Amendment No. 18) Rules 2010

- (1) This Order applies to any proceeding commenced on or after 1 January 2011.
- (2) Order 29 of the former Rules as in force immediately before 1 January 2011 continues to apply to any proceeding commenced before 1 January 2011.

Order 32—Preliminary discovery and discovery from non-party

32.01 Definitions

In this Order, unless the context or subject matter otherwise requires—

applicant means applicant for an order under this Order;

description includes the name, place of residence, place of business, occupation and sex of the person against whom the applicant desires to bring a proceeding and whether that person is an individual or a corporation;

possession means possession, custody or power.

32.02 Privilege

An order made under this Order shall not operate to require the person against whom the order is made to produce any document or answer any question which, on the ground of privilege, that person is not required to produce or answer.

32.03 Discovery to identify a defendant

- (1) The Court may make an order under paragraph (2) where—
 - (a) an applicant, having made reasonable inquiries, is unable to ascertain the description of a person sufficiently for the purpose of commencing a proceeding in the Court against that person (in this Rule called *the person concerned*); and
 - (b) it appears that some person has or is likely to have knowledge of facts, or has, or is likely to have or has had or is likely to have had in that person's possession any document or thing, tending to assist in such ascertainment.
- (2) The Court may order that the person, and in the case of a corporation, the corporation by an appropriate officer, shall—
 - (a) attend before the Court to be orally examined in relation to the description of the person concerned;

- (b) make discovery to the applicant of all documents which are or have been in his, her or its possession relating to the description of the person concerned.
- (3) Where the Court makes an order under paragraph (2)(a), it may—
 - (a) order that the person or corporation against whom or which the order is made shall produce to the Court on the examination any document or thing in his, her or its possession relating to the description of the person concerned;
 - (b) direct that the examination be held before an Associate Judge.

32.04 Party an applicant

Rule 32.03, with any necessary modification, applies where the applicant is a party to a proceeding and wishes to make, in the proceeding, against a person who is not a party, a claim which the applicant could properly have made in the proceeding had the person been a party.

32.05 Discovery from prospective defendant

Where—

- (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description the applicant has ascertained;
- (b) after making all reasonable inquiries, the applicant has not sufficient information to enable the applicant to decide whether to commence a proceeding in the Court to obtain that relief; and
- (c) there is reasonable cause to believe that that person has or is likely to have or has had or is likely to have had in that person's possession any document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist the applicant to make the decision—

the Court may order that that person shall make discovery to the applicant of any document of the kind described in paragraph (c).

32.06 Party an applicant

Rule 32.05, with any necessary modification, applies where—

- (a) the applicant is a party to a proceeding; and
- (b) there is reasonable cause to believe that the applicant has or may have the right to obtain against a person who is not a party relief which the applicant could properly have claimed in the proceeding had the person been a party.

32.07 Discovery from non-party

On the application of any party to a proceeding the Court may order that a person who is not a party and in respect of whom it appears that that person has or is likely to have or has had or is likely to have had in that person's possession any document which relates to any question in

the proceeding shall make discovery to the applicant of any such document.

32.08 Procedure

- (1) An application under Rule 32.03 or 32.05 shall be made by originating motion to which the person against whom the order is sought shall be made respondent.
- (2) An application under Rule 32.04, 32.06 or 32.07 shall be made by summons served on every party to the proceeding and served personally on the person against whom the order is sought.
- (3) An order may be made by an Associate Judge under any of the Rules referred to in paragraphs (1) and (2).
- (4) An originating motion under paragraph (1) or a summons under paragraph (2) shall be supported by an affidavit—
 - (a) stating the facts on which the application is made; and
 - (b) specifying or describing the documents or any class of documents in respect of which the order is sought.
- (5) A copy of the supporting affidavit shall be served on every person on whom the originating motion or the summons is served.

32.09 Inspection of documents

Rule 29.09, with any necessary modification, applies to the inspection of the documents referred to in an affidavit of documents made and served in accordance with this Order as if the affidavit were an affidavit of documents as referred to in Rule 29.09(1).

32.10 Directions as to documents

Rule 29.12, with any necessary modification, applies to the inspection of a document under this Order.

32.11 Costs

- (1) On an application under this Order, the Court may make an order for the costs and expenses of the applicant, of the person against whom the order is made or sought and of any party to the proceeding, including the costs of—
 - (a) making and serving any affidavit of documents;
 - (b) producing any document for inspection in accordance with Rule 32.09; or
 - (c) complying with any direction given under Rule 32.10.
- (2) The Court may make an order under this Order on condition that the applicant give security for the costs and expenses of the person against whom the order is made.

Order 36—Amendment

36.01 General

- (1) For the purpose of—
 - (a) determining the real question in controversy between the parties to any proceeding; or
 - (b) correcting any defect or error in any proceeding; or
 - (c) avoiding multiplicity of proceedings—the Court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.
- (2) In this Order *document* includes—
 - (a) originating process;
 - (b) an indorsement of claim on originating process; and
 - (c) a pleading.
- (3) An indorsement of claim or pleading may be amended under paragraph (1) notwithstanding that the effect is to add or substitute a cause of action arising after the commencement of the proceeding.
- (4) A mistake in the name of a party may be corrected under paragraph (1), whether or not the effect is to substitute another person as a party.
- (5) Where an order to correct a mistake in the name of a party has the effect of substituting another person as a party, the proceeding shall be taken to have commenced with respect to that person on the day the proceeding commenced.
- (6) Notwithstanding the expiry of any relevant limitation period after the day a proceeding is commenced, the Court may make an order under paragraph (1) where it is satisfied that any other party to the proceeding would not by reason of the order be prejudiced in the conduct of that party's claim or defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise.
- (7) For the purpose of paragraph (6) *any other party to the proceeding* includes a person who is substituted as a party by virtue of an order made to correct a mistake in the name of a party.
- (8) Paragraph (6), with any necessary modification, applies to an application under Rule 14.03(2).
- (9) Paragraph (1) shall not apply to the amendment of a judgment or an order.

36.02 Failure to amend within time limited

An order giving a party leave to amend a document shall cease to have effect if the party has not amended the document in accordance with the order at the expiration of—

- (a) the time limited by the order for making the amendment; or
- (b) if no time was limited, 21 days from the date of the order.

