EXPLANATORY MEMORANDUM TO

THE CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2024

2024 No. 839 (L. 11)

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Heidi Alexander MP, Minister of State at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Steven Jarman, Deputy Director for Civil Justice & Law Policy, at the Ministry of Justice, confirms that this Explanatory Memorandum meets the required standard.

3. Contact

Amrita Dhaliwal at the Ministry of Justice email: amrita.dhaliwal@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Civil Procedure Rules 1998 (S.I. 1998/3132) ("the CPR"), which govern practice and procedure in the Civil Division of the Court of Appeal, the High Court and the County Court. The amendment covers ten matters, explained in paragraph 5, below: (i) Alternative Dispute Resolution (ADR); (ii) References to Judges in the CPR (iii) Extending Fixed Recoverable Costs (FRC) (iv) Time limit to seek permission to appeal from the Court of Appeal to the UK Supreme Court (v) procedure for references relating to assimilated law (formerly retained EU law) (vi) delegation of functions to Legal Advisers (vii) Serious Crime Prevention Orders (viii) Contempt Warning (ix) Writs and Warrants of Possession and (x) Some minor amendments and tidying up of the Rules. References to a Part or rule by number alone are references to the Part or rule so numbered in the CPR.

Where does the legislation extend to, and apply?

4.2 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

5. Policy Context

What is being done and why?

5.1 The CPR are amended for the following purposes —

5.2 Alternative Dispute Resolution (ADR) – a suite of amendments to the CPR's Overriding Objective in Part 1, with additional amendments in Parts 3, 28 and 44 to

promote the use of alternative dispute resolution. This work follows the Court of Appeal's decision in Churchill -v- Merthyr Tydfil CBC [2023] EWCA Civ 1416 which decided that it was lawful for a court to stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process.

5.3 References to Judges in the CPR – a suite of amendments are made to Part 2 (application and interpretation of the Rules) and other Parts to bring terminology up to date, bringing Masters and District Judges within the definition of "judge". This properly reflects the status, as judges, of Masters and District Judges and provides consistency of language by removing some unnecessary and unhelpful distinctions between different levels of judge within the rules and supporting Practice Directions. The reforms are not intended to make any jurisdictional changes nor alter the jurisdiction of any rank of judge, they are purely focused on linguistic improvements. A "light touch" approach to the amendments has been taken to avoid unintended consequences.

5.4 Extending Fixed Recoverable Costs (FRC) – various amendments are made following the Ministry of Justice's (MoJ) consultation on FRC issues in July 2023 ('the 2023 FRC consultation'), and in response to issues that have been raised outside of the consultation process following the implementation of the extended FRC regime on 1 October 2023, those amendments having been made by the Civil Procedure (Amendment No. 2) Rules 2023 (S.I. 2023/572). These Rules are the product of further collaborative work between the Civil Procedure Rule Committee's (CPRC) costs sub-committee and the MoJ. The further amendments that have been made to the extended FRC regime are as follows:

- Changes to rule 3.7A1 and 44.9(1) so that where a claim is struck out because of the claimant's non-payment of a trial fee and, in consequence, a costs order in favour of the defendant would otherwise be deemed to be made on the standard basis, that costs order shall instead be determined in accordance with the provisions in Part 27 or Part 45 where applicable. This will ensure, in particular, that in such cases the FRC provisions in Part 45 will continue to apply.

- Changes to rule 26.15, Table 1, to better distinguish other claims for a sum of money in complexity band 3(e) from "defended debt claims" in complexity band 1(b).

- Changes to rule 28.7 and 28.14 to remove cross-references to rule 28.2, which are now superseded.

- Changes to rules 45.2, 45.8 and 45.15A to provide for the recoverability of VAT in addition to FRC in pre-action and interim applications, restoration proceedings and under the new fixed costs determination procedure, and on disbursements in restoration proceedings. VAT in respect of pre-action and interim applications and restoration proceedings was previously provided for in Practice Direction 45.

- The insertion of new rules 45.48(3), 45.48(4), 45.51(5), and 45.51(6) to provide that where a costs order is made following a preliminary issue in the

fast track or intermediate track, and the court is unable at that stage to quantify the total fixed costs, the court shall, unless there is good reason not to do so, order the payment of those costs which are specified in Table 12 or 14 of Practice Direction 45 and may order a payment on account of that element of the costs which are calculated as a percentage of the damages.

- Changes to rules 45.58, 45.59 and 45.61 to ensure consistency of language with rule 45.57(2)(a) so that the courts' broad discretion regarding claims for disbursements is both clear and consistent across those rules.

