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NSW CIVIL PROCEDURE

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Commentary by David Ash, Barrister

A particular peril when utilising the process of bankrupting or winding up is discussed. See [CPA 103.30].

Attention is drawn to the terms of s 135 in relation to enforcing judgments for payment of money. See [CPA 106.20].

The difference between the reach of s 108(5)(a) and s 108(5)(b) is considered in *Ryan v UPG 322 Pty Ltd (No 2)* [2023] NSWSC 1629. See [CPA 108.32].

An order for the payment of money which forms part of orders for specific performance is referenced in relation to *Ryan v UPG 322 Pty Ltd (No 2)* [2023] NSWSC 1629. See [CPA 108.50].

An affidavit in support of an application under s 108(5)(b) is considered with regards to *Re Xpress Fuel Australia Pty Ltd (Receivers and Managers Appointed) (Administrator Appointed)* [2023] NSWSC 692. See [CPA 108.60].

The discretion to refuse to make a garnishee order is discussed with reference to UCPR r 39.38(1). See [CPA 117.08].

Territorial limitation on enforcement is referenced in relation to *Siemens WLL v BIC Contracting LLC* [2023] FCA 1664. See [CPA 117.09].

The risk to a garnishee of being exposed to paying twice is looked at with reference to *Siemens WLL v BIC Contracting LLC* [2023] FCA 1664. See [CPA 124.80].

An example of the operation of s 124A is discussed in relation to *Barel v Barel* [2023] NSWDC 135. See [CPA 124A.20].

Money paid into court is dealt with in reference to *Hartnett (t/as Hartnett Lawyers) v Bell* [2023] NSWCA 244. See [CPA 136.30].

Commentary by Mary-Ann de Mestre, Barrister

That the Court may order mediation over opposition is discussed in relation to *Fordham Laboratories Pty Ltd v Sor* (2011) 81 NSWLR 383; [2011] NSWSC 706. See [CPA 26.20].

Confidentiality in s 30 is dealt with in reference to *Ian West Indoor & Outdoor Services Pty Ltd v Australian Posters Pty Ltd* [2011] VSC 287. See [CPA 30.80].

Commentary by Carol Webster SC

Substantial common questions of law or fact in relation to Pt 10, the nature of representative proceedings generally and that s 157(1)(c) is a precondition for litigation to be a representative proceeding are looked at in relation to *Nguyen v Rickhuss* [2023] NSWCA 249. See [CPA Pt 10.0.40], [CPA 157.20] and [CPA 157.40].

Proceedings ceasing to be representative proceedings under s 166 and the power to make partial de-classing orders are discussed with reference to *Nguyen v Rickhuss* [2023] NSWCA 249. See [CPA 166.40] and [CPA 166.60].

District Court Practice Notes

Inserted Practice Note DC (Civil) 1C – Attendance at Civil Proceedings by Audio Visual Link. See [DPN 1C].

Supreme Court Rules 1970 (Annotated)

Commentary by David Ash, Barrister

The Editor's Note has been updated.

A new reference has been added to the discussion of the rationale and purpose of the exercise of the contempt power. See [SCR 55.0.10].

Legal principles applying to penalty for contempt and the nature and extent of Pt 55 r 13 are discussed in relation to *Brennock v Norman* [2021] NSWSC 1182. See [SCR 55.0.240] and [SCR 55.13.10].

The application of the *Supreme Court Rules* including in relation to criminal appeals are referenced in relation to Pt 75 r 1(2). See [SCR 75.1.20] and [SCR 75.1.80].

Discussion of the Succession & Probate List and SC PN Eq 07 has been updated. See [SCR 78.0.10].

Disclosure statements in probate proceedings are dealt with in relation to SC PN Eq 07. See [SCR 78.0.15].

The role of parties in the commencement of proceedings is discussed with reference to *Thomas v Aplitt* [2023] NSWSC 727. See [SCR 78.0.40].