36.03 Amendment of writ or other originating process before service and disallowance of amendment

- (1) With leave of the Prothonotary or of the Court, a party may amend a writ or other originating process if—
 - (a) the writ or other originating process has not been served on the defendant or other party to the proceeding;
 - (b) the party seeking to amend files an affidavit stating that service of the original writ or other originating process on the defendant or other party to the proceeding has not occurred; and
 - (c) all sealed copies of the writ or other originating process and other documents filed with the writ or other originating process are returned to the Court.
- (2) Each amendment under paragraph (1) shall be made in such a way as to distinguish the amendment from the original writ or other originating process.
- (3) Where a party amends a writ or other originating process in accordance with paragraph (1), the Court may, on application by any other party made within 21 days after service of the amended writ or other originating process on that party—
 - (a) disallow the amendment; or
 - (b) allow it either wholly or in part.

36.04 Amendment of pleading and disallowance of amendment

- (1) A party may amend any pleading served by that party—
 - (a) once before the close of pleadings; or
 - (b) at any time by leave of the Court or with the consent of all other parties.
- (2) Where a party amends a pleading in accordance with paragraph (1)(a), the Court may, on application by any other party made within 21 days after service of the amended pleading on that party—
 - (a) disallow the amendment; or
 - (b) allow it either wholly or in part.

36.05 How pleading amendment made

- (1) Unless the Court otherwise orders, an amendment to a pleading shall be made by—
 - (a) amending the copy of the pleading filed in the Court or filing a copy of that pleading as amended; and
 - (b) serving a copy of the amended pleading on all parties.
- (2) A party who files an amended copy of a pleading in accordance with paragraph (1)(a) shall indorse the copy pleading previously filed with a statement to the effect that the amended copy has been substituted.

- (3) Where either of the requirements of paragraph (1)(a) is complied with, the Prothonotary shall, as the case requires, indorse the copy of the pleading filed in the Court with the date it is amended or the copy of the pleading as amended with the date it is filed.
- (4) Each amendment to a pleading shall be made in such a way as to distinguish the amendment from the original pleading and from any previous amendment to the original.

36.06 Pleading to an amended pleading

- (1) A party shall plead to an amended pleading within 30 days after it is served on that party.
- (2) Where a party has pleaded to a pleading which is subsequently amended, the party shall be taken to rely on that party's original pleading in answer to the amended pleading unless the party pleads to it within the time limited for so doing.

36.07 Amendment of judgment or order

The Court may at any time correct a clerical mistake in a judgment or an order or an error arising in a judgment or an order from any accidental slip or omission.

Order 37—Inspection, detention and preservation of property

37.01 Inspection, detention etc. of property

- (1) In any proceeding the Court may make an order for the inspection, detention, custody or preservation of any property, whether or not in the possession, custody or power of a party.
- (2) An order under paragraph (1) may authorise any person to—
 - (a) enter any land or do any other thing for the purpose of obtaining access to the property;
 - (b) take samples of the property;
 - (c) make observations (including the photographing) of the property;
 - (d) conduct any experiment on or with the property;
 - (e) observe any process.
- (3) On an application under paragraph (1), the Court may make an order for the costs and expenses of any person not being a party where—
 - (a) that person attends on the hearing of the application pursuant to a summons served under Rule 37.03(1); or
 - (b) the Court makes an order under paragraph (1) which will affect that person.

- (4) The Court may make an order under this Rule on condition that the party applying for the order give security for the costs and expenses of any person, whether or not a party, who will be affected by the order.

37.02 Inspection from prospective defendant

- (1) This Rule applies to any property not being a document.
- (2) In this Rule *applicant* means an applicant for an order under the Rule.
- (3) Where—
 - (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from an identified person;
 - (b) after making all reasonable enquiries, the applicant has not sufficient information to enable the applicant to decide whether to commence a proceeding in the Court to obtain that relief; and
 - (c) there is reasonable cause to believe that that person has or is likely to have in that person's possession, custody or power any property relating to the question whether the applicant has the right to obtain the relief and that inspection of the property by the applicant would assist the applicant to make the decision—the Court may make an order for the inspection, detention, custody or preservation of the property.
- (4) An order under paragraph (3) may authorise any person to do any of the things referred to in Rule 37.01(2).
- (5) On an application under this Rule, the Court may make an order for the costs and expenses of—
 - (a) the applicant; and
 - (b) the person against whom the order is sought.
- (6) The Court may make an order under this Rule on condition that the applicant give security for the costs and expenses of the person against whom the order is made.

37.03 Procedure

- (1) An application for an order under Rule 37.01 shall be made by summons—
 - (a) served on all parties to the proceeding; and
 - (b) served personally on each person who would be affected by the order if made.
- (2) The Court may make an order under Rule 37.01 notwithstanding that any person not being a party who will be affected by the order has not been served with the summons personally or at all.

- (3) An application under Rule 37.02 shall be made by originating motion to which the person against whom the order is sought shall be made respondent.
- (4) An order shall not be made under Rule 37.02 except by a Judge of the Court.
- (5) A summons under paragraph (1) or an originating motion under paragraph (3) shall be supported by an affidavit—
 - (a) stating the facts on which the application is made; and
 - (b) specifying or describing the property in respect of which the order is sought.
- (6) A copy of the supporting affidavit shall be served on every person on whom the summons or originating motion is served.

37.04 Disposal of perishable property

Where, in a proceeding concerning any property (other than land) or in a proceeding in which any question may arise as to any property (other than land), the property is of a perishable nature or is likely to deteriorate or diminish in value if kept, the Court may make an order for the sale or other disposal of the whole or any part of the property.

37.05 Payment into Court in discharge of lien

- (1) Where in any proceeding—
 - (a) the plaintiff claims the recovery of specific property (other than land); and
 - (b) it appears from the pleadings or otherwise that the defendant does not dispute the title of the plaintiff but claims to be entitled to retain the property by virtue of a lien or otherwise as security for any sum of money—

the Court may order that the plaintiff be at liberty to pay into court, to abide the event of the proceeding, the amount of money in respect of which the security is claimed and such further amount, if any, for interest and costs as the Court may direct and that, upon the making of such payments, the property claimed be given up to the plaintiff.

- (2) This Rule, with any necessary modification, applies to a counterclaim.