- The insertion of new Section X in Part 45 – 'Fixed Costs Determination' (FCD) – to provide for a bespoke procedure for both the summary determination of fixed recoverable costs following a hearing, and for their determination where both before and after proceedings have started, the parties agree on all issues except costs. The costs of determination in each case are also fixed by reference to the Tables of FRC in Practice Direction 45. Although in most cases FRC will not be disputed, a procedure to resolve any disputes that may arise was consulted upon in the 2023 FRC consultation (see paragraph 7.2 below). Consequential changes have been made to rules 45.6(2), 45.40(3), 46.7(1), and 46.14(5) to ensure consistency of language.

5.5 Time limit to appeal from the Court of Appeal to the Supreme Court – updates Part 52 (appeals) following changes in practice, in order to provide an express deadline for seeking permission from the Court of Appeal to appeal to the Supreme Court, so that refusal or grant of permission to appeal by the Court of Appeal takes place within a period short enough, to ensure that any application to the Supreme Court for permission to appeal, following refusal of permission by the Court of Appeal, is not "stale". The deadline of 28 days is reached after the date of the decision of the Court of Appeal which the appellant wishes to appeal (or such longer period as the Court of Appeal orders).

5.6 Retained EU Law – a new Part 68 is introduced to facilitate the operation of sections 6A-6C of the European Union (Withdrawal) Act 2018 (EUWA), as inserted by section 6 of the Retained EU Law (Revocation and Reform) Act 2023 in civil proceedings before the County Court and High Court; and in civil and family proceedings before the Court of Appeal. Sections 6A-6C of EUWA will come into force on 1 October 2024:

- Rule 68.1 defines terminology used in new Part 68 of the CPR.

- Rule 68.2 outlines in relation to section 6A of EUWA the procedure by which the County Court or High Court (a "lower court"), which continue to be bound by assimilated case law (i.e. that originating from the EU), can consider whether to refer points of law which arise on that case law to a "higher court" not bound by it to decide whether to depart from it. Such references may be made as a result of an application by a party to the proceedings or of the court's own motion.

- Rule 68.3 outlines the procedure of how the Court of Appeal (as a "higher court") should handle a reference made by the High Court, or any other lower

court or tribunal in civil or family proceedings, under section 6A. Rule 68.3 mirrors rule 68.2 in describing the information that a reference should include, and who a copy of the reference should be sent to by the referring court or tribunal. It also explains the process by which submissions may be made on whether to accept a reference are made, and how the Court of Appeal can consider whether to accept a reference with or without an oral hearing.

- Rule 68.4 provides further information about submissions made to the Court of Appeal in relation to references made under section 6A; including to make clear that all submissions made must be sent to the referring Court or Tribunal and persons listed in Rule 68.3, and that the Court may take them into account to whatever extent the Judge considers appropriate.

- Rule 68.5 describes, where the Court of Appeal accepts a reference made under section 6A, who that decision should be disseminated to and how resultant interventions should be made.

- Rule 68.6 relates to references to the Court of Appeal made by a Law Officer under section 6B of EUWA, outlining the criteria which must be met when making such a reference. It also outlines how a reference made under section 6B should be sent to all the other Law Officers.

- Rule 68.7 outlines that the Court of Appeal should give case management directions and set a timetable for a case when a reference is accepted under section 6A or 6B.

- Rule 68.8 provides guidance for cases the Court of Appeal is considering arguments about whether it should depart from assimilated case law and section 6C of EUWA therefore applies (except in criminal proceedings). The rule is consistent with the above rules in outlining who should be informed of such consideration being given, where rights to intervene exist, and states the timescale for when the Court of Appeal can decide on whether to depart from assimilated case law.

5.7 Legal Adviser delegation – amendments to Part 73 (charging orders, stop orders and stop notices) remove a legacy limitation that it is only the Designated Civil Judge for Greater Manchester that can consent to court legal advisers being authorised to carry out specified delegated functions. The change widens the scope to "relevant Designated Civil Judge" in the interest of efficiency and consistency with legal advisers exercising jurisdiction under other CPR Parts and Practice Directions.

5.8 Serious Crime Prevention Orders – this amendment changes Part 77 (provision in support of criminal justice) to enable centralisation of the process for applications (for which there is a low volume - around 4 applications a year) to be made to the Royal Courts of Justice (RCJ) in London. The RCJ is considered to have the relevant expertise in this specialist area of work. However, cases can still be heard by High Court Judges in the Regions/Wales, as appropriate.

5.9 Contempt Warning – updates the provision in Part 81 (applications and proceedings in relation to contempt of court) which requires a committal application to give

information to a respondent about their rights, including the right to silence. This is done by adding to it, the requirement to warn of the risk that the court may draw adverse inferences from that silence, if the right is exercised. This amendment follows caselaw and aligns with the position in criminal proceedings.

