Paper for Legalwise Seminar – 7 June 2018

Chaos & Reform

That there is chaos in the Family Court of Australia and the Federal Circuit Court (in its Family Law Division) is beyond dispute. Whether there will be any meaningful reform is problematic.

The war stories are so numerous and so frequent in their telling and occurrence. The time wasted and costs incurred needlessly are a disgrace.

There are a number of reasons for this including but not limited to:

1. The Rules.

2. Non compliance with pre-action procedures.

3. The absence of compulsory mediation before proceedings commence in financial matters.

4. Self-represented litigants.

5. Unmeritorious proceedings.

6. Costs Orders (or the lack of them).

Review of the Family Law System

The then Attorney General on 17 August 2017 set out the terms of reference for this review. Subsequently the Law Reform Commission published an issues paper in which there were 47 questions which the Commissioner suggested needed to be addressed.

I have dealt with some of these questions and will distribute these at the seminar, but this paper is really my submission to the Commissioner. I now set out for your consideration what I view as the way in which the chaos in which we find ourselves can be reformed. I will start with the Family Law Rules.

1. <u>The Rules</u>

The Rules presently require an appearance at Court in the first instance at some stage after the filing of the Initiating Application.

I advocate that this appearance could be avoided thereby saving a great deal of Registrars' time, and the FCC Judges' time, and the parties' costs.

As well, the material required in order to file initiating process is not as limited as it should be. In particular the Rules of the Federal Circuit Court requiring an Affidavit to be filed with the Initiating Application is an absurdity in terms of the costs that are needlessly incurred in what is required, sometimes not much less than an Affidavit of evidence. This is in complete contradiction of the way the Court was set up – to simplify things.

I will deal in the first instance with Financial Applications. My complaint with the present form of Application is that it should go further and include something in the nature of what is to be found in the Financial Questionnaire.

I am not sure whether the Financial Questionnaire type of information should be provided only after a Response has been filed. Anticipating that in most cases there is a Response I would think that the Financial Questionnaire material should be included in the Initiating Application.

I believe that the Financial Statement, in an abbreviated form, could also be included in the Initiating Application, which should be verified.

The Application should also contain a Certificate that the pre-action procedures have been complied with, before it is accepted in the filing office.

All of the foregoing assumes that the pre-action procedures have been complied with before one reaches the filing stage.

The pre-action proceedings of themselves need amending and in Schedule 1 to this paper is what I would call the ideal pre-action procedures in financial matters.

The Response should set out the Orders to be sought and whether any material in the Application is agreed or disputed. It should also include material in the nature of the Financial Questionnaire and an abbreviated Financial Statement.

The Rules should require that a Response be filed and served within 28 days of the initial service.

Once the Response is filed and served the legal representatives should be obliged to confer by telephone to determine what material from a standard list and what further material

specific to the matter is required to be provided by one to the other for the purpose of a worthwhile Conciliation Conference. Hopefully all of what is required will have been provided during the pre-action procedures.

It would only be in cases where there is disagreement about the material that had to be provided and/or a failure to file a Response that the matter would need to be referred to a Court.

Such referral should automatically be listed within 7 days of the referral unless otherwise required by the person seeking the listing, and the request should specify precisely what is required and why. If possible, to save costs this should be a tele-mention.

The Applicant in any matter will be required to certify that the pre-action procedures have been carried out prior to the institution of proceedings.

Compliance with pre-action procedures is something that does not always happen in my observation and in the circumstances it should be an absolute requirement, and an ethical responsibility, for lawyers to comply with these procedures.

However, the full extent of the procedures needs to be examined and the requirement of the production of pages of bank and credit card statements is not something which would be seen as being helpful or required in every case.

A failure on the part of the Respondent to provide a Response to the initial notice within 28 days whether the Response is simply an acknowledgement accompanied by such documents as are reasonably available in such a period or otherwise should result in a costs penalty. In the absence of such a Response the Applicant should be entitled then to immediately commence proceedings.

The first Court event should either be the Conciliation Conference or a mention to enforce compliance with the Rules.

Conciliation Conferences should be scheduled within 1 month of the request being made and there should be some methodology whereby a case co-ordinator can communicate by phone with each lawyer or an assistant for the purpose of reaching an agreement as to the date and time of the conference.

Assuming no settlement is reached at the Conciliation Conference the matter should then be placed in the waiting list of cases awaiting the allocation of a docket Judge and a final hearing date.

No docket Judge should be selected at that time as it would be unfair to some litigants compared with others if there was an allocation to Judge A instead of Judge B when Judge B's docket is larger or filled with more complex or longer cases and therefore Judge B's hearing dates are somewhat further out.

Nevertheless in order that a final hearing date can be selected, it is suggested that this be a function of the Registrar at the conclusion of the Conciliation Conference to perform the functions usually carried out by Trial Judges on the first day of the less adversarial trial.

In other words the number of days of hearing should be worked out and the evidence, or limits to the evidence, should be specified by the Registrar.

The Registrar would also at that time give standard directions for trial.

There would need to be some provision for an additional Conciliation Conference or for referral to a private Mediation.

What do the foregoing proposed reforms achieve? The answer is:

(i) elimination of judicial directions hearings and therefore a significant saving of judicial time in the Federal Circuit Court and Registrars time in the Family Court;

(ii) elimination of the unnecessary costs associated with most judicial directions hearings;

(iii) possibly the elimination of the wasteful first day before the Trial Judge;

(iv) and dare I hope that mandatory compliance with pre-action procedures will see more settlements and a slowdown in applications being filed.

Interim Applications

Obviously there will be matters on which directions will be needed because of a particular issue and requirement that cannot be agreed upon as between the practitioners and, of course, a great many of the cases in which there is a self-represented litigant on one side.

Again one way of dealing with such issues would be for enhanced powers to be given to Senior Registrars, and perhaps Registrars and perhaps, more Senior Registrar positions.