The principles relating to rectification are discussed with reference to *Re Kandros* [2019] NSWSC 757; and *Lewis v Lewis* [2021] NSWCA 168. See [SCR 78.0.60].

Principles regarding testamentary capacity and principles informing settlement of probate claims are discussed with regards to *Bear v Bear* [2022] NSWSC 1687. See [SCR 78.0.110] and [SCR 78.0.140].

Principles informing costs in contested probate matters are discussed with regards to *Starr v Miller (No 2)* [2021] NSWSC 685. See [SCR 78.0.140].

The procedural framework around contentious probate proceedings is looked at with reference to Practice Note SC Eq 07. See [SCR 78.35.10].

General caveats under Pt 78 r 66 are discussed with regards to *Wild v Meduri* [2023] NSWSC 113. See [SCR 78.66.20].

Uniform Civil Procedure Rules 2005 (Annotated)

Commentary by David Ash, Barrister

The operation of r 10.1 is discussed in relation to *Trustees of the Property of Robinson v Robinson* [2023] NSWSC 900. See [r 10.1.40].

Practice Note SC Gen 4 – Affidavits is quoted with reference to the operation of r 10.2. See [r 10.2.40].

A party may commence proceedings in the Supreme Court in accordance with either the rules or the *Service and Execution of Process Act 1992* (Cth) (SEPA) while a party may only commence proceedings in other courts in accordance with SEPA. See [r 10.3.30].

The discussion on the operation of r 10.5 has been updated. See [r 10.5.40].

The definition of “person under a legal incapacity” is referred to with regards to *Perera v Alpha Westmead Private Hospital (t/as Westmead Private Hospital)* [2022] NSWSC 571. See [r 10.12.60].

That service by posting to a post office box may be confirmed as sufficient is looked at with reference to *Macrae v St Margaret’s Hospital* (1999) 19 NSWCCR 1; [1999] NSWCA 381. See [r 10.14.125].

Considerations where the person with the right to immediate possession has been unable to ascertain the name or identity of the occupier are discussed with reference to *Re Transport for New South Wales* [2023] NSWSC 1137. See [r 10.15.90].

A notice of an application to revoke the registration of a relationship is considered with regards to the *Relationships Register Regulation 2020* (NSW). See [r 10.20.60].

The effect of the appointment of a private receiver is discussed with reference to *Aquamore Fund 2 Pty Ltd v Church Point Apartments Pty Ltd (Receivers and Managers Appointed)*. See [r 10.22.120].

That Pts 11 and 11A are concerned with two processes – service overseas of documents related to proceedings commenced in New South Wales; and service in New South Wales of documents related to proceedings commenced overseas – is discussed in the overview of Pt 11. See [Pt11.10].

Constitutionality of service in New Zealand under the *Trans-Tasman Proceedings Act 2010* (NSW) is considered in relation to *Zurich Insurance Company Ltd v Koper* [2023] HCA 25. See [r 11.3.20].

That Sch 6 prescribes several instances in which originating process may be served without leave is looked at with reference to Notes 1 and 2 to the Schedule. See [r 11.4.50].

Failure to serve notice is discussed with reference to *Re Sunnya Pty Ltd* [2023] NSWSC 1104. See [r 11.7.60].

Standing over an application to final hearing is looked at with regards to *Re Sunnya Pty Ltd* [2023] NSWSC 1104. See [r 11.8AA.40].

Apportionment between interest and the balance of a judgment debt is discussed in relation to CPA s 136 and UCPR r 36.7. See [r Pt37.30].

The usual length of operation of instalment orders is discussed. See [r Pt37.37].

The operation of r 37.7 is referenced with regards to CPA s 136. See [r 37.7.40].

The rules relating to examination in Pt 38 are considered with reference to CPA s 108. See [r Pt38.40].

The contents of an affidavit in support in circumstances where the order is injunctive or another order which does not require payment of money is referenced in relation to CPA s 108. See [r 38.2.60].