5.10 Writs and Warrants of Possession – changes are made to Part 83 (writs and warrants – general provisions) to clarify the operation of the notice of eviction procedure. This follows issues in practice in relation to further notices of eviction, where it has not been possible to carry out an entire eviction. The reforms make the "further notice of eviction" a defined term and, in consequence, a suite of five prescribed forms have been updated.

5.11 Tidying Up: various minor corrections to address inaccurate or out of date cross references.

What was the previous policy, how is this different?

5.12 This is explained for each of the amendments in paragraphs 5.2 to 5.11 above.

6. Legislative and Legal Context

How has the law changed?

6.1 Civil Procedure Rules are made by the Civil Procedure Rule Committee (CPRC) under the Civil Procedure Act 1997, section 2(6) of which requires the CPRC before making rules to meet (unless inexpedient to do so) and consult such persons as they consider appropriate. The CPRC meets nine times a year and except in very rare circumstances considers any proposed matters for inclusion in the rules in at least one meeting (as it did for the matters in the present instrument). Consultation is addressed in section 7 of this memorandum.

Why was this approach taken to change the law?

6.2 This is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 The Civil Procedure Rule Committee must, before making Civil Procedure Rules, consult such persons as they consider appropriate (section 2(6)(a) of the Civil Procedure Act 1997). The Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in the work of sub-committees reviewing particular aspects of the rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government Departments and other authorities affected by rules of civil procedure.

7.2 For matters in this instrument, differing approaches to consultation were taken, ranging from consultation of the more informal sort described above (in the case of amendments made in these Rules particularly involving seeking the view of HM Courts & Tribunals Service and the judiciary in the specific areas affected, for example in respect of those set out at paragraphs 5.6, 5.7, 5.8 and 5.10 (above) to fuller consultation (described immediately below). Consultations were conducted on:

- The amendments in connection with the ADR reforms (at paragraph 5.2 above) were published for consultation which opened on 17 April 2024 and closed on 28 May 2024. 17 responses were received. Overall, the respondents were overwhelmingly positive, however, some suggested revisions were not adopted because they were outside the scope of the project.

- The amendments concerning references to Judges (at paragraph 5.3 above) in the CPR were subject to a focused consultation exercise with the judicial associations. One response was received (from the Association of High Court Masters and Insolvency and Companies Court Judges) which supported the reforms and suggested some modest revisions, which were broadly adopted.

- the amendments on FRC (at paragraph 5.4) in respect of fixing the costs of assessment in FRC cases ('Fixed Costs Determination' (FCD)) were subject to an MoJ consultation in July 2023 which received 74 responses.[1] There was broad support for the changes proposed in that consultation (including in respect of FCD), and the changes on (i) the recoverability of, separately, (a) inquest costs and (b) restoration proceedings; (ii) the recoverability of advocates' preparation in cases that are settled late or vacated; (iii) further inflationary uprating in PD 45, and; (iv) the position in respect of clinical negligence claims at CPR 26.9(10(b), were previously taken forward in The Civil Procedure (Amendment) Rules 2024 (legislation.gov.uk) A consultation response was published in February 2024[2]

- The amendments to Part 52 on Appeals (at paragraph 5.5 above) flowed from a wider consultation conducted by the Supreme Court on revising its rules of procedure. The consultation started on 2 April 2024 and closed on 17 May 2024. 28 responses were received, of which 13 addressed this point in respect of time limits. Responses were positive and supported the policy in respect of time limits for applying for permission to appeal; and the drafting of the CPR change required to give effect to that policy in the Court of Appeal was agreed in consultation with the Supreme Court.

8. Applicable Guidance

8.1 Amendments to the CPR are drawn to the attention of participants in the civil justice system by correspondence addressed by the CPR Committee secretariat to members of the judiciary, to other relevant representative bodies (for example the Law Society of England and Wales, the General Council of the Bar and the advice sector) and to the editors of relevant legal publications; as well as by publicity within HM Courts and Tribunals Service (HMCTS). News of changes to the rules, together with the consolidated version of the rules, are published on the Ministry of Justice website.[3]

[1] July 2023 consultation on issues relating to the new FRC regime: draft-consultation-on-frc-issues-summer-2023.pdf (publishing.service.gov.uk).

[2] February 2024 consultation response: fixed-recoverable-costs-consultation-response.pdf (publishing.service.gov.uk).

[3] https://www.justice.gov.uk/courts/procedure-rules/civil

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private, public or voluntary sectors is foreseen.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because no, or no significant impact, is foreseen.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector because no, or no significant impact, is foreseen.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

The approach to monitoring of this legislation is for the amendments to form part of the Civil Procedure Rules which are kept under continuous review by the Civil Procedure Rule Committee and may be subject to amendment accordingly.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

13. The Relevant European Union Acts

13.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.