Interim hearings should be scheduled for particular times during the day of no more than 1 hour's duration unless the Registrar can be persuaded that a special arrangement is necessary.

In the event of any necessity for directions rather than a directions hearing there should be an ability to compel or arrange a tele-mention of the same nature as occurs today.

Parenting Matters

Perhaps there should be a separate form of application for children's matters. It would seem easiest if one adopted the present format of divorce applications in which particulars of children their living arrangements and other matters relevant to the wellbeing are set out.

There should be a format comprising three separate columns for the provision of information with respect to each child, namely:

(i) setting out the situation during the 12 months before separation;

(ii) setting out the position immediately following separation; and

(iii) setting out the desired outcome sought by the parent.

Compliance with the pre-action procedures in respect of parenting matters should be strictly adhered to with the above format a mandatory starting point. Additionally the mediation process and the requirement for a Section 60I Certificate should remain mandatory except in the most extreme and urgent matters, but the pre action procedures should be mandatory and complied with before any mediation is sought. This should make mediation more effective particularly if no lawyers are involved at that early stage.

More resources should be provided to the Court in its counselling section with the counsellor to provide a report on the competing proposals and a recommendation in relation to the future progress of the matter as happens today.

To the contrary of the proposed reform in financial matters, an early exposure to a Judge will frequently be of great assistance to the parties and in terms of settlement, but only on the basis that that Judge was thereafter precluded from taking further part in the

proceedings, or at least in the final hearing something akin to the existing Children's Cases Programme should be re-introduced, except instead of this happening as the first LAT day it should be much sooner.

A family report should be sought at the earliest possible opportunity. Again this should be ordered by a Judge who can, as is the case now, specify matters of particular importance to be addressed in the report. The cost of some of these reports now is such that there needs to be a review as to how to provide appropriate material at a reasonable cost.

As I have indicated financial and parenting matters should be dealt with separately and parenting matters should take priority, and not include any financial issues at all.

For the system to operate more efficiently, it is clear that the very small number of Court experts regularly appointed should be expanded. How this can occur I do not know but it must be done in order that these types of issues involving children should be concluded sooner rather than later and at a more reasonable cost. If that means that it will be only the rarest of cases that requires a full psychiatric report, then so be it.

Interim Parenting Application

These are of significant importance these days when there is so much time to wait between such a hearing and the final hearing and the putting in place of a regime to stay in place for the next 18 months to 2 years or more on an abbreviated and truncated hearing on the papers usually without the benefit of a family report is of great concern.

Obviously if as a result of the proposed reforms final hearings in parenting matters can be heard within 6 months then there would possibly be less need for interim applications to be dealt with other than as now.

The most frequent types of interim parenting applications are:

1. As to what is to occur immediately upon separation, or;
2. Where one party is being denied time with the children immediately after separation of an amount that such party sees as being appropriate. It is not always the case that there is a genuine issue to be determined at an interim hearing as to primary care, although, this does occur of course in applications for exclusive occupation of the former matrimonial home.

Applications of that nature should be dealt with very, very quickly indeed and should be followed by a swift final hearing.

To the extent that resources are scarce they should be directed towards matters such as these rather than financial matters.

Of course in an interim hearing there is often the problem that the judicial officer cannot make any findings where facts are in issue and accordingly much injustice, or perceived injustice, results. In my view, until delays are eliminated, it may become necessary to allow limited cross examination in order that findings can be made, and justice done and seen to have been done.

Mediations & Arbitrations

The Act was recently amended to better provide for arbitrations in property matters. There is some debate as to whether this should be extended to parenting matters as well. Personally I see no reason why parenting matters should not also be dealt with in an arbitration. The trouble is that there is always one party who will not consent to bringing on a final hearing sooner.

There are many property mediations now conducted, many of which are conducted by retired judges and many of which are conducted also by senior barristers.

They are of course costly both in terms of preparation of them and the attendance in some instances of counsel as well as solicitors on behalf of each party. I do have a concern about the cost of mediation and am not sure of the circumstances in which it should be ordered.

Perhaps it should be ordered in circumstances where there is an application for expedited hearing or some other degree of urgency as a sort of filter in respect of these types of matters.

Arbitration is of course one way of achieving a final hearing more quickly than would otherwise have occurred.

Of course arbitration can lead to “Judge shopping” but I believe that this aspect is capable of being handled appropriately.

Pre-Trial Checks

Obviously there will be the need for a pre-trial check, say 1 month prior to the hearing date at, say, 9.30am before the Trial Judge. At least 7 days prior to which each solicitor will be required to certify that from their perspective the matter is ready for hearing or otherwise spelling out what particular problem exists and what directions are needed to solve it, accompanied by appropriate minutes of the Order sought.

2. Self-Represented Litigants

The number of self-represented litigants has grown enormously in recent years and in my view will continue to grow as the cost of representation becomes higher and out of reach for most families.

Perhaps too much latitude is given to self-represented litigants and this is a matter which will require close examination of ways in which the help to be given to such parties and the latitude allowed to them in wasteful exercises should be curtailed. I think if Judges were firmer and more appropriate in shutting down the self-represented litigant raising unnecessary, trivial and / or vexatious material much more could be achieved than is presently achieved.

It is beyond the scope of this paper for me to suggest ways and means that this could be done but a review of this issue is in my view a necessity. Any such review might deal with how the leave of a Registrar might be required before an application can be filed.

It also follows that a sufficient number of Orders for costs against self-represented litigants pursuing unmeritorious claims might be a way in which such claims can be curbed. This of course will require the amendment to the legislation that I deal with below.

3. Costs

Offers of settlement

The Rules should be amended to provide for offers of compromise to be made compulsorily at relevant stages of the matter.

The result of the successful offer of compromise (or, to put it another way, the result of unsuccessfully not accepting an offer of compromise) should be an Order for indemnity costs as is the case under the UCPR.

It is not surprising that much un-meritorious litigation is occurring at this time. That is because there is literally no penalty in costs for having a go and failing except the incurring of one's own costs. If one is self-represented then the cost of having a go is minimal.