The need for leave to issue a writ if a judgment creditor is bankrupt is considered with regards to *Global Group Enterprises Pty Ltd v McKay* [2023] NSWSC 690. See [r 39.1.600].

A danger for purchasers of land is referenced in relation to CPA s 112. See [r 39.21.60].

The operation of r 39.38 is looked at in relation to CPA s 124. See [r 39.38.40].

The operation of r 39.44 is looked at in relation to CPA s 126. See [r 39.44.40].

Payment to a judgment creditor where there is an analogy with garnishment is discussed in relation to *Re Westpac Banking Corporation* [2023] NSWSC 147. See [r 41.3.130].

Commentary by Mary-Ann de Mestre, Barrister

The operation of rr 49.3 and 49.7 is considered with reference to *Re; Swain* [2008] NSWSC 1343. See [r 49.3.40] and [r 49.7.40].

The application of Pt 52 is discussed with regards to *Re Attorney General (NSW)* [2018] NSWSC 1267 (14 August 2018); *Re Securities and Exchange Commission* [2020] NSWSC 1212 (8 September 2020); and *Nanotech Industrial Solutions Inc v Nanoteko Pty Ltd* [2020] NSWSC 1285. See [r Pt52.20].

Commentary by Commissioner Janet McDonald

The meaning of event in relation to r 42.1 is discussed with regards to *Croc's Franchising Pty Ltd v Alamo Holdings Pty Ltd (No 3)* [2023] NSWCA 316. See [r 42.1.50].

Circumstances that may justify displacement of the usual rule in r 42.1 are considered in relation to *Re Gunyahweh Pty Ltd (No 2)* [2023] NSWSC 1204. See [r 42.1.62].

The application of the usual rule in r 42.1 in appeals is considered with regards to *Taylor v Stav Investments Pty Ltd (No 2)* [2023] NSWCA 322; and *Galati v Deans (No 2)* [2023] NSWCA 252. See [r 42.1.70].

The usual rule in r 42.1 as it applies in the protective jurisdiction is discussed in relation to *H v AC* [2024] NSWSC 40. See [r 42.1.240].

Other circumstances displacing the usual rule in r 42.1, namely civil proceedings to stay

a criminal prosecution, are looked at with regards to *Mahaffy v Mahaffy* [2018] NSWCA 42; (2018) 97 NSWLR 119. See [r 42.1.300].

The time in which to seek variation of a costs order is looked at with regards to *New South Wales v Hollingsworth (No 2)* [2023] NSWCA 283. See [r 42.1.340].

The Costs Indemnity Principle is considered in relation to *Atanaskovic v Birketu Pty Ltd* [2023] NSWCA 312. See [r 42.2.60].

The operation of r 42.4 is discussed with reference to *Allsop Investments Pty Ltd v Jerkovic (t/as LJ Hooker Riverwood)* [2021] NSWSC 1399; and *Bell v Hartnett Lawyers (No 4)* [2023] NSWSC 1592. See [r 42.4.40].

Capping orders under r 42.4 are considered with regards to *Bell v Hartnett Lawyers (No 4)* [2023] NSWSC 1592. See [r 42.4.100].

The operation of r 42.5 is looked at with reference to *Jordan v Goldspring (No 3)* [2024] NSWSC 11; and *Australian Securities and Investments Commission v Sigalla (No 4)* (2011) 80 NSWLR 113; [2011] NSWSC 62. See [r 42.5.40].

The operation of r 42.7 is discussed with regards to *Ryan v UPG 322 Pty Ltd (No 2)* [2023] NSWSC 1629. See [r 42.7.40].

The operation of r 42.8 is considered with reference to *D Capital 2 Pty Ltd v Western (No 2)* [2022] NSWSC 1283. See [r 42.8.40].

The operation of r 42.13 and how Pt 42 Div 3 applies to proceedings in the Court of Appeal is discussed. See [r 42.13.40].