37.06 Interim distribution of property or income

Where in a proceeding concerning any property the property will be more than sufficient to answer the claims on the property for which provision ought to be made in the proceeding, the Court—

- (a) may by order allow the whole or part of the annual income of the property or any part thereof to be paid, during such period as the Court may determine, to all or any of the persons having an interest in the income; or
- (b) may direct that any part of the property be conveyed, transferred or delivered to any person having an interest in the property.

37.07 Jurisdiction of Court not affected

The provisions of this Order shall not affect the exercise by the Court of any power to make orders with respect to the inspection, detention, custody or preservation of property which is exercisable apart from those provisions.

Order 37A—Freezing orders

37A.01 Definitions

In this Order, unless the contrary intention appears—

ancillary order has the meaning given by Rule 37A.03(1);

another court means a court outside Australia or a court in Australia other than the Court;

applicant means a person who applies for a freezing order or an ancillary order;

freezing order has the meaning given by Rule 37A.02(1);

respondent means a person against whom a freezing order or an ancillary order is sought or made.

37A.02 Freezing order

- (1) The Court may make an order (a *freezing order*), upon or without notice to the respondent, for the purpose of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied.
- (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.
- (3) A freezing order may be in Form 37AA.
- (4) In making a freezing order or an ancillary order, the Court shall have regard to the practice note concerning freezing orders.
- (5) The affidavits relied on in support of an application for a freezing order or an ancillary order shall, as far as possible, address the following—
 - (a) information about the judgment that has been obtained, or if no judgment has been obtained, the following information about the cause of action—
 - (i) the basis of the claim for substantive relief;
 - (ii) the amount of the claim; and
 - (iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;
 - (b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;

- (c) the matters referred to in Rule 37A.05; and
- (d) the identity of any person, other than the respondent, who the applicant believes may be affected by the freezing order and how that person may be affected by it.

37A.03 Ancillary order

- (1) The Court may make an order (an *ancillary order*) ancillary to a freezing order or prospective freezing order as the Court considers appropriate.
- (2) Without limiting the generality of paragraph (1), an ancillary order may be made for either or both of the following purposes—
 - (a) eliciting information relating to assets relevant to the freezing order or prospective freezing order;
 - (b) determining whether the freezing order should be made.

37A.04 Respondent need not be party to proceeding

The Court may make a freezing order or an ancillary order against a respondent, whether or not the respondent is a party to a proceeding in which substantive relief is sought against the respondent.

37A.05 Order against judgment debtor or prospective judgment debtor or third party

- (1) This Rule applies if—
 - (a) judgment has been given in favour of an applicant by—
 - (i) the Court; or
 - (ii) in the case of a judgment to which paragraph (2) applies, another court; or
 - (b) an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in—
 - (i) the Court; or
 - (ii) in the case of a cause of action to which paragraph (3) applies, another court.
- (2) This paragraph applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
- (3) This paragraph applies to a cause of action if—
 - (a) there is a sufficient prospect that the other court will give judgment in favour of the applicant; and
 - (b) there is a sufficient prospect that the judgment will be registered in or enforced by the Court.
- (4) The Court may make a freezing order or an ancillary order or both against a judgment debtor or prospective judgment debtor if the Court is satisfied, having regard to all the circumstances, that there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because any of the following might occur—

- (a) the judgment debtor, prospective judgment debtor or another person absconds; or
 - (b) the assets of the judgment debtor, prospective judgment debtor or another person are—
 - (i) removed from Australia or from a place inside or outside Australia; or
 - (ii) disposed of, dealt with or diminished in value.
- (5) The Court may make a freezing order or an ancillary order or both against a person other than a judgment debtor or prospective judgment debtor (a *third party*) if the Court is satisfied, having regard to all the circumstances, that—
- (a) there is a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied because—
 - (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
 - (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
 - (b) a process in the Court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment of the Court, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgment or prospective judgment.
- (6) Nothing in this Rule affects the power of the Court to make a freezing order or an ancillary order if the Court considers it is in the interests of justice to do so.

37A.06 Jurisdiction of Court not limited

Nothing in this Order limits the inherent, implied or statutory jurisdiction of the Court to make a freezing order or an ancillary order.

37A.07 Service

A freezing order—

- (a) shall be authenticated pursuant to Rule 60.02(1)(b);
- (b) when served, shall be served together with a copy of—
 - (i) the summons, or, if none was filed, any draft summons produced to the Court;
 - (ii) the material (other than material excepted by the Court as confidential) that was relied on by the applicant at the hearing when the order was made;

- (iii) a transcript or, if none is available, a note, of any oral allegation of fact that was made and of any oral submission that was put, to the Court; and
- (iv) the originating motion, or, if none was filed, any draft originating motion produced to the Court.

Note

An application for a freezing order or an ancillary order may be served on a person who is out of Australia where such service is authorised by or under Part 1 of Order 7: see, in particular, Rule 7.02(d).

37A.08 Costs

- (1) The Court may make any order as to costs as it considers appropriate in relation to an order made under this Order.
- (2) Without limiting the generality of paragraph (1), an order as to costs includes an order as to the costs of any person affected by a freezing order or an ancillary order.

37A.09 Application to be heard by Judge of the Court

An application under this Order shall be heard by a Judge of the Court.

Order 38—Injunctions

38.01 When Court may grant

The Court may grant an injunction at any stage of a proceeding or, in the circumstances referred to in Rule 4.08, before the commencement of a proceeding.

38.02 Application before trial

- (1) In an urgent case, the Court may grant an injunction on application made without notice.
- (2) Where a plaintiff applies for an injunction against a defendant, service of notice of application on that defendant may be made at the time of service of originating process in the proceeding.

38.03 Costs and expenses of non-party

- (1) This Rule applies where an application for an injunction is made before the trial of a proceeding.
- (2) The Court may grant an injunction on condition that the party applying for the injunction give security for the costs and expenses of any person who might be affected.
- (3) The Court may make such order as it thinks fit for the payment, either in the first instance or finally, of the costs and expenses of any person not being a party who might be affected by the grant of an injunction.

38.04 Ouster of office

- (1) Informations in the nature of quo warranto are abolished.