Where the value of assets is in dispute, or where the assets are difficult to value, a failure to accept an offer will not always result in a costs order. However, for this defence to succeed in future, the party receiving the offer would need to show relevance upon a reasonable expert report to justify the refusal.

The costs following the event philosophy and Rule that operates in all other Courts in the land ought to be reimported into proceedings arising out of the family breakdown.

As a reminder I will distribute relevant extracts from the Uniform Civil Procedure Rules.

Parenting Cases – Costs?

Should this occur, then, in children's matters, should there be some exemption?

That is a matter of some concern, and it is understood that frequently there are no winners in children's matters and frequently no clear cut results which would justify an Order for costs one way or the other. On the other hand there are a sufficient number of cases in which there is a clear result and in respect of which it would not be unreasonable to conclude that a particular party was unsuccessful and that the proceedings brought by that party had limited prospects of success only, or no reasonable prospects.

Perhaps this will require certification and obviously this topic will require a legislative amendment to Section 117 starting with the repeal of Section 117(1) and the noting that each party should meet his or her own costs.

A proposed new Section 117 should apply to property matters, and should mirror the UCPR as far as possible.

Expert evidence

The costs of single experts in both financial and parenting matters has been a matter of significant concern for a long time. Recent charges by the small panel of reliable and regular experts in respect of parenting matters are a great drain on parties' resources, costing as they do anywhere from $10,000.00 to $20,000.00 which in some cases must be borne by one party rather than the other.

Real Estate Valuers tend to charge a higher rate in Family Law matters than otherwise. Chartered Accountants valuing corporate or trust assets and businesses are also expensive.

Some effort will need to be made to curl such costs, by perhaps a simplified approach to the valuation process.

The philosophy

The philosophy of my approach is that the parties should be encouraged to reach agreement more so than is now the case and that the intervention or application by a Court or application by a party to a Court should be limited. In the event that such intervention or application is required there should be significant costs penalties imposed on any non-

complying or recalcitrant party. These costs should not be token but should be on an indemnity basis.

The costs scale as between party and party is anachronistic and should be abolished. It is now the case that under Rule 19.18(1)(b) the Court can specify the basis upon which costs are to be calculated or computed or assessed rather than on the basis of the application of the present scale. Schedule 3 to this paper sets out the way in which I see a costs order being made even under the present system. Essentially costs orders in relation to these matters should be dealt with by Assessors appointed who regularly deal with costs issues as between solicitor and client in Family Law matters.

There might possibly be an issue as to whether the assessors appointed by the Chief Justice of the Supreme Court of New South Wales (who are presently dealing with a high volume of solicitor/client disputes) could also deal with party and party costs orders. There is no reason why they should not be asked to do this. There is a fee for the application payable to the Supreme Court of New South Wales and ultimately in many cases the costs of the costs assessor of the assessment process is also to be borne by a party.

The likely time delay in having a final hearing

There should be available in the Court website or portal for all litigants, and their advisors, an indication of the likely hearing date of the matter, or the likely delay in time, and the priority that the matter has in the list of cases awaiting a hearing.

At the moment this information is obviously limited and unreliable and, of course, varies so much from time to time.

The knowledge of the likely delay is something which could encourage parties after a period of time to consider on a voluntary basis either a Mediation or referral to Arbitration.

Financial Matters – Experts

Valuation of Real Estate

A standard format for a joint request to expert should be included in the Rules so that there can be little room for debate, or the wasting of time or costs, between the parties in the instructions to the expert.

Business and company valuations

Again there should be a provision in the Rules for a joint letter of instruction to a proposed joint expert. There will of course need to be more room for instructions to be given and it would seem appropriate to permit matters which one party desires to bring to the attention of the expert to be referred to in the joint letter of instructions.

Balance Sheets

It should be incumbent upon the Applicant to include a draft balance sheet in Word format with the pre action exchange and the Application. It is appreciated that this document will be in many cases of limited relevance where the value and/or extent of the other party's proof of assets and/or resources under the other party's control exists. But the sooner a start on this document, the better.

Nevertheless such a document should be an appropriate adjunct to the Financial Statement to be incorporated with the Application.

The Respondent should be required, when filing a Response, to amend the draft balance sheet in accordance with their understanding of the assets and resources and their value. Clearly in each case, both for the Applicant and the Respondent, the intelligent use of notes to explain the basis of a statement as to the existence of an asset, and/or its value, should be mandatory.

Appeals

The cost of Appeal Books and the sheer bulk of same in so many matters has been a concern for a long time and more effort should be made to limit the reproduction of material to that which is all that is really reasonably required by the Appellate Court or for the submissions of either party.

Given that in most appellate matters counsel appears, it should be a requirement at an early stage that counsel certify when lodging the Notice of Appeal (or acknowledging that in some cases there will be urgency about such Notices or difficulties of time or availability to have or require within a short period thereafter to prepare a draft Index where either the relevant paragraphs of an Affidavit as opposed to the whole Affidavit, or simply the relevant Affidavits, are set out. The whole of the pleadings that have been filed which could possibly be relevant should perhaps be referred to in one column whilst in the next column there

should be an indication of how much of that particular document, if at all any of it, should be included in the Appeal Book.

Each side should then have its say about this.

The Court system

It is ludicrous that there are two separate Courts with their own respective infrastructure and staffing requirements to administer proceedings under the Family Law Act 1975.

Either tthe Family Court of Australia should be abolished and merged into the Federal Circuit Court or the Federal Circuit Court should be abolished and merged into the Family Court and/or the creation of a new Family Law Division of the Federal Court of Australia should be considered. Whatever is seen as best should result in only one Court and one set of Rules of procedure.

Personnel and Judicial Officers

Obviously the cost of all employees of the Court system is a significant expenditure item so far as the public purse is concerned. The employment of appropriately qualified levels of staff to deal with the implementation that the above Rules requiring less Court intervention and less Court time than previous will be an essential ingredient of any reform. Part-time appointments should be considered.