The operation of r 42.13A is considered in relation to *Wang v Yu (No 2)* [2024] NSWSC 4; and *Curtis v Harden Shire Council (No 2)* [2015] NSWCA 45. See [r 42.13A.20].

The operation of r 42.16 is referenced with regards to *Dlakic v Vaughan (No 4)* [2023] NSWSC 893. See [r 42.16.40].

The operation of r 42.19 is looked at with reference to *Re Cabramatta King Tea Pty Ltd; Yuans Sunshine Pty Ltd v Cabramatta King Tea Pty Ltd* [2022] NSWSC 462. See [r 42.19.40].

The operation of r 42.20 is considered with regards to *Benjamin & Khoury Pty Ltd v Rahme (No 4)* [2023] NSWSC 1162. See [r 42.20.40].

The power to order security for costs is discussed with reference to *Liprini v Thirdi William Street Pty Ltd* [2023] NSWSC 1375; and *Mitchell v Roads and Maritime Services* [2022] NSWSC 500. See [r 42.21.80].

Exercising the discretion to order security is looked at in relation to *Mitchell v Transport for NSW* [2022] NSWCA 141. See [r 42.21.100].

General principles relevant to the exercise of the discretion under r 42.21 are referenced with regards to *Liprini v Thirdi William Street Pty Ltd* [2023] NSWSC 1375. See [r 42.21.110].

Nominal and representative plaintiffs under r 42.21 are considered with regards to *Mitchell v Roads and Maritime Services* [2022] NSWSC 500; *Mitchell v Transport for NSW* [2022] NSWCA 141; *Liprini v Thirdi William Street Pty Ltd* [2023] NSWSC 1375; and *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 462; 369 ALR 512. See [r 42.21.140].

The operation of r 42.22 is discussed with reference to *Cellarlit Pty Ltd v Cawarra Holdings Pty Ltd (No 2)* [2018] NSWCA 266. See [r 42.22.40].

The operation of r 42.27 is looked at in relation to *Re Struthers (No 3)* [2005] NSWSC 1113; 64 NSWLR 392. See [r 42.27.40].

The operation of r 42.32 (Smyth orders) is discussed with regards to *Hollingsworth v New South Wales* [2023] NSWDC 46. See [r 42.32.40].

The operation of r 42.34 is considered with reference to *Redwood Anti-Ageing Pty Ltd v Knowles (No 2)* [2013] NSWSC 742; and *Taylor v Stav Investments Pty Ltd (No 2)* [2023] NSWCA 322. See [r 42.34.40].

Commentary by Joanne Shepard, Barrister

Appointment of a receiver over assets in the context of an application by the NSW Trustee and Guardian is looked at in light of *Re Haberl (No 2)* [2022] NSWSC 803. See [r 26.1.130].

Entitlement to remuneration is discussed with reference to *In the matter of Banksia Securities Ltd (in liq)* [2017] NSWSC 540. See [r 26.4.20].

Powers under r 26.7 are considered in relation to *HN QCV Bottle Tree Village Pty Ltd v QCV Bottle Tree Village Pty Ltd* [2018] NSWSC 1807. See [r 26.7.20].

Standing to set aside under r 33.4 is discussed with regards to *Mehanna v New South Wales* [2017] NSWDC 427. See [r 33.4.60].

The issue of legitimate forensic purpose is looked at in relation to *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145. See [r 33.4.120].

The operation of r 33.13 and objections to access to documents produced pursuant to a request are discussed with reference to *Collier v Attorney General (NSW)* [2021] NSWCA 16. See [r 33.13.40] and [r 33.13.60].

Commentary by Mandy Tibbey, Barrister

That r 16.2 as an exception to the filing of a defence in accordance with r 14.3(1) is looked at with reference to *Constantinidis v Prentice* [2023] NSWSC 128. See [r 16.2.20].