- (2) Where any person acts in an office in which the person is not entitled to act and an information in the nature of quo warranto would, but for paragraph (1), lie against that person, the Court—
 - (a) may grant an injunction restraining the person from so acting; and
 - (b) may, if the case so requires, declare the office to be vacant.

Order 42—Subpoenas

42.01 Definitions

In this Order and in Order 42A, unless the contrary intention appears—
addressee means the person who is the subject of the order expressed in a subpoena;

conduct money means a sum of money or its equivalent, such as pre-paid travel, sufficient to meet the reasonable expenses of the addressee of attending court as required by the subpoena and returning after so attending;

issuing party means the party at whose request a subpoena is issued;

subpoena means an order in writing requiring the addressee—

- (a) to attend to give evidence;
- (b) to produce the subpoena or a copy of it and a document or thing; or
- (c) to do both of those things;

subpoena to attend to give evidence means a subpoena requiring the addressee to attend to give evidence;

subpoena to produce means a subpoena requiring the addressee to produce the subpoena or a copy of it and a document or thing.

42.02 Issuing of subpoena

- (1) The Court may, in any proceeding, by subpoena order the addressee—
 - (a) to attend to give evidence as directed by the subpoena;
 - (b) to produce the subpoena or a copy of it and any document or thing as directed by the subpoena; or
 - (c) to do both of those things.
- (2) The Prothonotary shall not issue a subpoena—
 - (a) if the Court has made an order, or there is a Rule of the Court, having the effect of requiring that the proposed subpoena—
 - (i) not be issued; or
 - (ii) not be issued without the leave of the Court and that leave has not been given; or

- (b) requiring the production of a document or thing in the custody of the Court or another court.
- (3) The Prothonotary shall seal with the seal of the Court, or otherwise authenticate, a sufficient number of copies of the subpoena for service and proof of service.
- (4) A subpoena is taken to have been issued on its being sealed or otherwise authenticated in accordance with paragraph (3).
- (5) In any proceeding to which Order 28A applies, the Prothonotary may issue in RedCrest a subpoena which has been submitted by a party.

42.03 Form of subpoena

- (1) A subpoena shall be in accordance with—
 - (a) Form 42A, for a subpoena to attend to give evidence;
 - (b) Form 42B, for a subpoena to produce; or
 - (c) Form 42C, for a subpoena both to attend to give evidence and to produce.
- (2) A subpoena shall not be addressed to more than one person.
- (3) Unless the Court otherwise orders, a subpoena shall identify the addressee by name or by description of office or position.
- (4) A subpoena to produce shall—
 - (a) identify the document or thing to be produced; and
 - (b) specify the date, time and place for production.
- (5) A subpoena to attend to give evidence shall specify the date, time and place for attendance.
- (6) The date specified in a subpoena shall be the date of trial or any other date as ordered by the Court.
- (7) The place specified for production may be the Court or the address of any person authorised to take evidence in the proceeding as ordered by the Court.
- (8) The last date for service of a subpoena—
 - (a) is the date falling 5 days before the earliest date on which an addressee is required to comply with the subpoena or an earlier or later date fixed by the Court; and
 - (b) shall be specified in the subpoena.
- (9) If the addressee is a corporation, the corporation shall comply with the subpoena by its appropriate or proper officer.

42.03.1 Alteration of date for attendance or production

- (1) The issuing party may give notice to the addressee of a date or time later than the date or time that is specified in a subpoena as the date or time for attendance or for production or for both.

- (2) If notice is given under paragraph (1), the subpoena has effect as if the date or time notified appears in the subpoena instead of the date or time that is specified in the subpoena.

42.04 Setting aside or other relief

- (1) The Court may, of its own motion or on the application of a party or of any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
- (2) An application under paragraph (1) shall be made on notice to the issuing party.
- (3) The Court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

42.05 Service

- (1) A subpoena shall be served personally on the addressee.
- (2) The issuing party shall serve a copy of a subpoena to produce on each other party as soon as practicable after the subpoena has been served on the addressee, but it shall not be necessary that the copy served be sealed or be served personally.

42.06 Compliance with subpoena

- (1) An addressee need not comply with the requirements of a subpoena to attend to give evidence (a subpoena in Form 42A) or a subpoena both to attend to give evidence and to produce (a subpoena in Form 42C) unless conduct money has been provided or tendered to the addressee a reasonable time before the day on which attendance is required.
- (2) An addressee need not comply with the requirements of a subpoena unless it is served on or before the day specified in the subpoena as the last day for service of the subpoena.
- (3) Despite Rule 42.05(1), an addressee shall comply with the requirements of a subpoena even if it has not been served personally on that addressee if the addressee has, by the last day for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (4) The addressee shall comply with a subpoena to produce—
 - (a) by attending at the date, time and place specified for production or, if the addressee has received notice of a later date or time from the issuing party, at that later date or time, and producing the subpoena or a copy of it and the document or thing to the Court or to the person authorised to take evidence in the proceeding as permitted by the Court; or
 - (b) by delivering or sending the subpoena or a copy of it and the document or thing to the Prothonotary at the address specified for the purpose in the subpoena, so that they are received not less than two clear business days before the day specified in the subpoena

for attendance and production or, if the addressee has received notice of a later day from the issuing party, before that later day.

- (5) In the case of a subpoena that is both a subpoena to attend to give evidence and a subpoena to produce, production of the subpoena or a copy of it and of the document or thing in any of the ways permitted by paragraph (4) does not discharge the addressee from the obligation to attend to give evidence.
- (6) Unless a subpoena specifically requires the production of the original, the addressee may produce a copy of any document required to be produced by the subpoena.
- (7) The copy of a document may be—
 - (a) a photocopy; or
 - (b) in an electronic form in any of the following electronic formats—
 - (i) .doc and .docx—Microsoft Word documents;
 - (ii) .pdf—Adobe Acrobat documents;
 - (iii) .xls and .xlsx—Microsoft Excel spreadsheets;
 - (iv) .jpg—image files;
 - (v) .rtf—rich text format;
 - (vi) .gif—graphics interchange format;
 - (vii) .tif—tagged image format; or
 - (viii) any other format agreed with the issuing party.

42.07 Production otherwise than upon attendance

- (1) This Rule applies if an addressee produces a document or thing in accordance with Rule 42.06(4)(b).
- (2) The Prothonotary shall, if requested by the addressee, give a receipt for the document or thing to the addressee.
- (3) If the addressee produces more than one document or thing, the addressee shall, if requested by the Prothonotary, provide a list of the documents or things produced.