Case Co-Ordinators

The number of these persons should be expanded, subject to appropriate training and qualifications, as the first line of communication between the Court and litigants and/or the legal representatives.

Deputy Registrar numbers should also be expanded for the purpose of holding of tele-mentions and directions hearings.

Senior Registrar numbers should be expanded to deal with issues such as injunctive relief and wider powers than now exist.

The proposed expansion of Registrars' powers should be a matter for consideration in the review.

The cost of the Court system and how to fund it

It is a sad commentary on our society that many persons suffering a marital breakdown have nothing much to argue about except children and, accordingly, they do so. We then usually find that they will need either Legal Aid or some other form of assistance in order to properly present their case to the Court and in any event the Legal Aid scheme will have to provide an Independent Children's Lawyer.

It is of fundamental importance to the proper functioning of our society and for the welfare of children and to the type of grown-ups that children of separated families are likely to be that their care is appropriately monitored and conducted. It is quite clearly the case now that there is a welfare dependent class within our society which probably gives rise to the need for a Court intervention out of proportion to their numbers. They need more assistance from the system than they now get.

As well, there are persons of average means for whom the cost of litigation, even reduced as one hopes it would be under the proposed system, is beyond them and they end up being self-represented.

How such self-represented litigants can be accommodated is dealt with elsewhere but under this concept of funding I propose that there be a deduction from Centrelink benefits of a very modest amount over a potentially significant period of time in order to recoup the costs incurred by the Court system in dealing with these persons' matters. There could even be given a discretion to judicial officers to specify a rate at which the cost to the Court system of the particular litigant should be deducted from their on-going benefits over a period of time. I am suggesting that somewhat akin to the present HECS system of funding of university fees that the cost to the Court system of litigation should be funded in due course at either by very small amounts over a long period of time from Centrelink benefits and/or secured by charge on property where that is available.

There are two strands to this particular issue – one is the recovery of appropriate Court fees for the institution of proceedings and the filing of relevant documents, including Subpoenae, Conciliation Conference costs and hearing allocation fees.

The other is the need for a revised Legal Aid system whereby the cost of the provision of Legal Aid to appropriate persons could be recouped out of their future Centrelink benefits or earnings or sale of property.

This would have two effects – one an enhancement of the Legal Aid system and a better funding method for it with the flow-on effect of less self-represented litigants hopefully more settlements, and therefore less wasted Court time.

More private practitioners would probably act for people who qualify basically for Legal Aid in both financial and parenting matters if the present prohibition on the charging of an additional fee were abolished.

Directions – A triumph of hope over experience, and what to do about it

Simply, the automatic penalty of a Costs Order might stimulate more compliance than is now seen.

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SCHEDULE 1

FAMILY LAW RULES 2004 - SCHEDULE 1
Pre-action procedures

(rule 1.05)

Part 1 -- Financial cases (property settlement and maintenance)

1 General

(1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case by:

(a) participating in dispute resolution, such as negotiation, conciliation, arbitration and counselling;

(b) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and

(c) complying, as far as practicable, with the duty of disclosure.

(2) Unless ~~there are good reasons for not doing so~~ a serious urgent need for injunctive relief, all parties ~~are expected to have~~ must follow~~ed~~ these pre-action procedures before filing an application to start a case, and certify that they have done so.

~~(3) There may be serious consequences, including costs penalties, for non-compliance with these requirements.~~

(4) The only circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures ~~include~~ are cases of extreme urgency:

a. where a proposed dealing has the propensity to defeat a claim or some other basis in which a person would be unduly prejudiced or adversely affected if notice is given to another person (in the dispute) of an intention to start a case; or
b. In which a time limitation is close to expiring; and [note – this could be cured by an amendment to Section 44;
c. Involving a genuine dispute about the existence of a de facto relationship, or whether a choice under item 86A or 90A of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* should be set aside.

~~(a) involving urgency;~~

~~(b) involving allegations of family violence;~~

~~(c) involving allegations of fraud;~~

~~(d) in which there is a genuinely intractable dispute;~~

~~(e) in which a person would be unduly prejudiced or adversely affected if notice is given to another person (in the dispute) of an intention to start a case;~~

~~(f) in which a time limitation is close to expiring; and~~

~~(g) involving a genuine dispute about the existence of a de facto relationship, or whether a choice under item 86A or 90A of Schedule 1 to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* should be set aside.~~

(5) The objects of these pre-action procedures are to prevent unnecessary applications being filed:

a. This may be achieved by requiring a certificate of compliance with these Rules to be completed before any application can be filed.
b. to encourage early and full disclosure in appropriate cases by the exchange of information and documents about the prospective case;
c. to provide parties with a process to help them avoid legal action by reaching a settlement of the dispute before starting a case;
d. to provide parties with a procedure to resolve the case quickly and limit costs;
e. to help the efficient management of the case if a case becomes necessary (that is, parties who have followed the pre-action procedure should be able to clearly identify the real issues which should help to reduce the duration and cost of the case); and
f. to encourage parties, if a case becomes necessary, to seek only those orders that are reasonably achievable on the evidence.

~~(b) to provide parties with a process to help them avoid legal action by reaching a settlement of the dispute before starting a case;~~

~~(c) to provide parties with a procedure to resolve the case quickly and limit costs;~~

~~(d) to help the efficient management of the case, if a case becomes necessary (that is, parties who have followed the pre-action procedure should be able to clearly identify the real issues which should help to reduce the duration and cost of the case); and~~

~~(e) to encourage parties, if a case becomes necessary, to seek only those orders that are reasonably achievable on the evidence.~~

(6) At all stages during the pre-action negotiations and, if a case is started, during the conduct of the case itself, the parties must have regard to:

(a) the need to protect and safeguard the interests of any child;

(b) the continuing relationship between a parent and a child and the benefits that cooperation between parents brings a child (that is, helping to maintain as good a continuing relationship between the parties and the child as is possible in the circumstances) ;

(c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;

(d) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;

(e) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;

(f) the impact of correspondence on the intended reader (in particular, on the parties);

(g) the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law;

(h) the principle of proportionality and the need to control costs because it is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute; and

(i) t he duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

(7) Parties must not:

(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or

(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

(8) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

(9) The parties are not expected to continue to follow the pre-action procedures to their detriment if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

2 Compliance

(1) The court ~~regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court~~ shall prevent the filing of an application without compliance.