Affidavit of service under r 16.3 is discussed with reference to *Trustees of the Property Robinson v Robinson* [2023] NSWSC 900. See [r 16.3.60].

Jurisdiction to grant a freezing order is considered with regards to *D’Cruz v Coutinho* [2023] NSWSC 1221; *Cook v Cook* [2023] NSWSC 1132; and *Apollo Blinds Australasia Pty Ltd v Messner (No 2)* [2023] NSWSC 1319. See [r 25.11.20].

Principles governing payment out of court are considered in *Council of the City of Sydney v Baboon Pty Ltd* [2020] NSWSC 1480; *Re National Australia Bank Ltd* [2023] NSWSC 1153; and *Re Westpac Banking Corporation* [2023] NSWSC 147. See [r 55.11.20].

Commentary by Dr Sonya Willis

Referral of a question to a referee is considered in relation to *Rialto Sports Pty Ltd v Cancer Care Associates Pty Ltd (No 2)* [2023] NSWCA 246; *Rialto Sports Pty Ltd (Admins Apptd) v Cancer Care Associates Pty Ltd (No 3)* [2023] NSWCA 279; and *Kyriacou v Makis (No 3)* [2023] NSWSC 1098. See [r 20.14.60].

Court use of the referee’s report is looked at with reference to *Rialto Sports Pty Ltd v Cancer Care Associates Pty Ltd (No 2)* [2023] NSWCA 246; *Rialto Sports Pty Ltd (Admins Apptd) v Cancer Care Associates Pty Ltd (No 3)* [2023] NSWCA 279; and *Owners Strata Plan 64757 v Sydney Remedial Builders Pty Ltd* [2023] NSWSC 1127. See [r 20.24.60].

That the *Trans-Tasman Proceedings Act* registration process constitutes an exercise of judicial power is discussed with regards to *LFDB v Deputy District Registrar* [2023] FCA 1516. See [r 32.8.60].

The discussion on Australia’s position re the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* has been updated. See [r 53.1.80].

Interest and costs for judgments registered under the *Foreign Judgments Act 1991* (Cth) are considered in relation to *Nadeem v Bindaree Food Group Pty Ltd* [2023] NSWCA 250. See [r 53.1.240].

Commentary by Carol Webster SC

The operation of r 6.19 is discussed in relation to *Nguyen v Rickhuss* [2023] NSWCA 249.

See [r 6.19.40].

The material date in relation to r 50.2 is looked at with reference to *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14. See [r 50.2.40].

The discussion on appeals from the former Administrative Decisions Tribunal has been updated. See [r 50.3.240].

The operation of r 50.7 is looked at with reference to *Nu-Stone Building Pty Ltd v McInerney* [2023] NSWSC 67. See [r 50.7.40].

The operation of r 51.16 is explored in relation to *Coshott v Vardas* [2017] NSWCA 258. See [r 51.16.40].

Extension of time in relation to r 51.9 is discussed with reference to *Salmon v Albarran* [2024] NSWCA 3. See [r 51.9.50].

The operation of r 51.40 is looked at in relation to *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* [1947] NSWStRp 10. See [r 51.40.40].

The operation of r 51.48 is considered with reference to *Koprivnjak v Koprivnjak (No 2)* [2023] NSWCA 62. See [r 51.48.40]

The operation of r 51.50 is discussed in relation to *Preston v Harbour Pacific Underwriting Management Pty Ltd* [2007] NSWCA 247; *Charara v Integrex Pty Ltd* [2010] NSWCA 342; and *Prynew Pty Ltd v Nemeth* (2010) 28 ACLC 10-026; [2010] NSWCA 94. See [r 51.50.40].

Commentary by Wen Wu, Barrister

The list of relevant considerations in the discussion of r 48.16 as compared to the corresponding Federal Court rule has been updated; and *Sanofi v Amgen Inc* [2023] FCA 264 has been added to the list of relevant cases. See [r 48.16.80].