42.08 Removal, return, inspection, copying and disposal of documents and things

The Court may give directions in relation to the removal from and return to the Court, and the inspection, copying and disposal, of any document or thing that has been produced to the Court in response to a subpoena.

42.09 Inspection of, and dealing with, documents and things produced otherwise than on attendance

- (1) This Rule applies if an addressee produces a document or thing in accordance with Rule 42.06(4)(b).
- (2) On the request in writing of a party, the Prothonotary shall inform the party whether production in response to a subpoena has occurred, and,

if so, include a description, in general terms, of the document and thing produced.

- (3) Subject to this Rule, no person may inspect a document or thing produced unless the Court has granted leave and the inspection is in accordance with that leave.
- (4) Unless the Court otherwise orders, the Prothonotary may permit the parties to inspect at the office of the Prothonotary any document or thing produced unless the addressee, a party or any person having sufficient interest objects to the inspection under this Rule.
- (5) If the addressee objects to a document or thing being inspected by any party to the proceeding, the addressee shall, at the time of production, notify the Prothonotary in writing of the objection and of the grounds of the objection.
- (6) If a party or person having a sufficient interest objects to a document or thing being inspected by a party to the proceeding, the objector may notify the Prothonotary in writing of the objection and of the grounds of the objection.
- (7) On receiving a notice of an objection under this Rule, the Prothonotary—
 - (a) shall not permit any, or any further, inspection of the document or thing the subject of the objection; and
 - (b) shall refer the objection to the Court for hearing and determination.
- (8) The Prothonotary shall notify the issuing party of the objection and of the date, time and place at which the objection will be heard, and the issuing party shall notify the addressee, the objector and each other party accordingly.
- (9) The Prothonotary shall not permit any document or thing produced to be removed from the office of the Prothonotary except on application in writing signed by the solicitor for a party.
- (10) A solicitor who signs an application under paragraph (9) and removes a document or thing from the office of the Prothonotary, undertakes to the Court by force of this Rule that—
 - (a) the document or thing will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding; and
 - (b) the document or thing will be returned to the office of the Prothonotary in the same condition, order and packaging in which it was removed, as and when directed by the Prothonotary.
- (11) The Prothonotary may, in the Prothonotary's discretion, grant an application under paragraph (9) subject to conditions or refuse to grant the application.

42.10 Disposal of documents and things produced

- (1) Unless the Court otherwise orders, the Prothonotary may, in the Prothonotary's discretion, return to the addressee any document or thing produced to him in response to the subpoena.
- (2) Unless the Court otherwise orders, the Prothonotary shall not return any document or thing under paragraph (1) unless the Prothonotary has given to the issuing party at least 14 days' notice of the intention to do so and that period has expired.
- (3) The addressee of a subpoena which is in accordance with Form 42B or Form 42C must complete the declaration by the addressee provided for in the subpoena.
- (4) The completed declaration must be included in the subpoena or copy of the subpoena which accompanies the documents produced under the subpoena.
- (5) Subject to paragraph (6), the Prothonotary may, upon the expiry of four months from the conclusion of the proceeding, cause to be destroyed all the documents produced in the proceeding in compliance with a subpoena which were declared by the addressee to be copies.
- (6) The Prothonotary may cause to be destroyed those documents declared by the addressee to be copies which have become exhibits in the proceeding when they are no longer required in connection with the proceeding, including on any appeal.

42.11 Costs and expenses of compliance

- (1) The Court may order the issuing party to pay the amount of any reasonable loss or expense incurred in complying with the subpoena.
- (2) If an order is made under paragraph (1), the Court shall fix the amount or direct that it be fixed in accordance with the Court's usual procedure in relation to costs.
- (3) An amount fixed under this Rule is separate from and in addition to—
 - (a) any conduct money paid to the addressee;
 - (b) any witness expenses payable to the addressee.

42.12 Failure to comply with subpoena—contempt of court

- (1) Failure to comply with a subpoena without lawful excuse is a contempt of court and the addressee may be dealt with accordingly.
- (2) Despite Rule 42.05(1), if a subpoena has not been served personally on the addressee, the addressee may be dealt with for contempt of court as if the addressee had been so served if it is proved that the addressee had, by the last day for service of the subpoena, actual knowledge of the subpoena and of its requirements.
- (3) Paragraphs (1) and (2) are without prejudice to any power of the Court under any Rules of the Court (including any Rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

42.13 Documents and things in the custody of a court

- (1) A party who seeks production of a document or thing in the custody of the Court or of another court may inform the Prothonotary in writing accordingly, identifying the document or thing.
- (2) If the document or thing is in the custody of the Court, the Prothonotary shall produce the document or thing—
 - (a) in Court or to any person authorised to take evidence in the proceeding, as required by the party; or
 - (b) as the Court directs.
- (3) If the document or thing is in the custody of another court, the Prothonotary shall, unless the Court has otherwise ordered—
 - (a) request the other court to send the document or thing to the Prothonotary; and
 - (b) after receiving it, produce the document or thing—
 - (i) in Court or to any person authorised to take evidence in the proceeding as required by the party; or
 - (ii) as the Court directs.

Order 43—Affidavits

43.01 Form of affidavit

- (1) An affidavit shall be made in the first person.
- (2) Unless the Court otherwise orders, an affidavit shall state—
 - (a) the place of residence of the deponent and the deponent's occupation or, if the deponent has none, the deponent's description; and
 - (b) that the deponent is a party to the proceeding or employed by a party, if such be the case.
- (3) Notwithstanding paragraph (2), where a deponent makes an affidavit in a professional or other occupational capacity, the affidavit may, instead of stating the deponent's place of residence, state—
 - (a) the address of the deponent's place of business;
 - (b) the position the deponent holds; and
 - (c) the name of the deponent's firm or employer, if any.
- (4) An affidavit shall be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.
- (5) Every affidavit shall be signed by the deponent, except as provided by Rule 43.02(1), and the jurat shall be completed and signed by the person before whom it is sworn.