(2) If a case is subsequently started, the court may consider whether these requirements have been met and, if not, what the consequences should be (if any).

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see paragraphs 1.10(2)(d), 11.03(2)(b) and 19.10(1)(b) , and paragraph 6.10(1)(b) of Schedule 6).

(4) Unreasonable non-compliance may result in the court ordering the non-complying party to pay all or part of the costs of the other party or parties in the case on an indemnity basis.

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse a position than he or she would have been if the pre-action procedures had been complied with.

Examples of non-compliance with pre-action procedures

Not sending a written notice of proposed application; not providing sufficient information or documents to the other party; not following a procedure required by the pre-action procedures; not responding appropriately within the nominated time to the written notice of proposed

application; not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of this procedure.

3 Pre-action procedures

(1) A person who is considering filing an application to start a case must, before filing the application:

(a) give a copy of these pre-action procedures to the other prospective parties to the case;

(b) make inquiries about the dispute resolution services available, identify and contact an accredited service, and obtain a mediation timetable; and

(c) invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed.

(1A) Paragraph (1)(a) does not apply if, within 12 months before filing the application, the person gave to, or received from, a prospective party to the case, a copy of these pre-action procedures.

(2) Each prospective party must:

(a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; and

(b) make a genuine effort to resolve the dispute by participating in dispute resolution.

(3) If the prospective parties reach agreement, they may arrange to have the agreement made binding by filing an Application for Consent Orders.

(4) Before filing an application, the proposed applicant must give to the other party (the ***proposed respondent***) written notice of his or her intention to start a case if:

(a) there is no appropriate dispute resolution service available to the parties;

(b) a party fails or refuses to participate in dispute resolution; ~~or~~

~~(c) the other party fails to provide financial disclosure; or~~

(d) the parties are unable to reach agreement by dispute resolution.

(5) The notice under subclause (4) must set out:

(a) the issues in dispute including the failure of disclosure alleged;

(b) the orders to be sought if a case is started;

(c) a genuine offer to resolve the issues;

(d) a time (the ***nominated time***) (that is at least 14 days after the date of the letter) within which the proposed respondent is required to reply to the notice.

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:

(a) the issues in dispute;

(b) the orders to be sought if a case is started;

(c) a genuine counter-offer to resolve the issues [but only if financial disclosure has been made]; and

(d) the nominated time (that is at least 14 days after the date of the letter) within which the claimant must reply.

(7) It is expected that a party will not start a case by filing an application in a court unless:

(a) the proposed respondent does not respond to a notice of intention to start a case; or provide financial disclosure;

(b) agreement is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

4 Disclosure and exchange of correspondence

(1) Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 13.01).

(2) In attempting to resolve their dispute, parties should, as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange:

(a) a schedule of assets, income and liabilities;

(b) a list of documents in the party's possession or control that are relevant to the dispute; and

(c) a copy of any document required by the other party, identified by reference to the list of documents.

(3) ~~Parties are encouraged to refer to the Financial Statement and~~Set out below are rules 4.15, 12.05 and 13.04 as a guide for what information to provide and documents to exchange.

FAMILY LAW RULES 2004 - RULE 4.15

Evidence to be provided

(1) On the first court date and the hearing date of an Application for spousal or de facto maintenance, each party must bring to the court the following documents:

(a) a copy of the party's taxation returns for the 3 most recent financial years;

(b) the party's taxation assessments for the 3 most recent financial years;

(c) the party's bank records for the period of 3 years ending on the date on which the application was filed;

(d) if the party receives wages or salary payments--the party's payslips for the past 12 months;

(e) if the party owns or controls a business, either as sole trader, partnership or a company--the business activity statements and the financial statements (including profit and loss statements and balance sheets) for the 3 most recent financial years of the business; and

(f) any other document relevant to determining the income, needs and financial resources of the party.

Note 1: Documents that may need to be produced under paragraph (f) include documents setting out the details mentioned in rule 13.04.

Note 2: For modification of a spousal maintenance order, see section 83 of the Act. For modification of a de facto maintenance order, see section 90SI of the Act.

(2) Before the hearing date, a party must produce the documents mentioned in subrule (1) for inspection, if the other party to the proceedings makes a written request for their production.

(3) If a request is made under subrule (2), the documents must be produced within 7 working days of the request being received

FAMILY LAW RULES 2004 - RULE 12.05

Property case--exchange of documents before conciliation conference

(1) This rule applies to a party to a property case in which the parties are required to attend a conciliation conference.

(2) Within 28 days after the case assessment conference, each party must, as far as practicable, exchange with each other party:

(a) if not already exchanged, a copy of all the documents mentioned in rule 12.02; and

(b) any other documents ordered at the case assessment conference to be exchanged.

FAMILY LAW RULES 2004 - RULE 13.04

Full and frank disclosure

(1) A party to a financial case must make full and frank disclosure of the party's financial circumstances, including:

(a) the party's earnings, including income that is paid or assigned to another party, person or legal entity;

(b) any vested or contingent interest in property;

(c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;

(d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;

(e) the party's other financial resources;

(f) any trust:

(i) of which the party is the appointor or trustee;

(ii) of which the party, the party's child, spouse or de facto spouse is an eligible beneficiary as to capital or income;

(iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party's child, spouse or de facto spouse is a shareholder or director of the corporation;

(iv) over which the party has any direct or indirect power or control;

(v) of which the party has the direct or indirect power to remove or appoint a trustee;

(vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;

(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or

(viii) over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party's child, spouse or de facto spouse is a director or shareholder of the corporation;

(g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:

(i) in the 12 months immediately before the separation of the parties; or

(ii) since the final separation of the parties; and

(h) liabilities and contingent liabilities.

