

1995—No. 244

## DISTRICT COURT ACT 1973—RULE

NEW SOUTH WALES



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1. This rule is made by the Rule Committee on 14 June 1995, and has effect on and from 23 June 1995.
2. The District Court Rules 1973 are amended as follows:

(a) Part 1 rule 4 (1)

Insert in alphabetical order:

“**dismiss**”, in relation to any proceedings, means finally dispose of the proceedings, but (except where the proceedings consist of an appeal to the Court) without prejudice to any right to commence fresh proceedings seeking the same, or substantially the same, relief;

(b) Part 5 rule 7

After “appeal” insert “or application for leave to appeal”.

(c) Part 5 rule 9 (2)

Omit “or 7”, insert instead “, 7 or 8”.

(d) Part 6 Division 8

After Part 6 rule 60 insert the following Division:

**DIVISION 8—*Applications and appeals under section 208M of the Legal Profession Act 1987***

### Interpretation

61. In this Division:

“**appeal**” means appeal to the Court under section 208M of the subject Act;

“**application for leave**” means application under section 208M (2) of the subject Act seeking leave of the Court to appeal to the Court against a determination of a costs assessor;

“**subject Act**” means the Legal Profession Act 1987.

**Application for leave**

62. (1) An application for leave may be made by notice of motion under Part 16.

(2) An application for leave must be filed and served within 14 days of the date on which the decision sought to be appealed against was given, or within such extended time as the Court may fix.

(3) The Court may extend the time prescribed in subrule (2) at any time.

(4) The applicant for leave must file with, or include in, the notice of motion or a supporting affidavit:

- (a) a statement of the points on which the applicant objects to the decision of the assessor;
- (b) a statement of the reasons why leave should be given;
- (c) all of the documents which were submitted by the parties for the consideration of the assessor, or copies of those documents; and
- (d) where the assessor has given reasons for the decision sought to be appealed against, a copy of those reasons.

(5) On the day fixed for the hearing or adjourned hearing of the application, the Court may proceed to hear and determine the application or may adjourn it to another day.

(6) The Court may, whether or not it adjourns the application, require any party to produce any relevant document in the party's possession or control, or to provide further particulars as to the party's case in the application.

(7) Nothing in this rule prevents the Court from dealing with the application in chambers.

**Appeal**

63. (1) Where the Court grants leave to appeal under section 208M (3) of the subject Act, it may give directions as to the extent, if any, to which matter which was before it, and decisions made by it, on the application for leave are admissible or binding on the hearing of the appeal, and may:

- (a) proceed immediately to hear and determine the appeal; or
- (b) give such directions as to filing and service of documents, conferences, fixing of a hearing date, and any other matter as appear requisite for the hearing and determination of the appeal.

(2) Unless the Court otherwise orders, an appeal shall be heard and determined in chambers, and not in the presence of the parties or their representatives.

(e) Part 12A rule 3 (5)

After paragraph (c) insert:

(ci) after giving the plaintiff a reasonable opportunity to be heard, dismiss the action;

(f) Part 19A rule 11 (1)

Omit “third or subsequent” where secondly appearing.

(g) Part 24C rule 7

After paragraph (c) insert:

(ci) after giving the plaintiff a reasonable opportunity to be heard, dismiss the action;

(h) Part 43 rule 2 (2)

Omit the subrule.

(i) Part 45 rule 2A

After Part 45 rule 2 insert:

**Notice to minor to appoint tutor**

2A. In any proceedings in which the plaintiff or applicant believes on reasonable grounds that the defendant or respondent is a minor for whom no tutor has been appointed, the plaintiff or applicant may serve on the defendant or respondent a notice requiring the defendant or respondent to cause a tutor to appear on the record of the proceedings within 28 days of service of the notice. Any such notice must contain advice that if the defendant or respondent does not comply with the notice the plaintiff or applicant will, unless the Court otherwise orders, be at liberty to proceed as though the defendant or applicant were not a minor.

(j) Part 45 rule 4

(i) In subrule (2), omit “subrule”, insert instead “subrules (2A) and”;

(ii) After subrule (2) insert:

(2A) The registrar may not be a tutor.

(k) Part 45 rule 6

(i) Omit “Where”, insert instead “(1) Subject to subrule (2), where”;

(ii) After subrule (1) insert:

(2) Unless the Court otherwise orders, where a defendant or respondent in any proceedings is a minor and does not comply with a notice served under rule 2A, the plaintiff or applicant, and the Court, may take any step in the proceedings as though the defendant or respondent were not a minor.

(l) Part 45 rule 7 (3)

(i) In paragraph (a) omit “person;”, insert instead “person; and”;

(ii) Omit paragraphs (b) and (c), insert instead:

(b) that the proposed tutor:

(i) consents to act;

(ii) is a proper person for appointment; and

(iii) has no interest in the proceedings adverse to the interest of the disable person.

(m) Part 51A rule 3

After subrule (4) insert:

(4A) An arbitrator who has not determined an action may, under subrule (4), inform the Court at any time that the arbitrator is not prepared to hear and determine the action, whether or not the arbitrator has commenced to hear the action.

(n) Part 51A rule 5

After subrule (2) insert:

(2A) An arbitrator who has not determined an action may return the record of the action to the Court under subrule (2) (a) at any time, whether or not the arbitrator has complied with subrule (2) (b) and whether or not the arbitrator has commenced to hear the action.

(o) Part 52 rule 3

(i) Omit subrule (3);

(ii) In subrule (4) omit “to subrule (3), and”.

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#### **EXPLANATORY NOTE**

The purpose of the amendments is:

(a), (e) and (g): to define “dismiss”, as opposed to “strike out”, and ensure that an action cannot be dismissed without the plaintiff having a reasonable opportunity to be heard;

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- (b)–(d): to provide a procedure for the hearing of applications for leave to appeal, and appeals, from the decisions of costs assessors under section 208M of the Legal Profession Act 1987;
- (f): to ensure that a defendant may make to a third party an offer as to contribution which can be taken into account by the Court on questions of costs;
- (h) and (o): to remove a requirement to maintain a register of writs of execution, which no longer serves any purpose;
- (i)–(l): to remove any power of the Court to appoint the registrar as tutor for a disable party, and to provide that a plaintiff may proceed against a minor defendant who fails to appoint a tutor after being served with a notice requiring such an appointment;
- (m) and (n): to ensure that an arbitrator has the discretion to return an action to the Court even after commencing to hear the action.

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E. J. O'Grady  
Secretary to the Rule Committee.