- (6) Each page of an affidavit shall be signed by the person before whom it is sworn.
- (7) The person before whom an affidavit is sworn shall legibly write, type or stamp below the person's signature in the jurat—
 - (a) the person's name and address; and
 - (b) a statement of the capacity in which the person has authority to take the affidavit.

43.02 Affidavit by illiterate or blind person

- (1) Where it appears to the person before whom an affidavit is sworn that the deponent is illiterate or blind, the person shall certify in or below the jurat that—
 - (a) the affidavit was read in the person's presence to the deponent;
 - (b) the deponent seemed to the person perfectly to understand it; and
 - (c) the deponent made the deponent's signature or mark in the presence of the person before whom the affidavit is sworn.
- (2) Where an affidavit is made by an illiterate or blind deponent and a certificate in accordance with paragraph (1) does not appear on the affidavit, it may not be used in evidence unless the Court is satisfied that the affidavit was read to the deponent and that the deponent seemed perfectly to understand it.

43.03 Content of affidavit

- (1) Except where otherwise provided by or under these Rules, an affidavit shall be confined to facts which the deponent is able to state of the deponent's own knowledge.
- (2) On an interlocutory application an affidavit may contain a statement of fact based on information and belief if the grounds are set out.

43.04 Affidavit by two or more deponents

Where an affidavit is made by two or more deponents, the names of the persons making the affidavit shall be inserted in the jurat, except that, if the affidavit is sworn by both or all the deponents at one time before the same person, it shall be sufficient to state that it was sworn by "each of the abovenamed" deponents.

43.05 Alterations

- (1) Notwithstanding any interlineation, erasure or other alteration in the jurat or body, an affidavit may be filed, unless the Court otherwise orders, but may not be used without the leave of the Court unless the person before whom it is sworn has initialled the alteration.
- (2) Paragraph (1) shall apply to an account verified by affidavit as if the account were part of the affidavit.

43.06 Annexures and exhibits

- (1) A document referred to in an affidavit shall not be annexed to the affidavit but may be referred to as an exhibit.

- (2) An exhibit to an affidavit shall be identified by a separate certificate annexed to it—
 - (a) bearing the same heading as the affidavit; and
 - (b) signed by the person before whom the affidavit is sworn.
- (3) The certificate shall—
 - (a) be in Form 43A; and
 - (b) contain in the bottom right hand corner of the page in bold type and in a font size not less than 20 points the distinguishing mark of the exhibit and a brief and specific description of the exhibit.

43.07 Time for swearing

Unless the Court otherwise orders, an affidavit may be used in a proceeding notwithstanding that it was sworn before the commencement of the proceeding.

43.08 Irregularity

Notwithstanding any irregularity of form an affidavit may, with the leave of the Court, be used in evidence.

43.09 Filing

- (1) Unless the Court otherwise orders, an affidavit—
 - (a) which has not been filed; or
 - (b) which has not been served or filed in compliance with an order in respect of its service or filing—shall not be used by the party by or on whose behalf it was made.
- (2) An affidavit may be filed with the Prothonotary or with the proper officer in court.

...

Order 44—Expert evidence

44.01 Definitions

In this Order, unless the context or subject matter otherwise requires—

expert means a person who has specialised knowledge based on the person's training, study or experience;

opinion includes more than one opinion;

the code means the expert witness code of conduct in Form 44A.

44.02 Application of Order

- (1) This Order applies to a proceeding however commenced.

- (2) This Order does not apply to the evidence of a party who would, if called as a witness at the trial, be qualified to give evidence as an expert in respect of any question in the proceeding.
- (3) With respect to the opinion of a medical practitioner, in a proceeding for medical negligence in which the plaintiff claims damages for or in respect of bodily injury, this Order applies to an opinion on the liability of the defendant but does not otherwise apply to a medical report to which Order 33 applies.

44.03 Report of expert

- (1) Unless otherwise ordered, a party who intends at trial to adduce the evidence of a person as an expert shall—
 - (a) as soon as practicable after the engagement of the expert and before the expert makes a report under this Rule, provide the expert with a copy of the code; and
 - (b) not later than 30 days before the day fixed for trial, serve on each other party, a report by the expert in accordance with clause (3) of the code and deliver a copy for the use of the Court.

...

- (3) If the expert provides to a party a supplementary report, including a report indicating that the expert has changed the expert's opinion on a material matter expressed in an earlier report—
 - (a) that party shall forthwith serve the supplementary report on all other parties; and
 - (b) in default of such service, the party and any other party having a like interest shall not use the earlier report or the supplementary report at trial without the leave of the Court.
- (4) Any report provided by the expert pursuant to this Rule—
 - (a) shall be signed by the expert; and
 - (b) shall be accompanied by clear copies of any photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter to which the report refers.

44.04 Other party's report as evidence

Unless otherwise ordered, a party may put in evidence a report served on that party by another party under this Order.

44.05 No evidence unless disclosed in report

Except with the leave of the Court or by consent of the parties affected, a party shall not, except in cross-examination, adduce any evidence from a person as an expert at the trial of a proceeding unless the substance of the evidence is contained within a report or reports which the party has served under this Order.

44.06 Conference between experts

- (1) The Court may direct expert witnesses—

- (a) to confer; and
 - (b) to provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for their not agreeing.
- (2) The Court may specify the matters on which the experts are to confer.
- (3) An expert witness may apply to the Court for further directions.
- (4) The Court may direct the legal representatives of a party—
- (a) to attend the conference;
 - (b) not to attend the conference;
 - (c) to attend or not to attend at the option of the party whom they represent.
- (5) Subject to paragraph (1)(b), except as the parties affected agree in writing, no evidence shall be admitted of anything said or done by any person at the conference.
- (6) An agreement reached during the conference shall not bind a party except in so far as the party agrees in writing.

Order 45—Originating motion

45.01 Definitions

In this Order—

judgment includes order;

proceeding means proceeding commenced by originating motion.

45.02 Evidence by affidavit

- (1) Except where otherwise provided by any Act or these Rules, and subject to paragraph (2), evidence at the trial of a proceeding shall be given by affidavit.
- (2) By agreement of the parties, evidence at the trial of the proceeding may be given orally, unless the Court otherwise orders.