(2) Paragraph (1)(g) does not apply to a disposal of property made with the consent or knowledge of the other party or in the ordinary course of business.

(3) In this rule:

"legal entity " means a corporation (other than a public company), trust, partnership, joint venture business or other commercial activity.

Note: The requirements in this rule are in addition to the requirements in rules 12.02 and 12.05 to exchange certain documents before a conference in a property case.

(4) Parties are not required to exchange documents that are not subject to the duty of disclosure under rule 13.12 set out hereunder and that would not be ordered to be disclosed by a court ~~(see rule 13.12)~~.

FAMILY LAW RULES 2004 - RULE 13.12

Documents that need not be produced

Subject to rule 15.55, a party must disclose, but need not produce to the party requesting it:

(a) a document for which there is a claim for privilege from disclosure; or

(b) a document a copy of which is already disclosed, if the copy contains no change, obliteration or other mark or feature that is likely to affect the outcome of the case.

Note: Rule 13.13 sets out the requirements for challenging a claim of privilege from disclosure.

(5) The documents that the court would consider appropriate to include in the list of documents and exchange include:

(a) in a maintenance case:

(i) a copy of the party's taxation return for the most recent financial year;

(ii) the party's bank records for the 12 months ending on the date when the maintenance application was filed;

(iii) if the party receives wage or salary payments--the party's 3 most recent pay slips;

(iv) if the party owns or controls a business--the business activity statements for the business for the previous 12 months; and

(v) any other document relevant to determining the income, expenses, assets, liabilities and financial resources of the party; and

(b) in a property settlement case:

(i) a copy of the party's 3 most recent taxation returns and assessments;

(ii) documents about any superannuation interest of the party, including:

(A) a completed superannuation information form for the superannuation interest or a recent statement from the Fund;

(B) if the party is a member of a self-managed superannuation fund--a copy of the trust deed and the 3 most recent financial statements for the fund; ~~and~~

(C) the value of the superannuation interest, including the basis on which the value has been worked out and any documents working out the value; and

(C) An ASIC printout in relation to the corporation and (but only if other than ordinary shares have been issued)

(iii) for a corporation in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns;

(B) a copy of the corporation's most recent annual return that lists the directors and shareholders; and

(C) a copy of the corporation's constitution and any amendments;

(iv) for a trust in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(B) a copy of the trust deed, including any amendments;

(v) for a partnership in relation to which a party has a duty of disclosure under rule 13.04:

(A) a copy of the financial statements for the 3 most recent financial years, including balance sheets, profit and loss accounts, depreciation schedules and taxation returns; and

(B) a copy of the partnership agreement, including any amendments;

(vi) for a person or entity mentioned in subparagraph (i), (iii), (iv) or (v)--any business activity statements for the previous 12 months; and

(vii) unless the value is agreed, a ~~market appraisal~~statement as to how ~~of~~ the value of any item of property in which a party has an interest has been arrived at.

(6) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.

(7) Parties should agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.

Note: The court will refer to Chapter 13 as a guide for what is regarded as reasonable conduct by the parties in making these arrangements.

(8) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.

(9) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the case only.

(10) Parties must bear in mind that an object of the pre-action procedures is to control costs and, if possible, resolve the dispute quickly.

(11) Disagreements about disclosure may be better managed by the court within the context of a case.

5 Expert witnesses should only be engaged where both parties agree, if the issue is about the value of a business. If the issue about the value of real estate, then if the parties cannot agree on the choice of one, they should each engage their own.

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 15.5).

(2) In summary:

(a) an expert witness must be instructed in writing and must be fully informed of his or her obligations;

(b) if possible, parties should seek to retain an expert witness only on an issue in which the expert witness's evidence is necessary to resolve the dispute;

(c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties; and

(d) if separate experts' reports are to be relied on at a hearing, the court requires the reports to be disclosed.

6 Lawyers' obligations

Note : See also rules 1.08 and 19.03.

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action;

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;

(c) subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;

(f) advise clients of the estimated costs of legal action (see rule 19.03);

(g) advise clients about the factors that may affect the court in considering costs orders;

(h) give clients documents prepared by the court (if applicable) about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client.

(3) It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice, however, a lawyer has a duty as an officer of the court and must not mislead the court until compliance with the pre-action procedures has concluded then no proceedings can be started.

(4) If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, to cease to act for the client.

Part 2 -- Parenting cases

1 General

(1) Each prospective party to a case in the Family Court of Australia is required to make a genuine effort to resolve the dispute before starting a case by:

(a) exchanging a notice of intention to claim and exploring options for settlement by correspondence; and

(b) complying, as far as practicable, with the duty of disclosure.

(2) Unless there are good reasons for not doing so, all parties are expected to have followed the pre-action procedures before filing an application to start a case.

(3) There may be serious consequences, including costs penalties, for non-compliance with these requirements.

(4) The circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures include cases:

(a) involving urgency;

(b) involving allegations of child abuse or risk of child abuse;

(c) involving allegations of family violence or risk of family violence; and

~~(d) in which there is a genuinely intractable dispute; and~~

(d) in which a person would be unduly prejudiced or adversely affected if another person to the dispute is given notice of an intention to start a case.

(5) The objects of these pre-action procedures are:

(a) to encourage early and full disclosure in appropriate cases by the exchange of information and documents about the prospective case;

(b) to provide parties with a process to help them avoid legal action by reaching a settlement of the dispute before starting a case,

(c) to provide parties with a procedure to resolve the case quickly and limit costs;

(d) to help the efficient management of the case, if a case becomes necessary (that is, parties who have followed the pre-action procedure should be able to clearly identify the real issues which should help to reduce the duration and cost of the case); and

(e) to encourage parties, if a case becomes necessary, to seek only those orders that are reasonably achievable on the evidence.

(6) At all stages during the pre-action negotiations and, if a case is started, during the conduct of the case itself, the parties must have regard to:

(a) the best interests of any child;

(b) the continuing relationship between a parent and a child and the benefits that cooperation between parents brings a child (that is, helping to maintain as good a continuing relationship between the parties and the child as is possible in the circumstances) ;

(c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;

(d) the principle that people should not seek orders about a child when an application is motivated by intentions other than the best interests of the child;

(e) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;

(f) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;

(g) the impact of correspondence on the intended reader (in particular, on the parties);

(h) the need to seek only those orders that are reasonably achievable on the evidence and that are consistent with the current law; and

(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note: The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

(7) Parties must not:

(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or to cause unnecessary cost or delay); or

(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

(8) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

(9) The parties are not expected to continue to follow the pre-action procedures to their detriment if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

2 Compliance

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

(2) If a case is subsequently started, the court may consider whether these requirements have been met, and if not, what the consequences should be (if any).

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs. ~~(see paragraphs 1.10(2)(d), 11.03(2)(b) and 19.10(1)(b)).~~

(4) Unreasonable non-compliance may result in the court ordering the non-complying party to pay all or part of the costs of the other party or parties in the case.

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse a position than he or she would have been if the pre-action procedures had been complied with.

Examples of non-compliance with pre-action procedures

Not sending a written notice of proposed application; not providing sufficient information or documents to the other party; not following a procedure required by the pre-action procedures; not responding appropriately within the nominated time to the written notice of proposed application; not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of this procedure.

3 Pre-action procedures

(1) A person who is considering filing an application to start a case must, before filing the application:

(a) give a copy of these pre-action procedures to the other prospective parties to the case;

(b) comply with the requirements of this Schedule.

(1A) Paragraph (1)(a) does not apply if, within 12 months before filing the application, the person gave to, or received from, a prospective party to the case, a copy of these pre-action procedures.

(3) If the prospective parties reach agreement, they may arrange to have the agreement made binding by filing an Application for Consent Orders.

(4) Before filing an application, the proposed applicant must give to the other party (the ***proposed respondent***) written notice of his or her intention to start a case.

(5) The notice under subclause (4) must set out:

(a) the issues in dispute;

(b) the orders to be sought if a case is started;

(c) a genuine offer to resolve the issues;

(d) a time (the ***nominated time***) (that is at least 14 days after the date of the letter) within which the proposed respondent is required to reply to the notice.

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:

(a) the issues in dispute;

(b) the orders to be sought if a case is started;

(c) a genuine counter-offer to resolve the issues; and

(d) the nominated time (that is at least 14 days after the date of the letter) within which the claimant must reply.

(7) It is expected that a party will not start a case by filing an application in a court unless:

(a) the proposed respondent does not respond to a notice of intention to start a case; or

(b) agreement is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

4 Disclosure and exchange of correspondence

(1) Parties to a case have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 13.01).

(2) In attempting to resolve their dispute, parties should as soon as practicable on learning of the dispute and, if appropriate, as a part of the exchange of correspondence under clause 3 of these pre-action procedures, exchange copies of documents in their possession or control relevant to an issue in the dispute (for example, medical reports, school reports, letters, drawings, photographs).

(3) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates.

(4) Documents produced by a person to another person in compliance with these pre-action procedures are taken to have been produced on the basis of an undertaking from the party receiving the documents that the documents will be used for the purpose of the case only.

5 Expert witnesses

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 15.5).

(2) In summary:

(a) an expert witness must be instructed in writing and must be fully informed of his or her obligations;

(b) if possible, parties should seek to retain an expert witness only on an issue in which the expert witness's evidence is necessary to resolve the dispute;

(c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties; and

(d) if separate experts' reports are obtained, the court requires the reports to be disclosed.

6 Lawyers' obligations

Note: See also rules 1.08 and 19.03 and clause 6.03 of Schedule 6.

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action;

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;

(c) subject to it being in the best interests of the client and any child, endeavour to reach a solution by settlement rather than start or continue legal action;

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if, in the lawyer's opinion, the compromise or settlement is a reasonable one;

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay;

(f) advise clients of the estimated costs of legal action (see rule 19.03 and clause 6.03 of Schedule 6);

(g) advise clients about the factors that may affect the court in considering costs orders;

(h) give clients documents prepared by the court (if applicable) about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to his or her client.

(3) It is accepted that it is sometimes impossible to comply with a procedure because a client may refuse to take advice, however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) If a client wishes not to disclose a fact or document that is relevant to the case, a lawyer has an obligation to take the appropriate action, that is, cease to act for the client.

Note: Section 12E of the Act requires legal practitioners to give to persons considering instituting proceedings documents containing information about non-court based family services and court's processes and services.

SCHEDULE 2

- That pursuant to Rule 19.18(1)(a) and (b) of the *Family Law Rules 2004* (Cth) such costs be paid in the amount assessed as fair and reasonable costs as between party and party on application by the Respondent to the Manager Costs Assessment of the Supreme Court of New South Wales in accordance with the *Legal Profession Act 2004* (NSW) such costs to be assessed without reference to the scale provided for in Schedule 3 to the *Family Law Rules 2004* (Cth) which scale is to be disregarded completely for the purpose of the assessment having regard to the costs reasonably and actually incurred by the Applicant in the proceedings in accordance with his retainer agreement with his solicitors.

SCHEDULE 3

CIVIL PROCEDURE ACT 2005 - SECT 98
Courts powers as to costs

a) 98 Courts powers as to costs

(cf Act No 52 1970, section 76; SCR Part 52A, rules 5, 6, 7 and 8; Act No 9 1973, section 148B; Act No 11 1970, section 34)

(1) Subject to rules of court and to this or any other Act:

(a) costs are in the discretion of the court, and

(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and

(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

(2) Subject to rules of court and to this or any other Act, a party to proceedings may not recover costs from any other party otherwise than pursuant to an order of the court.