45.03 Judgment where no appearance

- (1) Where a defendant fails to file an appearance within the time limited, the Court may—
 - (a) on application made by the plaintiff without notice to the defendant; and
 - (b) on proof of service of the originating motion and of the failure—
give judgment against that defendant for the relief or remedy sought in the originating motion.
- (2) For the purpose of these Rules, the hearing of the application is the trial of the proceeding.
- (3) Except for the purpose of proof of service of the originating motion and of the failure of the defendant to appear, the plaintiff shall not, unless the Court otherwise orders, use in evidence on the application any affidavit made by the plaintiff or on the plaintiff's behalf and not served on the defendant with the originating motion.

45.04 Proceedings after appearance

- (1) Where a defendant has filed an appearance, no judgment shall be given for the relief or remedy sought except on application by the plaintiff in accordance with this Rule.
- (2) Except as provided in paragraph (3), application shall be made to an Associate Judge by summons in Form 45A served on the defendant.
- (3) In a proceeding commenced by originating motion under Order 53, the plaintiff may apply for judgment on the day specified in the originating motion for application to the Associate Judge.
- (4) On an application under paragraph (2) or (3), the Associate Judge may, as appropriate—
 - (a) where the Associate Judge has authority to give the judgment sought by the plaintiff, hear and determine the application or refer it to another Associate Judge for hearing and determination;
 - (b) by consent of the defendant, give the judgment;

- (c) refer the application to a Judge of the Court for hearing and determination;
- (d) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.

45.05 Special procedure

- (1) In this Rule *plaintiff* includes a person who proposes to commence a proceeding by originating motion.
- (2) The Court may by order—
 - (a) dispense with the requirements of Rules 5.03(1) and 8.02; and
 - (b) authorise the plaintiff to commence a proceeding by originating motion in Form 5C.
- (3) Without limiting paragraph (2), an order may be made—
 - (a) in an urgent case;
 - (b) to save time and expense for the parties; or
 - (c) where the defendant consents.
- (4) An order may be made on application by the plaintiff before or after the proceeding is commenced and, except where the originating motion has been served on the defendant, application may be made without notice to the defendant.
- (5) An application made before the proceeding is commenced shall not constitute a proceeding for the purpose of any requirement of these Rules with respect to originating process.
- (6) Judgment shall not be given for the plaintiff, or an order made, for the relief or remedy sought in the originating motion or otherwise except on application made to an Associate Judge or, if the Associate Judge does not have authority to give the judgment or make the order sought by the plaintiff, to a Judge of the Court, on notice to the defendant in Form 45B.
- (7) Where an application is made to an Associate Judge under paragraph (6), the Associate Judge may, as appropriate—
 - (a) hear and determine the application or refer it to another Associate Judge or a Judge of the Court for hearing and determination;
 - (b) by consent of the defendant, give judgment;
 - (c) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.
- (8) Where an application is made to a Judge of the Court under paragraph (6), the Judge may give judgment or make any order the Judge considers appropriate.

Order 46—Applications

46.01 Application of Order

This Order applies to an interlocutory or other application in a proceeding.

46.02 Application by summons

- (1) An application made on notice to any person shall be by summons, unless the Court otherwise orders.
- (2) An application by summons is made when the summons is filed in accordance with Rule 46.04.
- (3) An application not by summons is made when it comes on for hearing.

46.03 Notice of application

On the hearing of an application the Court may order that the person making the application give notice of it to any person having a sufficient interest.

46.04 Form and filing of summons

- (1) A summons shall be in Form 46A.
- (2) A summons shall be filed—
 - (a) where application is made to a Judge of the Court, or the Costs Court, with the Prothonotary;
 - (b) where application is made to an Associate Judge, other than an Associate Judge who is a Costs Judge, with the appropriate Associate Judge's Associate or the Prothonotary;
 - (c) where application is made to a judicial registrar, other than a judicial registrar in the Costs Court, with the appropriate judicial registrar's Associate or the Prothonotary.

Note

See also Rules 28.01 and 63.38(1).

- (3) Upon the filing of a summons, or at any later time on the request of the applicant, a sufficient number of copies of the summons for service and proof of service shall be sealed with the seal of the Court.

46.05 Service

- (1) The applicant shall serve a sealed copy of a summons and, except where these Rules otherwise provide, a copy of any affidavit in support on every person to whom notice of the application is to be given.
- (2) Service under paragraph (1) shall be made within a reasonable time before the day for hearing named in the summons, and in no case later than 2.00 p.m. on the previous day or, where the Prothonotary's office was closed on the day before the day for hearing, not later than 2.00 p.m. on the day the office was last open.
- (3) A plaintiff may serve any summons on a defendant personally before appearance.

46.05.1 Day for hearing

- (1) A summons which has not been served may, at the request of the party who filed it, be amended on or before the day for hearing named in the summons to name another day.
- (2) The summons may be amended—
 - (a) if the summons is to be heard by the Court constituted by a Judge of the Court, by the Prothonotary or a Judge's Associate;
 - (b) if the summons is to be heard by the Court constituted by an Associate Judge, by an Associate Judge's Associate or the Prothonotary;
 - (c) if the summons is to be heard by the Court constituted by a judicial registrar, by a judicial registrar's Associate or the Prothonotary.
- (3) A summons shall not be amended under this Rule more than once.
- (4) This Rule does not limit the power of the Court under Rule 36.01.

46.06 Adjournment

- (1) The Court may adjourn the hearing of an application on such terms as it thinks fit.
- (2) The Associate of the Judge of the Court, Associate Judge or judicial registrar (as the case requires) who is to hear the application or, where an application is to be heard within a specialist list, an Associate responsible for the specialist list—
 - (a) may by consent adjourn the hearing of an application to a particular date or for a particular time or generally, and reserve the costs of the adjournment; and
 - (b) shall record the adjournment and any reservation of the costs by indorsement on the court file.
- (3) If the hearing of an application is adjourned under paragraph (2), the Court may thereafter, whether the costs of the adjournment were reserved or not, make an order in relation to the costs of or occasioned by the adjournment as it thinks fit.
- (4) Rule 63.22 shall apply to costs reserved under paragraph (2) as if the costs were reserved by order of the Court.

46.07 Absence of party to summons

- (1) Where any person to whom a summons is addressed fails to attend, the Court may hear the application if satisfied that the summons was duly served.
- (2) Where on an application by summons the applicant fails to attend, the Court may dismiss the application or make such other order as it thinks fit.