(3) An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings.

(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:

(a) costs up to, or from, a specified stage of the proceedings, or

(b) a specified proportion of the assessed costs, or

(c) a specified gross sum instead of assessed costs, or

(d) such proportion of the assessed costs as does not exceed a specified amount.

(5) The powers of the court under this section apply in relation to a married woman, whether as party, tutor, relator or otherwise, and this section has effect in addition to, and despite anything in, the *Married Persons (Equality of Status) Act 1996* .

(6) In this section, **"costs"** include:

(a) the costs of the administration of any estate or trust, and

(b) in the case of an appeal to the court, the costs of the proceedings giving rise to the appeal, and

(c) in the case of proceedings transferred or removed into the court, the costs of the proceedings before they were transferred or removed.

Part 42 – Costs

Division 1 – Entitlement to costs

42.1 General rule that costs follow the event
(cf SCR Part 52A, rule 11)

Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs.

42.2 General rule as to assessment of costs
(cf SCR Part 52A, rule 32; DCR Part 39A, rule 10; LCR Part 31A, rule 6)

Unless the court orders otherwise or these rules otherwise provide, costs payable to a person under an order of the court or these rules are to be assessed on the ordinary basis.

42.3 (Repealed)

42.4 Power to order maximum costs
(cf SCR Part 52A, rule 35A)

(1) The court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.

(2) A maximum amount specified in an order under subrule (1) may not include an amount that a party is ordered to pay because the party:
- (a) has failed to comply with an order or with any of these rules, or
- (b) has sought leave to amend its pleadings or particulars, or
- (c) has sought an extension of time for complying with an order or with any of these rules, or
- (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
  - (i) progress of the proceedings to trial or hearing, or
  - (ii) trial or hearing of the proceedings.

(3) An order under subrule (1) may include such directions as the court considers necessary to effect the just, quick and cheap:
- (a) progress of the proceedings to trial or hearing, or
- (b) trial or hearing of the proceedings.

(4) If, in the court's opinion, there are special reasons, and it is in the interests of justice to do so, the court may vary the specification of maximum recoverable costs ordered under subrule (1).

42.5 Indemnity costs
(cf SCR Part 52A, rule 37)

If the court determines that costs are to be paid on an indemnity basis:

(a) in the case of costs payable out of property held or controlled by a person who is a party to the proceedings:
- (i) in the capacity of trustee, executor, administrator or legal representative of a deceased estate, or
- (ii) in any other fiduciary capacity,

all costs (other than those that have been incurred in breach of the person's duty in that capacity) are to be allowed, and

(b) in any other case, all costs (other than those that appear to have been unreasonably incurred or appear to be of an unreasonable amount) are to be allowed.

42.6 Amendment of pleading etc without leave
(cf SCR Part 52A, rule 15)

Unless the court orders otherwise, a party that amends a pleading or summons without leave must, after the conclusion of the proceedings, pay the costs of and occasioned by the amendment.

42.7 Interlocutory applications and reserved costs
(cf SCR Part 52A, rule 16; DCR Part 39A, rule 22; LCR Part 31A, rule 17)

(1) Unless the court orders otherwise, the costs of any application or other step in any proceedings, including:
(a) costs that are reserved, and
(b) costs in respect of any such application or step in respect of which no order as to costs is made,
are to be paid and otherwise dealt with in the same way as the general costs of the proceedings.
(2) Unless the court orders otherwise, costs referred to in subrule (1) do not become payable until the conclusion of the proceedings.

42.8 Dispute of fact subsequently proved or admitted
(1) In this rule:**"disputing party"** means the party who serves a notice disputing a fact under rule 17.3 (2).**"fact in dispute"** means the fact that is the subject of a notice served under rule 17.3 (2).**"requesting party"** means the party who is served with a notice disputing a fact under rule 17.3 (2).
(2) Unless the court orders otherwise, the disputing party must, after the conclusion of proceedings in which a fact in dispute is subsequently proved or is subsequently admitted by the disputing party, pay the requesting party's costs, assessed on an indemnity basis, being costs incurred by the requesting party:
(a) in proving the fact, or
(b) if the fact has not been proved--in preparation for the purpose of proving the fact.
(3) An entitlement to costs under this rule is not affected by any order as to costs unless that order makes particular reference in that regard.

42.9 Dispute of authenticity of document subsequently proved or admitted
(1) In this rule:**"disputing party"** means a party who serves a notice disputing the authenticity of a document under rule 17.4 (2) or 17.5 (3).**"document in dispute"** means a document that is the subject of a notice served under rule 17.4 (2) or 17.5 (3).**"requesting party"** means a party who is served with a notice disputing the authenticity of a document under rule 17.4 (2) or 17.5 (3).
(2) Unless the court orders otherwise, the disputing party must, after the conclusion of proceedings in which the authenticity of a document in dispute is subsequently proved or is subsequently admitted by the disputing party, pay the requesting party's costs, assessed on an indemnity basis, being costs incurred by the requesting party:
(a) in proving the authenticity of the document, or
(b) if the authenticity of the document has not been proved--in preparation for the purpose of proving the authenticity of the document.
(3) An entitlement to costs under this rule is not affected by any order as to costs unless that order makes particular reference in that regard.

42.10 Disobedience to rule, judgment, order or direction
(cf SCR Part 52A, rule 25; DCR Part 39A, rule 4)

If a party fails to comply with a requirement of these rules, or of any judgment or order of the court, the court may order the party to pay such of the other parties' costs as are occasioned by the failure.

42.11 Injunction
(cf SCR Part 52A, rule 27)

(1) Unless the court orders otherwise, an order as to costs with respect to an interlocutory injunction that continues an earlier interlocutory injunction, with or without modification, is to include the costs of the earlier injunction.
(2) In this rule, **"interlocutory injunction"** means an interlocutory injunction granted by the Supreme Court, and includes a temporary injunction granted by the District Court under section 140 of the *District Court Act 1973*.