46.08 Setting aside

The Court may set aside or vary an order which affects a person where the application for the order—

- (a) was made on notice to that person, but the person did not attend the hearing of the application; or
- (b) was not made on notice to that person.

Order 47—Place and mode of trial

47.01 Place of trial

Unless the Court otherwise orders, the place of trial of a proceeding shall be determined in accordance with Rule 5.08.

47.02 Mode of trial

- (1) A proceeding commenced by writ and founded on contract (including contract implied by law) or on tort (including a proceeding for damages for breach of statutory duty) shall be tried with a jury if—
 - (a) the plaintiff in the writ or the defendant by notice in writing to the plaintiff and to the Prothonotary within 10 days after the last appearance signifies that the plaintiff or the defendant (as the case requires) desires to have the proceeding so tried; and
 - (b) the prescribed fees for the purposes of section 24 of the **Juries Act 2000** are paid.
- (2) Any other proceeding shall be tried without a jury, unless the Court otherwise orders.
- (3) Notwithstanding any signification under paragraph (1), the Court may direct trial without a jury if in its opinion the proceeding should not in all the circumstances be tried before a jury.
- (4) Trial with a jury shall be with a jury of six.

47.03 Payment of jury fees

- (1) A party requiring a proceeding to be tried with a jury shall pay the prescribed fees for the purposes of section 24 of the **Juries Act 2000** to the Prothonotary.
- (2) If a proceeding is to be tried with a jury because the defendant so signified by notice in writing, the prescribed fees shall be paid by the defendant to the Prothonotary within 14 days after the date is fixed for the trial of the proceeding.
- (3) In case of a default under paragraph (1) or (2), the Court may order that the proceeding be tried without a jury.

Note

See also section 24(5) of the **Juries Act 2000**.

- (4) The party requiring a proceeding to be tried with a jury must produce a copy of the receipt for payment of the prescribed fees or other proof of that payment to the associate to the Judge hearing the proceeding—
 - (a) before the trial commences;
 - (b) before the trial resumes on each day in relation to which the prescribed fees are payable or, if an order is made under section 24(4) of the **Juries Act 2000**, in accordance with that order.

47.04 Separate trial of question

The Court may order that—

- (a) any question in a proceeding be tried before, at or after the trial of the proceeding, and may state the question or give directions as to the manner in which it shall be stated;
- (b) different questions be tried at different times or places or by different modes of trial.

47.05 Judgment after determination of preliminary question

If the determination of any question in a proceeding and tried separately from the proceeding substantially disposes of the proceeding or renders the trial of the proceeding unnecessary, the Court may dismiss the proceeding or make such other order or give such judgment as it thinks fit.

Order 49—Trial

49.01 Order of evidence and addresses

- (1) The Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.
- (2) Subject to any direction given under paragraph (1)—
 - (a) where the burden of proof on any question lies on the plaintiff, the plaintiff shall begin;
 - (b) where the burden of proof on all the questions lies on the defendant, the defendant shall begin.
- (3) Subject to any direction given under paragraph (1)—
 - (a) where the only parties are one plaintiff and one defendant, and there is no counterclaim, the order of evidence and addresses shall be as provided by the following paragraphs of this Rule; and
 - (b) in any other case, the order of evidence and addresses shall be as provided by those paragraphs with such modifications as the nature of the case requires.
- (4) The party who begins may make an address opening the party's case and may then adduce that party's evidence.
- (5) When, in the course of the case for the party who begins, no document or thing is admitted in evidence on tender by the opposite party, and at the conclusion of that case—
 - (a) the opposite party adduces evidence, the opposite party may first make an opening address and after adducing that party's evidence, the opposite party may make a closing address and thereafter the party who began may make a closing address;

- (b) the opposite party does not adduce evidence, the party who began may make a closing address and then the opposite party may make an address.
- (6) When, in the course of the case for the party who begins, any document or thing is admitted in evidence on tender by the opposite party, and at the conclusion of that case—
 - (a) the opposite party adduces evidence, the order of proceedings shall be as provided by paragraph (5)(a);
 - (b) the opposite party does not adduce evidence, the opposite party may make an address and then the party who began may make a closing address.

49.02 Absence of party

- (1) If, when the trial of a proceeding is called on, any party is absent, the Court may—
 - (a) order that the trial be not had unless the proceeding is again set down for trial, or unless such other steps are taken as the Court directs;
 - (b) proceed with the trial generally or so far as concerns any claim for relief in the proceeding; or
 - (c) adjourn the trial.
- (2) The Court may set aside or vary any judgment, order or verdict obtained where a party is absent at the trial.
- (3) An application under paragraph (2) shall be made within 14 days after the trial.

49.03 Adjournment of trial

The Court may adjourn a trial on such terms as it thinks fit.

49.04 Death before judgment

- (1) Where a party to a proceeding dies after the verdict or finding on the questions of fact, the Court may give judgment notwithstanding the death.
- (2) Paragraph (1) does not affect the power of the Court under Rules 9.08 and 9.09.

Order 62—Security for costs

62.01 Definitions

In this Order, unless the context or subject matter otherwise requires—
defendant includes any person against whom a claim is made in a proceeding;

plaintiff includes any person who makes a claim in a proceeding.

62.02 When security for costs may be ordered

(1) Where—

- (a) the plaintiff is ordinarily resident out of Victoria;
- (b) the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues, not for the plaintiff's own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
- (c) a proceeding by the plaintiff in another court for the same claim is pending;
- (d) subject to paragraph (2), the address of the plaintiff is not stated or is not stated correctly in the plaintiff's originating process;
- (e) the plaintiff has changed the plaintiff's address after the commencement of the proceeding in order to avoid the consequences of the proceeding;
- (f) under any Act the Court may require security for costs—

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given.

- (2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(d) if in failing to state the plaintiff's address or to state the plaintiff's correct address the plaintiff acted innocently and without intention to deceive.

62.03 Manner of giving security

Where an order is made requiring the plaintiff to give security for costs, security shall be given in the manner and at the time the Court directs.

62.04 Failure to give security

Where a plaintiff fails to give the security required by an order, the Court may dismiss the plaintiff's claim.

62.05 Variation or setting aside

The Court may set aside or vary any order requiring a plaintiff to give security for costs.